TITLE IX, SEXUAL HARASSMENT TRAINING MATERIALS

JOINTLY PRESENTED BY:

THE BEARD LEGAL GROUP

AND

THE LEVIN LEGAL GROUP, P.C.

The following pages contain material used for training under the regulations adopted under Title Ix that go into effect on August 14, 2020.

Title IX Training Materials

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The page numbers are 4 digit numbers on the lower right corner of each page.

1 **TITLE IX**

SEXUAL HARASSMENT AND THE NEW REGULATIONS

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2 **PRESENTERS FOR TODAY'S PROGRAM**

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3 **DISCLAIMERS**

- Although we have worked hard to ensure that the information in this training module is accurate, it does not constitute legal advice.
- We are not creating an attorney-client relationship through this training.
- The application of any of the rules to any particular fact pattern must be made by an attorney who is given all relevant facts.

4 **DISCLAIMERS**

- There are exceptions to almost every rule!
- Training and recommendations are subject to change with time and the issuance of court decisions and administrative guidance.
- When we refer to Title IX and the Title IX regulations in this training, we are limiting our comments to the new sexual harassment requirements.
- Remember—Title IX applies to much more than sexual harassment!

5 **ENSURING THAT YOU ARE LISTENING**

During this training, we will provide 6 code words. In order to get credit for attending, you will have to send an email to your HR Director or similar official in your school entity that includes all 6 code words.

6 **TRAINING MATERIALS**

- In addition to receiving a copy of this PowerPoint in an outline format to post on the District's website, we will provide a Dropbox folder to each of you with several additional documents that you must read and a link to a video by OCR.
- The additional training material is listed on the next 2 slides.

7 **TRAINING MATERIALS**

We are providing the following training materials:

1. This PowerPoint (in outline format);
2. 34 CFR, Part 106;
3. Federal Rules of Evidence;
4. The PSBA Complaint Procedures;
5. The Wiretapping and Electronic Surveillance Act;

8 **TRAINING MATERIALS**

6. The Commentary to the New Title IX Regulations;
7. OCR Summary of Major Title IX provisions
8. OCR Video Presentation on New Title IX Regulations;

9. OCR Final Rule Overview of Title IX Regulations; and
10. U.S. Department of Education Press Release on Sexual Assault in K-12 schools.

9 **TRAINING MATERIALS—YOUR HOMEWORK**

If you fall into any of the following categories, you must read the training materials and the video and parts of the Title IX commentary that applies to the function that you fill. We will provide a breakdown of that when we provide the materials. The categories are:

- Title IX Coordinator;
- Investigator;
- Informal Facilitator; and
- Decisionmakers.

10 **QUESTIONS—SUBMIT YOUR QUESTIONS AT ANY TIME**

1. Select Q & A on the right side of the screen;
2. Type your question in the compose box, then select Send;
3. If you want to ask your question anonymously, select "Ask anonymously"

11 **PRACTICAL TIPS**

Throughout this training we will provide practical tips. When you see the stop sign, "really" pay attention—it will be on the test!

12 **TRAINING**

The Regulations require that you receive training on specific topics. When you see the professor in a slide, that means that we will take a deeper dive into the required subject subsequently in the training.

13 **RECOMMENDATIONS**

When we make a recommendation, you will see our cartoon lawyer on the slide.

14 **AGENDA FOR TODAY'S PROGRAM**

Part I: The History Behind Sexual Harassment as a Legal Doctrine
Part II: A Deep Dive into the New Regulations
Part III: Integrating the New Requirements to Existing Legal Requirements

15 **UNDERSTANDING LEGAL CITATIONS**

- Statutes:
  - United States Code—20 U.S.C.A. §1401
  - Purdon's Statutes—24 P.S. §1-101
  - Pennsylvania Consolidated Statutes—24 Pa.C.S.A. §8101
- Regulations:
  - Code of Federal Regulations—34 C.F.R., Part 106
  - Pennsylvania Code—22 Pa. Code, Chapter 12

16 **UNDERSTANDING WORD USAGE**

As used in this training, "school" means:

- School District;
- Intermediate Unit;
- Public Vocational-Technical school; and

- Public charter and cyber charter school.
- Although the Title IX regulations apply to post secondary institutions, including community colleges, this training *does not!*

17 **UNDERSTANDING WORD USAGE**

As used in this training, "law" or "applicable law" means applicable statutes, regulations and relevant case law interpreting the statutes and regulations.

18 **PENNSYLVANIA SCHOOL BOARDS ASSOCIATION ("PSBA")**

Because virtually all school district, Intermediate Units and Vocational-Technical Schools subscribe to the PSBA Policy Service, we have tailored this training to the recommended PSBA policy and attachments that were published by PSBA on Friday, July 31, 2020. We recommend that you review those publications.

19 **PART I**
THE HISTORY BEHIND SEXUAL HARASSMENT AS A LEGAL CONCEPT AND BASIS FOR LEGAL LIABILITY

20 **THE HISTORY OF SEXUAL HARASSMENT AND THE LAW**

- Title VII of the Civil Rights Act of 1964:
- "It shall be an unlawful employment practice for an employer--(1) to fail or refuse to hire or to discharge any individual, *or otherwise to discriminate* against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's* race, color, religion, *sex*, or national origin . . . ." 42 U.S.C.A. §2000e-2 (Emphasis added)

21 **A SHORT HISTORY**

- Title IX: enacted in 1972 as part of the Education Amendments of 1972.
- "No person in the United States shall, [1]*on the basis of sex*, [2] be [a]excluded from participation in, be [b] denied the benefits of, or be [c] subjected to discrimination under any education program or activity receiving Federal financial assistance, ..." 20 U.S.C.A. § 1681 (Emphasis added)

22 **A SHORT HISTORY**

- Title VII—Applies only to employment discrimination; did not reach schools, colleges or universities in the capacity as protecting students;
- Title IX—Applies to "recipients of federal financial assistances," including
  - Public schools;
  - Colleges and Universities.

23 **A SHORT HISTORY—HOW DID "ON THE BASIS OF SEX" BECOME "SEXUAL HARASSMENT"?**

The phrase "sexual harassment" was coined in 1975 by a group of feminist activists at Cornell University

24 **A SHORT HISTORY: HOW DID "DISCRIMINATION" BECOME "SEXUAL HARASSMENT"?**

1975: New York Times Article: "Sexual harassment of women in their place of employment is extremely widespread. It is literally epidemic," said Lin Farley, director of the women's section of the Human Affairs Program at Cornell University. She listed the forms such harassment could take: Constant leering and ogling of a woman's body.; Continually brushing against a woman's body.; Forcing a woman to submit to squeezing or pinching.; Catching a woman alone for forced sexual intimacies.; Outright sexual propositions, backed by threat of losing a job."

25 **A SHORT HISTORY**

- Neither Title VII nor Title IX said anything about "sexual harassment."
- 1976: The early cases: "In company with three of the four district courts that have considered the issue, *this Court holds that sexual harassment and sexually motivated assault do not constitute sex discrimination under Title VII*. *Tomkins v. Pub. Serv. Elec. & Gas Co*., 422 F.Supp. 553, 556 (D.N.J. 1976), *rev'd*, 568 F.2d 1044 (3d Cir. 1977)."

26 **A SHORT HISTORY**

- 1975: First Set of Regulations Under Title IX:
- No mention of sexual harassment.
- No Title IX regulations until now have addressed sexual harassment.

27 **A SHORT HISTORY—QUID PRO QUO**

This is not to say either that sexual harassment is never of concern under Title IX, or that a university may properly ignore the matter entirely. In plaintiff Price's case, for example, it is perfectly reasonable to maintain that academic advancement conditioned upon submission to sexual demands constitutes sex discrimination in education, just as questions of job retention or promotion tied to sexual demands from supervisors have become increasingly recognized as potential violations of Title VII's ban against sex discrimination in employment . . . (cont'd on next slide)

28 **A SHORT HISTORY—QUID PRO QUO**

When a complaint of such an incident is made, university inaction then does assume significance, for on refusing to investigate, the institution may sensibly be held responsible for condoning or ratifying the employee's invidiously discriminatory conduct. *Alexander v. Yale Univ.*, 459 F.Supp. 1, 4 (D. Conn. 1977), *aff'd,* 631 F.2d 178 (2d Cir. 1980).

29 **A SHORT HISTORY—FIRST REGULATIONS**

April 11,1980: EEOC published the Interim Guidelines on sexual harassment as an amendment to the Guidelines on Discrimination Because of Sex. 29 CFR Part 1604.11, 45 FR 25024. "This amendment will re-affirm that sexual harassment is an unlawful employment practice."

30 **A SHORT HISTORY—FIRST SUPREME COURT CASE**

"Since the Guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created *a hostile or abusive work environment.* As the Court of Appeals for the Eleventh Circuit wrote in *Henson v. Dundee*, 682 F.2d 897, 902 (1982):

31 **A SHORT HISTORY: FIRST SUPREME COURT CASE**

'Sexual harassment which creates *a hostile or offensive environment* for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.' " *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57(1986).

32 **A SHORT HISTORY: MAJOR HOLDINGS**

- Title IX applies to employment discrimination; not just student discrimination. *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979);
- Students can sue for money damages under Title IX. *Franklin v. Gwinnett Cty. Pub. Sch*., 503 U.S. 60 (1992);

33 **A SHORT HISTORY: MAJOR HOLDINGS**

- Same sex sexual harassment is actionable. *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75 (1998);
- Title IX case will not lie by reason of teacher's sexual harassment of student in absence of *actual notice on part of school district*;

34 **A SHORT HISTORY: MAJOR HOLDINGS**

A private right of action will not lie in absence of district's [1] *deliberate indifference* to teacher's conduct upon [2] *receipt of actual notice* thereof. *Gebser v. Lago Vista Indep. Sch. Dist*., 524 U.S. 274 (1998).

35 **A SHORT HISTORY: MAJOR HOLDINGS**

A private damages action may lie against a school board under Title IX in cases of student-on-student harassment, but only where the funding recipient acts with [1] *deliberate indifference and* [2] *the harassment is so severe that it effectively bars the victim's access to an educational opportunity or benefit. Davis v. Monroe Cty. Bd. of Educ*., 526 U.S. 629 (1999).

36 **A SHORT HISTORY: MAJOR HOLDINGS**

- Title IX prohibits retaliation against those who complain of sex discrimination. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005);
- Title IX was not the exclusive mechanism for addressing gender discrimination in schools, or a substitute for § 1983 suits as a means of enforcing constitutional rights, and thus § 1983 suits based on the Equal Protection Clause were available in lawsuits alleging unconstitutional gender discrimination in schools. *Fitzgerald v. Barnstable Sch. Comm*., 555 U.S. 246 (2009).

37 **A SHORT HISTORY: MAJOR HOLDINGS**

An employer violates Title VII, which makes it unlawful to discriminate against an individual "because of" the individual's sex, by firing an individual for being homosexual or being a transgender person. *Bostock v. Clayton Cty., Georgia*, 140 S.Ct. 1731 (2020).

38 **PART II**
THE NEW REGULATIONS: A DEEP DIVE INTO THE NEW REGULATIONS

39 **SEXUAL WRONGDOING VS. SEXUAL HARASSMENT**

- Fundamental Premise #1: Not all sexualized conduct constitutes "sexual harassment."
- Fundamental Premise #2: Sexualized conduct must not be called "sexual harassment" by school or school officials until the process has been completed and the decision-maker concludes the conduct is sexual harassment.
- We will use the phrase "sexual wrongdoing" to refer to sexualized misconduct that may or may not rise to the level of sexual harassment.

40 **THE NEW REGULATIONS**

-
- Adopted: May 6, 2020
-
- Effective: August 14, 2020

41 **THE NEW REGULATIONS: ROLES AND RESPONSIBILITIES**

1. Title IX Coordinator;
2. Investigator;

3. Informal Facilitator;
4. First-level Decisionmaker;
5. Appeal Decisionmaker.

42 **AIDES TO UNDERSTANDING THESE SLIDES**

➢

➢Defined terms will be in blue font;

➢Action requirements will be in red font.

43 **THE NEW REGULATIONS: FUNDAMENTAL PREMISE**

The regulations are premised on setting forth clear legal obligations that require schools to: [1] promptly respond to individuals who are alleged to be victims of sexual harassment by [2] offering supportive measures;

44 **THE NEW REGULATIONS: FUNDAMENTAL PREMISE**

[2] follow a fair grievance process to resolve sexual harassment allegations [a] when a complainant requests an investigation or [b] a Title IX Coordinator decides on the school's behalf that an investigation is necessary;

45 **THE NEW REGULATIONS: FUNDAMENTAL PREMISE**

and [3] provide remedies to victims of sexual harassment.

➢Observations:

1. Conspicuously absent is reference to the alleged perpetrator—i.e., the "respondent";
2. Remember, a witness may be a victim.

46 **"COMPLAINANT" DEFINED:**

➢"Complainant means an individual who is alleged to be the victim of conduct that could constitute sexual harassment."

➢Can a witness to conduct that could constitute sexual harassment be a complainant?

➢Yes.

47 **WHAT HAVE WE LEARNED?**

➢A formal complaint can only be made by:

1. The Complainant; or
2. A Title IX Coordinator.

➢Why is this important?

➢No formal complaint, the grievance process does not need to be followed.

48 **THE NEW REGULATIONS: THE BASIC REQUIREMENT**

A School Entity with actual knowledge of sexual harassment in an education program or activity of the School Entity against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.

49 **THE NEW REGULATIONS: DEFINING SEXUAL HARASSMENT**

➢Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

➢(1) An employee of the school conditioning the provision of an aid, benefit, or service of the school on an individual's participation in unwelcome sexual conduct [i.e., quid pro quo];

50 **THE NEW REGULATIONS: DEFINING SEXUAL HARASSMENT**

(2) [1]Unwelcome conduct determined by a reasonable person to be [2] so severe, pervasive, and objectively offensive that [3]it effectively denies a person equal access to the school's education

program or activity (i.e., "hostile environment"); or

51 **THE NEW REGULATIONS: DEFINING SEXUAL HARASSMENT**

(3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

52 **THE NEW REGULATIONS: DEFINING SEXUAL HARASSMENT**

"Sexual assault" means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation. 20 U.S.C.A. § 1092 (f)(6)(A)(v).

53 **THE NEW REGULATIONS: DEFINING SEXUAL HARASSMENT**

- Forcible: Any sexual act directed against another person, without consent or where the victim is incapable of consent; includes:
  - Forcible Rape;
  - Forcible Sodomy;
  - Sexual assault with an object; and/or
  - Forcible fondling;

54 **THE NEW REGULATIONS: DEFINING SEXUAL HARASSMENT**

Nonforcible: unlawful, nonforcible sexual intercourse includes:

- Incest; and
- Statutory rape.

55 **THE NEW REGULATIONS: DEFINING SEXUAL HARASSMENT**

"Dating violence" means *violence* committed by a person--

(A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and

(B) where the existence of such a relationship shall be determined based on a consideration of the following factors:

(i) The length of the relationship.

(ii) The type of relationship.

(iii) The frequency of interaction between the persons involved in the relationship. 34 U.S.C.A. § 12291.

56 **THE NEW REGULATIONS: DEFINING SEXUAL HARASSMENT**

"Domestic violence" includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, . . ." 34 U.S.C.A. § 12291.

57 **THE NEW REGULATIONS: DEFINING SEXUAL HARASSMENT**

"Stalking" means engaging in a course of conduct directed at a specific person that would cause a reasonable person to--

(A) fear for his or her safety or the safety of others; or

(B) suffer substantial emotional distress. 34 U.S.C.A. § 12291.

58 **THE NEW REGULATIONS: ACTUAL KNOWLEDGE**

"Actual knowledge" means:

1. notice of sexual harassment; or
2. notice of allegations of sexual harassment

- What's the difference between the two?

59 **THE NEW REGULATIONS: ACTUAL KNOWLEDGE**

Notice to any of the following constitutes notice to the school:

1. Title IX Coordinator;
2. Any official of the school who has authority to institute corrective measures on behalf of the school; or
3. *Any employee of an elementary and secondary school, including custodians, bus drivers, cafeteria workers, etc.*

60 **THE NEW REGULATIONS: FORMAL COMPLAINT**

Formal complaint means:

[1] a document [a]filed by a complainant or [b]signed by the Title IX Coordinator;

[2]alleging sexual harassment against a respondent; and

[3]requesting that the school investigate the allegation of sexual harassment.

61 **THE NEW REGULATIONS: FORMAL COMPLAINT**

"At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the School Entity with which the formal complaint is filed."

62 **THE NEW REGULATIONS: FORMAL COMPLAINT**

A formal complaint may be filed with the Title IX Coordinator [1] in person, [2] by mail, or [3] by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under § 106.8(a), and by any additional method designated by the school.

63 **THE NEW REGULATIONS: FORMAL COMPLAINT**

[T]he phrase "document filed by a complainant" means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the school) that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.

64 **PRACTICAL TIPS**

When there is a "formal complaint" do the following:

1. Notify school's insurance broker of a possible claim; and
2. Institute "litigation hold procedures"
3. These actions may have to be taken even when there is no "formal complaint"

65 **THE NEW REGULATIONS: DEFINING SUPPORTIVE MEASURES**

Supportive measures means [1] non-disciplinary, [2] non-punitive [3] individualized services offered [4] as appropriate, as reasonably available, and without fee or charge [5] to [A] the complainant or [B] the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.

66 **THE NEW REGULATIONS: DEFINING SUPPORTIVE MEASURES**

Supportive measures are designed [1] to restore or preserve equal access to the school's education program or activity *without unreasonably burdening the other party*, including measures designed [2] to protect the safety of all parties or the school's educational environment, or [3] deter sexual harassment.

67 **THE NEW REGULATIONS: DEFINING SUPPORTIVE MEASURES**

Supportive measures may include [1] counseling, [2] extensions of deadlines or other course-

related adjustments, [3] modifications of work or class schedules, [4] campus escort services, [5] mutual restrictions on contact between the parties, [6] changes in work . . . locations, [7] leaves of absence, [8] increased security and [9] monitoring of certain areas of the campus, and other similar measures.

68 **THE NEW REGULATIONS: DEFINING SUPPORTIVE MEASURES**

The school 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 school to provide the supportive measures.

69 **THE NEW REGULATIONS: DEFINING "DELIBERATELY INDIFFERENT"**

A school is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

70 **THE NEW REGULATIONS: RESPONDING TO SEXUAL WRONGDOING**

With or without a formal complaint, school must do the following:

1. Promptly respond;
2. Title IX Coordinator must promptly contact complainant;
3. Must not be "deliberately indifferent";
4. Must treat complainant and respondents equitably by offering supportive measures to complainant;
5. Must follow grievance process when formal complaint is filed.

71 **THE NEW REGULATIONS: CONTACTING THE COMPLAINANT**

The Title IX Coordinator must promptly contact the complainant to

[1] discuss the availability of supportive measures,

[2] consider the complainant's wishes with respect to supportive measures,

[3] inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and

[4] explain to the complainant the process for filing a formal complaint.

72 **THE NEW REGULATIONS: AUTHORIZED ACTIONS**

"Emergency Removal": This is allowed: "provided that the [school]

[1] undertakes an individualized safety and risk analysis,

[2] determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and

[3] provides the respondent with notice and an opportunity to challenge the decision *immediately* following the removal."

73 **THE NEW REGULATIONS: ADMINISTRATIVE LEAVE**

School may place a "non-student" employee on administrative leave during the pendency of the grievance process.

74 **THE NEW REGULATIONS: RESPONSE TO FORMAL COMPLAINT**

In response to a formal complaint, a school must follow a grievance process that complies with § 106.45.

75 **THE NEW REGULATIONS: THE GRIEVANCE PROCESS**

- A school's treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under Title IX. §106.45(a).
- This requires meticulous professionalism, no threats, no rolling of the eyes, no patronizing

behaviors.

76 **THE NEW REGULATIONS: THE GRIEVANCE PROCESS**

Treat complainants and respondents equitably by:

[1] providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by

[2] following a grievance process that complies with this section *before* the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent.

77 **THE NEW REGULATIONS: THE GRIEVANCE PROCESS--REMEDIES**

1. Remedies must be designed to restore or preserve equal access to the school's education program or activity;
2. Remedies may include supportive measures;
3. Remedies need not be [a] non-disciplinary, [b] non-punitive and [c] need not avoid burdening the respondent.

78 **THE NEW REGULATIONS: THE GRIEVANCE PROCESS—OBJECTIVE EVALUATION**

Requires:

- an [1] objective evaluation of all relevant evidence including both [a] inculpatory and [b] exculpatory evidence; and
- that [2] credibility determinations may not be based on a person's status as a [a] complainant, [b] respondent, or [c] witness.

79 **THE NEW REGULATIONS: THE GRIEVANCE PROCESS—CONFLICT OF INTEREST**

Requires that any individual designated by a school as a Title IX Coordinator, investigator, decision-maker, or a facilitator, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

80 **THE NEW REGULATIONS: THE GRIEVANCE PROCESS--TRAINING**

- The school must ensure that [1] Title IX Coordinators, [2] investigators, [3] decision-makers, and [4] facilitators, *receive training* on:
- [A] the definition of sexual harassment,
- [B] the scope of the school's education program or activity,
- [C] how to conduct an investigation and
- [D] the grievance process, including
  - [1] hearings,
  - [2] appeals, and
  - [3] informal resolution processes, and
  - [4] how to serve impartially, . . .

81 **THE NEW REGULATIONS: THE GRIEVANCE PROCESS--TRAINING**

[E] Training to serve impartially, including by [1] avoiding prejudgment of the facts at issue, [2] conflicts of interest, and bias.

[F]A School must ensure that decision-makers receive training on:

[1] any technology to be used at a live hearing; and on

[2] issues of relevance of questions and evidence, including [i] when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section.

82 **THE NEW REGULATIONS: THE GRIEVANCE PROCESS—THE INVESTIGATIVE REPORT**

School also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence.

83 **THE NEW REGULATIONS: THE GRIEVANCE PROCESS—TRAINING MATERIALS**

Any materials used to train Title IX Coordinators, investigators, decision-makers, and facilitators must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.

84 **THE NEW REGULATIONS: THE GRIEVANCE PROCESS—PRESUMPTION OF INNOCENCE**

[The grievance process must] 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.

85 **THE NEW REGULATIONS: THE GRIEVANCE PROCESS—PROMPT TIME FRAMES**

Include reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the school offers informal resolution processes, and a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause.

86 **THE NEW REGULATIONS: THE GRIEVANCE PROCESS**

[The process may allow temporary delays] with [1] written notice to the complainant and the respondent of the delay or extension and [2] the reasons for the action. Good cause may include considerations such as the [A] absence of a party, [B] a party's advisor, or [C] a witness; [D] concurrent law enforcement activity; or [E] the need for language assistance or accommodation of disabilities.

87 **THE NEW REGULATIONS: THE GRIEVANCE PROCESS—DISCIPLINARY SANCTIONS**

Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the school may implement following any determination of responsibility.

88 **THE NEW REGULATIONS: THE GRIEVANCE PROCESS—BURDEN OF PROOF**

[1] State whether the standard of evidence to be used to determine responsibility is the [a] *preponderance of the evidence* standard or the [b] *clear and convincing evidence standard*, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment.

89 **THE NEW REGULATIONS: THE GRIEVANCE PROCESS**

- Include the procedures and permissible bases for the complainant and respondent to appeal.
- Describe the range of supportive measures available to complainants and respondents.

90 **THE NEW REGULATIONS: THE GRIEVANCE PROCESS**

Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

91 **THE NEW REGULATIONS: THE GRIEVANCE PROCESS—NOTICE OF ALLEGATIONS**

Upon receipt of a "formal complaint," School must provide the following written notice to the *complaint and respondent(s)* who are known:

1. Notice of grievance process;
2. Notice of informal resolution process;
3. Notice of the allegations potentially constituting sexual harassment "including sufficient details known at the time."

92 **THE NEW REGULATIONS: THE GRIEVANCE PROCESS—NOTICE OF ALLEGATIONS**

"Sufficient details" include:

1. The identities of the parties involved in the incident, if known,
2. the conduct allegedly constituting sexual harassment,
3. the date, and
4. location of the alleged incident, if known.

93 **THE NEW REGULATIONS: THE GRIEVANCE PROCESS—NOTICE OF ALLEGATIONS**

The written notice must include a statement that [1] the respondent is presumed not responsible for the alleged conduct and [2] that a determination regarding responsibility is made at the conclusion of the grievance process.

94 **THE NEW REGULATIONS: THE GRIEVANCE PROCESS—NOTICE OF ALLEGATIONS**

The written notice must inform the parties that:

1. they may have an advisor of their choice, who may be, but is not required to be, an attorney, and
2. they may inspect and review evidence.

95 **THE NEW REGULATIONS: THE GRIEVANCE PROCESS—NOTICE OF ALLEGATIONS**

The written notice must inform the parties of any provision in the school's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

96 **THE NEW REGULATIONS: THE GRIEVANCE PROCESS—AMENDED NOTICE OF ALLEGATIONS**

If, in the course of an investigation, the school decides to investigate allegations about the complainant or respondent that are not included in the original notice, the school must provide notice of the additional allegations to the parties whose identities are known.

97 **THE NEW REGULATIONS: THE GRIEVANCE PROCESS—DISMISSAL OF COMPLAINT**

Complaint must be dismissed:

1. if the conduct alleged in the formal complaint would not constitute sexual harassment even if proved;
2. did not occur in the school's education program or activity, or
3. did not occur against a person in the United States; but-----

98 **THE NEW REGULATIONS: THE GRIEVANCE PROCESS—DISMISSAL OF COMPLAINT**

Dismissal of a formal complaint does not preclude action under another provision of the school's code of conduct.

99 **THE NEW REGULATIONS: THE GRIEVANCE PROCESS—PERMISSIVE DISMISSAL**

A complaint may be dismissed if:

1. a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein;
2. the respondent is no longer enrolled or employed by the school; or

3. Specific circumstances prevent the school from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

100 **THE NEW REGULATIONS: THE GRIEVANCE PROCESS**

Upon a dismissal, the school must [1] promptly send [a] written notice of the dismissal and [b] reason(s) therefor [2] simultaneously to the parties.

101 **THE NEW REGULATIONS: THE GRIEVANCE PROCESS—THE INVESTIGATION**

1. The burden of proof and burden of gathering evidence rests on the school.
2. The school cannot use a party's medical records developed for treatment purposes without consent of party, or party's parent if party is under 18.

102 **THE NEW REGULATIONS: THE GRIEVANCE PROCESS—THE INVESTIGATION**

- Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence;
- Do not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;

103 **THE NEW REGULATIONS: THE GRIEVANCE PROCESS—THE INVESTIGATION**

- 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, who may be, but is not required to be, an attorney;
- However, the School Entity 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;

104 **THE NEW REGULATIONS: THE GRIEVANCE PROCESS—THE INVESTIGATION**

Provide written notice to a party whose participation is invited or expected of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate;

105 **THE NEW REGULATIONS: THE GRIEVANCE PROCESS—THE INVESTIGATION**

Provide both parties an *equal opportunity to inspect and review any evidence obtained as part of the investigation* that is [1] directly related to the allegations raised in a formal complaint, including the [2] evidence upon which the School Entity does not intend to rely and [3] inculpatory or [4] exculpatory evidence whether obtained from a party or other source, *so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.*

106 **THE NEW REGULATIONS: THE GRIEVANCE PROCESS—THE INVESTIGATION**

1. Prior to completion of the investigative report, the school must send to [1] each party and [2] the party's advisor, if any, [A]the evidence subject to inspection and review [B]in an electronic format or a hard copy.
2. The parties must have at least 10 days to submit a written response,
3. The investigator must consider the response(s) prior to completion of the investigative report.

107 **THE NEW REGULATIONS: THE GRIEVANCE PROCESS—THE INVESTIGATION--EVIDENCE**

The School Entity must make all such evidence subject 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.

108 **THE NEW REGULATIONS: THE GRIEVANCE PROCESS—INVESTIGATION--REPORT**

1. Prepare an investigative report that fairly summarizes relevant evidence; and

2. At least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, *for their review and written response*.

109 **THE NEW REGULATIONS: THE GRIEVANCE PROCESS—PROCEDURES AFTER THE REPORT**

After the School Entity has sent the investigative report to the parties *and before reaching a determination regarding responsibility*,

1. the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness,
2. provide each party with the answers, and allow for additional, limited follow-up questions from each party.

110 **THE NEW REGULATIONS: THE GRIEVANCE PROCESS—FOLLOW UP QUESTIONS**

- Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered [1] to prove that someone other than the respondent committed the conduct alleged by the complainant, or [2] if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.
- The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.

111 **THE NEW REGULATIONS: THE GRIEVANCE PROCESS—THE WRITTEN DETERMINATION**

- A written determination must be issued after the investigative report is finalized
- Written determination must be by the "decision-maker"
  - Decision-maker and "due process"
- Decision-maker may not be the Title IX Coordinator or the Investigator.

112 **THE NEW REGULATIONS: THE GRIEVANCE PROCESS—THE WRITTEN DETERMINATION**

Must include:

1. Allegations potentially constituting sexual harassment;
2. Description of the procedural steps from receipt of formal complaint to written determination, including:
   a) Notifications to parties
   b) Interviews
   c) Site visits
   d) Methods used to gather evidence
   e) Hearings held.

113 **THE NEW REGULATIONS: THE GRIEVANCE PROCESS—THE WRITTEN DETERMINATION**

Must include:

3. Findings of fact supporting determination;
4. Conclusions regarding the application of Code of Conduct to facts;
5. The rationale for each allegation, including determination of responsibility disciplinary sanctions and whether remedies will be provided to victim to restore or preserve equal access;

114 **THE NEW REGULATIONS: THE GRIEVANCE PROCESS—THE WRITTEN DETERMINATION**

Must include:

6. Procedures for appeal;
7. Timeline for appeal;
8. Bases for appeal by complainant and respondent.

➢ The Written Determination must be provided to the parties simultaneously.

115 **THE NEW REGULATIONS: THE GRIEVANCE PROCESS—THE APPEAL**

School Entity must offer both parties an appeal from:

1. A determination regarding responsibility;
2. Dismissal of a formal complaint or any allegation in a formal complaint.

116 **THE NEW REGULATIONS: THE GRIEVANCE PROCESS—BASES OF APPEAL**

The following bases for an appeal are required:

1. Procedural irregularity that affected the outcome of the matter.
2. New evidence that was not reasonably available at the time the determination.
3. Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the parties specifically.

117 **THE NEW REGULATIONS: THE GRIEVANCE PROCESS--APPEAL**

When an appeal is filed, school must:

1. Notify the other party in writing and implement appeal procedures equally for both parties;
2. Assign a new decision-maker;
3. Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;

118 **THE NEW REGULATIONS: THE GRIEVANCE PROCESS—THE APPEAL**

When an appeal is filed, school must:

4. Issue a written decision describing the result of the appeal and the rationale for the result;
5. Provide the written decision simultaneously to both parties.

119 **THE NEW REGULATIONS: RECORDKEEPING**

Must maintain for minimum of 7 years the following:

1. Each sexual harassment investigation, including
   a) Determinations;
   b) Recordings and transcripts;
   c) Disciplinary sanctions;
   d) Remedies;
   e) Appeals;

120 **THE NEW REGULATIONS: RECORDKEEPING**

Must maintain for minimum of 7 years the following:

2. All materials used to train Title IX Coordinators; investigators; decision-makers and any person who facilitates an informal resolution process

➢School entities must make these training materials publicly available on their websites

121 **THE NEW REGULATIONS: RECORDKEEPING**

3. For each response to known sexual harassment, school must create records of actions, including supporting measures
   a) Basis for conclusion that response was not deliberately indifferent

b) Measures designed to restore and preserve equal access
c) Reasons why complainant was not provided with supportive measures.

122 **THE NEW REGULATIONS: INFORMAL RESOLUTION--PROHIBITIONS**

- Schools cannot require anyone to waive the minimum rights under the regulations.
- Schools may not require any party to participate in informal resolution process.
- Schools may not offer an informal resolution process unless a formal complaint is filed.
- Informal resolution not allowable when an employee allegedly harassed a student

123 **THE NEW REGULATIONS: PRECONDITIONS TO INFORMAL RESOLUTION PROCESS**

1. A formal complaint has been filed;
2. No determination of responsibility has been filed;
3. Parties have been provided with a written notice stating:
   a) The allegations
   b) The requirements of the informal resolution process, including when it precludes resumption of formal complaint process;

124 **THE NEW REGULATIONS: PRECONDITIONS TO INFORMAL RESOLUTION PROCESS**

4. Obtains the parties' voluntary, written consent to the informal resolution process.

- At any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process.

125 **THE NEW REGULATIONS: CONFIDENTIALITY**

Schools must keep confidential the following:

1. identity of any individual who has made a report or complaint of sex discrimination,
2. any complainant,
3. any individual who has been reported to be the perpetrator,
4. any respondent, and
5. any witness.

126 **THE NEW REGULATIONS: EXCEPTIONS TO CONFIDENTIALITY**

Disclosure can be made under the following circumstances:

1. As permitted by the FERPA;
2. As required by law; and
3. To carry out the purposes of 34 CFR, Part 106, including conducting an investigation, hearing, or judicial proceeding.

127 **THE NEW REGULATIONS: RETALIATION PROHIBITED—GENERALLY**

No school or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or the new Title IX Regulations

128 **THE NEW REGULATIONS: RETALIATION PROHIBITED—SPECIFIC PROHIBITIONS**

Schools may not retaliate against an individual who:

1. Made a report or complaint;
2. Testified;
3. Assisted or participated in an investigation, proceeding or hearing;
4. Refused to participate in an investigation, proceeding or hearing under the Regulations.

129

Part 3:

Applying the New Requirement to the Existing School Environment

130 **TO-DO LIST—FOR BOARD**

- ❑ Adopt Policy;
- ❑ Adopt Motion superseding all policies, codes of conduct or AR's inconsistent with Title IX or new Policy;
- ❑ Designate (or Re-designate) Title IX Coordinator(s); and
- ❑ Amend Code of Student Conduct.

131 **TO DO LIST –FOR ADMINISTRATION**

- ❑ Create and adopt necessary AR's
- ❑ Designate:
  - ❑ Investigators;
  - ❑ Facilitators;
  - ❑ First-level decision-makers; and
  - ❑ Appeal-level decision-makers;
- ❑ Create list of duties to include in job descriptions of the foregoing personnel;

132 **TO DO LIST –FOR ADMINISTRATION**

- ❑ Review current governing documents and remove inconsistencies with Title IX Requirements;
- ❑ Make sure everyone knows the rules through:
  - ❑ Posting;
  - ❑ Distribution;
    - ❑ Include policy in student and employee handbooks; and
  - ❑ Training;

133 **TO DO LIST –FOR ADMINISTRATION**

❑Create templates for:

- ❑ Incident report;
- ❑ Intake form;
- ❑ Notices;
- ❑ Formal complaint form;
- ❑ Notice to Complainant;
- ❑ Notice to Respondent;
- ❑ Notice to witnesses;

134 **TO DO LIST –FOR ADMINISTRATION**

Templates, cont'd:

- ❑ Notice when delay or extension is necessary;
- ❑ The investigative report;
- ❑ Answer form for questions asked by party(ies);
- ❑ Explanations for excluding response to any questions;
- ❑ Written Determination and notices;

135 ☐ **TO DO LIST –FOR ADMINISTRATION**

Templates, cont'd:

- ❑ Appeal form;
- ❑ Notice of filing of appeal form;
- ❑ Notice to parties of procedure and rights on appeal;
- ❑ Form for Appeal Decision; and
- ❑ Chain of Custody form.

136 ☐ **TO DO LIST –FOR ADMINISTRATION**

- ❑ Create the following services:
  - ❑ supportive services; and
  - ❑ informal resolution processes;
- ❑ Write and adopt an extensive Code of Employee Conduct or amend existing Code of Employee Conduct;
- ❑ Create a training program;

137 ☐ **TO DO LIST –FOR ADMINISTRATION**

- ❑ Establish process to train all new Coordinators, Investigators, Facilitators and Decisionmakers as they assume that role;
- ❑Create effective and secure record keeping system that meets regulatory requirements;

138 ☐ **TO DO LIST –FOR ADMINISTRATION**

- ❑ Make all required postings on website:
  - ❑Title IX Coordinator(s) name and contact information;
  - ❑Process to file complaint or report sexual harassment;
  - ❑Anti-discrimination/anti-harassment Policy; and
  - ❑All training materials.

139 ☐ **TO DO LIST –FOR ADMINISTRATION; ADMINISTRATIVE REGULATIONS**

The authority for Administrative Regulations ("AR's) is both implied in law and expressly authorized in Policy 000 if your school subscribes to the PSBA Policy Service.

140 ☐ **TO DO LIST –ADMINISTRATIVE REGULATIONS**

➢ Policy 000 provides:

"The policies of the Board shall consist of the policies and procedures adopted by the Board and contained in the Policy Manual, and such other separate documents approved by the Board that are expressly incorporated by reference in particular policies and declared to constitute Board policy, such as the Code of Student Conduct.

Administrative regulations are not part of Board policy and may be altered by the administration without Board action. Administrative regulations may not conflict with Board policy or with applicable law."

141 ☐ **TO DO LIST –FOR ADMINISTRATION**

- ❑ Two of the recommended AR's are:
  - ❑ a detailed "Complaint Procedure"; and
  - ❑ a detailed "Grievance Process.

- Both should be prepared with counsel;
- PSBA has provided samples as "Attachments" to the recommended Policy

142

INTEGRATING THE TITLE IX
PROCEDURES INTO THE
SCHOOL'S EXISTING PROCEDURES

143 **WHO SHOULD FILL THE REQUIRED ROLES?**

Title IX Coordinator:

- Remember, at least one is required, several can be appointed
- HR Director; Director of Pupil Services; Athletic Director

144 **WHO SHOULD FILL THE REQUIRED ROLES?**

Investigators:
For student matters—principals
For employee matters—HR Office or supervisors

145 **WHO SHOULD FILL THE REQUIRED ROLES?**

Decisionmakers:
First level: someone from HR or Pupil Services
Second level: Superintendent, Assistant Superintendent, someone else from HR or Pupil Services

146 **WHO SHOULD FILL THE REQUIRED ROLES?**

Informal Facilitator:

- Someone from HR or Pupil Services

147 **ONE PUBLIC SCHOOL, TWO SYSTEMS**

- System 1: Everything that does not come within the scope of Title IX
- System 2: Everything that comes within the scope of Title IX
- They are separate systems that run on separate tracks, but (1) sometimes the tracks intersect; and (2) sometimes a matter will change tracks

148 **ONE PUBLIC SCHOOL, TWO SYSTEMS**

"The obligation to comply with [the Regulations] is not obviated or alleviated by any State or local law." 34 C.F.R. §106.6(h).

149 **ONE PUBLIC SCHOOL, TWO SYSTEMS**

Comments: "Recipients may continue to address harassing conduct that does not meet the § 106.30 definition of sexual harassment, as acknowledged by the Department's change to §106.45(b)(3)(i) to clarify that dismissal of a formal complaint because the allegations do not meet the Title IX definition of sexual harassment, does not preclude a recipient from addressing the alleged misconduct under other provisions of the recipient's own code of conduct."

150 **ONE PUBLIC SCHOOL, TWO SYSTEMS**

Comments: "Nothing in these final regulations prevents a recipient from addressing conduct that is outside the Department's jurisdiction due to the conduct constituting sexual harassment *occurring outside the recipient's education program or activity*, or occurring against a person who is not located in the United States." (Emphasis added)

151 **CODE OF STUDENT CONDUCT**

"(c) Each governing board shall adopt a code of student conduct that includes policies governing student discipline and a listing of students' rights and responsibilities as outlined in this chapter. This conduct code shall be published and distributed to students and parents or guardians. Copies of the code shall also be available in each school library." 22 Pa. Code, §12.3(c).

152 **CODE OF EMPLOYEE CONDUCT**

"The Board directs that all district employees shall be informed of conduct that is required and is prohibited during work hours and the disciplinary actions that may be applied for violation of Board policies, administrative regulations, rules and procedures." Policy 317.

153 **THE NEW REGULATIONS: EXCEPTIONS TO RETALIATION**

1. The exercise of First Amendment rights does not constitute retaliation;
2. Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation;
3. But, a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

154 **REFERENCES TO "CODE OF CONDUCT" IN NEW REGULATIONS**

§106.45(b)(2): The notice of allegations must inform the parties of any provision in school's "code of conduct" that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

155 **REFERENCES TO "CODE OF CONDUCT" IN NEW REGULATIONS**

§106.45(b)(3): If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient's education program or activity, or did not occur against a person in the United States, then the [school] must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; such a dismissal does not preclude action under another provision of the recipient's code of conduct.

156 **REFERENCES TO "CODE OF CONDUCT" IN NEW REGULATIONS**

§106.45(b)(7)(D): the written determination must include "Conclusions regarding the application of the [school's] code of conduct to the facts . . .."

157 **CODES OF CONDUCT—THE BOTTOM LINE**

- Public School Entities Need a Code of Employee Conduct as well as a Code of Student Conduct
- The Codes of Conduct must contain provisions that incorporate the new rules and standards

158 **THE INVESTIGATION; INVESTIGATIVE INTERVIEWS**

- Select the investigator
- The Investigator plans investigation process
- The Investigator determines whether and how School Attorney will be involved
- The Investigator ensures proper notices given to complainant, respondent and witnesses

159 **THE INVESTIGATION; INVESTIGATIVE PLAN**

Investigators are encouraged to have a flexible plan that can be and is changed as warranted, identifying:

- witness list

- order of interviews
- topics to cover for each witness (be prepared to change and supplement—this is different than interviewing for job applicants—you are not to ask the same questions of each witness!

160 **THE INVESTIGATION; INVESTIGATIVE PLAN**

Investigative plan, cont'd:

- list of physical evidence needed, such as
  - records
  - reports
  - documents
  - calendars
  - measurements
  - etc.
- where will witness interviews take place, what confidentiality is needed?

161 **THE INVESTIGATION; INVESTIGATIVE PLAN**

Investigative plan, cont'd:

- Interviewing member of a collective bargaining unit—remember employee's *Weingarten* rights!
  - Should union be contacted by school or by employee?
    - Generally by employee due to confidentiality rules

162 **THE INVESTIGATION; MISC. ISSUES**

- Don't promise anything other than the promise to do a thorough and fair investigation
- Don't promise confidentiality
- Don't promise or offer "immunity"
- What do you do with an uncooperative witness who refuses to be interviewed or answer certain questions?
- Answer: Call counsel for District

163 **THE INVESTIGATION; INVESTIGATIVE INTERVIEWS**

- How will investigative interviews be conducted?
- Notes only?
- Audio recording?
- Court reporter?

164 **THE INVESTIGATION; NOTE TAKERS**

- If Investigator uses a "note taker," be careful:
- give written directives to note taker to:
  - keep everything confidential;
  - Not to give copies of the notes to anyone, except Investigator, counsel for school, Title IX Coordinator or Superintendent/Executive Director
  - Not to destroy any handwritten or other notes used to prepare the final "record" of the interview

165 **THE INVESTIGATION**

Investigations include more than interviews—they may involve:

- security video (make sure it is preserved and not automatically deleted);
- Records from the FOB system;

- Sign-in sheets;
- Time sheets for non-exempt employees;
- Applicable policies, code of conduct, collective bargaining agreement(s), individual contracts

166 **THE INVESTIGATION**

Investigations include more than interviews—they may involve:

- Calls to prior employers;
- Personnel files;
- Investigation of social media;
- Forensic study of computers and electronic devices
- Etc., etc., etc.

167 **THE INVESTIGATION**

Investigations include more than interviews—they may involve:

- Searches of lockers, bookbags, pockets, desks, etc.
  - Caution—Remember the 4th Amendment and State Board regulations

168 **THE INVESTIGATION**

Investigations include more than interviews—they may involve:

- Confiscation and search of electronic device:
  - Use a chain of custody form
  - Have student or employee turn it off before you take it
  - Decide whether forensic IT consultant will be hired; is a forensic image needed
  - Decide who turns it on and searches it

169 **THE INVESTIGATION; SCHOOL COUNSEL**

- What is the role of counsel for the school?
- Counsel represents the entity—i.e., the School District, Intermediate Unit or Vocational-Technical School, not:
  - the superintendent;
  - the board; or
  - any administrator, investigator, decision-maker
- Counsel has many ethical duties as he/she is involved in an investigation or decision

170 **THE INVESTIGATION; SCHOOL COUNSEL**

- There are different ways that counsel can be used:
  - as a "passive advisor" answering specific questions; to
  - hands-on planner and interviewer
- It is strongly recommended that counsel be and remain legal counsel performing only work within the scope of a legal counsel—this will preserve the attorney-client privilege
- Even as "hands-on" planner and interviewer, these are roles of a lawyer

171 **THE INVESTIGATION; PRESERVING COUNSEL'S ROLE AS AN ATTORNEY**

- Counsel is not to make decisions, only offer recommendations and advice
- The school—be it the Title IX coordinator, the Investigator, the Facilitator or the Decisionmakers—makes the decisions based on counsel's advice
- Counsel should not be sending any of the notices or correspondence required by Title IX—those must come from the school on school letterhead

172 **THE INVESTIGATION; PRESERVING COUNSEL'S ROLE AS AN ATTORNEY**

- If counsel will be present for an investigative interview and conduct the questioning, counsel should clearly identify his/her role, saying something like the following:
- "You may be wondering why the School District has an attorney here and what my role is. I have been asked to provide legal assistance to the School District to ensure that it is complying with applicable law and to ask appropriate questions in accordance with legal rules. I will not be making any of the decisions in this matter—the decisions will be made by the appropriate officials of the school, which may be based on legal advice that I provide. I represent the School District and not anyone else in these proceedings."
- Make sure your lawyer says something like that "on the record"

173 **MUST BE IMPARTIAL AND FAIR**

All investigations, decisions and actions must be fair and impartial

174 **MUST BE FAIR AND IMPARTIAL**

- Don't prejudge the facts—wait until you hear all the evidence from all of the witnesses;
- presumes the non-responsibility of respondents until conclusion of the grievance process when a decision is made based on a fair assessment of evidence;
- Both parties must have equal opportunity to present witnesses and other evidence;

175 **MUST BE FAIR AND IMPARTIAL**

- written notice of the allegations to both parties;
- does not restrict the parties from discussing the allegations or gathering evidence (What about confidentiality?);
- gives the parties equal opportunity to select an advisor of the party's choice (who may be, but does not need to be, an attorney);

176 **SCHOOL ATTORNEY**

Can school be represented by counsel at each step of the process?

- Yes!
- Caveat: Perhaps same lawyer should not be involved at appeal step who was involved in initial decision step?

177 **SCHOOL ATTORNEY**

When are the times when it is important to have counsel involved?

- When the complainant, the respondent or any witness is represented by counsel;
- When there are unusual legal issues at play;
- When there are threats of litigation;
- When the alleged conduct is significant, or the possible disciplinary consequences are significant;

178 **EFFECT OF CRIMINAL PROCEEDINGS OR INVESTIGATION**

- Does not relieve school of its duties under Title IX—you must investigate promptly, decide promptly, provide supportive measures promptly, and take appropriate action based on decision
- Decision of police is not determinative of whether there was unlawful harassment, unless there is guilty plea or verdict of an offense whose elements establish "sexual harassment"

179 **MUST BE FAIR AND IMPARTIAL**

- Both parties have equal opportunity to review and respond to the evidence gathered during the investigation
- Cannot be biased in any way:
  - Due to nature of allegations;
  - Due to the identity of the parties or the witnesses;
  - Due to the status of the parties or the witnesses;

180 **MUST BE FAIR AND IMPARTIAL**

- Must not rely upon or consider stereotypes or other irrelevant facts:
  - Manner of dress;
  - Most past disciplinary issues;
  - Occupation of parents;

181 **MUST BE FAIR AND IMPARTIAL**

- Must not rely upon untrustworthy evidence;
- Uncorroborated hearsay
  - go to the source;
- Summaries or descriptions of a document;
  - get the document;

182 **MUST BE FAIR AND IMPARTIAL--RECUSAL**

When must you "recuse" yourself?

- Knowledge of parties or witnesses—not a reason to recuse;
- Friendship, socializing out of school, membership in same clubs, organizations or religious congregations—may be a reason to recuse;
- Your belief that you cannot perform your function fairly and without bias to any party;
- You are named as the alleged Perpetrator;

183 **MUST BE FAIR AND IMPARTIAL--RECUSAL**

When must you recuse yourself?

- Prior significant event with either party or a witness, such as:
- Unsatisfactory rating to teacher—probably not enough to require recusal;
- Prior suspension of a student—probably not enough to require recusal;
- Testified against a student or teacher—probably should recuse;

184 **MUST BE FAIR AND IMPARTIAL--RECUSAL**

When must you recuse yourself?

- There's a picture of you and the respondent in a pool together in Los Vegas—you should recuse
- You are Facebook "friends" with a party or witness—you should recuse
- You posted (thumbs down) on social media—it depends whether you should recuse

185 **MUST BE FAIR AND IMPARTIAL--RECUSAL**

When must you recuse yourself?

- You previously dated one of the parties—you must recuse yourself;
- You dated a witness—maybe you need to recuse yourself
- Bottom line: You must be alert to see the situations that may require your recusal and get the advice of counsel when necessary!

186 **MUST BE FAIR AND IMPARTIAL--RECUSAL**

When must you recuse yourself?

- You are the Title IX Coordinator and you signed the formal complaint—no
- You filed a report to Childline—no
- You notified law enforcement—no
- You wrote an op-ed for the Washington Post denouncing a party—yes

187 **PRACTICAL TIPS**

We recommend that notice be provided to the parties of their ability to raise the issue of bias and conflict and to state the reasons—it should be in writing.

188 **RULES OF EVIDENCE**

- Formal legal rules of evidence do not apply
- Evidence should be heard that is reasonably probative of relevant facts

Note: Virtually every rule we will discuss today has exceptions!

189 **RULES OF EVIDENCE**

Although formal or legal rules of evidence do not apply, there are several substantive laws that apply to the evidence gathering process

190 **RULES OF EVIDENCE--RELEVANCY**

- "Relevant evidence" is that which tends to establish a material fact, makes a fact at issue more or less probable, or supports a reasonable inference or presumption regarding a material
- A "material fact" is a fact that directly affects the outcome of the investigation

191 **RULES OF EVIDENCE--RELEVANCY**

The kinds of evidence that would usually be relevant include the following:

- "Inculpatory" evidence—evidence which tends to prove that the alleged respondent is guilty;
- "Exculpatory" evidence—evidence which tends to prove that the alleged respondent is innocent;

192 **RULES OF EVIDENCE--RELEVANCY**

Relevancy, cont'd:

- Who, what, where, when and why
- Alibi
- DNA, fiber, fingerprint,
- Electronic data; meta data
- Names of witnesses
- Motive

193 **RULES OF EVIDENCE--RELEVANCY**

Relevancy, cont'd:

- Admission
- Prior inconsistent statements;
- Lying about an important material fact;
- Etc., etc., etc.

194 **RULES OF EVIDENCE--PRIVILEGE**

- Lawful privilege: legally recognized privilege may not be pierced
- Attorney-client confidential communications;
- Attorney Work Product;
- Medical Records

195 **RULES OF EVIDENCE—JUDICIAL CODE**

"No guidance counselor, school nurse, school psychologist, or home and school visitor in the public schools . . .including any clerical worker of such schools . . . who, while in the course of his professional or clerical duties . . . shall be compelled or allowed:
(1) without the consent of the student, if the student is 18 years of age or over; or
(2) without the consent of his parent or guardian, if the student is under the age of 18 years;
to disclose such information in any legal proceeding, trial, or investigation before any government unit." 42 Pa.C.S.A. § 5945

196 **RULES OF EVIDENCE—JUDICIAL CODE**

"(1) No sexual assault counselor or an interpreter translating the communication between a sexual assault counselor and a victim may, without the written *consent of the victim*, disclose the victim's confidential oral or written communications to the counselor nor consent to be examined in any court or criminal proceeding.
(2) No coparticipant who is present during counseling may disclose a victim's confidential communication made during the counseling session nor consent to be examined in any civil or criminal proceeding without the written consent of the victim" 42 Pa.C.S.A. § 5945.1 (Emphasis added)

197 **RULES OF EVIDENCE—ABUSE OF FAMILY**

"Unless a victim waives the privilege in a signed writing prior to testimony or disclosure, a domestic violence counselor/advocate or a coparticipant who is present during domestic violence counseling/advocacy shall not be competent nor permitted to testify or to otherwise disclose confidential communications made to or by the counselor/advocate by or to a victim. The privilege shall terminate upon the death of the victim.

198 **RULES OF EVIDENCE—ABUSE OF FAMILY**

Neither the domestic violence counselor/ advocate nor the victim shall waive the privilege of confidential communications by reporting facts of physical or sexual assault under Chapter 63 (relating to child protective services), a Federal or State mandatory reporting statute or a local mandatory reporting ordinance." 23 Pa.C.S.A. § 6116.

199 **RULES OF EVIDENCE**

Neither husband nor wife shall be competent or permitted to testify to confidential communications unless privilege is waived. 42 Pa.C.S.A. § 5923.

200 **RULES OF EVIDENCE—OTHER PRIVILEGES**

- Confidential communications to clergy;
- Confidential communications with human trafficking caseworkers;
- Confidential communications to news reporters;
- Educator misconduct complaints
- First Amendment Rights;

201 **RULES OF EVIDENCE—STUDENT RECORDS**

- Student records are generally considered "confidential"
  - FERPA, 20 U.S.C.A. §1232g; 34 C.F.R., Part 99
  - State Board Regulations, 22 Pa. Code, §§12.31, 12.32
  - School Board Policy

202 **PRACTICAL TIPS**

Have consent forms, HIPAA compliant authorization forms, and school records authorization forms ready to be used as necessary!

203 **RULES OF EVIDENCE—ILLEGAL RECORDINGS**

- "Wiretapping and Electronic Surveillance Control Act." 18 Pa.C.S.A. § 5701
- Prohibits—
  - Unlawful recording of private conversation
  - Disclosure of illegal recording
  - Use of illegal recording
- You can be fired if you violate the Act!

204 **PRACTICAL TIPS--RECORDINGS**

- Do not listen to, take or use a recording until you are positively sure that it is not illegal!
- Contact legal counsel if there is any doubt at all!

205 **RULES OF EVIDENCE--HEARSAY**

What is hearsay?

- (c) Hearsay. "Hearsay" means a statement that:
- (1) the declarant does not make while testifying at the current trial or hearing; and
- (2) a party offers in evidence to prove the truth of the matter asserted in the statement. Fed. R. Evid. 801

206 **RULES OF EVIDENCE--EXCEPTIONS**

- There are many exceptions to hearsay, such as:
- Some prior inconsistent statements;
- Admissions;
- Excited utterance
- Statement made for medical diagnosis or treatment
- Statement is supported by sufficient guarantees of trustworthiness

207 **PRACTICAL TIPS**

Listen to all evidence, including hearsay, but do not "rely upon" hearsay for making any decisions unless it is corroborated by competent evidence

208 **RULES OF EVIDENCE**

- Direct evidence vs. Circumstantial evidence
- Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw, heard, or did.
- Circumstantial evidence is proof of one or more facts from which you could find another fact.

209 **EVIDENCE OF COMPLAINT'S SEXUAL PREDISPOSITION AND PRIOR SEXUAL BEHAVIOR**

- General rule—NOT RELEVANT!
- Exceptions:
  - Offered to prove that someone other than the respondence committed the conduct alleged by complainant;
  - Offered to prove consent, Really?

210 **EVIDENCE OF COMPLAINT'S SEXUAL PREDISPOSITION AND PRIOR SEXUAL BEHAVIOR**

"[T]he Court concludes that Plaintiff did not have the legal capacity to welcome Oakes's sexual advances." *Chancellor v. Pottsgrove Sch. Dist.*, 501 F.Supp.2d 695, 706 (E.D. Pa. 2007)

211 **RULES OF EVIDENCE**

- You should consider both kinds of evidence—direct evidence and circumstantial evidence.
- The law makes no distinction between the weight to be given to either direct or circumstantial evidence.
- You may decide the case solely based on circumstantial evidence.

212 **BURDEN OF PROOF—PREPONDERANCE**

What does it mean that a fact has been proven by a preponderance of the evidence?

- This means that you are persuaded that the fact is more probably accurate and true than not

213 **BURDEN OF PROOF--PREPONDERANCE**

- Judges explain it as follows:

Think of an ordinary balance scale, with a pan on each side. Onto one side of the scale, place all of the evidence favorable to the complainant; onto the other, place all of the evidence favorable to the respondent. If, after considering the comparable weight of the evidence, you feel that the scales tip, ever so slightly or to the slightest degree, in favor of one or the other, then the fact has been proven by a preponderance of evidence.

214 **BURDEN OF PROOF—CLEAR AND CONVINCING**

For evidence to be clear and convincing, the witnesses must be found credible; the facts to which they testify must be distinctly remembered, and the testimony must be so clear, direct, weighty, and convincing that you can reach a clear conviction, without hesitancy, of the truth of the precise facts in issue. Although this is a significant burden of proof, it is not necessary that the evidence be uncontradicted, as long as the evidence leads you to a clear conviction of its truth.

215 **PRACTICAL TIPS**

Adoption of the "preponderance of evidence" standard is recommended.

216 **SHE SAID—HE SAID**

- An argument can be made that a decision based on the notion of "she said/he said" is a cop out
- Decide based on the standard adopted by your school, in accordance with your credibility determinations, and the weight of the evidence.

217 **"LIVE HEARING"**

- Schools have the discretion to include a "live hearing" as part of the grievance process.
- This is different than the School Board or arbitration "live hearing" under law or collective bargaining agreement.

- Numerous rules apply to live hearings, including training regarding technology used at the hearing.

218 **PRACTICAL TIPS**

- It is recommended that the grievance process not mandate a live hearing.
- If your school has live hearings, your decision-makers will need to receive additional training on technology used at the hearing.

219 **DECIDING CREDIBILITY**

- Judges say: You must consider and weigh the testimony of each witness and give it the weight that, in your judgment, it is fairly entitled to receive.
- The matter of the credibility of a witness, that is, whether the testimony is believable in whole or in part, is solely for your determination.

220 **DECIDING CREDIBILITY**

- I will mention some of the factors that might bear on that determination: whether witnesses have any interest in the outcome of the case or have friendship or animosity toward other persons concerned in the case;
- the behavior of the witness, the witness' demeanor; the manner of testifying and whether witnesses show any bias or prejudice that might color their testimony;

221 **DECIDING CREDIBILITY**

- the accuracy of witnesses' memory and recollection;
- witnesses' ability and opportunity to acquire knowledge of or to observe the matters they are testifying about; and the consistency or inconsistency of their testimony as well as its reasonableness or unreasonableness in the light of all the evidence in the case.

222 **DECIDING CREDIBILITY**

When you judge credibility, you are doing something you do every day of your life. You do it with your family, with friends and business associates, you do it whenever you go shopping or when you are out. That is, you have to decide what is it that you see and hear? What is it that you are being told that you will accept as true, that you will accept as something on which you will base a decision?

223 **DECIDING CREDIBILITY**

What do you believe? What has the ring of truth about it amongst all of the answers, all of the evidence that you hear? What are you willing to base an important decision on?

224 **INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS--DECIDING WHICH TRACK TO GO DOWN**

225 **INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS--DECIDING WHICH TRACK TO GO DOWN**

Students: Track 1: The regular disciplinary process governed principally by:

- 22 Pa. Code, Chapter 12 (Students and Student Services)
- Code of Student Conduct (22 Pa. Code §12.3(c))
- 24 P.S. §13-1318 (Suspension and expulsion of pupils)
- 20 U.S.C.A. § 1415(k) (Placement in alternative educational setting [of a student with a disability])

226 **INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS--DECIDING WHICH TRACK TO GO DOWN**

Track 1 applies to all student matters unless they are governed by the Title IX regulations!

227 **INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS--DECIDING WHICH TRACK TO GO DOWN**

Employees: Track 1: The regular disciplinary process governed principally by:

- 24 P.S. §11-1122 (Causes for termination);
- 24 P.S. §5-514 (Removal of employees);
- *Rike v. Com., Sec'y of Educ.*, 508 Pa. 190, 494 A.2d 1388 (1985)(districts possess authority to impose other forms of discipline);
- Code of Employee Conduct;
- Just Cause.

228 **INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS--DECIDING WHICH TRACK TO GO DOWN**

Track 1 applies to all employee matters unless they are governed by the Title IX regulations!

229 **INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS--DECIDING WHICH TRACK TO GO DOWN**

Understanding our perspective and assumptions:

1. Virtually all matters will at least initially be reported to the principal(s) or supervisor(s) rather than the Title IX Coordinator(s);
2. Principals and supervisors generally have the power to take some level of disciplinary or corrective action, and commonly do;
3. The following slides are directed to you—principals and supervisors!

230 **INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS--DECIDING WHICH TRACK TO GO DOWN**

- Always keep Title IX in your mind
- Always consider whether Title IX may apply
- Always remember that the usual rules do not apply as usual when Title IX applies
-

231 **INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS--DECIDING WHICH TRACK TO GO DOWN**

If you originally thought that the matter did not involve Title IX, always reassess whether a it does involve Title IX and change tracks as appropriate

232 **INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS--DECIDING WHICH TRACK TO GO DOWN**

Always send matter to applicable Title IX Coordinator if it seems like it might involve Title IX in any way and stop what you are doing!

233 **INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS--DECIDING WHICH TRACK TO GO DOWN**

What kinds of matters are governed by the Title IX Regulations?

- "Sexual harassment" in a school program or activity
- "Sexual harassment" is a legal conclusion that can only be made in accordance with the Title IX processes

234 **INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS--DECIDING WHICH TRACK TO GO DOWN**

- So if you don't know whether a matter is sexual harassment until later, how do you know when to get off Track 1 and proceed on Track 2?
- By the nature of the information or allegations
- If it is sexual in any way, switch to Track 2!

235 **INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS--DECIDING WHICH TRACK TO GO DOWN--EXAMPLES**

- "Johnny told me a sex joke"
- Send it to the Title IX Coordinator
- "The Assistant Principal keeps staring at me"
- Send it to the Title IX Coordinator
- "He keeps looking at my chest"
- Send it to the Title IX Coordinator
- "She is harassing me"
- Send it to the Title IX Coordinator

236 **INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS--DECIDING WHICH TRACK TO GO DOWN--EXAMPLES**

- The custodian tells you, "I saw two kids kissing"
- Send it to the Title IX Coordinator
- You walk by two people talking about a teacher having an affair with the assistant principal
- Send it to the Title IX Coordinator
- You hear a rumor of a student having sex with another student or an employee
- Send it to the Title IX Coordinator

237 **INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS--DECIDING WHICH TRACK TO GO DOWN--EXAMPLES**

- You hear that a student or employee is using sexually charged profanity towards another, "you are an F---- B---"
- Send it to the Title IX Coordinator
- You hear a student bullying a transgender student
- Send it to the Title IX Coordinator
- You hear that a teacher refuses to use the correct name or pronoun for a transgender student or colleague
- Send it to the Title IX Coordinator

238 **INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS--DECIDING WHICH TRACK TO GO DOWN--EXAMPLES**

- A teacher talks about his/her sexual experiences as part of a lesson
- Send it to the Title IX Coordinator
- An employee swats a student on the rump with a rolled-up magazine
- Send it to the Title IX Coordinator
- A science teacher buys a telescope for a student and gazes at the stars in the student's back yard
- Send it to the Title IX Coordinator

239 **INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS--DECIDING WHICH TRACK TO GO DOWN--EXAMPLES**

- The examples are infinite—be on the lookout to recognize when you must refer the matter to the Title IX Coordinator!
- If in doubt—refer it!
- When you have referred it, stop your usual process until told otherwise by the Title IX Coordinator

240 **INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS--DECIDING WHICH TRACK TO GO DOWN--EXAMPLES**

- The Title IX Coordinator will act as the signalman in determining whether to proceed down Track

2 (the Title IX track) or whether, when and how to return the matter to Track 1 (the usual disciplinary procedures)

➢Whether, when and how is based upon both substantive law and procedural law.

241 **ONE SCHOOL; TWO SYSTEMS—GETTING OFF TRACK 2—THE SUBSTANTIVE RULES**

After initial interviews, including interviews of the alleged victim, Title IX Coordinator concludes that the conduct, if true:

1. Do not meet the definition of "sexual harassment";
2. Did not occur within the school's program or activity;
3. Did not occur to a person within the United States

242 **ONE SCHOOL; TWO SYSTEMS—GETTING OFF TRACK 2—THE SUBSTANTIVE RULES—NOT "SEXUAL HARASSMENT"**

1. Conduct wasn't "sexual" in nature, objectively determined;
2. Conduct was not objectively "severe, pervasive and objectively offensive";
3. Conduct was "welcomed" by the alleged victim(s); . . .

243 **ONE SCHOOL; TWO SYSTEMS—GETTING OFF TRACK 2—THE SUBSTANTIVE RULES—NOT "SEXUAL HARASSMENT"**

4. Conduct did not deny alleged victim(s) equal access to school's program or activity;
5. Conduct did not meet the elements of the crimes enumerated in subsection (3) of the definition;
6. There were no elements of "quid pro quo".

244 **ONE SCHOOL; TWO SYSTEMS—GETTING OFF TRACK 2—THE SUBSTANTIVE RULES—NOT A SCHOOL PROGRAM OR ACTIVITY**

Usually not an issue, but consider:

1. Foreign travel sponsored by a foreign language teacher?
2. Summer sports camp sponsored by a team coach?
3. Activities sponsored by a booster club?
4. Student-on-student online sexual harassment published out of school, but accessed at school?

245 **ONE SCHOOL; TWO SYSTEMS—GETTING OFF TRACK 2—THE SUBSTANTIVE RULES—NOT IN THE UNITED STATES**

The sexual harassment occurs in a foreign country during a school trip.

246 **ONE SCHOOL; TWO SYSTEMS—WHEN THE TWO TRACKS MERGE: EMERGENCY REMOVAL OF STUDENT**

Track 2: Title IX Regulations allow removing a respondent "on an emergency basis" provided:

1. there is an "individualized safety and risk analysis"
2. Respondent is provided with notice and opportunity to challenge removal;
3. But . . .

247 **ONE SCHOOL; TWO SYSTEMS—WHEN THE TWO TRACKS MERGE: EMERGENCY REMOVAL OF STUDENT**

Track 1: Before emergency removal, Student respondent entitled to:

1. Student must be given rights under IDEA if applicable;
2. "Informal hearing" and "formal hearing" under 22 Pa. Code, §12.8
3. School board hearing under School Code and Local Agency Law if removal is for more than 10 days

248 **ONE SCHOOL; TWO SYSTEMS—WHEN THE TWO TRACKS MERGE: ADMINISTRATIVE LEAVE OF EMPLOYEE**

Track 1:

- Administrative leave with pay generally does not require any prior process;
- If school contemplates an administrative leave without pay, informal hearing is required that meets standards of *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985);

249 **ONE SCHOOL; TWO SYSTEMS—WHEN THE TWO TRACKS MERGE: ADMINISTRATIVE LEAVE OF EMPLOYEE**

Track 1:

- Collective bargaining agreements or individual employment agreements sometimes contain provisions requiring prior notice or other process in addition to "due process"
- If administrative leave without pay is decided upon, it cannot be for "sexual harassment" until the entire grievance process has been completed—i.e., track 2

250 **NO CONTACT ORDERS**

- Among the permissible "supportive measures" are "*mutual restrictions* on contact between the parties" 34 C.C.R. §106.30(a).
- This is not retaliation;
- This treats both parties equally.

Note: the definition of "mutual restrictions" seems to be inconsistent with 34 C.F.R. §106.44 that speaks to offering supportive measures to a complainant—not a respondent.

251 **NO CONTACT IMPOSED ONLY ON ONE PARTY?**

- It is questionable whether a "no contact" order can be imposed on only one of the parties—there are arguments pro and con
- Pro Argument: If you can have an emergency removal of a student, or an administrative leave of an employee, surely you can have a less drastic measure
- Con Argument: A restriction of contact by only one of the parties is not authorized while you are on the Title IX track

252 **THANK YOU AND STAY SAFE!**

DISCRIMINATION
COMPLAINT PROCEDURES

The Discrimination Complaint Procedures prescribed in this Attachment apply to reports of retaliation or discrimination on the basis of race, color, age, creed, religion, sex, sexual orientation, ancestry, national origin, marital status, pregnancy or handicap/disability that do not constitute Title IX sexual harassment as defined in the Policy 103.

All reports of discrimination shall be reviewed by the Title IX Coordinator upon receipt to determine if the allegations meet the definition and parameters of sexual harassment under Title IX. If the result of this review determines that the allegations fall within the scope of Title IX sexual harassment, then the process set forth in Policy 103 Attachment 3 for Title IX Sexual Harassment shall be followed.

[Note: if the same individual is assigned to the roles of Title IX Coordinator and Compliance Officer through Policy 103, please revise the terminology in this Attachment 2 to reflect the position of Title IX Coordinator/Compliance Officer throughout.]

All reports of discrimination and retaliation brought pursuant to the district's discrimination policy shall also be reviewed for conduct which may not be proven discriminatory under Policy 103 but merits review and possible action under the Code of Student Conduct and other Board policies. (Pol. 103.1, 218, 247, 249, 252)

Definitions

Complainant shall mean an individual who is alleged to be the victim.

Respondent shall mean an individual who has been reported to be the perpetrator of the alleged conduct.

Discrimination shall mean to treat individuals differently, or to harass or victimize based on a protected classification including race, color, age, creed, religion, sex, sexual orientation, ancestry, national origin, marital status, pregnancy, or handicap/disability.

Harassment is a form of discrimination based on the protected classifications listed in this policy consisting of unwelcome conduct such as graphic, written, electronic, verbal or nonverbal acts including offensive jokes, slurs, epithets and name-calling, ridicule or mockery, insults or put-downs, offensive objects or pictures, physical assaults or threats, intimidation, or other conduct that may be harmful or humiliating or interfere with a person's school or school-related performance when such conduct is:

1. Sufficiently severe, persistent or pervasive; and

2. A reasonable person in the complainant's position would find that it creates an intimidating, threatening or abusive educational environment such that it deprives or adversely interferes with or limits an individual or group of the ability to participate in or benefit from the services, activities or opportunities offered by a school.

Retaliation shall mean actions including, but not limited to, intimidation, threats, coercion, or discrimination against a victim or other person because they report discrimination or harassment, participate in an investigation or other process addressing discrimination or harassment, or act in opposition to discriminatory practices.

Reasonable Accommodations

Throughout the discrimination complaint procedures, the district shall make reasonable accommodations for identified physical and intellectual impairments that constitute disabilities for all parties, and address barriers being experienced by disadvantaged students such as English learners and homeless students, consistent with the requirements of federal and state laws and regulations and Board policy. (Pol. 103.1, 113, 138, 251, 832, 906)

Required Reporting Under Other Policies

In addition to implementing the disciplinary complaint procedures, the building principal or Compliance Officer shall ensure that reported conduct which meets the definition of other laws, regulations or Board policies, is also appropriately addressed in accordance with the applicable laws, regulations or Board policies, including but not limited to, incidents under the Safe Schools Act, reports of educator misconduct, threats, or reports of suspected child abuse. (Pol. 218, 317.1, 806, 824)

Timeframes

Reasonably prompt timeframes shall be established for completing each step of the discrimination complaint procedures, including timeframes for filing and resolving appeals.

The established timeframes included in these procedures may be adjusted to allow for a temporary delay or a limited extension of time for good cause. Written notice of the delay or extension and the reason for such action shall be provided to the complainant and the respondent, and documented with the records of the complaint. Good cause may include, but is not limited to, considerations such as:

1. The absence of a party or a witness.

2. Concurrent law enforcement activity.

3. Need for language assistance or accommodation of disabilities.

PROCEDURES FOR COMPLAINTS OF DISCRIMINATION

Step 1 – Reporting

A student or individual who believes they have been subject to discrimination by any student, employee or third party is encouraged to immediately report the incident to the building principal using the Discrimination/Sexual Harassment/Bullying/Hazing/Dating Violence/Retaliation Report Form or by making a general report verbally or in writing to the building principal.

Parents/Guardians of students have the right to act on behalf of the complainant, the respondent, or other individual at any time.

Any person with knowledge of discrimination in violation of Board policy or this procedure is encouraged to immediately report the matter to the building principal.

A school employee who suspects or is notified that a student has been subject to discrimination shall immediately report the incident to the building principal. Additionally, employees who have reasonable cause to suspect that a child is the victim of child abuse, shall immediately report the suspected abuse, in accordance with applicable law, regulations and Board policy. (Pol. 806)

The building principal shall immediately notify the Title IX Coordinator and Compliance Officer of the reported discrimination.

If the building principal is the subject of a complaint, the student, third party or employee shall report the incident directly to the Title IX Coordinator and/or Compliance Officer.

The complainant or reporting individual shall be encouraged to use the Discrimination/Sexual Harassment/Bullying/Hazing/Dating Violence/Retaliation Report Form, however, complaints shall be accepted in person, by telephone, by mail or email, or by any other means that results in the appropriate individual receiving the individual's verbal or written report. Verbal reports shall be documented using the Discrimination/Sexual Harassment/Bullying/Hazing/Dating Violence/Retaliation Report Form, and these procedures shall be implemented.

The Title IX Coordinator shall review reports and complaints, and may gather additional information from the individual submitting the report and other parties identified in the report using the Discrimination/Sexual Harassment/Bullying/Hazing/Dating Violence/Retaliation Report Form. The Title IX Coordinator shall promptly contact the complainant regarding the report to gather additional information as necessary, and to discuss the availability of supportive measures. The Title IX Coordinator shall consider the complainant's wishes with respect to supportive measures.

The Title IX Coordinator shall conduct an assessment to determine whether the reported circumstances are most appropriately addressed through the Discrimination Complaint Procedures prescribed in this Attachment 2, or if the reported circumstances meet the definition

and parameters of Title IX sexual harassment and are most appropriately addressed through the Title IX Sexual Harassment Procedures and Grievance Process for Formal Complaints in Attachment 3, or other applicable Board policies.

If the Title IX Coordinator determines that the report should be addressed through the discrimination complaint procedures, the Compliance Officer shall be notified and the complaint procedures in this Attachment 2 implemented.

When any party is an identified student with a disability, or thought to be a student with a disability, the Title IX Coordinator shall notify the Director of Special Education and coordinate to determine whether additional steps must be taken for the party, while the discrimination complaint procedures are implemented. Such measures may include, but are not limited to, conducting a manifestation determination, functional behavioral assessment (FBA) or other assessment or evaluation, in accordance with applicable law, regulations or Board policy. FBAs must be conducted when a student's behavior interferes with the student's learning or the learning of others and information is necessary to provide appropriate educational programming, and when a student's behavior violates the Code of Student Conduct and is determined to be a manifestation of a student's disability. (Pol. 113, 113.1, 113.2, 113.3)

Step 2 – Initial Communications/Supports

The complainant shall be informed about the Board's policy on discrimination, including the right to an investigation of both verbal and written reports of discrimination.

The building principal or designee, in consultation with the Compliance Officer, Title IX Coordinator and other appropriate individuals, shall promptly implement appropriate measures to protect the complainant and others as necessary from violation of the policy throughout the course of the investigation.

The building principal or designee may provide to the complainant factual information on the complaint and the investigative process, the impact of choosing to seek confidentiality and the right to file criminal charges. The person accepting the complaint shall handle the report objectively, neutrally and professionally, setting aside personal biases that might favor or disfavor the complainant or respondent.

The building principal or designee shall seek to obtain consent from parents/guardians to initiate an investigation where the complainant or alleged victim is under age eighteen (18), and inform parents/guardians of the complainant that the complainant may be accompanied by a parent/guardian during all steps of the complaint procedure. When a parent/guardian requests confidentiality and will not consent to the alleged victim's participation in an investigation, the building principal or designee shall explain that the school shall take all reasonable steps to investigate and respond to the complaint consistent with that request for confidentiality as long as doing so does not preclude the school from responding effectively to the discrimination and preventing discrimination that affects other students.

The building principal or Compliance Officer shall provide relevant information on resources available in addition to the discrimination complaint procedure, such as making reports to the police, available assistance from domestic violence or rape crisis programs and community health resources, including counseling resources.

Informal Remedies -

At any time after a complaint has been reported, if the Compliance Officer believes the circumstances are appropriate, the Compliance Officer may offer the parties involved in the complaint the opportunity to participate in informal remedies to address the reported conduct. Informal remedies can take many forms, depending on the particular case. Examples include, but are not limited to, mediation, facilitated discussions between the parties, restorative practices, acknowledgment of responsibility by a respondent, apologies, a requirement to engage in specific services, or other measures to support the parties.

If the matter is resolved to the satisfaction of the parties, the district employee facilitating the informal remedies shall document the nature of the complaint and the proposed resolution of the matter, have both parties sign the documentation to indicate agreement with the resolution and receive a copy, and forward it to the Compliance Officer.

The Compliance Officer shall contact the complainant to determine if the resolution was effective and to monitor the agreed upon remedies, and shall document all appropriate actions.

*If the informal remedies result in the final resolution of the complaint, the following steps are not applicable.

Step 3 – Investigation

The Compliance Officer shall assess whether the investigation should be conducted by the building principal, another district employee, the Compliance Officer or an attorney and shall promptly assign the investigation to that individual. When a parent/guardian has requested confidentiality and will not consent to the alleged victim's participation in an investigation, the Compliance Officer shall provide the parent/guardian with a letter containing information related to the district's legal obligations to conduct an investigation and address violations of Board policy, and any other information appropriate to the specific complaint.

The Compliance Officer shall ensure that the individual assigned to investigate the complaint has an appropriate understanding of the relevant laws pertaining to discrimination and retaliation issues and Board policy, and how to conduct investigations and draft an investigative report.

The investigator shall work with the Compliance Officer to assess the anticipated scope of the investigation, who needs to be interviewed and what records or evidence may be relevant to the investigation.

The investigator shall conduct an adequate, reliable and impartial investigation. The complainant and the respondent may suggest additional witnesses and provide other evidence during the course of the investigation. When the initial complaint involves allegations relating to conduct which took place away from school property, school-sponsored activities or school conveyances, the investigation may include inquiries related to these allegations to determine whether they resulted in continuing effects such as harassment in school settings.

The investigation may consist of individual interviews with the complainant, the respondent, and others with knowledge relative to the allegations. The investigator may also evaluate any other information and materials relevant to the investigation. The person making the report, parties, parents/guardians and witnesses shall be informed of the prohibition against retaliation for anyone's participation in the process and that conduct believed to be retaliatory should be reported. All individuals providing statements or other information or participating in the investigation shall be instructed to keep the matter confidential and to report any concerns about confidentiality to the investigator.

If the investigation reveals that the conduct being investigated may involve a violation of criminal law, the investigator shall promptly notify the Compliance Officer, who shall promptly inform law enforcement authorities about the allegations.

The obligation to conduct this investigation shall not be negated by the fact that a criminal or child protective services investigation of the allegations is pending or has been concluded. The investigator should coordinate with any other ongoing investigations of the allegations, including agreeing to requests for a delay in fulfilling the district's investigative responsibilities during the fact-finding portion of a criminal or child protective services investigation. Such delays shall not extend beyond the time necessary to prevent interference with or disruption of the criminal or child protective services investigation, and the reason for such delay shall be documented by the investigator.

Step 4 – Investigative Report

The investigator shall prepare and submit a written report to the Compliance Officer within

{ } twenty (20) school days

{ } thirty (30) school days

{ } _____ school days

of the initial report of alleged discrimination, unless the nature of the allegations, anticipated extent of the investigation or the availability of witnesses requires the investigator and the Compliance Officer to establish a different due date. The parties shall be notified of the anticipated date the investigative report will be completed and of any changes to the anticipated due date during the course of the investigation.

The investigative report shall include a summary of the investigation, a determination of whether the complaint has been substantiated as factual, the information and evaluation that formed the basis for this determination, whether the conduct violated Board Policy 103 and of any other violations of law or Board policy which may warrant further district action, and a recommended disposition of the complaint. An investigation into discrimination or harassment shall consider the record as a whole and the totality of circumstances in determining whether a violation of Board policy has occurred, recognizing that persistent and pervasive conduct, when taken together, may be a violation even when the separate incidents are not severe.

The complainant and the respondent shall be informed of the outcome of the investigation, for example, whether the investigator believes the allegations to be founded or unfounded, within a reasonable time of the submission of the written investigative report, to the extent authorized by the Family Educational Rights and Privacy Act (FERPA) and other applicable laws. The respondent shall not be notified of the individual remedies offered or provided to the complainant.

Step 5 – District Action

If the investigation results in a finding that some or all of the allegations of the discrimination complaint are founded and constitute a violation of Board policy, the district shall take prompt, corrective action designed to ensure that such conduct ceases and that no retaliation occurs. The district shall promptly take appropriate steps to prevent the recurrence of the prohibited conduct and to address the discriminatory effect the prohibited conduct had on the complainant and the district education program or activity. District staff shall document the corrective action taken and, where not prohibited by law, inform the complainant. The Compliance Officer shall follow up by assessing the effectiveness of the corrective action at reasonable intervals.

If an investigation results in a finding that a different policy was violated separately from or in addition to violations of Policy 103 or these procedures, or that there are circumstances warranting further action, such matters shall be addressed at the conclusion of this investigation or through disciplinary or other appropriate referrals where further evaluation or investigation is necessary. (Pol. 113.1, 218, 233, 247, 249)

Disciplinary actions shall be consistent with the Code of Student Conduct, Board policies and administrative regulations, district procedures, applicable collective bargaining agreements, and state and federal laws and regulations. (Pol. 103, 104, 113.1, 218, 233, 317, 317.1)

Appeal Procedure

If the complainant or the respondent is not satisfied with a finding made pursuant to these procedures or with recommended corrective action, they may submit a written appeal to the Compliance Officer within fifteen (15) school days of receiving notification of the outcome of the investigation. If the Compliance Officer investigated the complaint, such appeal shall be made to the Superintendent.

The individual receiving the appeal shall review the investigation and the investigative report and may also conduct or designate another person to conduct a reasonable supplemental investigation to assess the sufficiency and propriety of the prior investigation.

The person handling the appeal shall prepare a written response to the appeal within

{ } five (5) school days.

{ } ten (10) school days.

{ } twenty (20) school days.

{ } _____ school days.

Copies of the response shall be provided to the complainant, the respondent and the investigator who conducted the initial investigation.

Note: The official version of this document is the document published in the Federal Register. This document has been sent to the Office of the Federal Register but has not yet been scheduled for publication.

4000-01-U

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: Final rule.

SUMMARY: The Secretary of Education amends the regulations implementing Title IX of the Education Amendments of 1972 (Title IX). The final regulations specify how recipients of Federal financial assistance covered by Title IX, including elementary and secondary schools as well as postsecondary institutions, (hereinafter collectively referred to as "recipients" or "schools"), must respond to allegations of sexual harassment consistent with Title IX's prohibition against sex discrimination. These regulations are intended to effectuate Title IX's prohibition against sex discrimination by requiring recipients to address sexual harassment as a form of sex discrimination in education programs or activities. The final regulations obligate recipients to respond promptly and supportively to persons alleged to be victimized by sexual harassment, resolve allegations of sexual harassment promptly and accurately under a predictable, fair grievance process that provides due process protections to alleged victims and alleged perpetrators of sexual harassment, and effectively implement remedies for victims. The

final regulations also clarify and modify Title IX regulatory requirements regarding remedies the Department may impose on recipients for Title IX violations, the intersection between Title IX, Constitutional protections, and other laws, the designation by each recipient of a Title IX Coordinator to address sex discrimination including sexual harassment, the dissemination of a recipient's non-discrimination policy and contact information for a Title IX Coordinator, the adoption by recipients of grievance procedures and a grievance process, how a recipient may claim a religious exemption, and prohibition of retaliation for exercise of rights under Title IX.

DATES: These regulations are effective August 14, 2020.

FOR FURTHER INFORMATION CONTACT**:**

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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.

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PART 106—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION 2008

Effective Date

On March 13, 2020, the President of the United States declared that a national emergency concerning the novel coronavirus disease (COVID-19) outbreak began on March 1, 2020, as stated in "Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-

19) Outbreak," Proclamation 9994 of March 13, 2020, *Federal Register* Vol. 85, No. 53 at 15337-38. The Department appreciates that exigent circumstances exist as a result of the COVID-19 national emergency, and that these exigent circumstances require great attention and care on the part of States, local governments, and recipients of Federal financial assistance. The Department recognizes the practical necessity of allowing recipients of Federal financial assistance time to plan for implementing these final regulations, including to the extent necessary, time to amend their policies and procedures necessary to comply. Taking into account this national emergency, as well as consideration of public comments about an effective date as discussed in the "Effective Date" subsection of the "Miscellaneous" section of this preamble, the Department has determined that these final regulations are effective August 14, 2020.

Executive Summary

Purpose of this Regulatory Action

Enacted in 1972, Title IX prohibits discrimination on the basis of sex in education programs and activities that receive Federal financial assistance.[1] In its 1979 opinion *Cannon v. University of Chicago*,[2] the Supreme Court stated that the objectives of Title IX are two-fold: first, to "avoid the use of Federal resources to support discriminatory practices" and second, to "provide individual citizens effective protection against those practices."[3] The U.S. Department of Education (the "Department" or "we") may issue rules effectuating the dual purposes of Title

[1] 20 U.S.C. 1681 ("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 . . . .").
[2] 441 U.S. 677 (1979).
[3] *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979).

IX.[4] We refer herein to Title IX's prohibition on sex discrimination and purposes as described by the Supreme Court as Title IX's non-discrimination mandate.

The Department's predecessor, the Department of Health, Education, and Welfare (HEW), first promulgated regulations under Title IX, effective in 1975.[5] Those regulations reinforced Title IX's non-discrimination mandate, addressing prohibition of sex discrimination in hiring, admissions, athletics, and other aspects of recipients' education programs or activities. The 1975 regulations also required recipients to designate an employee to coordinate the recipient's efforts to comply with Title IX and to adopt and publish grievance procedures providing for prompt and equitable resolution of complaints that a recipient is discriminating based on sex.

When HEW issued its regulations in 1975, the Federal courts had not yet addressed recipients' Title IX obligations with respect to sexual harassment as a form of sex discrimination. In the decades since HEW issued the 1975 regulations, the Department has not promulgated any Title IX regulations to address sexual harassment as a form of sex discrimination. Beginning in 1997, the Department addressed this subject through a series of guidance documents, most

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[4] 20 U.S.C. 1682 ("Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity . . . 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.").

[5] 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. 45 FR 30802, 30955-65 (May 9, 1980).

notably the 2001 Guidance[6] (which revised similar guidance issued in 1997[7]), the withdrawn 2011 Dear Colleague Letter,[8] the withdrawn 2014 Q&A,[9] and the 2017 Q&A.[10] The Department understands that agency guidance is not intended to represent legal obligations; however, we also acknowledge that in part because the Title IX statute and the Department's implementing regulations have (until these final regulations) not addressed sexual harassment, recipients and the Department have relied on the Department's guidance to set expectations about how recipients should respond to sexual harassment and how the Department investigates recipients for possible Title IX violations with respect to responding to sexual harassment.[11] These final

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[6] U.S. Dep't. of Education, Office for Civil Rights, *Revised Guidance on Sexual Harassment: Harassment of Students by School Employees, Other Students, or Third Parties* (Jan. 19, 2001) (hereinafter, "2001 Guidance"), https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf.

[7] U.S. Dep't. of Education, Office for Civil Rights, *Sexual Harassment Guidance: Harassment of Students By School Employees, Other Students, or Third Parties*, 62 FR 12034 (Mar. 13, 1997) (hereinafter, "1997 Guidance"), https://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html#skipnav2.

[8] U.S. Dep't. of Education, Office for Civil Rights, *Dear Colleague Letter: Sexual Violence* (April 4, 2011) (hereinafter "2011 Dear Colleague Letter"), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf, *withdrawn by*, U.S. Dep't. of Education, Office for Civil Rights, *Dear Colleague Letter* (Sept. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf.

[9] U.S. Dep't. of Education, Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence* (April 29, 2014) (hereinafter "2014 Q&A"), https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf, *withdrawn by*, U.S. Dep't. of Education, Office for Civil Rights, *Dear Colleague Letter* (Sept. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf.

[10] U.S. Dep't. of Education, Office for Civil Rights, *Q&A on Campus Sexual Misconduct* (Sept. 22, 2017) (hereinafter, "2017 Q&A"), https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf.

[11] For example, OCR found numerous institutions in violation of Title IX for failing to adopt the preponderance of the evidence standard in its investigations of sexual harassment, even though the notion that the preponderance of the evidence standard is the only standard that might be applied under Title IX is set forth in the 2011 Dear Colleague Letter and not in the Title IX statute, current regulations, or other guidance. *E.g.*, U.S. Dep't. of Education, Office for Civil Rights, Letter of Findings to Harvard Law School 7 (Dec. 10, 2014) ("Harvard Law Letter"), https://www2.ed.gov/documents/press-releases/harvard-law-letter.pdf ("[I]n order for a recipient's grievance procedures to be consistent with the Title IX evidentiary standard, the recipient must use a preponderance of the evidence standard for investigating allegations of sexual harassment, including sexual assault/violence.") OCR in its letter of findings against Harvard Law School noted that Harvard's procedures provide that "formal disciplinary sanctions shall be imposed only upon clear and convincing evidence." Harvard Law Letter at 10. OCR found the following: "This higher standard of proof was inconsistent with the preponderance of the evidence standard required by Title IX for investigating allegations of sexual harassment or violence." *Id.; see also* U.S. Dep't. of Education, Office for Civil Rights, Letter of Findings to S. Methodist Univ. 4 (Dec. 11, 2014),

regulations impose, for the first time, legally binding rules on recipients with respect to responding to sexual harassment, and the nature of the legal obligations imposed under these final regulations is similar in some ways, and different in some ways, to the way the Department approached this subject in its guidance documents. Those similarities and differences are explained throughout this preamble, including in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" and "Role of Due Process in the Grievance Process" sections of this preamble.

Prior to these final regulations, the Department's last policy statement on Title IX sexual harassment was its withdrawal of the 2011 Dear Colleague Letter[12] and concomitant issuance of the 2017 Q&A. The 2017 Q&A along with the 2001 Guidance represent the "status quo" or "baseline" against which these final regulations make further changes to the Department's

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https://www2.ed.gov/documents/press-releases/southern-methodist-university-letter.pdf; U.S. Dep't. of Education, Office for Civil Rights, Letter of Findings to Princeton Univ. 6, 11, 18 (Nov. 5, 2014), https://www2.ed.gov/documents/press-releases/princeton-letter.pdf; U.S. Dep't. of Education, Office for Civil Rights, Letter of Findings to Tufts Univ. 5 (Apr. 28, 2014), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01102089-a.pdf; U.S. Dep't. of Education, Office for Civil Rights, Letter of Findings to Yale Univ. 4-5 (June 15, 2012), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/01112027-a.pdf. Many recipients changed their Title IX policies and procedures to conform to the 2001 Guidance, and then to the 2011 Dear Colleague Letter, in part based on OCR enforcement actions that found recipients in violation for failing to comport with interpretations of Title IX found only in guidance. *E.g.*, Blair A. Baker, *When Campus Sexual Misconduct Policies Violate Due Process Rights*, 26 CORNELL J. OF LAW & PUB. POL'Y 533, 542 (2016) (The 2011 Dear Colleague Letter has "forced universities to change their former policies drastically, with regards to their specific procedures as well as the standard of proof, out of fear that the Department of Education will pursue their school for a violation of Title IX. In sum, the Dear Colleague Letter applied pressure on colleges to maintain a victim-friendly environment, which is admirable and necessary, but in turn has created a situation that can be insensitive to the accused and 'tilted in favor of the alleged victim.' These situations do not have to be mutually exclusive; and there must be a solution in which victim-friendly is not synonymous with procedurally adverse to respondents.") (internal citations omitted); Lauren P. Schroeder, *Cracks in the Ivory Tower: How the Campus Sexual Violence Elimination Act Can Protect Students from Sexual Assault*, 45 LOY. UNIV. CHI. L. J. 1195, 1202 (2014) ("[Because] Title IX is such a short statute with little direction, schools look to specific guidance materials provided by the Department of Education to determine the specific requirements of Title IX.").

[12] The 2014 Q&A (withdrawn at the same time as the 2011 Dear Colleague Letter was withdrawn) expounded on the same approach taken by the Department in the withdrawn 2011 Dear Colleague Letter; throughout this preamble, references to and discussion of the 2011 Dear Colleague Letter may be understood to assume that the same or similar approach was taken in the 2014 Q&A unless otherwise noted.

enforcement of Title IX obligations.[13] However, the withdrawal of the 2011 Dear Colleague Letter and issuance of the 2017 Q&A did not require or result in wholesale changes to the set of expectations guiding recipients' responses to sexual harassment or to many recipients' Title IX policies and procedures. The Department understands from public comments and media reports that many (if not most) recipients chose not to change their Title IX policies and procedures following the withdrawal of the 2011 Dear Colleague Letter and issuance of the 2017 Q&A.[14] This lack of change by recipients is a reasonable response to the following facts: guidance is not legally enforceable;[15] the 2017 Q&A expressly stated to recipients that the 2017 Q&A was issued as an interim, non-binding interpretation of Title IX sexual harassment responsibilities while the Department conducted rulemaking to arrive at legally binding regulations addressing this subject;[16] and both the 2017 Q&A and the withdrawn 2011 Dear Colleague Letter relied heavily on the 2001 Guidance.[17] The 2017 Q&A along with the 2001 Guidance, and not the withdrawn 2011 Dear Colleague Letter, remain the baseline against which these final regulations make further changes to enforcement of Title IX obligations.

These final regulations largely address the same topics addressed in the Department's current and past guidance, including withdrawn guidance. Throughout this preamble we explain

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[13] 2017 Q&A at 1 ("[T]hese questions and answers – along with the [2001 Guidance] previously issued by the Office for Civil Rights – provide information about how OCR will assess a school's compliance with Title IX" in "the interim" while the Department "engage[s] in rulemaking on the topic of schools' Title IX responsibilities concerning complaints of sexual misconduct, including peer-on-peer sexual harassment and sexual violence.").
[14] *E.g.*, Alice B. Lloyd, *Colleges Stick With Obama-Era Title IX Guidance*, WASHINGTON EXAMINER (Aug. 2, 2018) (describing the 2017 Q&A and withdrawal of the 2011 Dear Colleague Letter as giving recipients "the option to adjust their procedures" for example with respect to which standard of evidence to use in sexual harassment cases, and designating a longer investigation time frame than the 60 calendar day time frame specified in the 2011 Dear Colleague Letter, and describing reasons why most recipients have chosen not to change Title IX policies and procedures).
[15] *Perez* v. *Mortgage Bankers Ass'n*, 575 U.S. 92, 96-98 (2015).
[16] 2017 Q&A at 1.
[17] *Compare* 2017 Q&A at 1-4, 6-7 *with* 2011 Dear Colleague Letter at 2, 3-9, 11, 13.

points of difference, and similarity, between these final regulations, and the Department's guidance. As such discussion makes clear, some of the Title IX policies and procedures that recipients have in place due to following the 2001 Guidance and the withdrawn 2011 Dear Colleague Letter remain viable policies and procedures for recipients to adopt while complying with these final regulations. Because these final regulations represent the Department's interpretation of a recipient's legally binding obligations, rather than best practices, recommendations, or guidance, these final regulations focus on precise legal compliance requirements governing recipients. In many regards, as discussed throughout this preamble, these final regulations leave recipients the flexibility to choose to follow best practices and recommendations contained in the Department's guidance or, similarly, best practices and recommendations made by non-Department sources, such as Title IX consultancy firms, legal and social science scholars, victim advocacy organizations, civil libertarians and due process advocates, and other experts.

Based on extensive review of the critical issues addressed in this rulemaking, the Department has determined that current regulations do not provide clear direction for how recipients must respond to allegations of sexual harassment because current regulations do not reference sexual harassment at all. Similarly, the Department has determined that Department guidance is insufficient to provide clear direction on this subject because it is not legally enforceable,[18] has created confusion and uncertainty among recipients,[19] and has not adequately

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[18] For further discussion, see the "Notice and Comment Rulemaking Rather Than Guidance" section of this preamble.

[19] Janet Napolitano, *"Only Yes Means Yes": An Essay on University Policies Regarding Sexual Violence and Sexual*

advised recipients as to how to uphold Title IX's non-discrimination mandate while at the same time meeting requirements of constitutional due process and fundamental fairness.[20] Therefore, the Department issues these final regulations addressing sexual harassment, to better align the Department's Title IX regulations with the text and purpose of Title IX, the U.S. Constitution, Supreme Court precedent and other case law, and to address the practical challenges facing students, employees, and recipients with respect to sexual harassment allegations in education programs and activities.

The final regulations define and apply the following terms, as discussed in the "Section 106.30 Definitions" section of this preamble: "actual knowledge," "complainant," "elementary and secondary schools," "formal complaint," "postsecondary institution," "respondent," "sexual harassment," and "supportive measures"; each term has a specific meaning under these final regulations. For clarity of understanding when reading this preamble, "complainant" means any individual who is alleged to be the victim of sexual harassment, and "respondent" means any individual who is reported to be the perpetrator of sexual harassment. A person may be a complainant, or a respondent, even where no formal complaint has been filed and no grievance process is pending. A "formal complaint" is a document that initiates a recipient's grievance

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Assault, 33 YALE L. & POL'Y REV. 387, 393-97 (2015) (The Honorable Janet Napolitano, the President of the University of California, who is a former Governor and Attorney General of Arizona and a former United States Secretary of Homeland Security, writing that OCR's guidance documents "left [campuses] with significant uncertainty and confusion about how to appropriately comply after they were implemented" and specifically noted that the "2011 Dear Colleague Letter generated significant compliance questions for campuses."); *see also* Task Force on Fed. Regulation of Higher Education, *Recalibrating Regulation of Colleges and Universities* at 12 (2015) (the Task Force on Federal Regulation of Higher Education, appointed by a bipartisan group of U.S. Senators, noting: "[A] guidance document meant to clarify uncertainty only led to more confusion. A 2011 'Dear Colleague' letter on Title IX responsibilities regarding sexual harassment contained complex mandates and raised a number of questions for institutions. As a result, the Department was compelled to issue further guidance clarifying its letter. This took the form of a 53-page 'Questions and Answers' document [the withdrawn 2014 Q&A] that took three years to complete. Still, that guidance has raised further questions. Complexity begets more complexity.").

[20] *See* the "Role of Due Process in the Grievance Process" section of this preamble.

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process, but a formal complaint is not required in order for a recipient to have actual knowledge of sexual harassment, or allegations of sexual harassment, that activates the recipient's legal obligation to respond promptly, including by offering supportive measures to a complainant. References in this preamble to a complainant, respondent, or other individual with respect to exercise of rights under Title IX should be understood to include situations in which a parent or guardian has the legal right to act on behalf of the individual.[21]

Alleged victims of sexual harassment often have options to pursue legal action through civil litigation or by pressing criminal charges. Title IX does not replace civil or criminal justice systems. However, the way in which a school, college, or university responds to allegations of sexual harassment in an education program or activity has serious consequences for the equal educational access of complainants and respondents. These final regulations require recipients to offer supportive measures to every complainant, irrespective of whether the complainant files a formal complaint. Recipients may not treat a respondent as responsible for sexual harassment without providing due process protections. When a recipient determines a respondent to be responsible for sexual harassment after following a fair grievance process that gives clear procedural rights to both parties, the recipient must provide remedies to the complainant.

Summary of the Major Provisions of This Regulatory Action

These final regulations are premised on setting forth clear legal obligations that require recipients to: promptly respond to individuals who are alleged to be victims of sexual harassment by offering supportive measures; follow a fair grievance process to resolve sexual harassment

[21] For further discussion see the "Section 106.6(g) Exercise of Rights by Parents/Guardians" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble.

allegations when a complainant requests an investigation or a Title IX Coordinator decides on the recipient's behalf that an investigation is necessary; and provide remedies to victims of sexual harassment.

Regarding sexual harassment, the final regulations:

- 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, and specify requirements that such a response much include, such as offering supportive measures in response to a report or formal complaint of sexual harassment;
- Specify conditions that require a recipient to initiate a grievance process to investigate and adjudicate allegations of sexual harassment; and
- Establish procedural due process protections that must be incorporated into a recipient's grievance process to ensure a fair and reliable factual determination when a recipient investigates and adjudicates a formal complaint of sexual harassment.

Additionally, the final regulations: affirm that the Department's Office for Civil Rights ("OCR") may require recipients to take remedial action for discriminating on the basis of sex or otherwise violating the Department's regulations implementing Title IX, consistent with 20 U.S.C. 1682; clarify that in responding to any claim of sex discrimination under Title IX, recipients are not required to deprive an individual of rights guaranteed under the U.S. Constitution; acknowledge the intersection of Title IX, Title VII, and FERPA, as well as the legal rights of parents or guardians to act on behalf of individuals with respect to Title IX rights; update the requirements for recipients to designate a Title IX Coordinator, disseminate the recipient's non-discrimination policy and the Title IX Coordinator's contact information, and

notify students, employees, and others of the recipient's grievance procedures and grievance process for handling reports and complaints of sex discrimination, including sexual harassment; eliminate the requirement that religious institutions submit a written statement to the Assistant Secretary for Civil Rights to qualify for the Title IX religious exemption; and expressly prohibit retaliation against individuals for exercising rights under Title IX.

Timing, Comments, and Changes

On November 29, 2018, the Secretary published a notice of proposed rulemaking (NPRM) for these parts in the *Federal Register*.[22] The final regulations contain changes from the NPRM (interchangeably referred to in this preamble as the "NPRM," the "proposed rules," or the "proposed regulations"), and these changes are fully explained in the "Analysis of Comments and Changes" and other sections of this preamble.

Throughout this preamble, the Department uses the terms "institutions of higher education" (or "IHEs") interchangeably with "postsecondary institutions" (or "PSEs"). The Department uses the phrase "elementary and secondary schools" (or "ESEs") interchangeably with "local educational agencies" (or "LEAs" or "K-12").

Throughout this preamble, the Department refers to Title IX of the Education Amendments of 1972, as amended, as "Title IX,"[23] to the Individuals with Disabilities Education Act as the "IDEA,"[24] to Section 504 of the Rehabilitation Act of 1973 as "Section 504,"[25] to the Americans with Disabilities Act as the "ADA,"[26] to Title VI of the 1964 Civil Rights Act as

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[22] 83 FR 61462 (Nov. 29, 2018) (to be codified at 34 CFR pt. 106).
[23] 20 U.S.C. 1681 *et seq*.
[24] 20 U.S.C. 1400 *et seq.*
[25] 29 U.S.C. 701 *et seq*.
[26] 42 U.S.C. 12101 *et seq*.

"Title VI,"[27] to Title VII of the 1964 Civil Rights Act as "Title VII,"[28] to section 444 of the General Education Provisions Act (GEPA), which is commonly referred to as the Family Educational Rights and Privacy Act of 1974, as "FERPA,"[29] to the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act as the "Clery Act,"[30] and to the Violence Against Women Reauthorization Act of 2013 as "VAWA."[31]

The Department uses the phrase "Title IX sexual harassment" to refer to the conduct defined in § 106.30 to be sexual harassment as well as the conditions described in § 106.44(a) that require a recipient to respond to sexual harassment under Title IX and these final regulations.[32] When the Department uses the term "victim" (or "survivor") or "perpetrator" to discuss these final regulations, the Department assumes that a reliable process, namely the grievance process described in § 106.45, has resulted in a determination of responsibility, meaning the recipient has found a respondent responsible for perpetrating sexual harassment against a complainant.[33]

Throughout the preamble, the Department references and summarizes statistics, data, research, and studies that commenters submitted. The Department's reference to or summarization of these items, however, does not speak to their level of accuracy. Whether

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[27] 42 U.S.C. 2000d *et seq.*
[28] 42 U.S.C. 2000e *et seq.*
[29] 20 U.S.C. 1232g.
[30] 20 U.S.C. 1092(f).
[31] 34 U.S.C. 12291 *et seq.* (formerly codified at 42 U.S.C. 13925).
[32] Section 106.44(a) requires a recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States to respond promptly in a manner that is not deliberately indifferent, meaning not clearly unreasonable in light of the known circumstances.
[33] As noted in the "Executive Summary" section of this preamble, "respondent," "sexual harassment," and "complainant" are defined terms in § 106.30.

specifically cited or not, we considered all relevant information submitted to us in our analysis and promulgation of these final regulations.

The Department references statistics, data, research, and studies throughout this preamble. Such reference to or summarization of these items does not indicate that the Department independently has determined that the entirety of each item is accurate.

Many commenters referenced the impact of sexual harassment or the proposed rules on individuals who belong to, or identify with, certain demographic groups, and used a variety of acronyms and phrases to describe such individuals; for example, various commenters referred to "LGBT" or "LGBTQ+" and "persons of color" or "racial minorities." For consistency, throughout this preamble we use the acronym "LGBTQ" while recognizing that other terminology may be used or preferred by certain groups or individuals, and our use of "LGBTQ" should be understood to include lesbian, gay, bisexual, transgender, queer, questioning, asexual, intersex, nonbinary, and other sexual orientation or gender identity communities. We use the phrase "persons of color" to refer to individuals whose race or ethnicity is not white or Caucasian. We emphasize that every person, regardless of demographic or personal characteristics or identity, is entitled to the same protections against sexual harassment under these final regulations, and that every individual should be treated with equal dignity and respect.

Finally, several provisions in the NPRM have been renumbered in the final regulations.[34] In response to commenters who asked for clarification as to whether the definitions in § 106.30

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[34] Provisions proposed in the NPRM, as renumbered in these final regulations, are:
Proposed § 106.44(b)(2) *eliminated in the final regulations.*
Proposed § 106.44(b)(3) *eliminated in the final regulations*.

apply to a term in a specific regulatory provision, some of the regulatory provisions specifically refer to a term "as defined in § 106.30" to provide additional clarity.[35] Notwithstanding these points of additional clarification in certain regulatory provisions, the definitions in § 106.30 apply to the entirety of 34 CFR part 106. For consistency, references in this preamble are to the provisions as numbered in the final, and not the proposed, regulations. Citations to "34 CFR 106.__" in the body of the preamble and the footnotes are citations to the Department's current regulations and not the final regulations.

Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment

Seven years after the passage of Title IX, the Supreme Court in *Cannon v. University of Chicago*[36] held that a judicially implied private right of action exists under Title IX. Thirteen years after that, in *Franklin v. Gwinnett County Public Schools*[37] the Supreme Court held that money damages are an available remedy in a private lawsuit alleging a school's intentional

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Proposed § 106.44(b)(4) *eliminated in the final regulations*.
Proposed § 106.44(b)(5) *in the final regulations as* § 106.44(b)(2).
Proposed § 106.45(b)(3)(i) *in the final regulations as* § 106.45(b)(5)(i).
Proposed § 106.45(b)(3)(ii) *in the final regulations as* § 106.45(b)(5)(ii).
Proposed § 106.45(b)(3)(iii) *in the final regulations as* § 106.45(b)(5)(iii).
Proposed § 106.45(b)(3)(iv) *in the final regulations as* § 106.45(b)(5)(iv).
Proposed § 106.45(b)(3)(v) *in the final regulations as* § 106.45(b)(5)(v).
Proposed § 106.45(b)(3)(vi) *in the final regulations as* § 106.45(b)(6)(ii).
Proposed § 106.45(b)(3)(vii) *in the final regulations as* § 106.45(b)(6)(i).
Proposed § 106.45(b)(3)(viii) *in the final regulations as* § 106.45(b)(5)(vi).
Proposed § 106.45(b)(3)(ix) *in the final regulations as* § 106.45(b)(5)(vii).
Proposed § 106.45(b)(4) *in the final regulations as* § 106.45(b)(7).
Proposed § 106.45(b)(5) *in the final regulations as* § 106.45(b)(8).
Proposed § 106.45(b)(6) *in the final regulations as* § 106.45(b)(9).
Proposed § 106.45(b)(7) *in the final regulations as* § 106.45(b)(10).

[35] *E.g.*, §§ 106.8(c), 106.44(a), 106.45(b) (introductory sentence), 106.45(b)(1)(i), 106.45(b)(2), 106.45(b)(3)(i), 106.45(b)(7).
[36] 441 U.S. 677, 717 (1979).
[37] 503 U.S. 60, 76 (1992).

discrimination in violation of Title IX. The *Cannon* Court explained that Title IX has two primary objectives: avoiding use of Federal funds to support discriminatory practices and providing individuals with effective protection against discriminatory practices.[38] Those two purposes are enforced both by administrative agencies that disburse Federal financial assistance to recipients, and by courts in private litigation. These two avenues of enforcement (administrative enforcement by agencies, and judicial enforcement by courts) have different features: for instance, administrative enforcement places a recipient's Federal funding at risk,[39] while judicial enforcement does not.[40] But the goal of both avenues of enforcement (administrative and judicial) is the same: to further the non-discrimination mandate of Title IX.

In deciding whether to recognize a judicially implied right of private action, the *Cannon* Court considered whether doing so would conflict with administrative enforcement of Title IX. The *Cannon* Court concluded that far from conflicting with administrative enforcement, judicial enforcement would complement administrative enforcement because some violations of Title IX may lend themselves to the administrative remedy of terminating Federal financial assistance, while other violations may lend themselves to a judicial remedy in private litigation.[41] The *Cannon* Court recognized that judicial and administrative enforcement both help ensure "the orderly enforcement of the statute" to achieve Title IX's purposes.[42]

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[38] *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979) ("Title IX, like its model Title VI, sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices.").
[39] 20 U.S.C. 1682.
[40] *Franklin*, 503 U.S. at 76.
[41] *Cannon*, 441 U.S. at 704-06.
[42] *Id.* at 705-06 ("The award of individual relief to a private litigant who has prosecuted her own suit is not only sensible but is also fully consistent with – and in some cases even necessary to – the orderly enforcement of the statute."); *see also id.* at 707 ("the individual remedy will provide effective assistance to achieving the statutory purposes.").

In *Franklin*, the Supreme Court acknowledged that sexual harassment and sexual abuse of a student by a teacher may mean the school itself engaged in intentional sex discrimination.[43] The *Franklin* Court held that money damages is an available remedy in a private lawsuit under Title IX, reasoning that even though Title IX is a Spending Clause statute, schools have been on notice since enactment of Title IX that intentional sex discrimination is prohibited under Title IX.[44]

In 1998, six years after *Franklin*, in *Gebser v. Lago Vista Independent School District*[45] the Supreme Court analyzed the conditions under which a school district will be liable for money damages for an employee sexually harassing a student. The *Gebser* Court began its analysis by stating that while *Franklin* acknowledged that a school employee sexually harassing a student may constitute the school itself committing intentional discrimination on the basis of sex, it was necessary to craft standards defining "the contours of that liability."[46] The *Gebser* Court held that where a school has actual knowledge of an employee sexually harassing a student but responds with deliberate indifference to such knowledge, the school itself has engaged in discrimination, subjecting the school to money damages in a private lawsuit under Title IX.[47] The following

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[43] *Franklin*, 503 U.S. at 74-75 (holding intentional discrimination by the school is alleged where the school's employee sexually harassed a student).
[44] *Id.* at 74 (noting that under *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981), monetary damages may be appropriate to remedy an intentional violation of a Spending Clause statute because entities subject to the statute are on notice that intentional violations of a statute may subject the entity to monetary damages); *see also Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 281 (1998) (noting that in *Franklin*, the plaintiff alleged that "school administrators knew about the harassment but took no action, even to the point of dissuading her from initiating charges").
[45] 524 U.S. 274 (1998).
[46] *Id*. at 281 ("*Franklin* thereby establishes that a school district can be held liable in damages in cases involving a teacher's sexual harassment of a student; the decision, however, does not purport to define the contours of that liability. We face that issue squarely in this case.").
[47] *Id*. at 290.

year, in 1999, in *Davis v. Monroe County Board of Education*,[48] the Supreme Court held that where sexual harassment is committed by a peer rather than an employee, the same standards of actual knowledge and deliberate indifference apply.[49] The *Davis* Court additionally crafted a definition of when sex-based conduct becomes actionable sexual harassment, defining the conduct as "so severe, pervasive, and objectively offensive" that it denies its victims equal access to education.[50]

The Supreme Court's *Gebser* and *Davis* cases built upon the Supreme Court's previous Title IX decisions in *Cannon* and *Franklin* to establish a three-part framework describing when a school's response to sexual harassment constitutes the school itself committing discrimination. The three parts of this framework are: conditions that must exist to trigger a school's response obligations (actionable sexual harassment, and the school's actual knowledge) and the deliberate indifference liability standard evaluating the sufficiency of the school's response. We refer herein to the "*Gebser/Davis* framework," consisting of a definition of actionable sexual harassment, the school's actual knowledge, and the school's deliberate indifference.

The *Gebser/Davis* framework is the appropriate starting point for ensuring that the Department's Title IX regulations recognize the conditions under which a school's response to sexual harassment violates Title IX. Whether the available remedy is money damages (in private litigation) or termination of Federal financial assistance (in administrative enforcement), the

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[48] 526 U.S. 629 (1999).
[49] *Id.* at 650 (holding 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.").
[50] *See id.*

Department's regulations must acknowledge that when a school itself commits sex discrimination, the school has violated Title IX.

In crafting the *Gebser*/*Davis* framework, the Supreme Court emphasized that because a private lawsuit under Title IX subjects a school to money damages, it was important for the Court to set standards for a school's liability premised on the school's knowledge and deliberate choice to permit sexual harassment, analogous to the way that the Title IX statute provides that a school's Federal financial assistance is terminated by the Department only after the Department first advises the school of a Title IX violation, attempts to secure voluntary compliance, and the school refuses to come into compliance.[51] Nothing in *Gebser* or *Davis* purports to restrict the *Gebser/Davis* framework only to private lawsuits for money damages.[52] Rather, the Supreme Court justified that framework as appropriate for recognizing when a school's response to sexual harassment constitutes intentional discrimination by the school, warranting exposure to money damages in a private Title IX lawsuit. Neither *Gebser* nor *Davis* opined as to what the appropriate conditions (e.g., definition of sexual harassment, actual knowledge) and liability

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[51] *See, e.g.*, *Gebser*, 524 U.S. at 288-90 (examining the administrative enforcement scheme set forth in the Title IX statute, 20 U.S.C. 1682, and concluding that "[b]ecause the express remedial scheme under Title IX is predicated upon notice to an 'appropriate person' and an opportunity to rectify any violation, 20 U.S.C. § 1682, we conclude, in the absence of further direction from Congress, that the implied damages remedy should be fashioned along the same lines" and adopting the actual knowledge and deliberate indifference standards).

[52] The Department notes that courts also have used the *Gebser/Davis* framework in awarding injunctive relief, not only in awarding monetary damages. *E.g.*, *Fitzgerald v. Barnstable Sch. Dist.*, 555 U.S. 246, 255 (2009) ("In addition, this Court has recognized an implied private right of action . . . In a suit brought pursuant to this private right, *both injunctive relief and damages are available*.") (internal citations omitted; emphasis added); *Hill v. Cundiff*, 797 F.3d 948, 972-73 (11th Cir. 2015) (reversing summary judgment against plaintiff's claims for injunctive relief because a jury could find that the alleged conduct was "severe, pervasive, and objectively offensive" under *Davis*); *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 322-23 (3d Cir. 2013) (upholding preliminary injunction against school for banning students from wearing bracelets because the school failed to show that the "bracelets would breed an environment of pervasive and severe harassment" under *Davis*); *Haidak v. Univ. of Mass. at Amherst*, 299 F. Supp. 3d 242, 270 (D. Mass. 2018) (denying plaintiff's request for a preliminary injunction because he failed to show that the school was deliberately indifferent to an environment of severe and pervasive discriminatory conduct under *Davis*), *aff'd in part, vacated in part, remanded by Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56 (1st Cir. 2019).

standard (e.g., deliberate indifference) must or should be for the Department's administrative enforcement.

The Department has regulatory authority to select conditions and a liability standard different from those used in the *Gebser/Davis* framework, because the Department has authority to issue rules that require recipients to take administrative actions to effectuate Title IX's non-discrimination mandate. For example, longstanding Department regulations require recipients to designate an employee to coordinate the recipient's efforts to comply with Title IX,[53] to file an assurance of compliance with the Department,[54] and to adopt and publish grievance procedures for handling complaints of sex discrimination.[55] Failure to do any of the foregoing does not, by itself, mean the school has committed sex discrimination, but the Department lawfully may enforce such administrative requirements because the Department has authority to issue and enforce rules that effectuate the purpose of Title IX.[56]

These final regulations begin with the *Gebser/Davis* framework, so that when a school itself commits sex discrimination by subjecting its students or employees to sexual harassment, that form of discrimination is clearly prohibited by these final regulations. The Department adopts the *Gebser/Davis* framework in these final regulations by defining "sexual harassment,"

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[53] 34 CFR 106.8(a).
[54] 34 CFR 106.4(a).
[55] 34 CFR 106.8(b).
[56] *See, e.g.*, *Gebser*, 524 U.S. at 292 ("And in any event, the failure to promulgate a grievance procedure does not itself constitute 'discrimination' under Title IX. Of course, the Department of Education could enforce the requirement administratively: Agencies generally have authority to promulgate and enforce requirements that effectuate the statute's non-discrimination mandate, 20 U.S.C. § 1682, even if those requirements do not purport to represent a definition of discrimination under the statute. *E.g.*, *Grove City* [*v. Bell*, 465 U.S. 555, 574-575 (1984), superseded by statute on a different point by the Civil Rights Restoration Act of 1987] (permitting administrative enforcement of regulation requiring college to execute an 'Assurance of Compliance' with Title IX). We have never held, however, that the implied private right of action under Title IX allows recovery in damages for violation of those sorts of administrative requirements.").

defining "actual knowledge," and describing "deliberate indifference," consistent with *Gebser* and *Davis*.

The Department does not simply codify the *Gebser/Davis* framework. Under the Department's statutory authority to issue rules to effectuate the purpose of Title IX, the Department reasonably expands the definitions of sexual harassment and actual knowledge, and the deliberate indifference standard, to tailor the *Gebser/Davis* framework to the administrative enforcement context.

The Department believes that adapting the *Gebser/Davis* framework is appropriate for administrative enforcement, because the adapted conditions (definitions of sexual harassment and actual knowledge) and liability standard (deliberate indifference) reflected in these final regulations promote important policy objectives with respect to a recipient's legal obligations to respond to sexual harassment. As explained in more detail in the "Actual Knowledge" and "Sexual Harassment" subsections of the "Section 106.30 Definitions" section of this preamble, and the "Section 106.44(a) Deliberate Indifference Standard" subsection of the "Section 106.44(a) Recipient's Response to Sexual Harassment, Generally" section of this preamble, the Department believes that:

- Including the *Davis* definition of sexual harassment for Title IX purposes as "severe, pervasive, and objectively offensive" conduct that effectively denies a person equal educational access helps ensure that Title IX is enforced consistent with the First Amendment. At the same time, the Department adapts the *Davis* definition of sexual harassment in these final regulations by also expressly including *quid pro quo* harassment and Clery Act/VAWA sex offenses. This expanded definition of sexual

harassment[57] ensures that *quid pro quo* harassment and Clery Act/VAWA sex offenses trigger a recipient's response obligations, without needing to be evaluated for severity, pervasiveness, offensiveness, or denial of equal access, because prohibiting such conduct presents no First Amendment concerns and such serious misconduct causes denial of equal educational access;

- Using the *Gebser/Davis* concept of actual knowledge, adapted in these final regulations by including notice to any recipient's Title IX Coordinator,[58] or notice to any elementary and secondary school employee,[59] furthers the Department's policy goals of ensuring that elementary and secondary schools respond whenever a school employee knows of sexual harassment or allegations of sexual harassment, while respecting the autonomy of students at postsecondary institutions to decide whether or when to report sexual harassment; and
- Using the deliberate indifference standard, adapted in these final regulations by specifying actions that every recipient must take in response to every instance of

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[57] The final regulations define sexual harassment in § 106.30 as follows: Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:
(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 determined by a reasonable person to be 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 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

[58] As discussed throughout this preamble, the final regulations ensure that every recipient gives its educational community clear, accessible options for reporting sexual harassment to the recipient's Title IX Coordinator. *See, e.g.*, § 106.8.

[59] The final regulations define "actual knowledge" in § 106.30 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 any employee of an elementary or secondary school.

> actual knowledge of sexual harassment,[60] ensures that recipients respond to sexual harassment by offering supportive measures designed to restore or preserve a complainant's equal educational access without treating a respondent as responsible until after a fair grievance process. The deliberate indifference standard achieves these aims without unnecessarily second guessing a recipient's decisions with respect to appropriate supportive measures, disciplinary sanctions, and remedies when the recipient responds to sexual harassment incidents, which inherently present fact-specific circumstances.[61]

The Department chooses to build these final regulations upon the foundation established by the Supreme Court, to provide consistency between the rubrics for judicial and administrative enforcement of Title IX, while adapting that foundation for the administrative process, in a manner that achieves important policy objectives unique to sexual harassment in education programs or activities.

Differences Between Standards in Department Guidance and These Final Regulations

The Department's guidance on schools' responses to sexual harassment recommended conditions triggering a school's response obligations, and a liability standard, that differed in significant ways from the *Gebser/Davis* framework and from the approach taken in these final

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[60] The final regulations require recipients to respond promptly by: offering supportive measures to every complainant (i.e., an individual who is alleged to be the victim of sexual harassment); refraining from imposing disciplinary sanctions on a respondent without first following a prescribed grievance process; investigating every formal complaint filed by a complainant or signed by a Title IX Coordinator; and effectively implementing remedies designed to restore or preserve a complainant's equal educational access any time a respondent is found responsible for sexual harassment. § 106.44(a); § 106.44(b)(1); § 106.45(b)(3)(i); § 106.45(b)(1)(i); § 106.45(b)(7)(iv).

[61] As explained below in the "Deliberate Indifference" subsection of the preamble, the final regulations apply a deliberate indifference standard for evaluating a recipient's decisions with respect to selection of supportive measures and remedies, and these final regulations do not mandate or scrutinize a recipient's decisions with respect to disciplinary sanctions imposed on a respondent after a respondent has been found responsible for sexual harassment.

regulations. With respect to the three-part *Gebser/Davis* framework (i.e., a definition of sexual harassment, actual knowledge condition, and deliberate indifference standard), the Department's guidance recommended a broader definition of actionable sexual harassment, a constructive notice condition, and a standard closer to strict liability than to deliberate indifference.

The Department's 1997 Guidance used a definition of sexual harassment described as "sexually harassing conduct (which can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature) by an employee, by another student, or by a third party" and indicated that a school's response was necessary whenever sexual harassment became "sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from an education program or activity, or to create a hostile or abusive educational environment."[62] The 1997 Guidance recommended that schools take action on the basis of constructive notice rather than actual knowledge.[63] Instead of a deliberate indifference standard, the 1997 Guidance indicated that the Department would find a school in violation where the school's response failed to stop the harassment and prevent its recurrence.[64]

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[62] 1997 Guidance ("Sexually harassing conduct (which can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature) by an employee, by another student, or by a third party that is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from an education program or activity, or to create a hostile or abusive educational environment.").

[63] 1997 Guidance ("[A] school will always be liable for even one instance of *quid pro quo* harassment by a school employee . . . whether or not it knew, should have known, or approved of the harassment at issue."); *id.* ("a school will be liable under Title IX if its students sexually harass other students if . . . the school knows or should have known of the harassment").

[64] 1997 Guidance ("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 steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again.").

The 2001 Guidance acknowledged that in the time period between the Department issuing the 1997 Guidance and the 2001 Guidance, the Supreme Court's *Gebser* and *Davis* cases addressed the subject of school responses to sexual harassment under Title IX.[65] The 2001 Guidance reasoned that because those Supreme Court cases were decided in the context of private lawsuits for money damages under Title IX, the Department was not obligated to adopt the same standards for administrative enforcement.[66] The 2001 Guidance noted that the *Gebser* and *Davis* decisions analogized to Title IX's statutory administrative enforcement scheme, which provides that a school receives notice and an opportunity to correct a violation before an agency terminates Federal financial assistance.[67] The 2001 Guidance reasoned that because a school always receives notice of a violation and opportunity to voluntarily correct a violation before the Department may terminate Federal financial assistance, the Department was not required to use the actual knowledge condition or deliberate indifference standard, and the 2001 Guidance continued the 1997 Guidance's approach to constructive notice and strict liability.[68]

The 2001 Guidance nonetheless asserted that consistency between the judicial and administrative rubrics was desirable, and with respect to a definition of sexual harassment, the 2001 Guidance stated that a multiplicity of definitions (i.e., one definition for private lawsuits

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[65] 2001 Guidance at iii-iv.
[66] *Id.* at ii, iv.
[67] *Id.* at iii-iv ("The *Gebser* Court recognized and contrasted lawsuits for money damages with the incremental nature of administrative enforcement of Title IX. In *Gebser*, the Court was concerned with the possibility of a money damages award against a school for harassment about which it had not known. In contrast, the process of administrative enforcement requires enforcement agencies such as OCR to make schools aware of potential Title IX violations and to seek voluntary corrective action before pursuing fund termination or other enforcement mechanisms.").
[68] *Id*. at 10 (a "school has notice of harassment if a responsible school employee actually knew or, in the exercise of reasonable care, should have known about the harassment.") ("Schools are responsible for taking prompt and effective action to stop the harassment and prevent its recurrence" and the recipient is "also responsible for remedying any effects of the harassment on the victim . . . .").

and another for administrative enforcement) would not serve the purpose of consistency between judicial and administrative enforcement.[69] The 2001 Guidance asserted that the *Davis* definition of actionable sexual harassment used different words (i.e., severe, pervasive, and objectively offensive) but was consistent with the definition of sexual harassment used in the 1997 Guidance (i.e., severe, persistent, or pervasive).[70] The 2001 Guidance proceeded to describe sexual harassment as "unwelcome conduct of a sexual nature"[71] that is "severe, persistent, or pervasive"[72] and asserted that this definition was consistent with the *Davis* definition because both definitions "are contextual descriptions intended to capture the same concept – that under Title IX, the conduct must be sufficiently serious that it adversely affects a student's ability to participate in or benefit from the school's program."[73]

The withdrawn 2011 Dear Colleague Letter continued to define sexual harassment as "unwelcome conduct of a sexual nature" and added that "[s]exual violence is a form of sexual harassment prohibited by Title IX" without defining sexual violence.[74] The withdrawn 2011 Dear Colleague Letter continued the approach from the 2001 Guidance that sexual harassment must be "sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the school's program" but omitted the description of actionable sexual harassment as "severe, persistent, or pervasive" that had been utilized in the 1997 Guidance and the 2001

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[69] *Id.* at vi ("schools benefit from consistency and simplicity in understanding what is sexual harassment for which the school must take responsive action. A multiplicity of definitions would not serve this purpose.").
[70] *Id*. at v-vi.
[71] 2001 Guidance at 2. The 2001 Guidance, like the 1997 Guidance, emphasized that sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature, by an employee, student, or third party. Similarly, "sexual harassment" defined in these final regulations in § 106.30, includes the foregoing conduct of a sexual nature, as well as other unwelcome conduct "on the basis of sex" even if the conduct is devoid of sexual content.
[72] 2001 Guidance at vi.
[73] *Id.*
[74] 2011 Dear Colleague Letter at 3.

Guidance.[75] The withdrawn 2011 Dear Colleague Letter continued to recommend that schools act upon constructive notice (rather than actual knowledge) and to hold schools accountable under a strict liability standard rather than deliberate indifference.[76]

The 2017 Q&A used the definition of actionable sexual harassment as described in the 2001 Guidance, stating that "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."[77] The 2017 Q&A relied on the 2001 Guidance's condition of constructive notice rather than actual knowledge.[78] Although the 2017 Q&A did not expressly address the deliberate indifference versus strict liability standard, it directed recipients to the 2001 Guidance for topics not addressed in the 2017 Q&A,[79] including what it means for a school to "respond appropriately" when the school "knows or

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[75] 2011 Dear Colleague Letter at 3 ("As explained in OCR's 2001 Guidance, when a student sexually harasses another student, the harassing conduct creates a hostile environment if the conduct is sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the school's program. The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the harassment is physical. Indeed, a single or isolated incident of sexual harassment may create a hostile environment if the incident is sufficiently severe. For instance, a single instance of rape is sufficiently severe to create a hostile environment.").

[76] 2011 Dear Colleague Letter at 4 ("If a school knows or reasonably should know about student-on-student harassment that creates a hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects."); *id.* at 4 fn. 12 ("This is the standard for administrative enforcement of Title IX and in court cases where plaintiffs are seeking injunctive relief. . . . The standard in private lawsuits for monetary damages is actual knowledge and deliberate indifference. *See Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 643, 648 (1999).").

[77] 2017 Q&A at 1.

[78] 2017 Q&A at 2 (citing to the 2001 Guidance for the proposition that "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") (emphasis added).

[79] *See* 2017 Q&A at 1 ("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 [2001] Revised Sexual Harassment Guidance previously issued by the Office for Civil Rights – provide information about how OCR will assess a school's compliance* with Title IX.") (emphasis added).

reasonably should know"[80] of a sexual misconduct incident, thereby retaining the 2001 Guidance's reliance on constructive notice and strict liability.

To the extent that the Department intended for schools to understand the 1997 Guidance, the 2001 Guidance, the withdrawn 2011 Dear Colleague Letter, or the 2017 Q&A as descriptions of a school's legal obligations under Title IX, those guidance documents directed schools to apply standards that failed to adequately address the unique challenges presented by sexual harassment incidents in a school's education program or activity.

The Department believes that sexual harassment affects "the equal access to education that Title IX is designed to protect"[81] and this problem warrants legally binding regulations addressing sexual harassment as a form of sex discrimination under Title IX, instead of mere guidance documents which are not binding and do not have the force and effect of law.[82] The starting place for describing such legal obligations is adoption of the *Gebser/Davis* framework because that framework describes when sexual harassment constitutes a school itself discriminating on the basis of sex in violation of Title IX. At the same time, the Department adapts the three-part *Gebser/Davis* framework to further the purposes of Title IX in the context of administrative enforcement, holding schools responsible for taking more actions than what the *Gebser/Davis* framework requires.

The Department's adaptions of the three-part *Gebser/Davis* framework achieve important policy objectives that arise in the context of a school's response to reports, allegations, or incidents of sexual harassment in a school's education program or activity, including respect for

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[80] *Id.*
[81] *Davis*, 526 U.S. at 652.
[82] *Perez v. Mortgage Bankers' Ass'n*, 575 U.S. 92, 97 (2015).

freedom of speech and academic freedom,[83] respect for complainants' autonomy,[84] protection of complainants' equal educational access while respecting the decisions of State and local educators to determine appropriate supportive measures, remedies, and disciplinary sanctions,[85] consistency with constitutional due process and fundamental fairness, and clear legal obligations that enable robust administrative enforcement of Title IX violations.[86] The adaptions of the *Gebser/Davis* framework in these final regulations do not codify the Department's guidance yet provide recipients with flexibility, subject to the legal requirements in these final regulations, to respond to a greater range of misconduct, operate on a condition of constructive notice, or respond under a strict liability standard, if the recipient chooses to adopt those guidance-based standards for itself, or if the recipient is required under State or other laws to adopt those standards.

Definition of Sexual Harassment

Importantly, the final regulations continue the 1997 Guidance and 2001 Guidance approach of including as sexual harassment unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature by an employee, by another student, or by a third party.[87] Section 106.30 provides that "sexual harassment" is conduct "on the basis of sex" including "unwelcome conduct." This definition therefore includes

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[83] For further discussion see the "Sexual Harassment" subsection of the "Section 106.30 Definitions" section of this preamble.
[84] For discussion of the way that an actual knowledge standard, and a requirement for recipients to investigate upon receipt of a formal complaint, respect complainant's autonomy, see the "Actual Knowledge" and "Formal Complaint" subsections of the "Section 106.30 Definitions" section of this preamble.
[85] For further discussion, see the "Deliberate Indifference" subsection of this "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section and the "Section 106.44(a) Deliberate Indifference Standard" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this preamble.
[86] For further discussion, see the "Role of Due Process in the Grievance Process" section of this preamble.
[87] 2001 Guidance at 2; 1997 Guidance.

unwelcome conduct of a sexual nature, or other unwelcome conduct on the basis of sex, consistent with Department guidance. Equally as important is recognizing that these final regulations continue the withdrawn 2011 Dear Colleague Letter's express acknowledgment that sexual violence is a type of sexual harassment; the difference is that these final regulations expressly define sex-based violence, by reference to the Clery Act and VAWA.

The way in which these final regulations differ from guidance in defining actionable sexual harassment is by returning to the 2001 Guidance's premise that a consistent definition of sexual harassment used in both judicial and administrative enforcement is appropriate. Despite the 2001 Guidance's assertion that using "different words" from the *Davis* definition of actionable sexual harassment did not result in inconsistent definitions for use in judicial and administrative enforcement, the Department has reconsidered that assertion because that assertion did not bear out over time.[88] These final regulations thus use (as one of three categories of conduct that constitutes sexual harassment) the *Davis* Court's phrasing verbatim: unwelcome conduct that a reasonable person would determine is "so severe, pervasive, and objectively offensive" that it effectively denies a person equal access to education.[89] The Department chooses to return to the premise expressed in the 2001 Guidance: the Department has an interest

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[88] The "Sexual Harassment" subsection of the "Section 106.30 Definitions" section of this preamble discusses in greater detail how the *Davis* definition of sexual harassment as "severe, pervasive, and objectively offensive" comports with First Amendment protections, and the way in which a broader definition, such as severe, persistent, or pervasive (as used in the 1997 Guidance and 2001 Guidance), has led to infringement of rights of free speech and academic freedom of students and faculty.

[89] *Davis*, 526 U.S. 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."); § 106.30 (defining "sexual harassment" to include conduct "on the basis of sex" including "unwelcome conduct" that a reasonable person would determine to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity).

in providing recipients with "consistency and simplicity in understanding what is sexual harassment for which the school must take responsive action. A multiplicity of definitions would not serve this purpose."[90]

In addition to using the *Davis* definition verbatim (i.e., conduct that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to education), the proposed regulations defined "sexual harassment" to also include sexual assault as defined in the Clery Act. In these final regulations, the Department retains reference to sexual assault under the Clery Act, and additionally incorporates the definitions of dating violence, domestic violence, and stalking in the Clery Act as amended by VAWA.[91] Incorporating these four Clery Act/VAWA offenses clarifies that sexual harassment includes a single instance of sexual assault, dating violence, domestic violence, or stalking. Such incorporation is consistent with the Supreme Court's observation in *Davis* that a single instance of sufficiently severe harassment on the basis of sex *may* have the systemic effect of denying the victim equal access to an education program or activity.[92] However, the Department's inclusion of sexual assault, dating violence, domestic violence, and stalking in the § 106.30 definition of sexual harassment, without requiring those sex offenses to meet the *Davis* elements of severity, pervasiveness, and objective offensiveness, appropriately guards against, for instance, some sexual assaults or incidents of

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[90] 2001 Guidance at vi.
[91] Section 106.30 (defining "sexual harassment" to include sexual assault, dating violence, domestic violence or stalking as defined in the Clery Act and VAWA statutes).
[92] *See Davis*, 526 U.S. at 652-53 (noting that with respect to "severe, gender-based mistreatment" even "a single instance of sufficiently severe one-on-one peer harassment could be said to" have "the systemic effect of denying the victim equal access to an educational program or activity."). Although the withdrawn 2011 Dear Colleague Letter expressly disclaimed reliance on *Davis*, that guidance also stated that "The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the harassment is physical. Indeed, a single or isolated incident of sexual harassment may create a hostile environment if the incident is sufficiently severe. For instance, a single instance of rape is sufficiently severe to create a hostile environment." 2011 Dear Colleague Letter at 3.

dating violence or domestic violence being covered under Title IX while other sexual assaults or incidents of dating violence or domestic violence are deemed not to be "pervasive" enough to meet the *Davis* standard. Similarly, this approach guards against a pattern of sex-based stalking being deemed "not severe" even though the pattern of behavior is "pervasive." Such incorporation also provides consistency and clarity with respect to the intersection among Title IX, the Clery Act, and VAWA.[93]

The final regulations retain the proposed rules' definition of "*quid pro quo*" harassment in the definition of sexual harassment.[94] The Department recognized *quid pro quo* sexual harassment in its 1997 Guidance and 2001 Guidance, and cited to court cases that recognized *quid pro quo* sexual harassment under Title IX.[95]

The Honorable Janet Napolitano, the President of the University of California, who is a former Governor and Attorney General of Arizona and a former United States Secretary of

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[93] Although elementary and secondary schools are not subject to the Clery Act, elementary and secondary school recipients must look to the definitions of sexual assault, dating violence, domestic violence, and stalking as defined in the Clery Act and VAWA in order to address those forms of sexual harassment under Title IX. These final regulations do not, however, alter the regulations implemented under the Clery Act or an institution of higher education's obligations, if any, under regulations implementing the Clery Act.

[94] Section 106.30 defines "sexual harassment" to include: An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on the individual's participation in unwelcome sexual conduct. This type of harassment is commonly referred to as *quid pro quo* sexual harassment.

[95] *See, e.g.*, 2001 Guidance at 5, 10 (citing *Alexander v. Yale University*, 459 F. Supp. 1, 4 (D. Conn. 1977), *aff'd*, 631 F.2d 178 (2d Cir. 1980) (stating that a claim "that academic advancement was conditioned upon submission to sexual demands constitutes [a claim of] sex discrimination in education . . ."); *see also Crandell v. New York Coll., Osteopathic Med.*, 87 F. Supp. 2d 304, 318 (S.D.N.Y. 2000) (finding that allegations that a supervisory physician demanded that a student physician spend time with him and have lunch with him or receive a poor evaluation, in light of the totality of his alleged sexual comments and other inappropriate behavior, constituted a claim of *quid pro quo* harassment); *Kadiki v. Va. Commonwealth Univ.*, 892 F. Supp. 746, 752 (E.D. Va. 1995). The 2011 Dear Colleague Letter focused on peer harassment but expressly referred to the 2001 Guidance for the appropriate approach to sexual harassment by employees (i.e., *quid pro quo* harassment). 2011 Dear Colleague Letter at 2, fn. 8 ("This letter focuses on peer sexual harassment and violence. Schools' obligations and the appropriate response to sexual harassment and violence committed by employees may be different from those described in this letter. Recipients should refer to the 2001 Guidance for further information about employee harassment of students."); *see also* 2017 Q&A at 1 (not referencing *quid pro quo* sexual harassment, but directing recipients to look to the 2001 Guidance regarding matters not specifically addressed in the 2017 Q&A). *Quid pro quo* sexual harassment also is recognized under Title VII. *E.g.*, *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 752-53 (1998).

Homeland Security, observed that under the Department's guidance recipients had to grapple with "a broad continuum of conduct, from offensive statements to gang rape"[96] and the Department's guidance, especially after the 2001 Guidance was supplemented and altered by the withdrawn 2011 Dear Colleague Letter, caused recipients "uncertainty and confusion about how to appropriately comply."[97] By utilizing precise definitions of conduct that constitutes sexual harassment, the Department aims to reduce uncertainty and confusion for recipients, students, and employees, while ensuring conduct that jeopardizes equal educational access remains conduct to which a recipient must respond under Title IX.

Some commenters requested that the Department more closely align its definition of actionable sexual harassment with the definition that the Supreme Court uses in the context of discrimination because of sex in the workplace under Title VII. Specifically, commenters urged the Department to use a definition of sexual harassment that is "severe *or* pervasive" because that definition is used under Title VII[98] and the 1997 Guidance and 2001 Guidance relied on Title VII case law in using the definition of sexual harassment that is "severe, persistent, or pervasive."[99] However, in *Davis*, a case concerning sexual harassment of a fifth-grade student by another student, the Supreme Court did not adopt the Title VII definition of sexual harassment

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[96] Janet Napolitano, *"Only Yes Means Yes": An Essay on University Policies Regarding Sexual Violence and Sexual Assault*, 33 YALE L. & POL'Y REV. 387, 388 (2015).
[97] *Id.*
[98] *Meritor Sav. 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.") (internal quotation marks and citation omitted) (emphasis added).
[99] 2001 Guidance at vi (stating that "the definition of hostile environment sexual harassment found in OCR's 1997 guidance . . . derives from Title VII caselaw").

for use under Title IX, defining actionable sexual harassment for Title IX purposes as conduct that is "severe, pervasive, *and* objectively offensive."[100]

The Department is persuaded by the Supreme Court's reasoning that elementary and secondary "schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults."[101] These final regulations also are consistent with the Equal Access Act, requiring that public secondary schools provide equal access to limited public forums without discriminating against the students "on the basis of the religious, political, philosophical, or other content of speech."[102]

Similarly, an institution of higher education differs from the workplace. In this regard, these final regulations are consistent with the sense of Congress in the Higher Education Act of 1965, as amended, that "an institution of higher education should facilitate the free and open exchange of ideas."[103] The sense of Congress is that institutions of higher education should facilitate the free and robust exchange of ideas,[104] but such an exchange may prove disruptive, undesirable, or impermissible in the workplace. Moreover, workplaces are generally expected to be free from conduct and conversation of a sexual nature, and it is common for employers to prohibit or discourage employees from engaging in romantic interactions at work.[105] By contrast,

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[100] *Davis*, 526 U.S. at 652 ("Rather, in the context of student-on-student harassment, damages are available only where 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.") (emphasis added).
[101] *Davis*, 526 U.S. at 651-52 (citing *Meritor*, 477 U.S. at 67).
[102] 20 U.S.C. 4071(a).
[103] 20 U.S.C. 1101a(a)(2)(C).
[104] 20 U.S.C. 1101a(a)(2)(C).
[105] *See, e.g.*, Vicki Schultz, *The Sanitized Workplace*, 112 YALE L. J. 2061, 2191 (2003) (examining the trend through the twentieth century toward a societal expectation that workplaces must be rational environments "devoid of sexuality and other distracting passions" in which employers "increasingly ban or discourage employee romance"

it has become expected that college and university students enjoy personal freedom during their higher education experience,[106] and it is not common for an institution to prohibit or discourage students from engaging in romantic interactions in the college environment.[107]

The Department does not wish to apply the same definition of actionable sexual harassment under Title VII to Title IX because such an application would equate workplaces with educational environments, whereas both the Supreme Court and Congress have noted the unique differences of educational environments from workplaces and the importance of respecting the unique nature and purpose of educational environments. As discussed further in the "Sexual Harassment" subsection of the "Section 106.30 Definitions" section of this preamble, applying the same definition of actionable sexual harassment under Title VII to Title IX may continue to cause recipients to chill and infringe upon the First Amendment freedoms of students, teachers, and faculty by broadening the scope of prohibited speech and expression.

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and observing that both feminist theory and classical-management theory supported this trend, the former on equality grounds and the latter on efficiency grounds, but arguing that workplaces should instead focus on sex equality without "chilling intimacy and solidarity among employees of both a sexual and nonsexual variety."); *cf.* Rebecca K. Lee, *The Organization as a Gendered Entity: A Response to Professor Schultz's "The Sanitized Workplace"*, 15 COLUMBIA J. OF GENDER & LAW 609 (2006) (rebutting the notion that a sexualized workplace culture would be beneficial for sex equality, arguing that the "probable harms" would "outweigh the possible benefits of allowing sexuality to prosper in the work organization" and defending the "sexuality-constrained organizational paradigm in light of concerns regarding the role of work, on-the-job expectations, and larger workplace dynamics.").

[106] Kristen Peters, *Protecting the Millennial College Student*, 16 S. CAL. REV. OF L. & SOCIAL JUSTICE 431, 437 (2007) (noting that the doctrine of *in loco parentis* in the higher education context diminished in the 1960s and "[b]y the early 1970s, college students had successfully vindicated their contractual and civil rights, redefining the college-student relationship to emphasize student freedom and abrogate college authority.") (internal citations omitted).

[107] Justin Neidig, *Sex, Booze, and Clarity: Defining Sexual Assault on a College Campus*, 16 WILLIAM & MARY J. OF WOMEN & THE L. 179, 180-81 (2009) ("College is an exciting and often confusing time for students. This new experience is defined by coed dorms, near constant socializing that often involves alcohol, and the ability to retreat to a private room with no adult supervision. The environment creates a socialization process where appropriate behavior is defined by the actions of peers, particularly when it comes to sexual behavior.") (internal citations omitted).

The Department's use of the *Davis* definition of sexual harassment in these final regulations returns to the Department's intent stated in the 2001 Guidance: that the Department's definition of sexual harassment should be consistent with the definition of sexual harassment in *Davis*. The *Davis* definition of sexual harassment adopted in these final regulations, adapted by the Department's inclusion of *quid pro quo* harassment and the four Clery Act/VAWA offenses, will help prevent infringement of First Amendment freedoms, clarify confusion by precisely defining sexual violence independent from the *Davis* definition, clarify the intersection among Title IX, the Clery Act, and VAWA with respect to sex-based offenses, and ensure that recipients must respond to students and employees victimized by sexual harassment that jeopardizes a person's equal educational access.

Recipients may continue to address harassing conduct that does not meet the § 106.30 definition of sexual harassment, as acknowledged by the Department's change to § 106.45(b)(3)(i) to clarify that dismissal of a formal complaint because the allegations do not meet the Title IX definition of sexual harassment, does not preclude a recipient from addressing the alleged misconduct under other provisions of the recipient's own code of conduct. [108]

Actual Knowledge

The Department adopts and adapts the *Gebser/Davis* framework's condition of "actual knowledge."[109] The Supreme Court held that a recipient with actual knowledge of sexual harassment commits intentional discrimination (if the recipient responds in a deliberately

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[108] Section 106.45(b)(3). Similarly, nothing in these final regulations prevents a recipient from addressing conduct that is outside the Department's jurisdiction due to the conduct constituting sexual harassment occurring outside the recipient's education program or activity, or occurring against a person who is not located in the United States.
[109] *Davis*, 526 U.S. at 642 (stating that actual knowledge ensures that liability arises from "an official decision by the recipient not to remedy the violation") (citing *Gebser*, 524 U.S. at 290) (internal quotation marks omitted).

indifferent manner).[110] Because Title IX is a statute "designed primarily to prevent recipients of Federal financial assistance from using the funds in a discriminatory manner,"[111] it is a recipient's *own* misconduct – not the sexually harassing behavior of employees, students, or other third parties – that subjects the recipient to liability in a private lawsuit under Title IX, and the recipient cannot commit its own misconduct unless the recipient first knows of the sexual harassment that needs to be addressed.[112] Because Congress enacted Title IX under its Spending Clause authority, the obligations it imposes on recipients are in the nature of a contract.[113] The Supreme Court held that "a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond."[114] The Supreme Court reasoned that it would be "unsound" for the Court to allow a private lawsuit (with the potential for money damages) against a recipient when the statute's administrative enforcement scheme imposes a requirement that before an agency may terminate Federal funds the agency must give notice to "an appropriate person" with the recipient who then may decide to voluntarily take corrective action

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[110] *Gebser*, 524 U.S. at 287-88 ("If a school district's liability for a teacher's sexual harassment rests on principles of constructive notice or *respondeat superior*, it will likewise be the case that the recipient of funds was unaware of the discrimination. It is sensible to assume that Congress did not envision a recipient's liability in damages in that situation.").
[111] *Gebser*, 524 U.S. at 292; *Cannon*, 441 U.S. at 704 (noting that the primary congressional purposes behind Title IX were "to avoid the use of Federal resources to support discriminatory practices" and to "provide individual citizens effective protection against those practices.").
[112] *E.g.*, Julie Davies, *Assessing Institutional Responsibility for Sexual Harassment in Education*, 77 TULANE L. REV. 387, 402 (2002) (analyzing the *Gebser/Davis* framework and noting, "The Court concluded that a funding recipient's contract with the federal government encompassed only a promise not to discriminate, not an agreement to be held liable when employees discriminate.").
[113] *Gebser*, 524 U.S. at 286; *Davis*, 526 U.S. at 640.
[114] *Gebser*, 524 U.S. at 290.

to remedy the violation.[115] The Supreme Court reasoned that a "central purpose of requiring notice of the violation 'to the appropriate person' and an opportunity for voluntary compliance before administrative enforcement proceedings can commence is to avoid diverting education funding from beneficial uses where a recipient was unaware of discrimination in its programs and is willing to institute prompt corrective measures."[116]

The Supreme Court thus rejected theories of vicarious liability (e.g., *respondeat superior*) and constructive notice as the basis for a recipient's Title IX liability in private Title IX lawsuits.[117] The Supreme Court noted that the Department's 1997 Guidance held schools responsible under vicarious liability and constructive notice theories.[118] Neither *Gebser* nor *Davis* indicated whether the Department's administrative enforcement of Title IX should continue to rely on vicarious liability and constructive notice as conditions triggering a recipient's response obligations.

These final regulations adopt the actual knowledge condition from the *Gebser/Davis* framework so that these final regulations clearly prohibit a recipient's own intentional discrimination,[119] but adapt the *Gebser/Davis* condition of actual knowledge to include notice to

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[115] *Id.* at 289-90 ("Because the express remedial scheme under Title IX is predicated upon notice to an 'appropriate person' and an opportunity to rectify any violation, 20 U.S.C. § 1682, we conclude, in the absence of further direction from Congress, that the implied damages remedy should be fashioned along the same lines. An 'appropriate person' under § 1682 is, at a minimum, an official of the recipient entity with authority to take corrective action to end the discrimination.").

[116] *Id.* at 289. The Court continued, "When a teacher's sexual harassment is imputed to a school district or when a school district is deemed to have 'constructively' known of the teacher's harassment, by assumption the district had no actual knowledge of the teacher's conduct. Nor, of course, did the district have an opportunity to take action to end the harassment or to limit further harassment." *Id.*

[117] *Id.*; *Davis*, 526 U.S. at 650.

[118] *Gebser*, 524 U.S. at 282 (plaintiffs in *Gebser* advocated for private lawsuit liability based on vicarious liability and constructive notice in part by looking at the Department's 1997 Guidance which relied on both theories).

[119] Section 106.30 (defining "actual knowledge" to include notice to any recipient's officials with authority to institute corrective measures on behalf of the recipient, thereby mirroring the *Gebser/Davis* condition of actual knowledge).

more recipient employees than what is required under the *Gebser/Davis* framework,[120] in a way that takes into account the different needs and expectations of students in elementary and secondary schools, and in postsecondary institutions, with respect to sexual harassment and sexual harassment allegations.[121] These final regulations apply an adapted condition of actual knowledge in ways that are similar to, and different from, the Department's approach in guidance as to when notice of sexual harassment triggers a recipient's response obligations. In other words, we tailor the Supreme Court's condition of actual knowledge to the unique context of administrative enforcement.

The Department's guidance used a "responsible employees" rubric to describe the pool of employees to whom notice triggered the recipient's response obligations. The "responsible employees" rubric in guidance did not differentiate between elementary and secondary schools, and postsecondary institutions. For all recipients, Department guidance stated that a "responsible employee" was an employee who "has the authority to take action to redress the harassment," or "who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees," or an individual "who a student could reasonably believe has this authority or responsibility."[122] Under the responsible employees rubric in guidance, the

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[120] Section 106.30 (defining "actual knowledge" to include notice to any recipient's Title IX Coordinator, a position each recipient must designate and authorize for the express purpose of coordinating a recipient's compliance with Title IX obligations, including specialized training for the Title IX Coordinator, requirements not found in the *Gebser/Davis* framework); § 106.8(a); § 106.45(b)(1)(iii).

[121] Section 106.30 (defining "actual knowledge" to include notice to "any employee" in an elementary and secondary school, a condition not found in the *Gebser/Davis* framework).

[122] 2001 Guidance at 13-14; 1997 Guidance (while not using the same three-part definition of "responsible employees" as the 2001 Guidance, giving examples of a "responsible employee" to include "a principal, campus security, bus driver, teacher, an affirmative action officer, or staff in the office of student affairs"); 2011 Dear Colleague Letter at 4 (while not using the term "responsible employees," stating that a school must respond

recipient was liable when a responsible employee "knew," or when a responsible employee "should have known," about possible harassment.[123]

For reasons discussed below, these final regulations do not use the "responsible employees" rubric, although these final regulations essentially retain the first of the three categories of the way guidance described "responsible employees."[124] As discussed below, these final regulations depart from the "should have known" condition that guidance indicated would trigger a recipient's response obligations.

Rather than using the phrase "responsible employees," these final regulations describe the pool of employees to whom notice triggers the recipient's response obligations. That pool of employees is different in elementary and secondary schools than in postsecondary institutions. For all recipients, notice to the recipient's Title IX Coordinator or to "any official of the recipient who has authority to institute corrective measures on behalf of the recipient" (referred to herein

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whenever it "knows or reasonably should know" about sexual harassment); *id.* at 2 (stating that "This letter supplements the 2001 Guidance by providing additional guidance and practical examples regarding the Title IX requirements as they relate to sexual violence" thus indicating that the 2011 Dear Colleague Letter did not alter the 2001 Guidance's approach to responsible employees); 2014 Q&A at 14 ("According to OCR's 2001 Guidance, a responsible employee includes any employee: who has the authority to take action to redress sexual violence; who has been given the duty of reporting incidents of sexual violence or any other misconduct by students to the Title IX coordinator or other appropriate school designee; or whom a student could reasonably believe has this authority or duty."); 2017 Q&A 1-2 (citing to the 2001 Guidance for the proposition that a school must respond whenever the school "knows or reasonably should know" of a sexual misconduct incident and that in addition to a Title IX Coordinator other employees "may be responsible employees").

[123] 1997 Guidance (a school is liable where it "knows or should have known"); 2001 Guidance at 13 ("A school has notice if a responsible employee knew, or in the exercise of reasonable care should have known, about the harassment.") (internal quotation marks omitted); 2011 Dear Colleague Letter at 4; 2014 Q&A at 2 ("OCR deems a school to have notice of student-on-student sexual violence if a responsible employee knew, or in the exercise of reasonable care should have known, about the sexual violence."); 2017 Q&A at 1.

[124] The § 106.30 definition of "actual knowledge" including notice to "any official of the recipient who has authority to institute corrective measures on behalf of the recipient" is the equivalent of the first portion of the definition of "responsible employees" in Department guidance (e.g., 2001 Guidance at 13), that included any employee who "has the authority to take action to redress the harassment." *See also* Merle H. Weiner, *A Principled and Legal Approach to Title IX Reporting*, 85 TENN. L. REV. 71, 140 (2017) ("The Supreme Court's definition of an 'appropriate person'" as an 'official who at a minimum has authority to address the alleged discrimination and to institute corrective measures' is "very close to the first category [of responsible employees] in OCR's guidance.") (citing *Gebser*, 524 U.S. at 290).

as "officials with authority") conveys actual knowledge to the recipient and triggers the recipient's response obligations. Determining whether an individual is an "official with authority" is a legal determination that depends on the specific facts relating to a recipient's administrative structure and the roles and duties held by officials in the recipient's own operations. The Supreme Court viewed this category of officials as the equivalent of what 20 U.S.C. 1682 calls an "appropriate person" for purposes of the Department's resolution of Title IX violations with a recipient.[125] Lower Federal courts applying the *Gebser/Davis* actual knowledge condition have reached various results with respect to whether certain employees in an elementary and secondary school, or in a postsecondary institution, are officials with authority to whom notice conveys actual knowledge to the recipient.[126] Because these final regulations adopt the *Gebser/Davis* condition describing a recipient's actual knowledge as resulting from notice to an official with authority, but also include the recipient's Title IX Coordinator and any elementary and secondary school employee, the fact-specific nature of whether certain officials of the recipient qualify as officials with authority does not present a barrier to reporting sexual harassment and requiring schools, colleges, and universities to respond promptly.

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[125] *Gebser*, 524 U.S. at 290 ("Because the express remedial scheme under Title IX is predicated upon notice to an 'appropriate person' and an opportunity to rectify any violation, 20 U.S.C. § 1682, we conclude, in the absence of further direction from Congress, that the implied damages remedy should be fashioned along the same lines. An 'appropriate person' under § 1682 is, at a minimum, an official of the recipient entity with authority to take corrective action to end the discrimination.").

[126] With respect to elementary and secondary schools, *see* Julie Davies, *Assessing Institutional Responsibility for Sexual Harassment in Education*, 77 TULANE L. REV. 387, 398, 424-26 (2002) (reviewing cases decided under the *Gebser/Davis* framework and noting that courts reached different results regarding teachers, principals, school boards, and superintendents, and concluding that "The legal authority of individuals to receive notice is clearly relevant and a basis for their inclusion as parties to whom notice may be given, but courts must also evaluate the factual reality.") With respect to postsecondary institutions, *see* Merle H. Weiner, *A Principled and Legal Approach to Title IX Reporting*, 85 TENN. L. REV. 71, 139 (2017) ("Overall, this category is rather narrow and the identity of the relevant employees rests on an institution's own policies regarding who has the authority to take action to redress sexual violence.").

Under these final regulations, in elementary and secondary schools, notice to "any employee" (in addition to notice to the Title IX Coordinator or to any official with authority) triggers the recipient's response obligations, so there is no longer a need to use the responsible employees rubric. Under these final regulations, an elementary and secondary school must respond whenever *any* employee has notice of sexual harassment or allegations of sexual harassment, so there is no need to distinguish among employees who have "authority to redress the harassment," have the "duty to report" misconduct to appropriate school officials, or employees who "a student could reasonably believe" have that authority or duty.[127] In the elementary and secondary school setting where school administrators, teachers, and other employees exercise a considerable degree of control and supervision over their students, the Department believes that requiring a school district to respond when its employees know of sexual harassment (including reports or allegations of sexual harassment) furthers Title IX's non-discrimination mandate in a manner that best serves the needs and expectations of students.[128] The Department is persuaded by commenters who asserted that students in elementary and secondary schools often talk about sexual harassment experiences with someone other than their teacher, and that it is unreasonable to expect young students to differentiate among employees for the purpose of which employees' knowledge triggers the school's response obligations and which do not. Elementary and secondary schools generally operate under the doctrine of *in loco parentis*, under which the school stands "in the place of" a parent with respect to certain

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[127] *See* 2001 Guidance at 13.
[128] *Davis*, 526 U.S. at 646 (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") (citing *Veronica Sch. Dist. v. Acton*, 515 U.S. 646, 655 (1995)).

authority over, and responsibility for, its students.[129] Further, employees at elementary and secondary schools typically are mandatory reporters of child abuse under State laws for purposes of child protective services.[130] The Department is persuaded that employees at elementary and secondary schools stand in a unique position with respect to students and that a school district should be held accountable for responding to sexual harassment under Title IX when the school district's employees have notice of sexual harassment or sexual harassment allegations.

In postsecondary institutions, where *in loco parentis* does not apply,[131] notice to the Title IX Coordinator or any official with authority conveys actual knowledge to the recipient.

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[129] Todd A. Demitchell, *The Duty to Protect: Blackstone's Doctrine of In Loco Parentis: A Lens for Viewing the Sexual Abuse of Students*, 2002 BYU EDUC. & L. J. 17, 19-20 (2002) ("Acting in the place of parents is an accepted and expected role assumed by educators and their schools. This doctrine has been recognized in state statutes and court cases. For example, the United States Supreme Court noted that there exists an 'obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children – especially in a captive audience – from exposure to sexually explicit, indecent, or lewd speech. [Citing to *Bethel Sch. Dist. No. 403 v. Fraser ex rel. Fraser*, 478 U.S. 675, 684 (1986).] According to the Supreme Court, school officials have authority over students by virtue of *in loco parentis* and a concomitant duty of protection. It has been asserted that *in loco parentis* is a sub-set of government's broad common law power of *parens patriae*.") (internal citations omitted).

[130] *See* Ala. Code § 26-14-3; Alaska Stat. § 47.17.020; Ariz. Rev. Stat. § 13-3620; Ark. Code Ann. § 12-18-402; Cal. Penal Code § 11165.7; Colo. Rev. Stat. § 19-3-304; Conn. Gen. Stat. § 17a-101; Del. Code Ann. tit. 16, § 903; D.C. Code § 4-1321.02; Fla. Stat. § 39.201; Ga. Code Ann. § 19-7-5; Haw. Rev. Stat. § 350-1.1; Idaho Code Ann. § 16-1605; 325 Ill. Comp. Stat. § 5/4; Ind. Code § 31-33-5-1; Iowa Code § 232.69; Kan. Stat. Ann. § 38-2223; Ky. Rev. Stat. Ann. § 620.030; La. Child Code Ann. art. 603(17); Me. Rev. Stat. tit. 22, § 4011-A; Md. Code Ann., Fam. Law § 5-704; Mass. Gen. Laws ch. 119, § 21; Mich. Comp. Laws § 722.623; Minn. Stat. § 626.556; Miss. Code. Ann. § 43-21-353; Mo. Ann Stat. § 210.115; Mont. Code Ann. § 41-3-201; Neb. Rev. Stat. § 28-711; Nev. Rev. Stat. § 432B.220; N.H. Rev. Stat. Ann. § 169-C:29; N.J. Stat. Ann. § 9:6-8.10; N.M. Stat. Ann. § 32A-4-3; N.Y. Soc. Serv. Law § 413; N.C. Gen. Stat. Ann. § 7B-301; N.D. Cent. Code Ann. § 50-25.1-03; Ohio Rev. Code Ann. § 2151.421; Okla. Stat. tit. 10A, § 1-2-101; Or. Rev. Stat. § 419B.010; 23 Pa. Cons. Stat. Ann § 6311; R.I. Gen. Laws § 40-11-3(a); S.C. Code Ann. § 63-7-310; S.D. Codified Laws § 26-8A-3; Tenn. Code Ann. § 37-1-403; Tex. Fam. Code § 261.101; Utah Code Ann. § 62A-4a-403; Vt. Stat. Ann. tit. 33, § 4913; Va. Code Ann. § 63.2-1509; Wash. Rev. Code § 26.44.030; W. Va. Code § 49-2-803; Wis. Stat. § 48.981; Wyo. Stat. Ann. § 14-3-205.

[131] *E.g.*, *Wagner v. Holtzapple*, 101 F. Supp. 3d 462, 472-73 (M.D. Penn. 2015) (noting that "the law surrounding the student-university relationship has changed considerably in a relatively short period of time. 'The early period of American higher education, prior to the 1960s, was exclusively associated with the doctrine of *in loco parentis*.'") (citing to Jason A. Zwara, *Student Privacy, Campus Safety, and Reconsidering the Modern Student-University Relationship*, 38 JOURNAL OF COLL. & UNIV. L. 419, 432-33, 436 (2012) ("*In loco parentis* was applied in the early period of higher education law to prevent courts or legislatures from intervening in the student-university relationship, thus insulating the institution from criminal or civil liability or regulation. . . . Courts began to shift

Triggering a recipient's response obligations only when the Title IX Coordinator or an official with authority has notice respects the autonomy of a complainant in a postsecondary institution better than the responsible employee rubric in guidance. As discussed below, the approach in these final regulations allows postsecondary institutions to decide which of their employees must, may, or must only with a student's consent, report sexual harassment to the recipient's Title IX Coordinator (a report to whom always triggers the recipient's response obligations, no matter who makes the report). Postsecondary institutions ultimately decide which officials to authorize to institute corrective measures on behalf of the recipient. The Title IX Coordinator and officials with authority to institute corrective measures on behalf of the recipient fall into the same category as employees whom guidance described as having "authority to redress the sexual harassment."[132] In this manner, in the postsecondary institution context these final regulations continue to use one of the three categories of "responsible employees" described in guidance.

With respect to postsecondary institutions, these final regulations depart from using the other two categories of "responsible employees" described in guidance (those who have a "duty to report" misconduct, and those whom a "student could reasonably believe" have the requisite authority or duty). As discussed below, in the postsecondary institution context, requiring the

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away from *in loco parentis* beginning in the civil rights era of the 1960s through a number of cases addressing student claims for constitutional rights, in particular due process rights and free speech" and courts now generally view the student-university relationship as one governed by contract) (internal quotation marks and citations omitted)).

[132] The § 106.30 definition of "actual knowledge" as including notice to "any official of the recipient who has authority to institute corrective measures on behalf of the recipient" is the equivalent of the portion of the definition of "responsible employees" in Department guidance (e.g., 2001 Guidance at 13) that included any employee who "has the authority to take action to redress the harassment." *See also* Merle H. Weiner, *A Principled and Legal Approach to Title IX Reporting*, 85 TENN. L. REV. 71, 140 (2017) ("The Supreme Court's definition of an 'appropriate person'" as an 'official who at a minimum has authority to address the alleged discrimination and to institute corrective measures' is "very close to the first category [of responsible employees] in OCR's guidance.") (citing *Gebser*, 524 U.S. at 290).

latter two categories of employees to be mandatory reporters (as Department guidance has) may have resulted in college and university policies that have unintentionally discouraged disclosures or reports of sexual harassment by leaving complainants with too few options for disclosing sexual harassment to an employee without automatically triggering a recipient's response. Elementary and secondary school students cannot be expected to distinguish among employees to whom disclosing sexual harassment results in a mandatory school response, but students at postsecondary institutions may benefit from having options to disclose sexual harassment to college and university employees who may keep the disclosure confidential. These final regulations ensure that all students and employees are notified of the contact information for the Title IX Coordinator and how to report sexual harassment for purposes of triggering a recipient's response obligations, and the Department believes that students at postsecondary institutions benefit from retaining control over whether, and when, the complainant wants the recipient to respond to the sexual harassment that the complainant experienced.

In both the elementary and secondary school context and the postsecondary institution context, the final regulations use the same broad conception of what might constitute "notice" as the Department's guidance used. Notice results whenever any elementary and secondary school employee, any Title IX Coordinator, or any official with authority: witnesses sexual harassment; hears about sexual harassment or sexual harassment allegations from a complainant (i.e., a person alleged to be the victim) or a third party (e.g., the complainant's parent, friend, or peer); receives a written or verbal complaint about sexual harassment or sexual harassment allegations; or by any other means.[133] These final regulations emphasize that any person may always trigger a

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[133] *E.g.*, 2001 Guidance at 13.

recipient's response obligations by reporting sexual harassment to the Title IX Coordinator using contact information that the recipient must post on the recipient's website.[134] The person who reports does not need to be the complainant (i.e., the person alleged to be the victim); a report may be made by "any person"[135] who believes that sexual harassment may have occurred and requires a recipient's response.

The final regulations depart from the constructive notice condition described in Department guidance that stated that a recipient must respond if a recipient's responsible employees "should have known" about sexual harassment. The Department's guidance gave only the following examples of circumstances under which a recipient "should have known" about sexual harassment: when "known incidents should have triggered an investigation that would have led to discovery of [] additional incidents," or when "the pervasiveness" of the harassment leads to the conclusion that the recipient "should have known" of a hostile environment.[136]

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[134] Section 106.30 (defining "actual knowledge" to mean notice, where "notice" includes but is not limited to a report to the Title IX Coordinator as described in § 106.8(a)); § 106.8(b) (requiring the Title IX Coordinator's contact information to be displayed prominently on the recipient's website); § 106.8(a) (stating that any person may report sexual harassment (whether or not the person reporting is the person alleged to be the victim) using the contact information listed for the Title IX Coordinator or any other means that results in the Title IX Coordinator receiving the person's verbal or written report, and that a report may be made at any time, including during non-business hours, by using the listed telephone number or e-mail address, or by mail to the listed office address, for the Title IX Coordinator).

[135] Section 106.8(a) (specifying that "any person may report" sexual harassment).

[136] 2001 Guidance at 13-14 ("[A] school has a duty to respond to harassment about which it reasonably should have known, i.e., if it would have learned of the harassment if it had exercised reasonable care or made a reasonably diligent inquiry. For example, in some situations if the school knows of incidents of harassment, the exercise of reasonable care should trigger an investigation that would lead to a discovery of additional incidents. 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 (such as sexual harassment occurring in the hallways, graffiti in public areas, or harassment occurring during recess under a teacher's supervision.") (internal citations omitted); 1997 Guidance (same); 2014 Q&A at 2 (same). The 2011 Dear Colleague Letter at 1-2, and the 2017 Q&A at 1, did not describe the circumstances under which a school "should have known" but referenced the 2001 Guidance on this topic.

The Department has reconsidered the position that a recipient's response obligations are triggered whenever employees "should have known" because known incidents "should have triggered an investigation that would have led to discovery" of additional incidents.[137] The final regulations impose clear obligations as to when a recipient must investigate allegations. Unlike the Department's guidance, which did not specify the circumstances under which a recipient must investigate and adjudicate sexual harassment allegations, the final regulations clearly obligate a recipient to investigate and adjudicate whenever a complainant files, or a Title IX Coordinator signs, a formal complaint.[138] The Department will hold recipients responsible for a recipient's failure or refusal to investigate a formal complaint.[139] However, the Department does not believe it is feasible or necessary to speculate on what an investigation "would have" revealed if the investigation had been conducted. Even if there are additional incidents of which a recipient "would have" known had the recipient conducted an investigation into a known incident, each of the additional incidents involve complainants who also have the clear option and right under these final regulations to file a formal complaint that requires the recipient to investigate, or to report the sexual harassment and trigger the recipient's obligation to respond by offering supportive measures (and explaining to the complainant the option of filing a formal

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[137] 2001 Guidance at 13.
[138] Section 106.44(b)(1) (stating a recipient must investigate in response to a formal complaint); § 106.30 (defining "formal complaint" as a written document filed by a complainant or signed by a Title IX Coordinator requesting that the recipient investigate allegations of sexual harassment against a respondent, where "document filed by a complainant" also includes an electronic submission such as an e-mail or use of an online portal if the recipient provides one for filing formal complaints).
[139] Section 106.44(b)(1).

complaint).[140] If a recipient fails to meet its Title IX obligations with respect to any complainant, the Department will hold the recipient liable under these final regulations, and doing so does not necessitate speculating about what an investigation "would have" revealed.

The Department has reconsidered the position that a recipient's response obligations are triggered whenever employees "should have known" due to the "pervasiveness" of sexual harassment.[141] In elementary and secondary schools, the final regulations charge a recipient with actual knowledge whenever any employee has notice. Thus, if sexual harassment is "so pervasive" that some employee "should have known" about it (e.g., sexualized graffiti scrawled across lockers that meets the definition of sexual harassment in § 106.30), it is highly likely that at least one employee did know about it and the school is charged with actual knowledge. There is no reason to retain a separate "should have known" standard to cover situations that are "so pervasive" in elementary and secondary schools. In postsecondary institutions, when sexual harassment is "so pervasive" that some employees "should have known" it is highly likely that at least one employee did know about it. However, in postsecondary institutions, for reasons discussed below, the Department believes that complainants will be better served by allowing the postsecondary institution recipient to craft and apply the recipient's own policy with respect to which employees must, may, or must only with a complainant's consent, report sexual harassment and sexual harassment allegations to the Title IX Coordinator. With respect to whether a Title IX Coordinator or official with authority in a postsecondary institution "should

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[140] Section 106.8(a) (stating any person may report sexual harassment using the Title IX Coordinator's listed contact information); § 106.8(b) (stating recipients must prominently display the Title IX Coordinator's contact information on their websites); § 106.44(a) (stating recipients must respond promptly to actual knowledge of sexual harassment by, among other things, offering supportive measures to the complainant regardless of whether a formal complaint is filed, and by explaining to the complainant the process for filing a formal complaint).
[141] 2001 Guidance at 13-14.

have known" of sexual harassment, the Department believes that imposing a "should have known" standard unintentionally creates a negative incentive for Title IX Coordinators and officials with authority to inquire about possible sexual harassment in ways that invade the privacy and autonomy of students and employees at postsecondary institutions, and such a negative consequence is not necessary because the final regulations provide every student, employee, and third party with clear, accessible channels for reporting to the Title IX Coordinator,[142] which gives the Title IX Coordinator notice and triggers the recipients' response obligations,[143] without the need to require Title IX Coordinators and officials with authority to potentially invade student and employee privacy or autonomy.[144]

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[142] Section 106.8(a) (requiring every recipient to list the office address, telephone number, and e-mail address for the Title IX Coordinator and stating that any person may report sexual harassment by using the listed contact information, and that a report may be made at any time (including during non-business hours) by using the telephone number or e-mail address, or by mail to the office address, listed for the Title IX Coordinator); § 106.8(b) (requiring recipients to list the Title IX Coordinator's contact information on recipient websites).

[143] Section 106.30 (defining "actual knowledge" to mean notice to the Title IX Coordinator and stating that "notice" includes but is not limited to a report to the Title IX Coordinator as described in § 106.8(a)).

[144] The 2014 Q&A acknowledged one of the drawbacks of a condition that triggers a postsecondary institution's response obligations whenever a Title IX Coordinator or official with authority "should have known" about a student's disclosure of sexual harassment: Under such a condition, whenever the Title IX Coordinator or other officials with authority know about public awareness events (such as "Take Back the Night" events) where survivors are encouraged to safely talk about their sexual assault experiences, those recipient officials would be obligated to (a) attend such events and (b) respond to any sexual harassment disclosed at such an event by contacting each survivor, offering them supportive measures, documenting the institution's response to the disclosure, and all other recipient's response obligations, including an investigation. 2014 Q&A at 24. Failure to do so would be avoiding having learned about campus sexual assault incidents that could have been discovered with due diligence (i.e., the Title IX Coordinator and other university officials "should have known" about the experiences disclosed by survivors at such events). *Id*. Understanding the drawbacks of this kind of rule, the 2014 Q&A carved out an exception, but without explaining how or why the exception would apply only to "public awareness events" and not, for example, also extend to Title IX Coordinators and other postsecondary institution officials with authority needing to inquire into students' (and employees') private affairs whenever there was any indication that a student or employee *may* be suffering the impact of sexual harassment. *Id*. ("OCR wants students to feel free to participate in preventive education programs and access resources for survivors. Therefore, public awareness events such as 'Take Back the Night' or other forums at which students disclose experiences with sexual violence are not considered notice to the school for the purpose of triggering an individual investigation unless the survivor initiates a complaint.").

The Department's guidance did not use the term "mandatory reporters" but the 2001 Guidance expected responsible employees to report sexual harassment to "appropriate school officials"[145] and the withdrawn 2014 Q&A specified that responsible employees must report to the Title IX Coordinator.[146] As of 2017 many (if not most) postsecondary institutions had policies designating nearly all their employees as "responsible employees" and "mandatory reporters."[147] The "explosion" in postsecondary institution policies making nearly all employees mandatory reporters (sometimes referred to as "wide-net" or universal mandatory reporting) was due in part to the broad, vague way that "responsible employees" were defined in Department guidance.[148] The extent to which a wide-net or universal mandatory reporting system for employees in postsecondary institutions is beneficial, or detrimental, to complainants, is difficult

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[145] 2001 Guidance at 13.

[146] 2014 Q&A at 14; *cf. id.* at 22 (exempting responsible employees who have counseling roles from being obligated to report sexual harassment to the Title IX Coordinator in a way that identifies the student).

[147] Merle H. Weiner, *A Principled and Legal Approach to Title IX Reporting*, 85 TENN. L. REV. 71, 77-78 (2017) ("Today the overwhelming majority of institutions of higher education designate virtually all of their employees as responsible employees and exempt only a small number of 'confidential' employees. Kathryn Holland, Lilia Cortina, and Jennifer Freyd recently examined reporting policies at 150 campuses and found that policies at 69 percent of the institutions made all employees mandatory reporters, policies at 19 percent of the institutions designated nearly all employees as mandatory reporters, and only 4 percent of institutional policies named a limited list of reporters. The authors concluded, '[T]hese findings suggest that the great majority of U.S. colleges and universities – regardless of size or public vs. private nature – have developed policies designating most if not all employees (including faculty, staff, and student employees) as mandatory reporters of sexual assault.' At some institutions, these reporting obligations have even been incorporated into employees' contracts.") (citing an "accepted for publication" version of Kathryn Holland *et al.*, *Compelled disclosure of college sexual assault*, 73 AM. PSYCHOLOGIST 3, 256 (2018)).

[148] Merle H. Weiner, *A Principled and Legal Approach to Title IX Reporting*, 85 TENN. L. REV. 71, 79-80 (2017) (analyzing the "explosion" of universal or near-universal mandatory reporting policies, which the author calls "wide-net reporting policies" and finding a root of that trend in Department guidance: "The question was raised whether this language [in Department guidance] meant all employees had to be made responsible employees. For example, John Gaal and Laura Harshbarger, writing in the *Higher Education Law Report* asked, 'And does OCR really mean that any employee who has any 'misconduct' reporting duty is a 'responsible employee'? . . . We simply do not know.' Administrators started concluding, erroneously, that any employee who has an obligation to report any other misconduct at the institution must be labeled a responsible employee. Several OCR resolution letters issued at the end of 2016 bolstered this broad interpretation.") (internal citations omitted; ellipses in original).

to determine,[149] and research (to date) is inconclusive.[150] What research does demonstrate is that respecting an alleged victim's autonomy,[151] giving alleged victims control over how official

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[149] Merle H. Weiner, *A Principled and Legal Approach to Title IX Reporting*, 85 TENN. L. REV. 71, 82-83 (2017) (stating institutions with "wide-net reporting policies" defend such policies by "claiming that they are best for survivors" for reasons such as enabling institutions to "identify victims in order to offer them resources and support" and allowing institutions "to collect data on the prevalence of sexual assault and to ensure that perpetrators are identified and disciplined.") (internal citations omitted); *cf. id.* at 83-84 (stating institutional justifications "make wide-net reporting policies appear consistent with the spirit of Title IX, insofar as they seem consistent with institutional commitments to reduce campus sexual violence . . . . Even if wide-net policies were once thought beneficial to help break a culture of silence around sexual violence in the university setting, the utilitarian calculus has now changed and these policies do more harm than good.") (internal citations omitted); *id.* at 84 (summarizing the "harm survivors experience when they are involuntarily thrust into a system designed to address their victimization" and arguing that "wide-net" mandatory reporting policies "undermine [survivors'] autonomy and sense of institutional support, aggravating survivors' psychological and physical harm. These effects can impede survivors' healing, directly undermining Title IX's objective of ensuring equal access to educational opportunities and benefits regardless of gender. In addition, . . . because of the negative consequences of reporting, wide-net reporting policies discourage students from talking to any faculty or staff on campus. Fewer disclosures result in fewer survivors being connected to services and fewer offenders being held accountable for their acts. Holding perpetrators accountable is critical for creating a climate that deters acts of violence. Because wide-net policies chill reporting, these policies violate the spirit of Title IX.") (internal citations omitted).

[150] Merle H. Weiner, *A Principled and Legal Approach to Title IX Reporting*, 85 TENN. L. REV. 71, 78-79 (2017) ("The number of institutions with broad policies, sometimes known as universal mandatory reporting or required reporting, and hereafter called 'wide-net' reporting policies, has grown over time. Approximately fifteen years ago, in 2002, only 45 percent of schools identified some mandatory reporters on their campuses, and these schools did not necessarily categorize almost every employee in that manner. The trend since then is notable, particularly because it contravenes the advice from a [study published in 2002 using funds provided by the National Institute of Justice, Heather M. Karjane *et al.*, *Campus Sexual Assault: How America's Institutions of Higher Education Respond* 120, Final Report, NIJ Grant # 1999-WA-VX-0008 (Education Development Center, Inc. 2002)]. The authors of that study suggested that wide-net reporting policies were unwise. After examining almost 2,500 institutions of higher education, they warned: 'Any policy or procedure that compromises, or worse, eliminates the student victim's ability to make her or his own informed choices about proceeding through the reporting and adjudication process – such as mandatory reporting requirements that do not include an anonymous reporting option or require the victim to participate in the adjudication process if the report is filed – not only reduces reporting rates but may be counterproductive to the victim's healing process.'") (internal citations omitted); *id.* at 102 (concluding that wide-net reporting policies "clearly inhibit the willingness of some students to talk to a university employee about an unwanted sexual experience. This effect is not surprising in light of studies on the effect of mandatory reporting in other contexts. Studies document that women sometimes refuse to seek medical care when their doctors are mandatory reporters, or forego calling the police when a state has a mandatory arrest law.") (internal citations omitted); *id.* at 104-05 (citing to "conflicting research" about whether college and university mandatory reporting policies chill reporting, concluding that available research has not empirically demonstrated the alleged benefits of mandatory reporting policies in colleges and universities, and arguing that without further research, colleges and universities should carefully design reporting policies that "can accommodate both the students who would be more inclined and less inclined to report with a mandatory reporting policy.") (internal citations omitted).

[151] Margaret Garvin & Douglas E. Beloof, *Crime Victim Agency: Independent Lawyers for Sexual Assault Victims*, 13 OHIO ST. J. OF CRIM. LAW 67, 69-70 (2015) (explaining that "autonomy" has come to mean "the capacity of an

systems respond to an alleged victim,[152] and offering clear options to alleged victims[153] are critical aspects of helping an alleged victim recover from sexual harassment. Unsupportive institutional responses increase the effects of trauma on complainants,[154] and institutional betrayal may occur when an institution's mandatory reporting policies require a complainant's intended private conversation about sexual assault to result in a report to the Title IX Coordinator.[155]

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individual for self-governance combined with the actual condition of self-governance in an absolute state of freedom to choose unconstrained by external influence" and the related concept of "agency" has emerged to mean "self-definition" ("fundamental determination of how one conceives of oneself both as an individual and as a community member") and "self-direction" ("the charting of one's direction in life")) (internal citations omitted); *id.* at 71-72 (agency "is critically important for crime victims. Research reveals that for some victims who interact with the criminal justice system, participation is beneficial. It can allow them to experience improvement in depression and quality of life, provide a sense of safety and protection, and validate the harm done by the offender. For other victims, interaction with the criminal justice system leads to a harm beyond that of the original crime, a harm that is often referred to as 'secondary victimization' and which is recognized to have significant negative impacts on victims. . . . A significant part of what accounts for the difference in experience is whether victims have the ability to meaningfully choose whether, when, how, and to what extent to meaningfully participate in the system and exercise their rights. In short, the difference in experience is explained by the existence – or lack of – agency.") (internal citations omitted).

[152] *E.g.*, Patricia A. Frazier *et al.*, *Coping Strategies as Mediators of the Relations Among Perceived Control and Distress in Sexual Assault Survivors*, 52 JOURNAL OF COUNSELING PSYCHOL. 3 (2005) (control over the recovery process was associated with less emotional distress for sexual assault victims, partly because that kind of "present control" was associated with less social withdrawal and more cognitive restructuring.); Ryan M. Walsh & Steven E. Bruce, *The Relationships Between Perceived Levels of Control, Psychological Distress, and Legal System Variables in a Sample of Sexual Assault Survivors*, 17 VIOLENCE AGAINST WOMEN 603, 611 (2011) (finding that "a perception by victims that they are in control of their recovery process" is an "important factor" reducing post-traumatic stress and depression).

[153] *E.g.*, Nancy Chi Cantalupo, *For the Title IX Civil Rights Movement: Congratulations and Cautions*, 125 YALE J. OF L. & FEMINISM. 281, 291 (2016) (arguing against State law proposals that would require mandatory referral to law enforcement of campus sexual assault incidents in part because such laws would limit "the number and diversity of reporting options that victims can use"); Merle H. Weiner, *A Principled and Legal Approach to Title IX Reporting*, 85 TENN. L. REV. 71, 117 (2017) ("Schools expose survivors to harm when they turn a disclosure into either an involuntary report to law enforcement or an involuntary report to the Title IX office.").

[154] Lindsey L. Monteith *et al.*, *Perceptions of Institutional Betrayal Predict Suicidal Self-Directed Violence Among Veterans Exposed to Military Sexual Trauma*, 72 J. OF CLINICAL PSYCHOL. 743, 750 (2016); *see also* Rebecca Campbell *et al.*, *An Ecological Model of the Impact of Sexual Assault on Women's Mental Health*, 10 TRAUMA, VIOLENCE & ABUSE 225, 234 (2009) (survivors of sexual violence already feel powerless, and policies that increase a survivor's lack of power over their situation contribute to the trauma they have already experienced).

[155] Merle H. Weiner, *Legal Counsel for Survivors of Campus Sexual Violence*, 29 YALE J. OF L. & FEMINISM 123, 140-141 (2017) (identifying one type of institutional betrayal as the harm that occurs when "the survivor thinks she

Throughout these final regulations the Department aims to respect the autonomy of complainants and to recognize the importance of a complainant retaining as much control as possible over their own circumstances following a sexual harassment experience, while also ensuring that complainants have clear information about how to access the supportive measures a recipient has available (and how to file a formal complaint initiating a grievance process against a respondent if the complainant chooses to do so) if and when the complainant desires for a recipient to respond to the complainant's situation.[156] The Department recognizes the complexity involved in determining best practices with respect to which employees of postsecondary institutions should be mandatory reporters versus which employees of postsecondary institutions should remain resources in whom students may confide without automatically triggering a report of the student's sexual harassment situation to the Title IX Coordinator or other college or university officials.[157]

Through the actual knowledge condition as defined and applied in these final regulations, the Department intends to ensure that every complainant in a postsecondary institution knows that if or when the complainant desires for the recipient to respond to a sexual harassment experience (by offering supportive measures, by investigating allegations, or both), the

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is speaking to a confidential resource, but then finds out the advocate cannot keep their conversations private"); Michael A. Rodriguez, *Mandatory Reporting Does Not Guarantee Safety*, 173 W. J. OF MED. 225, 225 (2000) (mandatory reporting by doctors of patient intimate partner abuse may negatively impact victims by making them less likely to seek medical care and compromising the patient's autonomy).

[156] Section 106.44(a) (describing a recipient's general response obligations).

[157] *E.g.*, Merle H. Weiner, *A Principled and Legal Approach to Title IX Reporting*, 85 TENN. L. REV. 71, 188 (2017) ("The classification of employees as [mandatory] reporters should include those who students expect to have the authority to redress the violence or the obligation to report it, and should exclude those who students turn to for support instead of for reporting. Faculty should not be designated reporters, but high-level administrators should be. Schools should carefully consider how to classify employees who are resident assistants, campus police, coaches, campus security authorities, and employment supervisors. A well-crafted policy will be the product of thoughtful conversations about online reporting, anonymous reporting, third-party reports, and necessary exceptions for situations involving minors and imminent risks of serious harm.").

complainant has clear, accessible channels by which to report and/or file a formal complaint.[158] The Department also intends to leave postsecondary institutions wide discretion to craft and implement the recipient's own employee reporting policy to decide (as to employees who are not the Title IX Coordinator and not officials with authority) which employees are mandatory reporters (i.e., employees who must report sexual harassment to the Title IX Coordinator), which employees may listen to a student's or employee's disclosure of sexual harassment without being required to report it to the Title IX Coordinator, and/or which employees must report sexual harassment to the Title IX Coordinator but only with the complainant's consent. No matter how a college or university designates its employees with respect to mandatory reporting to the Title IX Coordinator, the final regulations ensure that students at postsecondary institutions, as well as employees, are notified of the Title IX Coordinator's contact information and have clear reporting channels, including options accessible even during non-business hours,[159] for reporting sexual harassment in order to trigger the postsecondary institution's response obligations.

As to all recipients, these final regulations provide that the mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual (such as a volunteer parent, or alumnus) as

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[158] Section 106.8(a) (requiring recipients to notify students, employees, and others of the contact information for their Title IX Coordinators and stating that any person may report sexual harassment by using that contact information, and that reports can be made during non-business hours by mail to the listed office address or by using the listed telephone number or e-mail address); § 106.8(b) (requiring a recipient to post the Title IX Coordinator's contact information on the recipient's website); § 106.30 (defining "formal complaint" and providing that any complainant may file a formal complaint by using the e-mail address, or by mail to the office address, listed for the Title IX Coordinator, or by any additional method designated by the recipient).

[159] Section 106.8 (stating that a report of sexual harassment may be made at any time, including during non-business hours, by using the telephone number or e-mail address, or by mail to the office address, listed for the Title IX Coordinator, and requiring recipients to prominently display the Title IX Coordinator's contact information on the recipient's website).

an official with authority to institute corrective measures on behalf of the recipient.[160] The Department does not wish to discourage recipients from training individuals who interact with the recipient's students about how to report sexual harassment, including informing students about how to report sexual harassment. Accordingly, the Department will not assume that a person is an official with authority solely based on the fact that the person has received training on how to report sexual harassment or has the ability or obligation to report sexual harassment. Similarly, the Department will not conclude that volunteers and independent contractors are officials with authority, unless the recipient has granted the volunteers or independent contractors authority to institute corrective measures on behalf of the recipient.

Deliberate Indifference

Once a recipient is charged with 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 in the *Gebser/Davis* framework, we believe that deliberate indifference, with adaptions for administrative enforcement, constitutes the best policy approach to further Title IX's non-discrimination mandate.

As the Supreme Court explained 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"[161] because for a recipient with actual knowledge to respond in a

[160] Section 106.30 (defining "actual knowledge").
[161] *Davis*, 526 U.S. at 648-49.

clearly unreasonable manner constitutes the recipient committing intentional discrimination.[162] The deliberate indifference standard under the *Gebser/Davis* framework is the starting point under these final regulations, so that the Department's regulations clearly prohibit instances when the recipient chooses to permit discrimination. The Department tailors this standard for administrative enforcement, to hold recipients accountable for responding meaningfully every time the recipient has actual knowledge of sexual harassment through a general obligation to not act clearly unreasonably in light of the known circumstances, and specific obligations that each recipient must meet as part of its response to sexual harassment.

Based on consideration of the text and purpose of Title IX, the reasoning underlying the Supreme Court's decisions in *Gebser* and *Davis*, and more than 124,000 public comments on the proposed regulations, the Department adopts, but adapts, the deliberate indifference standard in a manner that imposes mandatory, specific obligations on recipients that are not required under the *Gebser/Davis* framework. The Department developed these requirements in response to commenters' concerns that the standard of deliberate indifference gives recipients too much leeway in responding to sexual harassment, and in response to commenters who requested greater clarity about how the Department will apply the deliberate indifference standard.

The Department revises § 106.44(a) to specify that a recipient's response: must be prompt; must consist of offering supportive measures to a complainant;[163] must ensure that the

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[162] *Gebser*, 524 U.S. at 290 (deliberate indifference ensures that the recipient is liable for "its own official decision" to permit discrimination).

[163] Under § 106.44(a) the recipient must respond in a manner that is not clearly unreasonable in light of the known circumstances, and under § 106.30 defining "supportive measures," the Title IX Coordinator is responsible for the effective implementation of supportive measures. Thus, a recipient must provide supportive measures (that meet the

Title IX Coordinator contacts each complainant (i.e., person who is alleged to be the victim of sexual harassment) to discuss supportive measures, consider the complainant's wishes regarding supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. This mandatory, proactive, and interactive process helps ensure that complainants receive the response that will most effectively address the complainant's needs in each circumstance. Additionally, revised § 106.44(a) specifies that the recipient's response must treat complainants and respondents equitably, meaning that for a complainant, the recipient must offer supportive measures, and for a respondent, the recipient must follow a grievance process that complies with § 106.45 before imposing disciplinary sanctions. If a respondent is found to be responsible for sexual harassment, the recipient must effectively implement remedies for the complainant, designed to restore or preserve the complainant's equal educational access, and may impose disciplinary sanctions on the respondent.[164] These final regulations thus hold recipients accountable for responses to sexual harassment designed to protect complainants' equal educational access, and provide due process protections to both parties before restricting a respondent's educational access. By using a deliberate indifference standard to evaluate a recipient's selection of supportive measures and remedies, and refraining from second guessing a

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definition in § 106.30) unless, for example, a complainant does not wish to receive supportive measures. Under § 106.45(b)(10) a recipient must document the reasons why the recipient's response was not deliberately indifferent and specifically, if a recipient does not provide a complainant with supportive measures, the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances.

[164] Section 106.45(b)(1)(i); *see also* Brian Bardwell, *No One is an Inappropriate Person: The Mistaken Application of Gebser's "Appropriate Person" Test to Title IX Peer-Harassment Cases*, 68 CASE W. RES. L. REV. 1343, 1364-65 (2018) ("Title IX certainly does not suggest that offenders should not be punished for creating a hostile environment, but its implementation has consistently focused more heavily on taking actions on behalf of the students whom that environment has denied the benefit of their education."). The Department's focus in these final regulations is on ensuring that recipients take action to restore and preserve a complainant's equal educational access, leaving recipients discretion to make disciplinary decisions when a respondent is found responsible.

recipient's disciplinary decisions, these final regulations leave recipients legitimate and necessary flexibility to make decisions regarding the supportive measures, remedies, and discipline that best address each sexual harassment incident. Sexual harassment allegations present context-driven, fact-specific, needs and concerns for each complainant, and like the Supreme Court, the Department believes that recipients have unique knowledge of their own educational environment and student body, and are best positioned to make decisions about which supportive measures and remedies meet each complainant's need to restore or preserve the right to equal access to education, and which disciplinary sanctions are appropriate against a respondent who is found responsible for sexual harassment.

The Department's guidance set forth a liability standard more like reasonableness, or even strict liability,[165] instead of deliberate indifference, to evaluate a recipient's response to sexual harassment. The 2001 Guidance, withdrawn 2011 Dear Colleague Letter, and 2017 Q&A, took the position that a recipient's response to sexual harassment must effectively stop harassment and prevent its recurrence.[166] The Department's guidance did not distinguish between

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[165] 2001 Guidance at iv, vi (in response to public comment concerned that requiring an "effective" response by the school, with respect to stopping and preventing recurrence of harassment, meant a school would have to be "omniscient," the 2001 Guidance in its preamble insisted that "Effectiveness is measured based on a reasonableness standard. Schools do not have to know beforehand that their response will be effective."). Nonetheless, the 2001 Guidance stated the liability standard as requiring "effective corrective actions to stop the harassment [and] prevent its recurrence," which ostensibly holds a recipient strictly liable to "stop" and "prevent" sexual harassment. 2001 Guidance at 10, 12. Whether or not the liability standard set forth in Department guidance is characterized as one of "reasonableness" or "strict liability," in these final regulations the Department desires to utilize a "not clearly unreasonable in light of the known circumstances" liability standard (i.e., deliberate indifference) as the general standard for a school's response, so that schools must comply with all the specific requirements set forth in these final regulations, and a school's actions with respect to matters that are not specifically set forth are measured under a liability standard that preserves the discretion of schools to take into account the unique factual circumstances of sexual harassment situations that affect a school's students and employees.

[166] 2001 Guidance at 15 (stating recipients "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

an "investigation" to determine how to appropriately respond to the complainant (for instance, by providing supportive measures) and an investigation for the purpose of potentially punishing a respondent.[167] Similarly, the 2001 Guidance, withdrawn 2011 Dear Colleague Letter, and 2017 Q&A used the phrases "interim measures" or "interim steps" to describe measures to help a complainant maintain equal educational access.[168] However, unlike these final regulations' definition of "supportive measures" in § 106.30, the Department guidance implied that such measures were only available during the pendency of an investigation (i.e., during an "interim" period), did not mandate offering supportive measures, did not clarify whether respondents also may receive supportive measures,[169] and did not specify that supportive measures should not be

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a hostile environment if one has been created, and prevent harassment from occurring again"); *id.* at 10 ("Schools are responsible for taking prompt and effective action to stop the harassment and prevent its recurrence."); *id.* at 12 (a recipient "is responsible for taking immediate effective action to eliminate the hostile environment and prevent its recurrence."); 2011 Dear Colleague Letter at 4 (recipients must "take immediate action to eliminate the harassment [and] prevent its recurrence"); 2017 Q&A at 3 (referencing the 2001 Guidance's approach to preventing recurrence of sexual misconduct).

[167] 2001 Guidance at 15 ("Regardless of whether the student who was harassed, or his or her parent, decides to file a formal complaint or otherwise request action on the student's behalf . . . the school must promptly investigate to determine what occurred and then take appropriate steps to resolve the situation. The specific steps in an investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors. However, in all cases the inquiry must be prompt, thorough, and impartial."); 2011 Dear Colleague Letter at 4-5.

[168] *Compare* § 106.30 (defining "supportive measures" as individualized services provided to a complainant or respondent that are non-punitive, non-disciplinary, and do not unreasonably burden the other party yet are designed to restore or preserve a person's equal access to education) *with* 2001 Guidance at 16 ("It may be appropriate for a school to take *interim measures* during the investigation of a complaint. For instance, if a student alleges that he or she has been sexually assaulted by another student, the school may decide to place the students immediately in separate classes or in different housing arrangements on a campus, pending the results of the school's investigation) (emphasis added). 2011 Dear Colleague Letter at 16 ("Title IX requires a school to take steps to protect the complainant as necessary, including taking *interim steps* before the final outcome of the investigation. . . . The school should notify the complainant of his or her options to avoid contact with the alleged perpetrator and allow students to change academic or living situations as appropriate.") (emphasis added); 2017 Q&A at 2-3 ("It may be appropriate for a school to take *interim measures* during the investigation of a complaint" and insisting that schools not make such measures available only to one party) (emphasis added). Describing such individualized services in § 106.30 as "supportive measures" rather than as "interim" measures or "interim" steps reinforces that supportive measures must be offered to a complainant whether or not a grievance process is pending, and reinforces that the final regulations authorize initiation of a grievance process only where the complainant has filed, or the Title IX Coordinator has signed, a formal complaint. § 106.44(a); § 106.44(b)(1); § 106.30 (defining "formal complaint").

[169] *See, e.g.*, 2017 Q&A at 3 (providing that schools must not make interim measures available only to one party).

punitive, disciplinary, or unreasonably burden the other party. The Department's guidance recommended remedies for victims[170] and disciplinary sanctions against harassers[171] but did not specify that remedies are mandatory for complainants, and disciplinary sanctions cannot be imposed on a respondent without following a fair investigation and adjudication process, thereby lacking clarity as to whether interim punitive or disciplinary action is appropriate. These final regulations clarify that supportive measures cannot be punitive or disciplinary against any party and that disciplinary sanctions cannot be imposed against a respondent unless the recipient follows a grievance process that complies with § 106.45.[172] The Department's guidance instructed recipients to investigate even when the complainant did not want the recipient to investigate,[173] and directed recipients to honor a complainant's request for the complainant's identity to remain undisclosed from the respondent, unless a public institution owed constitutional due process obligations that would require that the respondent know the

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[170] 2001 Guidance at 10 ("The recipient is, therefore, also responsible for remedying any effects of the harassment on the victim, as well as for ending the harassment and preventing its recurrence. This is true whether or not the recipient has 'notice' of the harassment."); *id*. at 16-17. The 2011 Dear Colleague Letter took a similar approach, requiring schools to "take immediate action to eliminate the harassment, prevent its recurrence, and address its effects." 2011 Dear Colleague Letter at 4; *see also id.* at 15 ("effective corrective action may require remedies for the complainant").

[171] *See* 2001 Guidance at 16 ("Appropriate steps should be taken to end the harassment. For example, school personnel may need to counsel, warn, or take disciplinary action against the harasser, based on the severity of the harassment or any record of prior incidents or both."); 2011 Dear Colleague Letter at 15 (addressing sexual harassment may necessitate "counseling or taking disciplinary action against the harasser"); 2017 Q&A at 6 ("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.").

[172] Section 106.30 (defining "supportive measures"); § 106.44(a); § 106.45(b)(1).

[173] 2001 Guidance at 15 ("Regardless of whether the student who was harassed, or his or her parent, decides to file a formal complaint or otherwise request action on the student's behalf (including in cases involving direct observation by a responsible employee), the school must promptly investigate to determine what occurred and then take appropriate steps to resolve the situation."); 2011 Dear Colleague Letter at 4.

complainant's identity.[174] These final regulations obligate a recipient to initiate a grievance process when a complainant files, or a Title IX Coordinator signs, a formal complaint,[175] so that the Title IX Coordinator takes into account the wishes of a complainant and only initiates a grievance process against the complainant's wishes if doing so is not clearly unreasonable in light of the known circumstances. Unlike the Department's guidance, these final regulations prescribe that the only recipient official who is authorized to initiate a grievance process against a respondent is the Title IX Coordinator (by signing a formal complaint). As discussed in the "Formal Complaint" subsection of the "Section 106.30 Definitions" section of this preamble, the Department believes this restriction will better ensure that a complainant's desire not to be involved in a grievance process or desire to keep the complainant's identity undisclosed to the respondent will be overridden only by a trained individual (i.e., the Title IX Coordinator) and only when specific circumstances justify that action. These final regulations clarify that the recipient's decision not to investigate when the complainant does not wish to file a formal complaint will be evaluated by the Department under the deliberate indifference standard; that is,

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[174] 2001 Guidance at 17-18 (if the complainant desires that the complainant's identity not be disclosed to the alleged harasser, but constitutional due process owed by a public school means that "the alleged harasser could not respond to the charges of sexual harassment without that information" then "in evaluating the school's response, OCR would not expect disciplinary action against an alleged harasser."); 2011 Dear Colleague Letter at 5 ("If the complainant requests confidentiality or asks that the complaint not be pursued, the school should take all reasonable steps to investigate and respond to the complaint consistent with the request for confidentiality or request not to pursue an investigation. If a complainant insists that his or her name or other identifiable information not be disclosed to the alleged perpetrator, the school should inform the complainant that its ability to respond may be limited" if due process owed by a public institution requires disclosure of the complainant's identity to the respondent.); 2014 Q&A at 21-22 ("When weighing a student's request for confidentiality that could preclude a meaningful investigation or potential discipline of the alleged perpetrator, a school should consider a range of factors. . . . A school should take requests for confidentiality seriously, while at the same time considering its responsibility to provide a safe and nondiscriminatory environment for all students, including the student who reported the sexual violence.").

[175] Section 106.44(b)(1); § 106.45(b)(3)(i); § 106.30 (defining "formal complaint").

whether that decision was clearly unreasonable in light of the known circumstances.[176] Similarly, a Title IX Coordinator's decision to sign a formal complaint initiating a grievance process against the complainant's wishes[177] also will be considered under the deliberate indifference standard. At the same time, these final regulations ensure that a recipient must offer supportive measures to a complainant, regardless of whether the complainant decides to file, or the Title IX Coordinator decides to sign, a formal complaint.[178] With or without a grievance process that determines a respondent's responsibility, these final regulations require a recipient to offer supportive measures to a complainant, tailored to each complainant's unique circumstances,[179] similar to the Department's 2001 Guidance that directed a recipient to take timely, age-appropriate action, "tailored to the specific situation" with respect to providing "interim" measures to help a complainant.[180] These final regulations, however, clarify that supportive measures must be offered not only in an "interim" period during an investigation, but regardless of whether an investigation is pending or ever occurs. While the Department's guidance did not address emergency situations arising out of sexual harassment allegations, these final regulations expressly authorize recipients to remove a respondent from the recipient's education programs or

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[176] Section 106.44(a); § 106.45(b)(10)(ii) (requiring a recipient to document its reasons why it believes its response to a sexual harassment incident was not deliberately indifferent).
[177] Complainants may not wish for a recipient to investigate allegations for a number of legitimate reasons. The Department understands that a recipient may, under some circumstances, reach the conclusion that initiating a grievance process when a complainant does not wish to participate is necessary, but endeavors through these final regulations to respect a complainant's autonomy with respect to how a recipient responds to a complainant's individual situation by, for example, requiring such a conclusion to be reached by the specially trained Title IX Coordinator (whose obligations include having communicated with the complainant about the complainant's wishes) and requiring the recipient to document the reasons why the recipient believes that its response was not deliberately indifferent. § 106.44(a); § 106.45(b)(10).
[178] Section 106.44(a).
[179] Section 106.44(a) (requiring the recipient to offer supportive measures to a complainant, and requiring the Title IX Coordinator to discuss supportive measures with a complainant and consider the complainant's wishes regarding supportive measures); § 106.30 (defining "supportive measures" as "individualized services").
[180] 2001 Guidance at 16.

activities on an emergency basis, with or without a grievance process pending, as long as post-deprivation notice and opportunity to challenge the removal is given to the respondent.[181] A recipient's decision to initiate an emergency removal will also be evaluated under the deliberate indifference standard.

These final regulations impose specific requirements on recipients responding to sexual harassment, and failure to comply constitutes a violation of these Title IX regulations and, potentially, discrimination under Title IX. In addition to the specific requirements imposed by these final regulations, all other aspects of a recipient's response to sexual harassment are evaluated by what was not clearly unreasonable in light of the known circumstances.[182] Recipients must also document their reasons why each response to sexual harassment was not deliberately indifferent.[183]

In this manner, the Department believes that these final regulations create clear legal obligations that facilitate the Department's robust enforcement of a recipient's Title IX responsibilities. The mandatory obligations imposed on recipients under these final regulations share the same aim as the Department's guidance (i.e., ensuring that recipients take actions in response to sexual harassment that are reasonably calculated to stop harassment and prevent recurrence of harassment); however, these final regulations do not unrealistically hold recipients responsible where the recipient took all steps required under these final regulations, took other

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[181] Section 106.44(c).
[182] Section 106.44(b)(2) (providing that recipient responses to sexual harassment must be non-deliberately indifferent, meaning not clearly unreasonable in light of the known circumstances, and must comply with all the specific requirements in § 106.44(a), regardless of whether a formal complaint is ever filed).
[183] Section 106.45(b)(10). As revised, this provision states that if a recipient does not provide supportive measures as part of its response to sexual harassment, the recipient specifically must document why that response was not clearly unreasonable in light of the known circumstances (for example, perhaps the complainant did not want any supportive measures).

actions that were not clearly unreasonable in light of the known circumstances, and a perpetrator of harassment reoffends. Recipients cannot be guarantors that sexual harassment will never occur in education programs or activities,[184] but recipients can and will, under these final regulations, be held accountable for responding to sexual harassment in ways designed to ensure complainants' equal access to education without depriving any party of educational access without due process or fundamental fairness.[185]

Additionally, the Department clarifies in § 106.44(a) that the Department may not require a recipient to restrict rights protected under the U.S. Constitution, including the First Amendment, the Fifth Amendment, and the Fourteenth Amendment, to satisfy the recipient's duty to not be deliberately indifferent under this part. This language incorporates principles articulated in the 2001 Guidance[186] and mirrors § 106.6(d) in the NPRM, which remains the same in these final regulations and states that nothing in Part 106 of Title 34 of the Code of Federal Regulations, which includes these final regulations, requires a recipient to restrict rights protected under the U.S. Constitution. With this revision in § 106.44(a) the Department reinforces the premise of § 106.6(d), cautioning recipients not to view restrictions of

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[184] Under the liability standard set forth in Department guidance, recipients were expected to take actions that "stop the harassment and prevent its recurrence." *See, e.g.*, 2001 Guidance at 12. Even if a recipient expelled a respondent, issued a no-trespass order against the respondent, and took all other conceivable measures to try to eliminate and prevent the recurrence of the sexual harassment, under that liability standard the recipient was still responsible for any unforeseen and unexpected recurrence of sexual harassment. The Department believes the preferable way of ensuring that recipients remedy sexual harassment in its education programs or activities is set forth in these final regulations, whereby a recipient *must* take specified actions, and a recipients' decisions with respect to discretionary actions are evaluated in light of the known circumstances.

[185] As discussed in the "Role of Due Process in the Grievance Process" section of this preamble, implementing remedies and sanctions without due process protections sometimes resulted in the denial of another party's equal access to the recipient's education programs or activities because the other party was not afforded notice and a meaningful opportunity to respond to the allegations of sexual harassment.

[186] 2001 Guidance at 22.

constitutional rights as a means of satisfying the duty not to be deliberately indifferent to sexual harassment under Title IX.

Role of Due Process in the Grievance Process

As discussed above in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, the Supreme Court has held that sexual harassment is a form of sex discrimination under Title IX, and that a recipient commits intentional sex discrimination when the recipient knows of conduct that could constitute actionable sexual harassment and responds in a manner that is deliberately indifferent.[187] However, the Supreme Court's Title IX cases have not specified conditions under which a recipient must initiate disciplinary proceedings against a person accused of sexual harassment, or what procedures must apply in any such disciplinary proceedings, as part of a recipient's non-deliberately indifferent response to sexual harassment.[188] Similarly, the Supreme Court has not addressed procedures that a recipient must use in a disciplinary proceeding resolving sexual harassment allegations under Title IX in order to meet constitutional due process of law requirements (for recipients who are State actors), or requirements of fundamental fairness (for recipients who are not State actors).

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[187] *See* the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble.

[188] *See, e.g.*, *Davis*, 526 U.S. at 654 (holding that plaintiff's complaint should not be dismissed as a matter of law because plaintiff "may be able to show both actual knowledge and deliberate indifference on the part of the Board, which made no effort whatsoever either to investigate or to put an end to the harassment" without indication as to whether an investigation was required, or what due process procedures must be applied during such an investigation); *see also* Grayson Sang Walker, *The Evolution and Limits of Title IX Doctrine on Peer Sexual Assault*, 45 HARV. C.R.-C.L. L. REV. 95, fn. 139 (2010) ("*Davis* was silent on the scope, thoroughness, and timeliness of any investigation that a school may undertake and the procedures that should apply at a grievance hearing. To the extent that *Davis* can be interpreted as a call for some type of investigation and adjudication of sexual harassment complaints, the instruction represents the triumph of form over substance.").

At the time initial regulations implementing Title IX were issued by HEW in 1975, the Federal courts had not yet addressed recipients' Title IX obligations to address sexual harassment as a form of sex discrimination; thus, the equitable grievance procedures required in the 1975 rule did not contemplate the unique circumstances that sexual harassment allegations present, where through an equitable grievance process a recipient often must weigh competing narratives about a particular incident between two (or more) individuals and arrive at a factual determination in order to then decide whether, or what kind of, actions are appropriate to ensure that no person is denied educational opportunities on the basis of sex.

The Department's guidance since 1997 has acknowledged that recipients have an obligation to respond to sexual harassment that constitutes sex discrimination under Title IX by applying the "prompt and equitable" grievance procedures in place for resolution of complaints of sex discrimination required under the Department's regulations.[189] With respect to what constitutes equitable grievance procedures, the 2001 Guidance (which revised but largely retained the same recommendations as the 1997 Guidance) interpreted 34 CFR 106.8 (requiring recipients to adopt and publish equitable grievance procedures) to mean procedures that provide for: "Adequate, reliable, and impartial investigation of complaints [of sexual harassment], including the opportunity to present witnesses and other evidence."[190] The 2001 Guidance

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[189] 1997 Guidance ("Schools are required by the Title IX regulations to have grievance procedures through which students can complain of alleged sex discrimination, including sexual harassment."); 2001 Guidance at 19; 2011 Dear Colleague Letter at 6; 2017 Q&A at 3; 34 CFR 106.8(b) ("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.").

[190] 2001 Guidance at 20 (also specifying that equitable grievance procedures must provide for "[d]esignated and reasonably prompt time frames for the major stages of the complaint process" and "[n]otice to the parties of the

advised, "The specific steps in an investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors. However, in all cases the inquiry must be prompt, thorough, and impartial."[191]

The 2001 Guidance advised: "The rights established under Title IX must be interpreted consistent with any federally guaranteed due process rights involved in a complaint proceeding" and "Procedures that ensure the Title IX rights of the complainant, while at the same time according due process to both parties involved, will lead to sound and supportable decisions."[192] The withdrawn 2011 Dear Colleague Letter mentioned due process only with respect to recipients that are State actors (i.e., public institutions), implied that due process only benefits respondents, and implied that due process may need to yield to protect complainants: "Public and state-supported schools must provide due process to the alleged perpetrator. However, schools

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outcome of the complaint"); 2011 Dear Colleague Letter at 8 ("Any procedures used to adjudicate complaints of sexual harassment or sexual violence, including disciplinary procedures, however, must meet the Title IX requirement of affording a complainant a prompt and equitable resolution."); *id.* at 9-10 (citing to the 2001 Guidance for the requirements that equitable grievance procedures must include "[a]dequate, reliable, and impartial investigation of complaints, including the opportunity for both parties to present witnesses and other evidence," "[d]esignated and reasonably prompt time frames for the major stages of the complaint process," and "[n]otice to parties of the outcome of the complaint" and unlike the 2001 Guidance, which was silent on what standard of evidence to apply, the 2011 Dear Colleague Letter took the position that recipients must use only the preponderance of the evidence standard for sexual harassment complaints); *id.* at 11, fn. 29 (adding that in an equitable grievance process "[t]he complainant and the alleged perpetrator must be afforded similar and timely access to any information that will be used at the hearing" consistent with FERPA and while protecting privileged information and withholding from the alleged perpetrator information about the complainant's sexual history).

[191] 2001 Guidance at 15; *see also id.* at 20 ("Procedures adopted by schools will vary considerably in detail, specificity, and components, reflecting differences in audiences, school sizes and administrative structures, State or local legal requirements, and past experience.") As explained further in the "Similarities and Differences Between the § 106.45 Grievance Process and Department Guidance" subsection below in this section of the preamble, and throughout this preamble, the 2011 Dear Colleague Letter and 2017 Q&A took additional positions with respect to procedures that should be part of "prompt and equitable" grievance procedures; however, Department guidance has not set forth specific procedures necessary to ensure that grievance procedures are "adequate, reliable, and impartial" while also complying with due process.

[192] 2001 Guidance at 22.

should ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant."[193] The 2017 Q&A did not expressly reference the need for constitutional due process but directed recipients to look to the 2001 Guidance as to matters not addressed in the 2017 Q&A.[194]

These final regulations build on a premise of the 2001 Guidance and withdrawn 2011 Dear Colleague Letter – that Title IX cannot be interpreted in a manner that denies any person due process of law under the U.S. Constitution. These final regulations reaffirm the premise expressed in the 2001 Guidance – that due process protections are important for both complainants and respondents, do not exist solely to protect respondents, and result in "sound and supportable" decisions in sexual harassment cases.[195] These final regulations, however, provide recipients with prescribed procedures that ensure that Title IX is enforced consistent with both constitutional due process, and fundamental fairness, so that whether a student attends a public or private institution, the student has the benefit of a consistent, transparent grievance process with strong procedural protections regardless of whether the student is a complainant or respondent.

Neither the 2001 Guidance, nor the withdrawn 2011 Dear Colleague Letter, nor the 2017 Q&A, informed recipients of what procedures might be necessary to ensure that a grievance

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[193] 2011 Dear Colleague Letter at 12. The withdrawn 2014 Q&A combined the due process positions of the 2001 Guidance and withdrawn 2011 Dear Colleague Letter: "The rights established under Title IX must be interpreted consistently with any federally guaranteed due process rights. Procedures that ensure the Title IX rights of the complainant, while at the same time according any federally guaranteed due process to both parties involved, will lead to sound and supportable decisions. Of course, a school should ensure that steps to accord any due process rights do not restrict or unnecessarily delay the protections provided by Title IX to the complainant." 2014 Q&A at 13.

[194] 2017 Q&A at 1.

[195] 2001 Guidance at 22.

process is both "adequate, fair, and reliable" and consistent with constitutional due process. While the Department's guidance appropriately and beneficially drew recipients' attention to the need to take sexual harassment seriously under Title IX, the lack of specificity in how to meet Title IX obligations while ensuring due process protections for complainants and respondents,[196] has led to increasing numbers of lawsuits[197] and OCR complaints[198] against recipients since issuance of the now-withdrawn 2011 Dear Colleague Letter, alleging that recipients have mishandled Title IX sexual harassment cases resulting in injustice for complainants and for

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[196] *E.g.*, Matthew R. Triplett, *Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection*, 62 DUKE L. J. 487, 489-90 (2012) ("Many colleges and universities responded to the April 4, 2011 Dear Colleague Letter . . . by amending their procedures for adjudicating allegations of sexual assault. Meanwhile, the letter itself has sparked a debate about the appropriate balance between protecting victims of assault and ensuring adequate due process for the accused in the context of campus adjudications. . . . [T]he Dear Colleague Letter suffers from a fatally inadequate discussion of the appropriate balance between victim protection and due process. Specifically, the document has raised more questions than it has answered, leaving the interests of both victims and accused students in flux. Because institutions simultaneously face statutory duties to respond properly to victims' claims of assault and constitutional or contractual obligations to provide due process to the accused, better-defined policies . . . are needed. Without such guidance, institutions are left with a choice. They may closely follow the OCR's guidelines on victim protection, thereby risking possible due-process claims from alleged perpetrators, or they may independently attempt to balance victim-protection and due-process interests and risk Title IX violations for inadequate victim protection. Under either approach, institutions face potential liability, and both victims and alleged perpetrators may be insufficiently protected.") (internal citations omitted); Sara Ganim & Nelli Black, *An Imperfect Process: How Campuses Deal with Sexual Assault*, CNN.com (Dec. 21, 2015) (Alison Kiss, then-leader of the Clery Center for Security on Campus explained that "schools were so eager to reverse years of mistreatment of victims . . . that some put procedures into place that led to an unfair process." Kiss stated: "We want to see [college sexual assault disciplinary hearings] informed by trauma, and understand the dynamics that some of these crimes have. But they certainly have to be a hearing that's fair and that's impartial."); Emily D. Safko, *Are Campus Sexual Assault Tribunals Fair?: The Need for Judicial Review and Additional Due Process Protections in Light of New Case Law*, 84 FORDHAM L. REV. 2289, 2293 (2016) (observing that prior to Federal policy calling attention to campus sexual assault, "[m]any have argued that schools have systematically failed to hold students accountable for their actions. These shortcomings, coupled with the prevalence of sexual misconduct on college campuses, provoked national debate and spurred colleges, Congress, and the White House to act. Colleges have begun to reform their policies, especially in light of an April 2011 'Dear Colleague' letter addressed to all Title IX institutions from [OCR]. Over time, however, these reforms have drawn criticism for 'overcorrecting' the problem by overlooking the important and legally mandated protection of the interests and rights of those accused of misconduct.") (internal citations omitted).

[197] *E.g.*, Taylor Mooney, *How Betsy DeVos plans to change the rules for handling sexual misconduct on campus*, CBS NEWS (Nov. 24, 2019) ("Prior to 2011, the number of lawsuits filed against universities for failing to provide due process in Title IX cases averaged one per year. It is expected there will be over 100 such lawsuits filed in 2019 alone.").

[198] *E.g.*, Chronicle of Higher Education, *Title IX: Tracking Sexual Assault Investigations* (graph showing significant increase in number OCR Title IX investigations following the 2011 Dear Colleague Letter).

respondents. Public debates have emerged questioning whether recipients should leave criminal matters like sexual assault to the criminal justice system,[199] or whether Title IX requires recipients to "do both" – respond meaningfully to allegations of sexual harassment (including sexual assault) on campuses, while also providing due process protections for both parties.[200] The Department believes that recipients can and must "do both," because sexual harassment impedes the equal educational access that Title IX is designed to protect and because no person's

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[199] *E.g.*, Sarah L. Swan, *Between Title IX and the Criminal Law: Bringing Tort Law to the Campus Sexual Assault Debate*, 64 UNIV. KAN. L. REV. 963, 963 (2016) ("In a recent televised debate, four law professors partnered up to argue for, or against, the following proposition: 'Courts, not campuses, should decide sexual assault cases.' Their staged debate reflected the heated discussion occurring in society more broadly over the most appropriate forum and method for addressing campus sexual assault. As campus sexual assault has finally ascended to the status of a national concern, attracting the attention of even the White House, two main camps have emerged: those who believe campus sexual assault is a crime, and thus best dealt with in the criminal courts, using criminal law tools; and those who believe campus sexual assault is a civil rights violation, and thus best dealt with through university disciplinary proceedings, using Title IX.") (internal citation omitted); Alexandra Brodsky, *Against Taking Rape "Seriously": The Case Against Mandatory Referral Laws for Campus Gender Violence*, 53 HARV. C.R.-C.L. L. REV. 131, 131 (2018) (analyzing State laws proposed in recent years that would mandate referral of campus sexual assault incidents to law enforcement and arguing that mandatory referral laws would decrease victim well-being and reduce the already-low number of victims willing to report sexual assault to campus Title IX offices).

[200] *E.g.*, Association of Title IX Administrators (ATIXA), *ATIXA Position Statement: Why Colleges Are in the Business of Addressing Sexual Violence* 3-4 (Feb. 17, 2017) (noting that instances of recipients' failure to provide due process has led to public debate over whether Title IX should even cover criminal conduct such as sexual assault; observing that courts have recently begun doing a good job "scolding" recipients who do not provide due process and that OCR cases have included reprimanding recipients who failed to provide due process to the accused; and opining that "Some are genuinely concerned that colleges don't afford adequate due process to accused students. ATIXA shares these due process concerns. Unlike Title IX opponents however, we do not view this as a zero sum game, where providing for the needs of victims/survivors must inherently compromise the rights that attach to those who are accused of sexual violence. In fact, colleges must do both, and must do both better."); Erin E. Buzuvis, *Title IX and Procedural Fairness: Why Disciplined-Student Litigation Does Not Undermine the Role of Title IX in Campus Sexual Assault*, 78 MONT. L. REV. 71, 71-72 (2017) ("In the last five years, the Department of Education has increased its efforts to enforce [Title IX], both resulting from and contributing to increased public attention to the widespread problem of sexual assault among students, particularly in higher education. The increase in both enforcement and public attention has motivated colleges and universities to improve their policies and practices for addressing sexual assault, including their disciplinary processes. . . . In some cases, disciplined-student plaintiffs have prevailed in overturning their punishment, causing many to suggest that colleges and universities are 'overcorrecting' for earlier deficiencies in their procedures that lead to under-enforcement of campus policies banning sexual misconduct. Much of this rhetoric places blame on Title IX for universities' problems with compliance and calls, either implicitly or expressly, for repeal of Title IX's application to sexual assault.") (internal citations omitted).

constitutional rights or right to fundamental fairness should be denied. These final regulations help recipients achieve both.

Beginning in mid-2017 when the Department started to examine how schools, colleges, and universities were applying Title IX to sexual harassment under then-applicable guidance (e.g., the 2001 Guidance and the now-withdrawn 2011 Dear Colleague Letter), one of the themes brought to the Department's attention during listening sessions and discussions with stakeholders[201] was that, in the absence of regulations explaining what fair, equitable procedures compliant with constitutional due process consist of, recipients have interpreted and applied the concept of equitable grievance procedures in the sexual harassment context unevenly across schools, colleges, and universities, at times employing procedures incompatible with constitutionally guaranteed due process[202] and principles of fundamental fairness, and lacking impartiality and reliability.[203] As noted throughout this preamble including in the "Personal

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[201] The Department met with stakeholders expressing a variety of positions for and against the then-applicable Department guidance documents, 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; scholars and experts in law, psychology, and neuroscience; and numerous individuals who have experienced school-level Title IX proceedings as a complainant or respondent.

[202] *E.g.*, Blair A. Baker, *When Campus Sexual Misconduct Policies Violate Due Process Rights*, 26 CORNELL J. OF LAW & PUB. POL'Y 533, 550-51 (2016) ("Since the 2011 Dear Colleague Letter, many students have sued their schools for procedural due process violations, alleging they had been found wrongfully responsible for sexual misconduct. In these cases, courts have begun to recognize the precarious factors of various universities' disciplinary procedures when evaluating whether or not a school violated a student's due process rights. As discussed, these factors include, but are not limited to, whether the school provided the student with adequate notice of the charges against him or her, afforded the student the right to confront, and provided the student with a right to counsel.") (internal citations omitted).

[203] *E.g.*, Association of Title IX Administrators (ATIXA), *ATIXA Position Statement: Why Colleges Are in the Business of Addressing Sexual Violence* 3-4 (Feb. 17, 2017) (acknowledging that due process has been denied in some recipients' Title IX proceedings but insisting that "Title IX isn't the reason why due process is being compromised. . . . Due process is at risk because of the small pockets of administrative corruption . . . and because of the inadequate level of training currently afforded to administrators. *College administrators need to know more*

Stories" section, commenters described how grievance procedures applied under the 2001 Guidance and withdrawn 2011 Dear Colleague Letter have lacked basic procedural protections for complainants and respondents and have appeared biased for or against complainants, or respondents.[204] The result has been unpredictable Title IX adjudication systems under which complainants and respondents too often have been thrust into inconsistent, biased proceedings that deprive one or both parties of a fair process[205] and have resulted in some determinations

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about sufficient due process protections and how to provide these protections in practice.") (emphasis added). The Department agrees that recipients need to know more about sufficient due process protections and what such protections need to look like in practice, and this belief underlies the Department's approach to the § 106.45 grievance process which prescribes specific procedural features instead of simply directing recipients to provide due process protections, or be fair, for complainants and respondents. Edward N. Stoner II & John Wesley Lowery, *Navigating Past the "Spirit Of Insubordination": A Twenty-First Century Model Student Conduct Code With a Model Hearing Script*, 31 JOURNAL OF COLL. & UNIV. L. 1, 10-11 (2004) (noting that the trend among colleges and universities has been to put into place written student disciplinary codes but, whether an institution is public or private, a "better practice" is to describe in the written disciplinary code exactly what process will be followed rather than making broad statements about "due process" or "fundamental fairness"). The Department agrees that it is more instructive and effective for the Department to describe what procedures a process must follow, rather than leaving recipients to translate broad concepts like "due process" and "fundamental fairness" into Title IX sexual harassment grievance processes, and unlike the NPRM the final regulations do not reference "due process" but rather prescribe specific procedural features that a grievance process must contain and apply.

[204] As noted in the "Executive Summary" section of this preamble, withdrawal of the 2011 Dear Colleague Letter and issuance of the 2017 Q&A as interim guidance has not resulted in very many recipients changing their Title IX policies and procedures; thus, the grievance processes that serve as commenters' examples of biased or unfair proceedings are largely processes established in response to the 2001 Guidance or withdrawn 2011 Dear Colleague Letter, and not in response to the 2017 Q&A. Without the legally binding nature of these final regulations, the Department does not believe that recipients will modify their Title IX policies and procedures in a way that consistently ensures meaningful responses to sexual harassment *and* protection of due process for complainants and respondents.

[205] *E.g.*, Diane Heckman, *The Assembly Line of Title IX Mishandling Cases Concerning Sexual Violence on College Campuses*, 336 WEST'S EDUC. L. REPORTER 619, 631 (2016) (stating that since 2014 "there has been an influx of lawsuits contending post-secondary schools have violated Title IX due to their failure to properly handle sexual assault claims. What is unusual is that both sexes are bringing such Title IX mishandling cases due to lack of or failure to follow proper process and due process from each party's perspective. A staggering number of cases involve incidents of alcohol or drug usage or intoxication triggering the issue of the negating a voluntary consent between the participants.") (internal citations omitted).

regarding responsibility viewed as unjust and unfair to complainants, and other determinations regarding responsibility viewed as unjust and unfair to respondents.[206]

Compelling stories of complainants whose allegations of sexual assault go "unheeded by the institutions they attend and whose education suffers as a consequence"[207] and of respondents who have been "found responsible and harshly punished for [sexual assault] in sketchy campus procedures"[208] have led to debate around the issue of how recipients investigate and adjudicate sexual harassment (especially sexual assault) under Title IX, and the "challenge is to find a way to engage the stories from these different perspectives" because "federal regulators and regulated institutions could do better."[209]

The Department believes that the Federal courts' recognition of sexual harassment (including sexual assault) as sex discrimination under Title IX, the Department's guidance advising recipients on how to respond to allegations of sexual harassment, and these final

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[206] Examples of college Title IX sexual assault cases applying seemingly flawed and biased processes to reach decisions viewed as unjust, leading to claims that such situations are occurring with regularity across the country to the detriment of complainants and respondents, include: Nicolo Taormina, *Not Yet Enough: Why New York's Sexual Assault Law Does Not Provide Enough Protection to Complainants or Defendants*, 24 JOURNAL OF L. & POL'Y 595, 595-600 (2016) (detailing the case of a college student where medical evidence showed violent rape of the complainant by multiple respondents yet a college hearing panel reached a determination of non-responsibility in a seemingly biased, non-objective process; arguing that such a story is not unique and that New York's "Enough is Enough" law, as well as Federal Title IX guidance, "lack [] strict requirements" mandating a consistent grievance process and this "can lead to unfairness and injustice."); Cory J. Schoonmaker, *An "F" in Due Process: How Colleges Fail When Handling Sexual Assault*, 66 SYRACUSE L. REV. 213, 213-15 (2016) (detailing the case of a college student expelled from college after being found responsible following allegations of sexual assault by the respondent's ex-girlfriend, under a seemingly biased, non-objective process and where a criminal grand jury returned a "no charge" decision indicating there was not enough evidence to sustain the complainant's allegations even using a standard lower than preponderance of the evidence; arguing that such a story is not unique and that "campus authorities are not equipped, nor are they capable, of effectively investigating and punishing accusations of sexual assault.").

[207] Deborah L. Brakeman, *The Trouble With "Bureaucracy,"* 7 CAL. L. REV. ONLINE 66, 67, 77 (2016) (providing "counterpoints" to the points raised in Jacob E. Gersen & Jeannie Suk Gersen, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881 (2016), as part of the "productive conversation our nation has been having about campus sexual assault, its pervasiveness, and the balance struck by the public policies addressing it").

[208] *Id.* at 67.

[209] *Id.* at 77.

regulations, represent critical efforts to promote Title IX's non-discrimination mandate. With respect to grievance procedures (referred to in these final regulations as a "grievance process" recipients must use for responding to formal complaints of sexual harassment), these final regulations build upon the foundation set forth in the Department's guidance, yet provide the additional clarity and instruction missing from the Department's guidance as to how recipients must provide for the needs of complainants, with strong procedural rights that ensure due process protections for both complainants and respondents. These procedural rights reflect the very serious nature of sexual harassment and the life-altering consequences that may follow a determination regarding responsibility for such conduct. We believe that the procedures in the § 106.45 grievance process will ensure that recipients apply a fair, truth-seeking process that furthers the interests of complainants, respondents, and recipients in accurately resolving sexual harassment allegations.[210]

The § 106.45 grievance process does not codify current Department guidance but does build upon the principles recommended in guidance, while prescribing specific procedures to be consistently applied by recipients to improve the perception and reality that recipients are reaching determinations regarding responsibility that represent just outcomes. At least one State recently considered codifying the withdrawn 2011 Dear Colleague Letter, and decided instead

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[210] *E.g.*, Ashley Hartmann, *Reworking Sexual Assault Response on University Campuses: Creating a Rights-Based Empowerment Model to Minimize Institutional Liability*, 48 WASH. UNIV. J. OF L. & POL'Y 287, 313 (2015) ("As students file complaints with the Department of Education, bring Title IX suits with increasing frequency, and turn to the media for resolution in the court of public opinion, universities are often forced to prioritize complaints that have the potential to be most costly to the institution. This forced choice is often the result of sexual assault response procedures that focus too narrowly on the rights of either the victim or the accused student. Failing to create sexual assault response that respects the rights and needs of both the victim and the accused student has the potential to leave one student feeling powerless. This disenfranchisement opens the university to liability from either perspective, creating a zero-sum game in which university response caters to the student who has more social, political, or economic capital. A reformed process of how universities respond to sexual assault should work to meet the needs of all students while minimizing university liability.") (internal citation omitted).

that an approach much like what these final regulations set forth would be advisable. The Honorable Edmund G. Brown, Jr., former Governor of California, vetoed a California bill in 2017 that would have codified parts of the withdrawn 2011 Dear Colleague Letter, and Governor Brown's veto statement asserted:

> Sexual harassment and sexual violence are serious and complicated matters for colleges to resolve. On the one side are complainants who come forward to seek justice and protection; on the other side stand accused students, who, guilty or not, must be treated fairly and with the presumption of innocence until the facts speak otherwise. Then, as we know, there are victims who never come forward, and perpetrators who walk free. Justice does not come easily in this environment. . . . [T]houghtful legal minds have increasingly questioned whether federal and state actions to prevent and redress sexual harassment and assault – well-intentioned as they are – have also unintentionally resulted in some colleges' failure to uphold due process for accused students. Depriving any student of higher education opportunities should not be done lightly, or out of fear of losing state or federal funding.[211]

Governor Brown then convened a task force, or working group, to make recommendations about how California institutions of higher education should address allegations of sexual misconduct. That working group released a memorandum detailing those recommendations,[212] and many of these recommendations are consistent with the approach taken in these final regulations as to how postsecondary institutions should respond to sexual harassment allegations.[213]

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[211] Edmund G. Brown, Jr., Governor's Veto Message (Oct. 15, 2017) (responding to California Senate Bill 169).
[212] Governor Edmund G. Brown, Jr.'s Working Group to Address Allegations of Student Sexual Misconduct on College and University Campuses in California, *Recommendations of the Post-SB 169 Working Group* (Nov. 14, 2018) (referred to hereinafter as "Recommendations of the Post-SB 169 Working Group," (Nov. 14, 2018)). The Post-SB 169 Working Group was comprised of three members: a senior administrator and professor at UC Berkeley, an Assistant Dean at UCLA School of Law, and a retired California Supreme Court justice. The Post-SB 169 Working Group spent over a year reviewing California State law, current and prior Federal Title IX guidance, the American Bar Association Task Force recommendations, and legal scholarship on the topic of institutional responses to sexual misconduct before reaching its consensus recommendations.
[213] *See id.* It is notable that of the 21 separate topics covered by the Post-SB 169 Working Group, 20 of those topics reached recommendations consistent with the provisions in these final regulations. Only one topic reached a

Due Process Principles

Whether due process is conceived in terms of constitutional due process of law owed by State actors, or as principles of fundamental fairness owed by private actors, the final regulations prescribe a grievance process grounded in principles of due process for the benefit of both complainants and respondents, seeking justice in each sexual harassment situation that arises in a recipient's education program or activity. "Due process describes a procedure that justifies outcome; it provides reasons for asserting that the treatment a person receives is the treatment he [or she] deserves."[214] "Due process is a fundamental constitutional principle in American jurisprudence. It appears in criminal law, civil law, and administrative law . . . . [D]ue process is a peculiarly American phenomenon: no other legal system has anything quite like it. Due process is a legal principle which has been shaped and developed through the process of applying and interpreting a written constitution."[215] Due process is "a principle which is used to generate a number of specific rights, procedures, and practices."[216] Due process "may be thought of as a demand that a procedure conform to the requirements of formal justice, and formal justice is a basic feature of our idea of the rule of law."[217] "Research demonstrates that people's views about their outcomes are shaped not solely by how fair or favorable an outcome appears to be but also

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recommendation that would be precluded under the final regulations: the Post-SB 169 Working Group recommends that cross-examination at a live hearing occur by the parties submitting questions through the decision-maker(s), while the final regulations, § 106.45(b)(6)(i), require that the parties' advisors conduct the cross-examination. Every other recommendation reached by the Working Group is either required by, or permitted under, these final regulations. For further discussion of live hearings and cross-examination in postsecondary institution adjudications, see the "Hearings" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble.

[214] David Resnick, *Due Process and Procedural Justice*, *Due Process: NOMOS XVIII* 214 (J. Pennock & J. Chapman eds., 1977).

[215] *Id.* at 206-207.

[216] *Id.* at 208.

[217] *Id.* at 209.

by the fairness of the process through which the decision was reached. A fair process provided by a third party leads to higher perceptions of legitimacy; in turn, legitimacy leads to increased compliance with the law."[218] "Fair process" or "procedural justice" increases outcome legitimacy and thus increased compliance because it is likely to lead to an accurate outcome, and sends a signal about an individual's value and worth with respect to society in general.[219] The grievance process prescribed in these final regulations provides a fair process rooted in due process protections that improves the accuracy and legitimacy of the outcome for the benefit of both parties.

In *Rochin v. California*,[220] the Supreme Court reasoned that deciding whether proceedings in a particular context (there, State criminal charges against a defendant) met the constitutional guarantee of due process of law meant ascertaining whether the proceedings "offend those canons of decency and fairness which express the notions of justice . . . even toward those charged with the most heinous offenses."[221] Such "standards of justice are not authoritatively formulated anywhere as though they were specifics" yet are those standards "so rooted in the traditions and conscience of our people as to be ranked as fundamental" or are "implicit in the concept of ordered liberty."[222] Sexual harassment (defined in these final regulations to include sexual assault) qualifies as one of "the most heinous offenses" that one individual may perpetrate against another. Perpetration of sexual harassment impedes the equal educational access that Title IX was enacted to protect. These final regulations aim to ensure that

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[218] Rebecca Holland-Blumoff, *Fairness Beyond the Adversary System: Procedural Justice Norms for Legal Negotiation*, 85 FORDHAM L. REV. 2081, 2084 (2017) (internal citations omitted).
[219] *See id.*
[220] 342 U.S. 165 (1952).
[221] *Id.* at 169 (internal quotation marks and citations omitted).
[222] *Id.* (internal quotation marks and citations omitted).

a determination that a respondent committed sexual harassment is a "sound and supportable"[223] determination so that recipients remedy sexual harassment committed in education programs or activities. Because sexual harassment is a "heinous offense[]," these final regulations rely on and incorporate "standards of justice" fundamental to notions of "decency and fairness"[224] so that recipients, parties, and the public view recipients' determinations regarding responsibility as just and warranted, while recognizing that Title IX grievance processes are not criminal proceedings and the constitutional protections granted to criminal defendants do not apply.[225]

The Department, as an agency of the Federal government, is subject to the U.S. Constitution, including the Fifth Amendment, and will not interpret Title IX to compel a recipient, whether public or private, to deprive a person of due process rights.[226] "'Once it is determined that due process applies, the question remains what process is due.'"[227] Procedural due process of law requires at a minimum notice and a meaningful opportunity to be heard.[228] Due process "'is not a technical conception with a fixed content unrelated to time, place and circumstances.'"[229] Instead, due process "'is flexible and calls for such procedural protections as

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[223] *See* 2001 Guidance at 22.
[224] *Rochin v. California*, 342 U.S. 165, 169 (1952). As discussed throughout this preamble, due process of law is not confined to the criminal law context; due process of law applies in civil and administrative proceedings as well, even though the precise procedures that are due differ outside the criminal context.
[225] For example, these final regulations do not permit application of the criminal standard of evidence (beyond a reasonable doubt), do not grant respondents a right of self-representation with respect to confronting witnesses, do not grant respondents a right to effective assistance of counsel, and do not purport to protect respondents from "double jeopardy" (i.e., by preventing a complainant from appealing a determination of non-responsibility).
[226] 83 FR 61480-81; *see, e.g.*, *Peterson v. City of Greenville*, 373 U.S. 244 (1963); *Truax v. Raich*, 239 U.S. 33, 38 (1915); 2001 Guidance at 22 ("The rights established under Title IX must be interpreted consistent with any federally guaranteed due process rights involved in a complaint proceeding").
[227] *Goss v. Lopez*, 419 U.S. 565, 577 (1975) (quoting *Morrissey*, 408 U.S. at 481).
[228] *Goss*, 419 U.S. at 580 ("At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing."); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).
[229] *Mathews*, 424 U.S. at 334 (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)).

the particular situation demands."[230] "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[231]

The Department recognizes that the Supreme Court has not ruled on what constitutional due process looks like in the "particular situation"[232] of Title IX sexual harassment adjudications, and that Federal appellate courts have taken different approaches to which specific procedures are constitutionally required under the general proposition that due process in the educational discipline context requires some kind of notice and some kind of opportunity to be heard,[233] and for private institutions not subject to constitutional requirements, which specific procedures are required to comport with fundamental fairness.[234] In these final regulations, the Department deliberately declines to adopt wholesale the procedural rules that govern, for example, Federal civil lawsuits, Federal criminal proceedings, or proceedings before administrative law judges. Understanding that schools, colleges, and universities exist first and foremost to provide educational services to students, are not courts of law, and are not staffed with judges and

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[230] *Mathews*, 424 U.S. at 334 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (internal quotation marks omitted)).
[231] *Mathews*, 424 U.S. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).
[232] *Mathews,* 424 U.S. at 334 (internal quotation marks and citations omitted).
[233] *See Goss*, 419 U.S. at 578-79 (holding that in the public school context "the interpretation and application of the Due Process Clause are intensely practical matters" that require at a minimum notice and "opportunity for hearing appropriate to the nature of the case") (internal quotation marks and citations omitted); *see also, e.g.*, *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018) (holding that where university Title IX sexual misconduct proceeding turned on credibility of parties, the university must provide a hearing with opportunity for parties to cross-examine each other); *cf. Haidak v. Univ. of Massachusetts-Amherst*, 933 F.3d 56, 70 (1st Cir. 2019) (declining to require the same opportunity for cross-examination as required by the Sixth Circuit but requiring university to conduct "reasonably adequate questioning" designed to ferret out the truth, if the university declined to grant students the right to cross-examine at a hearing); *see also, e.g.*, *Doe v. Trustees of Boston Coll.*, 942 F.3d 527 (1st Cir. 2019) (interpreting State law guarantee of "basic fairness" in a private college's sexual misconduct disciplinary proceeding).
[234] Lisa Tenerowicz, *Student Misconduct at Private Colleges and Universities: A Roadmap for "Fundamental Fairness" in Disciplinary Proceedings*, 42 BOSTON COLL. L. REV. 653 (2001) ("In the absence of constitutional protections, courts generally have required that private school disciplinary procedures adhere to a 'fundamental' or 'basic' fairness standard and not be arbitrary or capricious. More precisely, state and federal courts have often held that a private school's disciplinary decisions are fundamentally fair if they comport with the rules and procedures that the school itself has promulgated.") (internal citation omitted.)

attorneys or vested with subpoena powers, the standardized Title IX sexual harassment grievance process in § 106.45 contains procedural requirements, rights, and protections that the Department believes are reasonably designed for implementation in the setting of an education program or activity.

While due process of law in some contexts (for example, criminal proceedings) is especially concerned with protecting the rights of accused defendants, the Department views due process protections as a critical part of a Title IX grievance process for the benefit of both complainants and respondents, as well as recipients. Both parties benefit from equal opportunities to participate by putting forward the party's own view of the allegations. Both parties, as well as recipients, benefit from a process geared toward reaching factually accurate outcomes. The § 106.45 grievance process prescribed in the final regulations is consistent with constitutional due process guarantees[235] and conceptions of fundamental fairness,[236] in a manner designed to accomplish the critical goals of ensuring that recipients resolve sexual harassment

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[235] *See Goss v. Lopez*, 419 U.S. 565, 583-84 (1975) ("On the other hand, requiring effective notice and informal hearing permitting the student to give his [or her] version of the events will provide a meaningful hedge against erroneous action. At least the disciplinarian will be alerted to the existence of disputes about facts and arguments about cause and effect. He may then determine himself to summon the accuser, permit cross-examination, and allow the student to present his own witnesses. In more difficult cases, he may permit counsel. In any event, his discretion will be more informed and we think the risk of error substantially reduced."); Nicola A. Boothe-Perry, *Enforcement of Law Schools' Non-Academic Honor Codes: A Necessary Step Towards Professionalism?*, 89 NEB. L. REV. 634, 662-63 (2012) ("Thus, while well-settled that there is no specific procedure required for due process in school disciplinary proceedings, the cases establish the bare minimum requirements of: (1) adequate notice of the charges; (2) reasonable opportunity to prepare for and meet them; (3) an orderly hearing adapted to the nature of the case; and (4) a fair and impartial decision. . . . Where disciplinary measures are imposed pursuant to non-academic reasons (e.g., fraudulent conduct), as opposed to purely academic reasons, the courts are inclined to reverse decisions made by the institutions without these minimal procedural safeguards.") (internal citations omitted).

[236] *E.g.*, Kathryn M. Reardon, *Acquaintance Rape at Private Colleges and Universities: Providing for Victims' Educational and Civil Rights*, 38 SUFFOLK UNIV. L. REV. 395, 406-07 (2005) ("Courts around the nation have taken a relatively consistent stance on what type of process private colleges and universities owe to their students. . . . Courts expect that schools will adhere to basic concepts of fairness in dealing with students in disciplinary matters. Schools must employ the procedures set out in their own policies, and those policies must not be offensive to fundamental notions of fairness.").

allegations to improve parties' sense of fairness and lead to reliable outcomes, while lessening the risk that sex-based bias will improperly affect outcomes.[237] In the words of the Honorable Ruth Bader Ginsburg, Associate Justice, discussing the #MeToo movement and the search for balance between sex equality and due process, "It's not one or the other. It's both. We have a system of justice where people who are accused get due process, so it's just applying to this field what we have applied generally."[238] The final regulations seek to apply fundamental principles of due process to the "particular situation"[239] of Title IX sexual harassment allegations. We believe the framework of the § 106.45 grievance process furthers Title IX's non-discrimination mandate consistent with constitutional guarantees of due process of law and conceptions of fundamental fairness.

Precisely because due process is a "flexible" concept dictated by the demands of a "particular situation,"[240] the Department recognizes, and these final regulations reflect, that due process protections in the "particular situation" of a recipient's response to sexual harassment may dictate different procedures than what might be appropriate in other situations (e.g., the

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[237] For discussion of sex-based bias in Title IX grievance proceedings, the "Section 106.45(a) Treatment of Complainants or Respondents Can Violate Title IX" subsection of the "General Requirements for § 106.45 Grievance Process" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble.

[238] Jeffrey Rosen, *Ruth Bader Ginsburg Opens Up About #MeToo, Voting Rights, and Millennials*, THE ATLANTIC (Feb. 15, 2018) ("Rosen: What about due process for the accused? Ginsburg: Well, that must not be ignored and it goes beyond sexual harassment. The person who is accused has a right to defend herself or himself, and we certainly should not lose sight of that. Recognizing that these are complaints that should be heard. There's been criticism of some college codes of conduct for not giving the accused person a fair opportunity to be heard, and that's one of the basic tenets of our system, as you know, everyone deserves a fair hearing. Rosen: Are some of those criticisms of the college codes valid? Ginsburg: Do I think they are? Yes. Rosen: I think people are hungry for your thoughts about how to balance the values of due process against the need for increased gender equality. Ginsburg: It's not one or the other. It's both. We have a system of justice where people who are accused get due process, so it's just applying to this field what we have applied generally.").

[239] *Mathews,* 424 U.S. at 334 (internal quotation marks and citations omitted).

[240] *Id*.

noneducational context of a criminal trial[241] or the administrative context of a government agency's determination of eligibility for public benefits,[242] or the educational context involving allegations of student academic misconduct[243]). Allegations of sexual harassment in an educational environment present unique challenges for the individuals involved, and for the recipient, with respect to how to best ensure that parties are treated fairly and accurate outcomes result.

Furthermore, due process protections in the "particular situation"[244] of elementary and secondary schools may differ from protections necessitated by the "particular situation" of postsecondary institutions. Thus, some procedural rules in the § 106.45 grievance process apply only to postsecondary institution recipients,[245] in recognition that postsecondary institutions present a different situation than elementary and secondary schools because, for instance, most students in elementary and secondary schools tend to be under the age of majority such that certain procedural rights generally cannot be exercised effectively (even by a parent acting on

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[241] For instance, in the criminal context, the U.S. Constitution imposes specific due process of law requirements that the Supreme Court has not required to be given to defendants in noncriminal matters, such as the right to be provided with effective assistance of counsel, the right to personally confront witnesses, and the right to have guilt determined under a standard of evidence described as "beyond a reasonable doubt." *See, e.g.*, *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing.").

[242] *E.g.*, *Mathews*, 424 U.S. at 348 ("The ultimate balance [of due process owed] involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness.").

[243] The Supreme Court has distinguished between the level of deference courts should give schools with respect to student discipline resulting from academic misconduct or academic failure, and other types of student misconduct. *E.g.*, *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 86 (1978) (stating that the Court will grant greater deference to public schools in decision making in academic, as opposed to disciplinary, dismissals and, would require more stringent procedural requirements in dismissals based upon purely disciplinary matters).

[244] *Mathews,* 424 U.S. at 334 (internal quotation marks and citations omitted).

[245] Section 106.45(b)(6)(i) requires postsecondary institutions to use a live hearing model to adjudicate formal complaints, while § 106.45(b)(6)(ii) does not require elementary or secondary schools to hold any kind of hearing to adjudicate formal complaints.

behalf of a minor[246]). For example, unlike postsecondary institutions, elementary and secondary schools are not required to hold a hearing under these final regulations.[247] The final regulations aim to accomplish the objective of a consistent, predictable Title IX grievance process while respecting the fact that elementary and secondary schools differ from postsecondary institutions.

However, the Department does not believe that the public or private status of a recipient, or the size of the recipient's student body, constitutes a different "particular situation"[248] that necessitates or advises different procedural protections. The Department recognizes that some recipients are State actors with responsibilities to provide due process of law to students and employees under the U.S. Constitution, including the Fourteenth Amendment, while other recipients are private institutions that do not have constitutional obligations to their students and employees. As previously explained, the Department, as an agency of the Federal government, will not interpret or enforce Title IX in a manner that would require any recipient, including a private recipient, to deprive a person of constitutional due process rights.[249] As a matter of policy, the Department cannot justify requiring a different grievance process for complainants and respondents based on whether the recipient is a public or private entity, or based on whether

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[246] The final regulations expressly recognize legal rights of parents and guardians to act on behalf of an individual with respect to exercising Title IX rights. § 106.6(g).
[247] Section 106.45(b)(6)(i)-(ii).
[248] *Mathews,* 424 U.S. at 334 (internal quotation marks and citations omitted).
[249] The Department also cannot interpret Title IX to compel a private recipient to deprive a person of their due process rights because the Department, as an agency of the Federal government, is subject to the U.S. Constitution. In *Peterson v. City of Greenville*, 373 U.S. 244, 247-48 (1963), the U.S. Supreme Court held that the City of Greenville through an ordinance could not compel a private restaurant to operate in a manner that treated patrons differently on the basis of race in violation of the Equal Protection Clause of the Fourteenth Amendment. Similarly, in *Truax v. Raich*, 239 U.S. 33, 38 (1915), the Supreme Court held that Arizona cannot use a State statute to compel private entities to employ a specific percentage of native-born Americans as employees in violation of the Equal Protection Clause of the Fourteenth Amendment. Like the City of Greenville and the State of Arizona, the Department cannot compel private schools to comply with Title IX in a manner that would require the private recipient to violate a person's due process rights.

the recipient enrolls a large number or small number of students. Additionally, many private schools owe students and employees fundamental fairness, often recognized by contract and under State laws[250] and while conceptions of fundamental fairness may not always equate to constitutional due process requirements, there is conceptual and practical overlap between the two.[251] Title IX applies to all recipients of Federal financial assistance, whether the recipient is a public or private entity and regardless of the size of the recipient's student body. Fair, reliable procedures that best promote the purposes of Title IX are as important in public schools, colleges, and universities as in private ones, and are as important in large institutions as in small ones. The final regulations therefore prescribe a consistent grievance process for application by all recipients without distinction as to public or private status, or the size of the institution.[252]

The grievance process prescribed in the final regulations is important for effective enforcement of Title IX and is consistent with constitutional due process and conceptions of fundamental fairness. The § 106.45 grievance process is designed for the particular "practical matters"[253] presented by allegations of sexual harassment in the educational context. The Department acknowledges that constitutional due process does not require the specific

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[250] *E.g.*, *Doe v. College of Wooster*, 243 F. Supp. 3d 875, 890-91 (N.D. Ohio 2017) ("[C]ourts consider whether the disciplinary process afforded by the [private] academic institution was 'conducted with notions of basic fairness'"); *Psi Upsilon of Pa. v. Univ. of Pa.*, 591 A.2d 755, 758 (Pa. 1991) (holding that "disciplinary procedures established by the [private] institution must be fundamentally fair").

[251] *See* Holly Hogan, *The Real Choice in a Perceived "Catch-22": Providing Fairness to Both the Accused and Complaining Students in College Sexual Assault Disciplinary Proceedings*, 38 JOURNAL OF L. & EDUC. 27 (2009) ("Even when the due process clause does not apply to a private university's disciplinary proceedings, a private university must nevertheless comply with its own procedural rules. . . . Because private higher education institutions often model their disciplinary proceedings on due process requirements, as a practical matter" the same principles apply to both private and public institutions) (internal citations omitted).

[252] As discussed in the "Regulatory Impact Analysis" section of this preamble, the Department considered the impact of these final regulations on small entities, but as a policy matter, does not believe that different procedures should apply based on the size of a recipient's student body or the amount of a recipient's revenues.

[253] *See Goss*, 419 U.S. at 578-79.

procedures included in the § 106.45 grievance process. However, the § 106.45 grievance process is consistent with the constitutional requirement to provide notice and a meaningful opportunity to be heard, and does so for the benefit of complainants and respondents, to address policy considerations unique to sex discrimination in the form of sexual harassment in education programs and activities. For example, if a recipient dismisses a formal complaint or any allegations in the formal complaint, the complainant should know why any of the complainant's allegations were dismissed and should also be able to challenge such a dismissal by appealing on certain grounds.[254] Even though constitutional due process may not require the specific procedure of a written notice of the dismissal stating the reasons for the dismissal, or the right to appeal the dismissal, such strong due process protections help ensure that a recipient is not erroneously dismissing an allegation due to a procedural irregularity, lack of knowledge of newly discovered evidence, or a conflict of interest or bias.[255] As discussed throughout this preamble and especially in the "Section 106.45 Recipient's Response to Formal Complaints" section, each of the procedural requirements in § 106.45 is prescribed because the Department views the requirement as important to ensuring a fair process for both parties rooted in the fundamental due process principles of notice and meaningful opportunities to be heard.[256]

In issuing these final regulations with a standardized grievance process for Title IX sexual harassment, the Department has carefully considered the public comments on the NPRM. The public comments have been crucial in promulgating the procedures that are most needed to

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[254] *See* §106.45(b)(3); § 106.45(b)(8)(i).
[255] *Id*.
[256] *See Goss*, 419 U.S. at 578-79 (holding that in the public school context "the interpretation and application of the Due Process Clause are intensely practical matters" that require at a minimum notice and "opportunity for hearing appropriate to the nature of the case") (internal quotation marks and citations omitted).

(i) improve perceptions that Title IX sexual harassment allegations are resolved fairly and reliably, (ii) avoid intentional or unintentional injection of sex-based biases and stereotypes into proceedings that too often have been biased for or against parties on the basis of sex, mostly because the underlying allegations at issue involve issues of sex-based conduct, and (iii) promote accurate, reliable outcomes so that victims of sexual harassment receive remedies restoring and preserving equal educational opportunities and respondents are not treated as responsible unless a determination of responsibility is factually reliable.

Summary of § 106.45

As a whole, § 106.45 contains ten groups of provisions[257] that together are intended to provide a standardized framework that governs recipients' responses to formal complaints of sexual harassment under Title IX:

(1) Section 106.45(a) acknowledges that a recipient's treatment of a complainant, or a respondent, could constitute sex discrimination prohibited under Title IX.

(2) Section 106.45(b)(1)(i)-(x) requires recipients to adopt a grievance process that:

- treats complainants and respondents equitably by recognizing the need for complainants to receive remedies where a respondent is determined responsible and for respondents to face disciplinary sanctions only after a fair process determines responsibility;

[257] Although not located in § 106.45, the final regulations also add § 106.71 to expressly prohibit retaliation against any individual exercising rights under Title IX, specifically protecting any individual's right to participate or refuse to participate in a Title IX grievance process.

- objectively evaluates all relevant evidence both inculpatory and exculpatory, and ensures that rules voluntarily adopted by a recipient treat the parties equally;
- requires Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolutions to be free from conflicts of interest and bias and trained to serve impartially without prejudging the facts at issue;
- presumes the non-responsibility of respondents until conclusion of the grievance process;
- includes reasonably prompt time frames for the grievance process;
- informs all parties of critical information about the recipient's procedures including the range of remedies and disciplinary sanctions a recipient may impose, the standard of evidence applied by the recipient to all formal complaints of sexual harassment under Title IX (which must be either the preponderance of the evidence standard, or the clear and convincing evidence standard), the recipient's appeal procedures, and the range of supportive measures available to both parties; and
- protects any legally recognized privilege from being pierced during a grievance process.

(3) Section 106.45(b)(2) requires written notice of the allegations to both parties, including informing the parties of the right to select an advisor of choice.

(4) Sections 106.45(b)(3)-(b)(4) require recipients to investigate formal complaints, describe when a formal complaint is subject to mandatory or discretionary dismissal, require the recipient to notify the parties of any dismissal, and authorize discretionary

consolidation of formal complaints when allegations of sexual harassment arise out of the same facts or circumstances.

(5) Section 106.45(b)(5)(i)-(vii) requires recipients to investigate formal complaints in a manner that:

- keeps the burden of proof and burden of gathering evidence on the recipient while protecting every party's right to consent to the use of the party's own medical, psychological, and similar treatment records;
- provides the parties equal opportunity to present fact and expert witnesses and other inculpatory and exculpatory evidence;
- does not restrict the parties from discussing the allegations or gathering evidence;
- gives the parties equal opportunity to select an advisor of the party's choice (who may be, but does not need to be, an attorney);
- requires written notice when a party's participation is invited or expected for an interview, meeting, or hearing;
- provides both parties equal opportunity to review and respond to the evidence gathered during the investigation; and
- sends both parties the recipient's investigative report summarizing the relevant evidence, prior to reaching a determination regarding responsibility.

(6) Section 106.45(b)(6) requires a live hearing with cross-examination conducted by the parties' advisors at postsecondary institutions, while making hearings optional for elementary and secondary schools (and other recipients that are not postsecondary institutions) so long as the parties have equal opportunity to submit written questions

for the other parties and witnesses to answer before a determination regarding responsibility is reached.

(7) Section 106.45(b)(7) requires a decision-maker who is not the same person as the Title IX Coordinator or the investigator to reach a determination regarding responsibility by applying the standard of evidence the recipient has designated in the recipient's grievance process for use in all formal complaints of sexual harassment (which must be either the preponderance of the evidence standard or the clear and convincing evidence standard), and the recipient must simultaneously send the parties a written determination explaining the reasons for the outcome.

(8) Section 106.45(b)(8) requires recipients to offer appeals equally to both parties, on the bases that procedural deficiencies, newly discovered evidence, or bias or conflict of interest affected the outcome.

(9) Section 106.45(b)(9) allows recipients to offer and facilitate informal resolution processes, within certain parameters to ensure such informal resolution only occurs with the voluntary, written consent of both parties; informal resolution is not permitted to resolve allegations that an employee sexually harassed a student.

(10) Section 106.45(b)(10) requires recipients to maintain records and documentation concerning sexual harassment reports, formal complaints, investigations, and adjudications; and to publish materials used for training Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolutions on the recipient's website or make these materials available upon request for inspection by members of the public.

The Department has concluded that the above provisions, rooted in due process principles of notice and a meaningful opportunity to be heard and the importance of an impartial process before unbiased officials, set forth the procedures adapted for the practical realities of sexual harassment allegations in an educational context that are most needed to (i) improve perceptions that Title IX sexual harassment allegations are resolved fairly and reliably, (ii) avoid intentional or unintentional injection of sex-based biases and stereotypes into Title IX proceedings, and (iii) promote accurate, reliable outcomes, all of which effectuate the purpose of Title IX to provide individuals with effective protection from discriminatory practices.

Similarities and Differences Between the § 106.45 Grievance Process and Department Guidance

The Department's guidance in 1997, 2001, 2011, and 2017 has interpreted the Department's regulatory requirement in 34 CFR 106.8(b) for recipients to "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" as applying to complaints of sexual harassment.[258] The § 106.45 grievance process, and the Department's guidance, largely address the same topics related to an "equitable" grievance process, and the final regulations are in many respects consistent with the Department's guidance. For example, these final regulations and the Department's guidance all address equal opportunity for both parties to present witnesses and evidence.[259] The Department's guidance has always stated that grievance procedures must

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[258] 1997 Guidance (recipients are required by regulations to adopt and publish grievance procedures providing for the "prompt and equitable" resolution of sex discrimination complaints and these procedures apply to complaints of sexual harassment); 2001 Guidance at 19; 2011 Dear Colleague Letter at 8; 2017 Q&A at 3.

[259] 1997 Guidance (to be "equitable" grievance procedures should provide for "the opportunity to present witnesses and other evidence"); 2001 Guidance at 20; 2011 Dear Colleague Letter at 9; 2017 Q&A at 3; *see also* § 106.45(b)(5)(ii) (grievance process must give both parties equal opportunity to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence); § 106.45(b)(5)(iii) (recipients may not restrict the ability of parties to gather evidence).

provide for "adequate, reliable, and impartial investigation of complaints,"[260] and these final regulations adopt that premise and explicitly instruct recipients to investigate and adjudicate in a manner that is (and ensure that Title IX personnel receive training to be) impartial and unbiased,[261] and to objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence.[262] These final regulations also expressly protect information protected by legally recognized privileges,[263] ensure that a party's treatment records are not used in a grievance process without the party's voluntary, written consent,[264] require that both parties receive copies of evidence gathered during the investigation that is "directly related to the allegations" in the formal complaint,[265] require that both parties be sent a copy of the recipient's investigative report that summarizes all relevant evidence including inculpatory and exculpatory evidence,[266] and deem questions and evidence about a complainant's prior sexual behavior to be irrelevant (with two limited exceptions).[267] The Department believes that these requirements build upon the expectation set forth in prior guidance, that grievance procedures must provide for the "adequate, reliable, and impartial investigation of complaints."[268]

Some provisions in § 106.45 address topics by requiring procedures that Department guidance did not address, or addressed as a recommendation. For instance, § 106.45(b)(2)

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[260] 1997 Guidance (grievance procedures must provide for "adequate, reliable, and impartial investigation of complaints"); 2001 Guidance at 20; 2011 Dear Colleague Letter at 9; 2017 Q&A at 3; 2017 Q&A at 4 (adding that an "equitable" investigation should include using a trained investigator to "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.").
[261] Section 106.45(b)(1)(iii).
[262] Section 106.45(b)(1)(ii); § 106.45(b)(5)(vii); § 106.45(b)(6).
[263] Section 106.45(b)(1)(x).
[264] Section 106.45(b)(5)(i).
[265] Section 106.45(b)(5)(vi).
[266] Section 106.45(b)(5)(vii).
[267] Section 106.45(b)(6).
[268] 2001 Guidance at 20.

requires written notice of the allegations with sufficient details to permit parties to prepare for an initial interview, which the recipient must send to both parties "upon receipt of a formal complaint," and § 106.45(b)(5)(v) requires written notice to the parties in advance of any meeting, interview, or hearing conducted as part of the investigation or adjudication. The 1997 Guidance, 2001 Guidance, and withdrawn 2011 Dear Colleague Letter were silent on the need for written notice. The 2017 Q&A stated that recipients "should" send written notice of allegations at the start of an investigation, but only "to the responding party" and stated that both parties "should" receive written notice to enable meaningful participation in any interview or hearing.[269] The final regulations make these written notices mandatory, for the benefit of both parties. As a further example, the 1997 Guidance, 2001 Guidance, and 2017 Q&A did not require any specific adjudicatory model, and while the withdrawn 2011 Dear Colleague Letter referred to "the hearing"[270] (thus presuming that adjudications take place after a hearing), no guidance document specifically addressed whether or not recipients should, or must, hold live hearings. Section 106.45(b)(6) clarifies that only postsecondary institutions must hold live hearings; other recipients (including elementary and secondary schools) may use a hearing or non-hearing model for adjudication. Similarly, the 1997 Guidance, 2001 Guidance, and 2017 Q&A did not address whether the parties have rights to confront or cross-examine other parties and witnesses,[271] and while the withdrawn 2011 Dear Colleague Letter "strongly discourage[d]" recipients "from allowing the parties personally to question or cross-examine each other during

[269] 2017 Q&A at 4.
[270] 2011 Dear Colleague Letter at 12.
[271] The 2017 Q&A did not require a hearing or cross-examination, but stated that any rights regarding procedures such as cross-examination must be given equally to both parties. 2017 Q&A at 5.

the hearing"[272] the withdrawn 2011 Dear Colleague Letter did not discourage or prohibit cross-examination by the parties' advisors, as required for postsecondary institutions under § 106.45(b)(6)(i).

In some significant respects, § 106.45 departs from positions taken in the Department's guidance by allowing recipients flexibility or discretion in a manner discouraged by guidance. For example, § 106.45(b)(1)(v) permits recipients to designate the recipient's own "reasonably prompt time frames" for conclusion of a grievance process. While the 1997 Guidance[273] and 2001 Guidance[274] were silent on what "prompt" resolution of complaints meant, the withdrawn 2011 Dear Colleague Letter recommended a 60 calendar day time frame.[275] The 2017 Q&A did not recommend a particular time frame for "prompt" resolution and referenced the 2001 Guidance approach on this subject.[276] Similarly, § 106.45(b)(1)(vii) and § 106.45(b)(7)(i) permit each recipient to select between one of two standards of evidence to use in resolving formal complaints of sexual harassment. While the 1997 Guidance and 2001 Guidance were silent on the appropriate standard of evidence, the withdrawn 2011 Dear Colleague Letter acknowledged that at the time, many recipients used the preponderance of the evidence standard, some recipients used the clear and convincing evidence standard, and took the position that only the preponderance of the evidence standard could be consistent with Title IX's non-discrimination

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[272] 2011 Dear Colleague Letter at 12.
[273] 1997 Guidance (a recipient's grievance procedures should provide for "designated and reasonably prompt timeframes for the major stages of the complaint process").
[274] 2001 Guidance at 20 (recipients' grievance procedures should provide for "designated and reasonably prompt timeframes for the major stages of the complaint process").
[275] 2011 Dear Colleague Letter at 12 ("Based on OCR experience, a typical investigation takes approximately 60 calendar days following receipt of the complaint. Whether OCR considers complaint resolutions to be timely, however, will vary depending on the complexity of the investigation and the severity and extent of the harassment.").
[276] 2017 Q&A at 3.

mandate.[277] The 2017 Q&A approved of using either the preponderance of the evidence standard or the clear and convincing evidence standard but cautioned recipients not to apply the preponderance of the evidence standard unless the recipient also used that standard for non-sexual misconduct proceedings.[278] Finally, § 106.45(b)(9) allows recipients the option of facilitating informal resolution processes (except as to allegations that an employee sexually harassed a student) so long as both parties voluntarily agree to attempt an informal resolution. Both the 2001 Guidance[279] and withdrawn 2011 Dear Colleague Letter[280] discouraged schools from using mediation (or other informal resolution) to resolve sexual assault allegations. The 2017 Q&A allowed informal resolution[281] but unlike § 106.45(b)(9)(iii), did not prohibit informal resolution of allegations that an employee sexually harassed a student.

For the purpose of ensuring that recipients reach accurate determinations regarding responsibility so that victims of sexual harassment receive remedies in furtherance of Title IX's non-discrimination mandate in a manner consistent with constitutional due process and fundamental fairness, the § 106.45 grievance process prescribes more detailed procedural requirements than set forth in the Department's guidance in some respects, and leaves recipients with greater flexibility than guidance in other respects.

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[277] 2011 Dear Colleague Letter at 11 ("Thus, in order for a school's grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard.").
[278] 2017 Q&A at 5, fn. 19.
[279] 2001 Guidance at 21 ("In some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis.").
[280] 2011 Dear Colleague Letter at 8 ("Moreover, in cases involving allegations of sexual assault, mediation is not appropriate even on a voluntary basis.").
[281] 2017 Q&A at 4.

Public Comment

In response to our invitation in the NPRM, we received more than 124,000 comments on the proposed regulations. We discuss substantive issues under topical headings, and by the sections of the final regulations to which they pertain.

Analysis of Comments and Changes

An analysis of the public comments and changes in the final regulations since the publication of the NPRM follows.

Personal Stories

Comments: Numerous commenters shared with the Department experiences they have had as complainants or respondents, or people supporting complainants or respondents.

Relating to complainants, such personal experiences included the following:

- A wide variety of individuals shared their stories identifying as survivors or victims, whether or not they were also involved as complainants in Title IX proceedings. These included females, males, LGBTQ individuals, individuals with disabilities, persons of color, individuals who grew up in both rural and urban settings, veterans who were assaulted in the military, and individuals who described being sexually assaulted or harassed more than 50 years ago. The personal stories recounted sexual harassment and assault incidents occurring at all stages in life, including elementary school students, high school students, undergraduate students at public and private universities, graduate students at public and private universities, faculty at public and private universities, and other university employees.
- Commenters shared stories as individuals who knew victims and witnessed the aftermath of trauma. These individuals included parents and grandparents of students who had been assaulted, classmates and friends of victims, teachers at all levels, professors, counselors,

coaches, Title IX Coordinators, rape crisis advocates, graduate students and teaching assistants, resident advisors, social workers, and health care professionals.

- The Department received comments from individuals who described harassment or assault by a wide variety of individuals. These included stalkers, intimate partners and ex-partners, friends, classmates, coaches, teachers and professors, non-students or non-employees on campus, and parents or family members.
- The Department received comments from individuals who described harassment or assault from before Title IX existed, after Title IX was enacted, prior to and after the Department's withdrawn 2011 Dear Colleague Letter and withdrawn 2014 Q&A, and prior to and after the Department's 2017 Q&A. We heard from individuals who described harassment or assault in a wide variety of locations, including on campuses of postsecondary institutions in locations such as student housing, classrooms, and, libraries, on elementary and secondary school grounds, locker rooms, off-campus housing and parties, while commuting to and from school, school-sponsored events, bars and parking lots, and study abroad programs.
- The Department received comments from individuals who described a range of traumatic incidents. Some commenters described inappropriate comments, inappropriate text messages or social media communication, and inappropriate touching. Other commenters recounted incidents of rape or attempted rape, gang rape, or forcible rape. Some commenters described being raped while they were passed out, while others described being drugged and raped, waking up with no memory but suffering symptoms of rape, or being pressured or intimidated into consenting to sex.
- The Department received comments from individuals who did not report their experiences for various reasons, including fearing that no one would believe them, not knowing who to

report to or the process for reporting, feeling too ashamed to report, or not wanting to relive the trauma and wanting to put the incident behind them.

- The Department received comments from individuals about many detrimental effects that sexual harassment and assault can have on victims. Individuals described what it is like to be raped, sexually assaulted, and sexually harassed, what they felt during the attack, and what they felt afterward. Commenters told the Department that rape and sexual assault, in particular, changed their lives forever, and has severe consequences emotionally, physically, academically, and professionally. Commenters also told us about severe post-traumatic stress disorder (PTSD) following sexual assault, about developing disabling physical or mental conditions due to rape, about pregnancy and sexually transmitted diseases resulting from rape, and about the lasting impact on their personal lives. Individuals told us about negative consequences they experienced in the aftermath of sexual assault, including nightmares, emotional breakdowns, lack of sleep, inability to focus or concentrate, changed eating habits, loss of confidence and self-esteem, stress, immense shame, lack of trust, and loneliness.
- Commenters described carrying the pain of victimization with them for life, even after more than half a century. Some commenters shared that they constantly live in fear of seeing their attacker again. Some commenters told us that their experiences affected future relationships and caused them to have trust issues for long periods of time, sometimes for life. Some commenters told us their assaults led to drug and alcohol abuse.
- Some commenters shared stories of friends or loved ones who committed suicide following sexual harassment or assault. Other commenters told us personally about suicidal thoughts and attempted suicide. We heard from some individuals who described still feeling unsafe

once the complaint process began and individuals who suffered increased trauma from having to see their attackers on campus or at a disciplinary proceeding.

- Individuals shared the severe impact of sexual harassment or assault on their educational experience, including the ability to learn and balance pressures of life. Commenters shared that sexual assault or harassment caused them to fail at school, or withdraw or drop out. Some commenters described the lifetime financial costs of dealing with the aftermath of sexual assault including legal and medical costs that exceeded $200,000, and lost income as a result of dropping out of school.
- The Department also received stories from individuals about the dynamics of sexual assault and harassment. Commenters told us that sexual abuse is based on power and inequity and that women are victims of male privilege. Several commenters shared personal stories about how serial offenders keep offending due to the power dynamic. Several commenters shared personal stories describing how sexual harassment by professors at schools was well known, but the schools did nothing.
- The Department also received stories from many individuals about how the current system was inadequate to protect victims of sexual assault or deliver justice. Commenters shared that they did not press charges or report because they had no confidence in the school system or criminal justice system. Commenters told us that they believed their institution was hiding the true numbers of campus rapes. Commenters told us that many Title IX reports are ignored by schools and by police officers. One individual told us that when the individual reported, city police told the individual it was a campus police issue, while campus police refused to take action because the individual had not reported while being raped, leaving the individual to be raped many more times by the same perpetrator while the authorities did nothing.

Individuals told us that perpetrators bully victims into keeping quiet, telling them no one will believe them.

- Individuals shared stories about how their institutions failed them. Some were told by their institutions or teachers that no one would believe them or told not to file a complaint. Some commenters shared that complaints were not taken seriously by school officials and that lack of action caused them to drop out of school to avoid their attacker. Commenters described experiences as complainants and told us that the Title IX Coordinator seemed more interested in proving the respondent innocent than helping the complainant.
- Several complainants told us they were blamed and shamed by authority figures including having their clothing choices questioned, decisions questioned, intelligence questioned, motives questioned, and being told they should have resisted more or been louder in saying "no."
- Individuals shared their experiences showing that it is difficult to prove rape in "he said/she said" situations. Individuals told us that respondents were found to not be at fault by hearing panels, including in instances where insufficient evidence was found despite multiple complainants reporting against the same respondent.
- Several individuals told us the current process took too long, sometimes nine months to over a year or more to get a resolution. One commenter described reporting sexual harassment at a university, along with other women who had reported the same harassing faculty member, but the university's process took so long and was so painful that the commenter left the university without finishing her degree, abandoning her career in a STEM (science, technology, engineering, medicine) field and resulting in $75,000 lost to taxpayers, wasted on funding a degree she did not finish.

- Individuals told us that respondents were given minimal punishment that did not fit the severity of the offense, or that victims were forced to encounter their perpetrators even after the respondents were found responsible. They told us that their perpetrators were well respected students or athletes in school, or prominent professors at universities, which caused the perpetrators to receive light punishments or no punishment at all. They told us they could not get attackers banned from their dorms or classes.
- We also heard from individuals who faced retaliation for filing complaints. These individuals faced continued harassment by respondents, received lower grades from professors reported as harassers, or lost scholarships due to rebuffing sexual advances from teachers.
- We also heard from several commenters about how the Title IX system was able to deliver justice for them in the aftermath of sexual harassment or assault, including commenters who believed that the withdrawn 2011 Dear Colleague Letter was the reason why their school responded appropriately to help them after they had been sexually assaulted. They told us that the counselors and resources available to help victims were the only reason they could survive the trauma or the Title IX process. They told us that the Title IX Coordinator was able to help them in ways that allowed them to stay in school. They also told us of instances where the campus system was finally able to remove a serial sexual predator. The father of a stalked student told us that he feared participation in a Title IX proceeding, but that because of Title IX, the stalker was excluded, and the campus is a safer place. One student stated a college made necessary changes after the student filed a Title IX complaint.
- A number of individuals told us that the proposed regulations would not be adequate to help victims, based on their own experiences with the Title IX process. Commenters expressed concern that the proposed rules would cause students to drop out of school and lose

scholarships. Other commenters asserted the proposed rules would enable serial rapists and harassers.

- Some individuals told us they never would have reported under the proposed rules because of the cross-examination requirement. Individuals who went through cross-examination in the criminal context told us how they suffered to get justice and that it is a traumatic experience that led to PTSD and more therapy. Several of these individuals told us defense attorneys badgered or humiliated them.
- One commenter expressed concern that, under the proposed rules' definition of sexual harassment, it could be argued that the rape that a friend endured was not a sufficiently severe impairment to the friend's educational access to be covered by Title IX.
- One commenter, who was a professor, told us that years ago a professor from another school who was interviewing for a position at the commenter's institution molested the commenter during an off-campus dinner. The commenter believed that under that institution's current policies, the commenter had a clear-cut reporting line, and the offender would, at a minimum, have received no further consideration for this job. This commenter claimed, however, that under the Department's proposed rules, even as a faculty member the commenter would not be protected.
- Commenters were also concerned about confidentiality. Several individuals stated they told a trusted coach or teacher, who was forced under current rules to report even though the individuals wanted the conversation to remain confidential. Other individuals stated they would not have reported under the proposed rules due to fear of backlash because of the public nature of reports or proceedings. One commenter recounted a friend's experience and stated that because the commenter's friend's name was not kept confidential during Title IX

proceedings, the commenter's friend quit playing school basketball and dropped out of school to get mental health counseling, due to the public embarrassment from the Title IX proceeding.

Relating to respondents, such personal experiences included the following:

- A wide variety of individuals submitted personal stories of respondents. These included student-respondents in past or present Title IX proceedings, individuals with disabilities such as autism, male and female respondents, respondents of color, faculty-respondents, and graduate-student respondents. We also heard from individuals who were associated with respondents such as friends and classmates, parents and family members, including parents of both males and females and parents of respondents with disabilities, such as OCD (obsessive-compulsive disorder) and autism. Some personal stories came from professors and teachers who had seen the system in action. Some personal stories came from self-proclaimed liberals, Democrats, feminists, attorneys of respondents, and a religious leader.
- A number of the personal stories shared in comments explained the devastating effects that an allegation of sexual assault or harassment can have on a respondent, even if the respondent is never formally disciplined. Commenters contended that one false accusation can ruin someone's life, and told us that the consequences follow respondents for life. Other commenters stated that false allegations, and resulting Title IX processes, destroyed the futures of respondents and kept them from becoming lawyers, doctors, military officers, academics, and resulted in loss of other career opportunities.
- Many commenters told us that false allegations and the Title IX process caused severe emotional distress for respondents and their families. This included several stories of respondents attempting suicide after allegedly false allegations, several stories of respondents

suffering from severe trauma, including anxiety disorders, stress, and PTSD, several stories of respondents suffering clinical depression, and several stories of respondents suffering from lack of sleep and changed eating habits.

- Several commenters told us that, as to respondents who were allowed to stay in school, being falsely accused of sexual misconduct affected their grades and academic performance, and ability to concentrate. Several commenters described the immense public shame and ridicule that resulted from a false allegation of sexual assault.
- Several professors commented that their academic freedom was curtailed due to unfair anti-sexual harassment policies.
- Several commenters described severe financial consequences to respondents and their families due to needing to hire legal representation to defend against allegedly false allegations. Commenters described incurring costs that ranged from $10,000 in legal fees to over $100,000 in legal and medical bills, including psychological treatment, to complete the process of clearing a respondent's name in the wake of a Title IX complaint. One comment was from parents who described feeling forced to put their house up for sale to pay to exonerate their child from baseless allegations.
- Several commenters stated that the status quo system disproportionately affects certain groups of respondents, including males, males of color, males of lower socioeconomic status, and students with disabilities. One commenter argued that the system is tilted in favor of females of means who are connected to the school's donor base.
- A number of respondents or other commenters described respondents being falsely accused and/or unfairly treated by their school in the Title IX process. Commenters shared numerous situations where there was an abundance of evidence indicating consent from both parties,

but the respondent either was still found responsible for sexual assault or was forced to endure an expensive and traumatic process before being found non-responsible.

- Several commenters told us stories where complainants were ex-intimate partners who did not report sexual assault allegations until weeks or months after a breakup, usually coinciding with the respondent finding a new intimate partner, under circumstances that the commenters believed showed that the complainant's motive was jealousy.
- Commenters shared stories of situations where two students engaged in sexual activity and allegations disputed over consent where both parties had been drinking, and commenters believed that many schools treated any intoxication as making a male respondent automatically liable for sexual assault even when neither party had been drinking so much that they were incapacitated.
- Commenters shared stories of situations where respondents were accused by complainants whom respondents had never met or did not recognize. Commenters shared stories of situations where respondents had befriended or comforted individuals who had experienced trauma and eventually found themselves being accused of sexual assault, harassment, or stalking.
- Commenters described their experiences with Title IX cases using negative terms to portray unfairness such as "Kafka-esque," "1984-like," "McCarthy-esque," and "medieval star chamber."
- We heard from several commenters who specifically argued that the withdrawn 2011 Dear Colleague Letter was the cause of the unfair Title IX process for respondents. One commenter expressed that the withdrawn 2011 Dear Colleague Letter destroyed the commenter's family.

- Many commenters opined that various parts of the proposed regulations would have helped prove their innocence or avoided or lessened the emotional, reputational, and financial hardships they experienced due to false accusations.
- A number of commenters expressed that they believed that Title IX investigations were biased in favor of the complainant and gave examples such as allowing only evidence in the complainant's favor, failing to give the hearing panel any opportunity to gauge the complainant's credibility, disallowing the respondent's witnesses from testifying but allowing testimony from all of the complainant's witnesses, and giving the complainant more time to prepare for a hearing or access to more evidentiary materials than the respondent was given.
- A number of commenters discussed the lack of due process protections in their experience with Title IX proceedings. Several students and professors detailed how they were expelled or fired without being permitted to give their side of the story. Several commenters described cases where respondents were suspended indefinitely from college without due process over an allegedly unprovable and false accusation of sexual harassment. Several commenters expressed how institutions took unilateral disciplinary action against respondents with no investigation. Two commenters noted that respondents' requests for autism accommodations were denied or appropriate disability accommodations were never offered.
- A number of commenters discussed how respondents were not allowed to have representation present when they met with the Title IX investigator or during their hearing. Several commenters stated that their advisor or lawyer was not allowed to speak during the hearing.

- A number of commenters described a lack of notice of the charges against them, of the details of the offenses they had allegedly committed, or of the evidence being used against them. Several commenters noted that the Title IX investigation produced a report describing evidence that respondents were not shown until after the opportunity to respond had passed. Several commenters complained that respondents were given no access to investigation documents.
- A number of commenters wrote that respondents felt like they were presumed guilty from the beginning by their institution. Several commenters expressed that they felt like the burden of proof rested completely on the respondent to prove innocence and they felt this was both unfair and un-American.
- A number of commenters described cases where respondents were denied the ability to cross-examine complainants, and even when the institution asked the complainant some questions, the institution refused to ask follow up questions during the hearing. Several commenters recounted cases where investigators did not ask the complainant follow up questions even though there were inconsistencies in the complainant's story.
- Several commenters told us that the university's Title IX decision-maker did not ask the questions that respondents submitted during the hearing. One commenter described a case where a respondent was not allowed to ask the complainant any questions at all; the respondent had to submit any questions ahead of time to a committee chairperson who, in turn, chose which questions to ask the complainant, and chose not to ask the complainant questions that the commenter had wanted asked.
- One attorney of a respondent described a situation where both the respondent and the complainant were allowed to submit only a written statement before the Title IX office made

the final determination. The complainant stated that the conduct at issue between the two was, at least initially, consensual. But due to the absence of cross-examination, the respondent's attorney was never allowed to ask the complainant how the respondent was supposed to know when the conduct became nonconsensual.

- One commenter stated that the respondent was told by the institution that "hearsay was absolutely admissible" yet the respondent had no opportunity to cross-examine witnesses making hearsay statements.
- Several commenters discussed that it took six to 12 months to clear their names from allegedly false accusations. One commenter stated the process took eight months to clear the respondent's name and the respondent was banned from school during that time.
- Several commenters were fearful of retaliation from institutions because they believed their school was biased in favor of complainants. Several commenters stated that their university invented new charges once the original charges against a respondent fell apart.
- Several commenters contended that a broad definition of sexual harassment led to nonsensical outcomes. One commenter shared that a high school boy was charged with creating a hostile environment on the basis of gender after a group of girls accessed his private social media account and took screen shots of comments that the girls found offensive. Another commenter described how a dedicated young professor, who was very popular with students, was forced to take anger management courses at his own expense and then denied continued employment because a female college student reported him to the Title IX office for making a passionate argument in favor of a local issue of workplace politics. One parent shared a story about their daughter, who was accused of sexual exploitation on her campus, put through a hearing process, and given sanctions, for posting (to a private

account) a video clip of herself walking down a common space hallway when someone was having loud sex in the background. One commenter mentioned an incident where a professor was investigated under Title IX just for disagreeing about another professor's Title IX investigation.

- One respondent, who also identified as a sexual assault survivor, stated that, before her own personal experience told her otherwise, she believed that false or wrongful accusations were unimaginable and rare, but that her personal experience as a respondent showed her that false or wrongful accusations of sexual misconduct are much more common than the general population knows or would believe.

Discussion: The Department has thoughtfully and respectfully considered the personal experiences of the many individuals who have experienced sexual harassment; been accused of it; have looked to their schools, colleges, and universities for supportive, fair responses; and have made the sacrifice in time and mental and emotional effort to convey their experiences and perspectives to the Department through public comment. Many of the themes in these comments echo those raised with the Department in listening sessions with stakeholders, leading to the Secretary of Education's speech in September 2017[282] in which she emphasized the importance of Title IX and the high stakes of sexual misconduct. The Secretary observed, after having personally spoken with survivors, accused students, and school administrators, that "the system established by the prior administration has failed too many students."[283] In the Secretary's words,

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

"One rape is one too many. One assault is one too many. One aggressive act of harassment is one too many. One person denied due process is one too many."[284]

The Secretary 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.[285] It is with those principles in mind that the Department prepared the NPRM, and because of robust public comment including from individuals personally affected by these issues, these final regulations even better reflect those principles.

Changes: In response to the personal stories shared by individuals affected by sexual harassment, the final regulations ensure that recipients offer supportive measures to complainants regardless of participation in a grievance process, and that respondents cannot be punished until the completion of a grievance process,[286] in addition to numerous changes throughout the final regulations discussed in various sections of this preamble.

Notice and Comment Rulemaking Rather Than Guidance

Comments: Many commenters, including some who supported the substance of the proposed rules and others who opposed the substance, commended the Department for following formal rulemaking procedures to implement Title IX reforms instead of imposing rules through sub-regulatory guidance. Many commenters asserted that the notice-and-comment rulemaking

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[284] *Id.*
[285] *Id.*
[286] Section 106.44(a). As discussed throughout this preamble, there are exceptions to this premise: any respondent may be removed from an education program or activity on an emergency basis under § 106.44(c); a non-student employee-respondent may be placed on administrative leave during pendency of a grievance process under § 106.44(d); an informal resolution process, in which the parties voluntarily participate, may end in an agreement under which the respondent agrees to a disciplinary sanction or other adverse consequence, without the recipient completing a grievance process, under § 106.45(b)(9).

process is critical for gathering informed feedback from all stakeholders and strengthening the rule of law, and leads to legal clarity and certainty for institutions and students. Several commenters stated that because the new regulations will be mandatory, they will provide a transparent standard that colleges must meet and a clear standard under which complainants can hold their institutions accountable.

One commenter described the public comment process as demonstrating the values of transparency, fairness, and public dialogue, and appreciated the Department exhibiting those values with this process. One commenter called notice-and-comment a "beautiful tool" which helps Americans participate in the democracy and freedom our land offers; another called it an important step that helps the public have confidence in the Department's rules. One commenter thanked the Department for taking time to solicit public comment instead of rushing to impose rules through guidance because public comment leads to rules that are carefully thought out to ensure that there are not loopholes or irregularities in the process that is adopted.

Another commenter opined that having codified rules will make it easier for colleges and universities to comply with Title IX and will ensure that sexual harassment policies are consistent, making policies and processes related to Title IX sexual harassment investigations more transparent to students, faculty and staff, and the public at large. One commenter, a student conduct practitioner, stated that the management of Title IX cases has felt like a rollercoaster for many years, and having clear regulations will be beneficial for the commenter's profession and the students served by that profession.

Several commenters noted that previous sub-regulatory guidance did not give interested stakeholders the opportunity to provide feedback. One commenter opined that although prior administrations acted in good faith by issuing a series of Title IX guidance documents, prior

administrations missed a critical opportunity by denying stakeholders the opportunity to publicly comment, resulting in many institutions of higher education lacking a clear understanding of their legal obligations; the commenter asserted that public comment reduces confusion for many administrators, Title IX Coordinators, respondents, and complainants, and avoids needless litigation.

One commenter stated that by opening this issue up to the public, the Department has demonstrated sincerity in constructing rules that fully consider the issues and concerns regularly seen by practitioners in the field; the commenter thanked the Department for the time and effort put into clarifying and modifying Title IX regulatory requirements to be relevant and effective for today's issues.

One commenter asserted that the proposed regulations address the inherent problem with "Dear Colleague" letters not being a "regulation." One commenter argued that no administration should have the ability to rewrite the boundaries of statutory law with a mere "Dear Colleague" letter. One commenter applauded the use of the rulemaking process for regulating in this area and encouraged the abandonment of "regulation through guidance." This commenter reasoned that institutions that comply with regulations are afforded certain safe harbors from liability as a matter of law, but institutions that complied with the Department's Title IX guidance were still subjected to litigation. This commenter asserted that recipients were left in a "Catch 22" because Title IX participants' attorneys freely second guessed the Department's Title IX guidance, forcing institutions to choose to follow the Department's guidance yet subject themselves to liability (or at least the prospect of an expensive litigation defense) from parties who had their own theories about discriminatory practices at odds with the Department's guidance, or else

follow a non-discriminatory process different from the Department's guidance and thereby invite enforcement actions from OCR under threat of loss of Federal funds.

Another commenter expressed appreciation that the Department seeks to provide further clarity to a complicated area of civil rights law and contended that since 2001 the Department has made numerous policy pronouncements, some of which have been helpful and others that have caused unnecessary confusion; that the 2001 Guidance was meant to ensure that cases of sexual violence are treated as cases of sexual harassment; that the withdrawn 2011 Dear Colleague Letter rightly addressed the failure of many institutions to address the needs of reporting parties; but by relying on guidance instead of regulations the Department's ability to provide technical assistance to institutions was undermined, and the guidance created further confusion.

One commenter opposed the proposed rules and opined that changing the 1975 Title IX regulations is very serious and change should only be made based on substantial consensus and evidence that any changes are critically needed and cannot be accomplished by traditionally effective guidance such as previous letters and helpful Q&As from the Department. Another commenter opined that under our system of checks and balances, because Congress passed Title IX, Congress should have to approve a regulation like this, issued under Title IX.

Discussion: The Department agrees with the many commenters who acknowledged the importance of prescribing rules for Title IX sexual harassment only after following notice-and-comment rulemaking procedures required by the Administrative Procedure Act ("APA"), 5 U.S.C. 701 *et seq.*, instead of relying on non-binding sub-regulatory guidance. The Department believes that sex discrimination in the form of sexual harassment is a serious subject that deserves this serious rulemaking process. Moreover, the Department believes that sub-regulatory

guidance cannot achieve the goal of enforcing Title IX with respect to sexual harassment because this particular form of sex discrimination requires a unique response from a recipient, and only law and regulation can hold recipients accountable. The Department acknowledges that Congress could address Title IX sexual harassment through legislation, but Congress has not yet done so. Congress has, however, granted the Department the authority and direction to effectuate Title IX's non-discrimination mandate,[287] and the Department is persuaded that the problem of sexual harassment and how recipients respond to it presents a need for the Department to exercise its authority by issuing these final regulations.[288]

Changes: None.

General Support and Opposition

Comments: Many commenters expressed overall support for the proposed rules. One commenter stated that the proposed rules are a reasonable means by which the Department can ensure that colleges and universities do not engage in unlawful discrimination. One commenter supported the proposed rules because they clearly address the problem of sex discrimination, gender bias, and gender stereotyping and asserted that there is widespread public support for the proposed rules based on public polling, opinion editorials, and media articles. Some commenters supported the proposed rules because they protect all students, including LGBTQ students and male

[287] 20 U.S.C. 1682 ("Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity . . . 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.").

[288] The Department notes that the Congress has the opportunity to review these final regulations under the Congressional Review Act, 5 U.S.C. 801 *et seq*.

students. One commenter expressed general support for the proposed rules, but was concerned that changing the rules still will not help victims who are afraid to speak up.

Some commenters expressed support for the proposed rules because they provide clarity and flexibility to institutions of higher education, and some asserted that the proposed rules appropriately establish firm boundaries regarding student safety and protections, while granting institutions flexibility to customize responses based on an institution's unique attributes. These commenters believed the proposed rules included a number of improvements that will assist institutions in advancing these goals. One commenter expressed support for the alignment between the proposed rules and the Clery Act because that will help institutions comply with all regulations and ensure a fair process. One commenter supported the clarity and flexibility in the proposed rules regarding the standards by which schools will be judged in implementing Title IX, the circumstances that require a Title IX response, and the amount of time schools have to resolve a sexual harassment proceeding. One commenter supported the clear directives in the proposed rules regarding how investigations must proceed and the written notice that must be provided to both parties, the opportunity for schools to use a higher evidentiary standard, the definition of sexual harassment, and the discussion of supportive measures. Another commenter characterized the proposed rules as containing several changes to when and where Title IX applies that offer welcome clarification to regulated entities by limiting subjective agency discretion, rolling back previous overreach, and creating certainty by substituting formal rules for nebulous guidance.

Some commenters expressed support for the proposed rules because they represent a return to fairness and due process for both parties, which will benefit everyone. Some of these commenters referenced personal stories in their comments and expressed their opinions that

many accusations are false and lives are being ruined. Some of these commenters also criticized withdrawn Department guidance for not providing adequate due process and for being punitive. One such commenter also criticized the prior Administration for not meeting with organizations or groups advocating for due process or fairness to the accused. Other commenters criticized the status quo system as being arbitrary and capricious, and biased, and stated that decision-makers often do not have the professional autonomy to render decisions incompatible with institutional interests.

Some commenters asserted that the proposed rules would assist victims by ensuring that they are better informed and able to have input in the way their case is handled. Some commenters stated that the proposed rules are important for defining the minimum requirements for campus due process and will help ensure consistency among schools. One commenter asserted that the proposed rules take a crucial step toward addressing systemic bias in favor of complainants who are almost always female and against respondents who are almost always male. The commenter stated that such bias is illustrated by schools that adopt pro-victim processes while claiming that favoring alleged victims is not sex discrimination. One commenter contended that men's rights are under attack and advocacy groups have hijacked Title IX enforcement to engineer cultural change not authorized by the law, engendering hostile relationships and mistrust on campuses between men and women, and contended that current codes of conduct are unconstitutional because of their disparate impact on men.

A number of commenters expressed general support for the proposed rules and suggested additional modifications. Some of these commenters recommended that the Department make the proposed rules retroactive for students who were disciplined unfairly under the previous rules, including requiring schools to reopen and reexamine old cases and then apply these new

rules, if requested to do so by a party involved in the old case. Some commenters stated that colleges should only be responsible for sexual assault or harassment perpetrated by employees of the school, and student-on-student sexual misconduct should not be the school's responsibility because it is outside the scope of Title IX. One of these commenters stated that it would be even better if the Department stopped enforcing Title IX. This commenter asserted that Title IX was passed to ensure that schools do not discriminate against females and it has achieved that objective, and the Department has the right to adopt the minority view in *Davis*,[289] that schools should not be held accountable for student-on-student sexual harassment.

One commenter expressed concern that some education systems are not covered by Title IX even though they receive Federal funding; this commenter specifically referenced fraternities and sororities and stated that this lack of Title IX coverage of Greek life should be reevaluated. One commenter suggested that the Department establish a procedure for the accused to file a complaint with the U.S. Secretary of Education. This commenter also suggested that there be a review board for Title IX accusations, the members of which are detached from the administration of the school. One commenter expressed concern that schools may not comply with the proposed rules and argued that the only lever that will work is a credible threat to cut off Federal funding for lack of compliance. One commenter expressed concern about funds from the U.S. Department of Justice's Office on Violence Against Women (OVW), which the commenter claimed funds studies that are being written only by those who support victims' rights; the

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[289] Commenter cited: *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 661-62 (1999) (Kennedy, J., dissenting) ("Discrimination by one student against another therefore cannot be 'under' the school's program or activity as required by Title IX. The majority's imposition of liability for peer sexual harassment thus conflicts with the most natural interpretation of Title IX's 'under a program or activity' limitation on school liability.") (internal citations omitted).

commenter asserted that OVW funds are being used by campus Title IX offices to investigate and adjudicate allegations of campus sexual assault. This commenter recommended that the Department specify that OVW-funded programs must comply with the new Title IX regulations. One commenter expressed concern over the costs students faced to defend themselves in a Title IX process under the previous rules and suggested that OCR may want to undertake a study on to what extent OCR's previous policies resulted in a serious adverse impact on lower- and moderate-income students and/or students of color since these students likely had fewer resources to pay for their defense.

Discussion: The Department appreciates commenters' variety of reasons expressing support for the Department's approach. The Department agrees that the final regulations will promote protection of all students and employees from sex discrimination, provide clarity as to what Title IX requires of schools, colleges, and universities, help align Title IX and Clery Act obligations, provide consistency while leaving flexibility for recipients, benefit all parties to a grievance process by focusing on a fair, impartial process, and require recipients to offer supportive measures to complainants as part of a response to sexual harassment.

The Department understands commenters' desire to require recipients who have previously conducted grievance processes in a way that the commenters view as unfair to reopen the determinations reached under such processes. However, the Department will not enforce these final regulations retroactively.[290]

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[290] Federal agencies authorized by statute to promulgate rules may only create rules with retroactive effect where the authorizing statute has expressly granted such authority. *See* 5 U.S.C. 551 (referring to a "rule" as agency action with "future effects" in the Administrative Procedure Act); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.").

The Department will continue to recognize, as has the Supreme Court, that sexual harassment, including peer-on-peer sexual harassment, is a form of sex discrimination prohibited under Title IX, and will continue vigorously to enforce Title IX with respect to all forms of sex discrimination.

Commenters questioning whether specific organizations receiving Federal financial assistance (including programs funded through OVW) are covered by Title IX may direct inquiries to the organization's Title IX Coordinator or to the Assistant Secretary, or both, pursuant to § 106.8(b)(1). Complaints alleging that a recipient has failed to comply with Title IX will continue to be evaluated and investigated by the Department. Section 106.45(b)(8) requires appeals from determinations regarding responsibility to be decided by decision-makers who are free from conflicts of interest. Recipients are subject to Title IX obligations, including these final regulations, with respect to all of the recipient's education programs or activities; there is no exemption from Title IX coverage for fraternities and sororities, and in fact these final regulations specify in § 106.44(a) that the education program or activity of a postsecondary institution includes any building owned or controlled by a student organization officially recognized by the postsecondary institution.

The Department appreciates commenters' concerns about the impact of Title IX grievance procedures implemented under withdrawn Department guidance or under status quo policies that commenters believed were unfair. While the Department did not commission a formal study into the impact of previous guidance, the Department conducted extensive stakeholder outreach prior to issuing the proposed rules and has received extensive input through public comment on the NPRM, and believes that the final regulations will promote Title IX enforcement more aligned with the scope and purpose of Title IX (while respecting every

person's constitutional due process rights and right to fundamental fairness) than the Department's guidance has achieved.

Changes: None.

Comments: Numerous commenters, including physicians, parents, students, State coalitions against rape, advocacy groups, sexual assault survivors, ministers, mental health therapists, social workers, and employees at educational institutions expressed general opposition to the proposed rules. A number of commenters emphasized the critical progress spurred on by Title IX. Some commenters emphasized how Title IX has broken down barriers and improved educational access for millions of students for decades, especially for girls and women, including increasing access to higher education, promoting gender equity in athletics, and protecting against sexual harassment. Many of these commenters expressed concern that the proposed rules would undermine this progress towards sex equality and combating sexual harassment when protections are still greatly needed. Some argued that the proposed rules would weaken protections for young women at the very time when the #MeToo movement has shown the pervasiveness of sexual harassment and how much protections are still needed. Other commenters asserted that women and girls still depend on Title IX to ensure equal access in all aspects of education.

A few commenters asserted that the proposed rules violate Christian or Jewish teachings or expressed the view that the proposed rules are immoral, unethical, or regressive. Commenters described the proposed rules using a variety of terms, such as disgusting, unfair, indecent, dishonorable, un-Christian, lacking compassion, callous, sickening, morally bankrupt, cruel, regressive, dangerous, or misguided. Other commenters expressed concern that the proposed rules would "turn back the clock" to a time when schools ignored sexual assault, excused male

misbehavior as “boys will be boys,” and treated sexual harassment as acceptable. Many commenters asserted that the prior Administration’s protections for victims of sexual assault should not be rolled back.

Some commenters expressed the belief that the proposed rules are inconsistent with the purpose and intent of Title IX because they would allow unfair treatment of women, force women to choose between their safety and education, increase the cultural tolerance of sexual assault and predatory behaviors, make it harder for young women to complete their education without suffering the harms of sex-based harassment, and obstruct Title IX’s purpose to protect and empower students experiencing sex discrimination. A few commenters expressed concern that the proposed rules would harm graduate students, who suffer sexual harassment at high rates.

Some commenters expressed the belief that the proposed rules are contrary to sex equality. Commenters asserted that Title IX protects all people from sexual assault, benefits both women and men, and that all students deserve equality and protection from sex discrimination and sexual harassment. Commenters expressed belief that: sexism hurts everyone, including men; men are far more likely to be sexually assaulted than falsely accused of it; both men and women are victims of rape and deserve protection; men on campus are not under attack and need protection as victims more than as falsely accused respondents; and the proposed rules were written to protect males or to protect males more than females, but should protect male and female students equally. Other commenters characterized the proposed rules as part of a broader effort by this Administration to dismantle protections for women and other marginalized groups.

One commenter argued that the Department should spend more time interviewing victims of sexual assault than worrying about whether the accused’s life will be ruined. Other

commenters stated that Title IX should be protected and left alone. One commenter stated that any legislation that limits the rights of the victim in favor of the accused should be scrutinized for intent. One commenter stated that the proposed rules only cater to the Department and its financial bottom line. One commenter supported protecting Title IX and giving girls' sports a future. One commenter asserted that we are losing female STEM (science, technology, engineering, math) leaders that the Nation needs right now.

One commenter urged the Department to create rules that protect survivors, prevent violence and sexual harassment and punish offenders, teach about boundaries and sexuality, and provide counseling and mental health resources to students. One commenter suggested that the Department should use more resources to educate about sexual consent communication, monitor drinking, and provide sexual education because this will protect both male and female students. Some commenters suggested alternate practices to the approaches advanced in the proposed rules, such as: behavioral therapy for offenders and bystander intervention training; best practices for supporting survivors in schools; community-based restorative justice programs; and independent State investigatory bodies independent of school systems with trained investigators. Some commenters expressed concern that the proposed rules ignore efforts to prevent sexual harassment or to address its root causes.

Discussion: The Department appreciates that many commenters with a range of personal and professional experiences expressed opposition to the proposed regulations. The Department agrees that Title IX has improved educational access for millions of students since its enactment decades ago and believes that these final regulations continue our national effort to make Title IX's non-discrimination mandate a meaningful reality for all students.

The Department notes that although some commenters formed opinions of the proposed rules based on Christian or Jewish teachings or other religious views, the Department does not evaluate legal or policy approaches on that basis. The Department believes that the final regulations mark progress under Title IX, not regression, by treating sexual harassment under Title IX as a matter deserving of legally binding regulatory requirements for when and how recipients must respond. In no way do the final regulations permit recipients to "turn back the clock" to ignore sexual assault or excuse sexual harassment as "boys will be boys" behavior; rather, the final regulations obligate recipients to respond promptly and supportively to complainants and provide a grievance process fair to both parties before determining remedies and disciplinary sanctions.

The Department disagrees that changing the status quo approach to Title IX will negatively impact women, children, students of color, or LGBTQ individuals, because the final regulations define the scope of Title IX and recipients' legal obligations under Title IX without regard to the race, ethnicity, sexual orientation, age, or other characteristic of a person.

The Department is committed to the rule of law and robust enforcement of Title IX's non-discrimination mandate for the benefit of individuals in protected classes designated by Congress in Federal civil rights laws such as Title IX. Contrary to a commenter's assertion, the Department is acutely concerned about the way that sexual harassment – and recipients' responses to it – have ruined lives and deprived students of educational opportunities. The Department aims through these final regulations to create legally enforceable requirements for the benefit of all persons participating in education programs or activities, including graduate students, for whom commenters asserted that sexual harassment is especially prevalent.

The Department understands that some commenters opposed the proposed regulations because they want Title IX to be protected and left alone. For reasons explained in the "Notice and Comment Rulemaking Rather Than Guidance" and "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" sections of this preamble, the Department believes that the final regulations create a framework for responding to Title IX sexual harassment that effectuates the Title IX non-discrimination mandate better than the status quo under the Department's guidance documents.

The Department disagrees that the proposed regulations in any manner limit the rights of alleged victims in favor of the accused; rather, for reasons explained in the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble, the prescribed grievance process gives complainants and respondents equally strong, clear procedural rights during a grievance process.[291] Those procedural rights reflect the seriousness of sexual harassment, the life-altering consequences that flow from a determination regarding responsibility, and the need for each determination to be factually accurate. The Department's intent is to promulgate Title IX regulations that further the dual purposes of Title IX: preventing Federal funds from supporting discriminatory practices, and providing individuals with protections against discriminatory practices. The final regulations in no way cater to the Department or the Department's financial bottom line and the Department will enforce the final regulations vigorously to protect the civil rights of students and employees. While the proposed regulations mainly address sex discrimination in the form of sexual harassment, the Department will also

[291] *See also* the "Role of Due Process in the Grievance Process" section of this preamble.

continue to enforce Title IX in non-sexual harassment contexts including athletics and equal access to areas of study such as STEM fields.

The Department believes that the final regulations protect survivors of sexual violence by requiring recipients to respond promptly to complainants in a non-deliberately indifferent manner with or without the complainant's participation in a grievance process, including offering supportive measures to complainants, and requiring remedies for complainants when respondents are found responsible. For reasons discussed in the "Deliberate Indifference" subsection of the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, the Department does not require or prescribe disciplinary sanctions and leaves those decisions to the discretion of recipients, but recipients must effectively implement remedies designed to restore or preserve a complainant's equal educational access if a respondent is found responsible for sexual harassment following a grievance process that complies with § 106.45.

The Department understands commenters' beliefs that the Department should create rules that monitor drinking, teach about interpersonal boundaries, sexuality, bystander intervention, and sexual consent communication, and provide counseling and mental health resources to students. The final regulations do not preclude recipients from offering counseling and mental health services, and while the Department does not mandate educational curricula, nothing in the final regulations impedes recipients' discretion to provide students (or employees) with educational information. While these final regulations are concerned with setting forth requirements for recipients' *responses* to sexual harassment, the Department agrees with commenters that educators, experts, students, and employees should also endeavor to *prevent*

sexual harassment from occurring in the first place. The 2001 Guidance took a similar position on prevention of sexual harassment.[292]

The Department appreciates and has considered the many alternative approaches proposed by commenters, including that the Department should require behavioral therapy for offenders, establish best practices for supporting survivors, require restorative justice programs, require that State investigatory bodies independent of school systems conduct Title IX investigations, and address the root causes of sexual harassment. The Department does not require particular sanctions – or therapeutic interventions – for respondents who are found responsible for sexual harassment, and leaves those decisions in the sound discretion of State and local educators. Under the final regulations, recipients and States remain free to consider alternate investigation and adjudication models, including regional centers that outsource the investigation and adjudication responsibilities of recipients to highly trained, interdisciplinary experts. Some regional center models proposed by commenters and by Title IX experts rely on recipients to form voluntary cooperative organizations to accomplish this purpose, while other, similar models involve independent, professional investigators and adjudicators who operate under the auspices of State governments. The Department will offer technical assistance to recipients with respect to pursuing a regional center model for meeting obligations to investigate and adjudicate sexual harassment allegations under Title IX.

Similarly, recipients remain free to adopt best practices for supporting survivors and standards of competence for conducting impartial grievance processes, while meeting obligations

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[292] The 2001 Guidance under the heading "Prevention" states: "Further, training for administrators, teachers, and staff and age-appropriate classroom information for students can help to ensure that they understand what types of conduct can cause sexual harassment and that they know how to respond." 2001 Guidance at 19.

imposed under the final regulations. The final regulations address recipients' required responses to sexual harassment incidents; identifying the root causes and reducing the prevalence of sexual harassment in our Nation's schools remains within the province of schools, colleges, universities, advocates, and experts.

Changes: None.

Comments: Some commenters contended that the proposed rules would have a negative impact on specific populations, including women, persons of color, children, and LGBTQ individuals, and supported keeping Title IX as-is. One commenter believed that many people hold an inaccurate stereotype that sexual assault does not happen at all-women's colleges and felt that the proposed rules would make it harder for students in such environments to get justice or to feel safe in their own dorms.

Some commenters were concerned about the negative impact of the proposed rules on victims and the message the proposed rules send to the public. Commenters asserted that the proposed rules perpetuate the acceptance of sexual assault and harassment and will result in people not believing victims despite how difficult it is to come forward. Commenters expressed concern that the proposed rules will place an additional burden on victims and make it less likely victims will come forward, allowing perpetrators to go unpunished. One commenter asserted that the proposed rules signal to the public and potential sexual harassers and assaulters that their actions will be excused by the Department and not sufficiently investigated by their campuses. Some commenters contended that the proposed rules, if enacted, would: protect abusers and those accused of assault; insulate harassers from punishment or make them feel like they can sexually harass others without consequence; give boys and young men who behave badly or have a sense of entitlement a free pass when it comes to their actions against girls, rather than teaching

men to respect women; make it easier for harassers to get away with it rather than ensuring accountability; allow rapists to escape consequences; continue a culture of impunity; strengthen rape culture; perpetuate systemic gender oppression; undermine efforts to ensure young people understand consent; disempower survivors and reinforce myths that they are at fault for being assaulted; prevent deterrence of sexual abuse; and be designed to protect rich and privileged boys.

Many commenters expressed general concern that the proposed rules would make schools less safe for all students, including LGBTQ students. Commenters identified an array of harms they believed the proposed rules would impose on victims. Commenters argued the proposed rules would: make it less likely victims will be protected, believed, or supported; make it harder for survivors to report their sexual assaults, to get their cases heard, to prove their claims, and to receive justice, despite a process that is already difficult, painful, convoluted, confusing, and lacking in resources, and in which victims fear coming forward; attack survivors in ways that make it harder for them to get help; restrict their rights and harm them academically and psychologically (e.g., dropping out of school, trauma, post-traumatic stress disorder, institutional betrayal, suicide). Commenters argued that the proposed rules would: discourage survivors from coming forward and subject them to retraumatizing experiences in order to seek redress; make schools dangerous by making it easier for perpetrators to get away with heinous acts of gender-based violence; encourage sexually predatory behavior; fail to prioritize the safety of survivors and students; make students feel less safe at school and on campus; jeopardize students' well-being; increase the helplessness survivors feel; and leave victims without recourse. Commenters argued that the proposed rules: put victims at greater risk of retaliation by schools eager to hide misconduct from the public; treat some people as less than others based on

gender; signal that survivors do not matter and that sexual assault can be ignored; hurt real women or show disdain for women and girls; and deny victims due process. Commenters believed that the proposed rules were antithetical to bodily autonomy and reproductive justice values, fail to advance the goal of stopping sexual violence, and shift the costs and burdens to those already suffering from trauma.

Discussion: The Department disagrees that the proposed regulations will negatively impact women, people of color, LGBTQ individuals, or any other population. The proposed regulations are designed to provide supportive measures for all complainants and remedies for a complainant when a respondent is found responsible for sexual harassment, and the Department believes that, contrary to commenters' assertions, the final regulations will help protect against sex discrimination regardless of a person's race or ethnicity, age, sexual orientation, or gender identity and will give complainants greater autonomy to receive the kind of school-level response to a reported incident of sexual harassment that will best help the complainant overcome the effects of sexual harassment and retain educational access. The Department notes that the final regulations do not differentiate between sexual assault occurring at an all-women's college and sexual assault occurring at a college enrolling women and men.

The Department believes that students, employees, recipients, and the public will benefit from the clarity, consistency, and predictability of legally enforceable rules for responding to sexual harassment set forth in the final regulations, and believes that the final regulations will communicate and incentivize these goals, contrary to some commenters' assertions that the final regulations will communicate negative messages to the public. The final regulations, including the § 106.45 grievance process, are motivated by fair treatment of both parties in order to avoid sex discrimination in the way either party is treated and to reach reliable determinations so that

victims receive remedies that restore or preserve access to education after suffering sex discrimination in the form of sexual harassment. The Department recognizes that anyone can be a victim, and anyone can be a perpetrator, of sexual harassment, and that each individual deserves a fair process designed to accurately resolve the truth of allegations.

The Department disagrees that the proposed regulations perpetuate acceptance of sexual harassment, rape culture, or systemic sex inequality; continue a culture of impunity; will result in people not believing victims; will disempower survivors or increase victim blaming, are designed to protect rich, privileged boys; or will make schools less safe. The Department recognizes that reporting a sexual harassment incident is difficult for many complainants for a variety of reasons, including fear of being blamed, not believed, or retaliated against, and fear that the authorities to whom an incident is reported will ignore the situation or fail or refuse to respond in a meaningful way, perhaps due to negative stereotypes that make women feel shamed in the aftermath of sexual violence. The final regulations require recipients to respond promptly to every complainant in a manner that is not clearly unreasonable in light of the known circumstances, including by offering supportive measures (irrespective of whether a formal complaint is filed) and explaining to the complainant options for filing a formal complaint. The final regulations impose duties on recipients and their Title IX personnel to maintain impartiality and avoid bias and conflicts of interest, so that no complainant or respondent is automatically believed or not believed. Complainants must be offered supportive measures, and respondents may receive supportive measures, whether or not a formal complaint has been filed or a determination regarding responsibility has been made.

The Department is sensitive to the effects of trauma on sexual harassment victims and appreciates that choosing to make a report, file a formal complaint, communicate with a Title IX

Coordinator to arrange supportive measures, or participate in a grievance process are often difficult steps to navigate in the wake of victimization. The Department disagrees, however, that the final regulations place additional burdens on victims or make it more difficult for victims to come forward. Rather, the final regulations place burdens on recipients to promptly respond to a complainant in a non-deliberately indifferent manner. The Department disagrees that the final regulations will excuse sexual harassment or result in insufficient investigations of sexual harassment allegations. Section 106.44(a) obligates recipients to respond by offering supportive measures to complainants, and § 106.45 obligates recipients to conduct investigations and provide remedies to complainants when respondents are found responsible. Thus, a recipient is not permitted under the final regulations to excuse or ignore sexual harassment, nor to avoid investigating where a formal complaint is filed.

Changes: We have revised § 106.44(a) to state that as part of a recipient's response to a complainant, the recipient must offer the complainant supportive measures, irrespective of whether a complainant files a formal complaint, and the Title IX Coordinator must contact the complainant to discuss availability of supportive measures, consider the complainant's wishes regarding supportive measures, and explain to the complainant the process for filing a formal complaint.

Comments: One commenter asked what statistics the proposed rules were based on and stated that the proposed rules seem to not have been thought through. A number of commenters expressed concerns that the proposed rules are not based on sufficient facts, evidence, or research, lack adequate justification, or demonstrate a lack of competence, knowledge, background, and awareness. A number of these commenters suggested gathering further evidence, best practices, and input from students, educators, administrators, advocates, survivors,

and others. One commenter stated that the way to make American life and society safer was to address domestic violence on campuses.

Some commenters expressed concerns that the proposed rules would reduce reporting and investigations of sexual assault. Some commenters argued that many elements of the proposed rules are based on the misleading claim that those accused of sexual misconduct should be protected against false accusations even though research shows that false accusations are rare. Several commenters contended that women are more likely to be sexually assaulted than a man is to be falsely accused and similarly, a man is more likely to be sexually assaulted than to be falsely accused of sexual assault.

One commenter stated that the proposed rules would create a two-tiered system to deal with sexual assault cases and would put undue financial burden on the marginalized to pay for representation in an already flawed reporting system. One commenter stated that Title IX should protect all female students from rape, and they should be believed until facts prove them wrong.

Some commenters expressed opposition because the proposed rules protect institutions. Some of these commenters contended that the proposed rules would allow schools to avoid dealing with cases of sexual misconduct and abdicate their responsibility to take accusations seriously. One of these commenters argued it was the Department's job to protect the civil rights of students, not to help shield schools from accountability. One commenter argued that the proposed regulations had been pushed for by education lobbyists. Some commenters expressed concerns about reducing schools' Title IX obligations noting that schools have a long history of not adequately addressing sexual misconduct, have reputational, financial, and other incentives not to fully confront such behavior, and need to be kept accountable under Title IX. A few commenters felt that the proposed regulations would give school officials too much discretion

and that the proposed regulations would result in inconsistencies among institutions in handling cases and in the support provided to students.

A number of commenters felt that the proposed rules prioritize the interests of schools, by narrowing their liability and saving them money, over protections for students. One commenter stated that universities that discriminate on the basis of sex should get no Federal money. One commenter was concerned that the proposed rules would create an environment in which institutions will refuse to take responsibility to avoid the financial aspect of having to make restitution rather than focusing on the well-being of victims. One commenter contended that the proposed rules enable school administrators to sexually abuse students by reducing a school's current Title IX responsibilities. One commenter stated that the proposed rules would hurt victims and perpetrators and leave institutions vulnerable to lawsuits.

Other commenters expressed a belief that the changes may violate constitutional safeguards, such as the rights to equal protection and to life and liberty. Some commenters believed that the proposed rules are in line with regressive laws regarding rape, sexual assault, and women's rights in less democratic countries. A few commenters felt that the proposed rules would signal an increased tolerance internationally for sexual violence, cause international students to avoid U.S. colleges where sexual assault is more prevalent, or compromise the country's ability to compete internationally in STEM fields where U.S. women are reluctant to focus given the prevalence of sexual harassment.

Discussion: The final regulations reflect the Department's legal and policy decisions of how to best effectuate the non-discrimination mandate of Title IX, after extensive internal deliberation, stakeholder engagement, and public comment. The Department is aware of statistics that describe the prevalence of sexual harassment in educational environments and appreciates the

many commenters who directed the Department's attention to such statistics.[293] The Department believes that these final regulations are needed precisely because statistics support the numerous personal accounts the Department has heard and that commenters have described regarding the problem of sexual harassment. The perspectives of survivors of sexual violence have been prominent in the public comments considered by the Department throughout the process of promulgating these final regulations. In response to commenters concerned about addressing domestic violence, the Department has revised the definition of "sexual harassment" in § 106.30 to expressly include domestic violence (and dating violence, and stalking) as those offenses are defined under VAWA, amending the Clery Act.

The Department does not believe the final regulations will reduce reporting or investigations of conduct that falls under the purview of Title IX. Section 106.44(a) requires recipients to respond supportively to complainants regardless of whether a complainant also wants to file a formal complaint. When a formal complaint is filed, the § 106.45 grievance process prescribes a consistent framework, fair to both complainants and respondents, with respect to the investigation and adjudication of Title IX sexual harassment allegations. Thus, both complainants and respondents receive due process protections, and where a § 106.45 grievance process concludes with a determination that a respondent is responsible, the complainant is entitled to remedies. Whether false accusations of sexual harassment occur frequently or infrequently, the § 106.45 grievance process requires allegations to be investigated

[293] Many such statistics are referenced in the "Commonly Cited Sources" and "Data – Overview" subsections of this "General Support and Opposition" section of the preamble.

and adjudicated impartially, without bias, based on objective evaluation of the evidence relevant to each situation.

As to all sexual harassment covered by Title IX, including sexual assault, the final regulations obligate recipients to respond and prescribe a consistent, predictable grievance process for resolution of formal complaints. Nothing in the final regulations precludes a recipient from applying the § 106.45 grievance process to address sexual assaults that the recipient is not required to address under Title IX. The Department disagrees that the proposed regulations put undue financial burden on marginalized individuals to pay for representation. Contrary to the commenter's assertions, § 106.45(b)(5)(iv) gives each party the right to choose an advisor to assist the party, but does not require that the advisor be an attorney (or other advisor who may charge the party a fee for their representation).[294]

The Department believes that schools, colleges, and universities desire to maintain a safe environment and that many have applied substantial effort and resources to address sexual harassment in particular; however, the Department acknowledges that reputational and financial interests have also influenced recipients' approaches to sexual violence problems. Contrary to some commenters' assertions, the proposed regulations neither "protect institutions" nor shield them from liability, but rather impose clear legal obligations on recipients to protect students' civil rights. The Department disagrees that the proposed regulations give recipients too much discretion; instead, the Department believes that the deliberate indifference standard requiring a

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[294] The Department also notes that where cross-examination is required at a live hearing (for postsecondary institutions), the cross-examination must be conducted by an advisor (parties must never personally question each other), and if a party does not have their own advisor of choice at the live hearing, the postsecondary institution must provide that party (at no fee or charge) with an advisor of the recipient's choice, for the purpose of conducting cross-examination, and such a provided advisor may be, but does not need to be, an attorney. § 106.45(b)(6)(i).

response that is not clearly unreasonable in the light of known circumstances, combined with particular requirements for a prompt response that includes offering supportive measures to complainants, strikes an appropriate balance between requiring all recipients to respond meaningfully to each report, while permitting recipients sufficient flexibility and discretion to address the unique needs of each complainant.

While the Department is required to estimate costs and cost savings associated with the final regulations, cost considerations have not driven the Department's legal and policy approach as to how best to ensure that the benefits of Title IX extend to all persons participating in education programs or activities. With respect to sexual harassment covered by Title IX, the final regulations require recipients to take accusations seriously and deal with cases of sexual misconduct, not avoid them. Regardless of whether a recipient wishes to dodge responsibility (to avoid reputational, financial, or other perceived institutional harms), recipients are obligated to comply with all Title IX regulations and the Department will vigorously enforce Title IX obligations. The Department disagrees with a commenter's contention that the final regulations enable school administrators to sexually abuse students; § 106.30 defines Title IX sexual harassment to include *quid pro quo* harassment by any recipient's employee, and includes sexual assault perpetrated by any individual whether the perpetrator is an employee or not. Indeed, if a school administrator engages in any conduct on the basis of sex that is described in § 106.30, then the recipient must respond promptly whenever any elementary or secondary school employee (or any school, college, or university Title IX Coordinator) has notice of the conduct.

The Department believes that the framework in these final regulations for responding to Title IX sexual harassment effectuates the non-discrimination mandate of Title IX for the protection and benefit of all persons in recipients' education programs and activities and

disagrees that the final regulations leave institutions vulnerable to lawsuits. A judicially implied right of private action exists under Title IX, and other Federal and State laws permit lawsuits against schools, but the Department's charge and focus is to administratively enforce Title IX, not to address the potential for lawsuits against institutions. However, by adapting for administrative purposes the general framework used by the Supreme Court for addressing Title IX sexual harassment (while adapting that framework for administrative enforcement) and prescribing a grievance process rooted in due process principles for resolving allegations, the Department believes that these final regulations may have the ancillary benefit of decreasing litigation.

The Department notes that § 106.6(d) expressly addresses the intersection between the final regulations and constitutional rights, stating that nothing in these final regulations requires a recipient to restrict rights guaranteed under the U.S. Constitution. This would include the rights to equal protection and substantive due process referenced by commenters concerned that the proposed rules violate those constitutional safeguards. The Department does not rely on the laws regarding rape and women's rights in other countries to inform the Department's Title IX regulations, but believes that Title IX's guarantee of non-discrimination on the basis of sex in education programs or activities represents a powerful statement of the importance of sex equality in the United States, and that these final regulations effectuate and advance Title IX's non-discrimination mandate by recognizing for the first time in the Department's regulations sexual harassment as a form of sex discrimination.

Changes: We have revised the definition of "sexual harassment" in § 106.30 to include dating violence, domestic violence, and stalking as those offenses are defined under VAWA, amending

the Clery Act. We have revised § 106.44(a) to require recipients to offer supportive measures to each complainant.

Comments: A few commenters argued that any use of personal blogs as a citation or source in Federal regulation is inappropriate and that using a blog as a source in a footnote in the NPRM (for example, a blog maintained by K.C. Johnson, co-author of the book *Campus Rape Frenzy*), is inappropriate and unprofessional; one commenter contested the accuracy of Professor Johnson's compilation on that blog of information regarding lawsuits filed against institutions relating to Title IX campus proceedings. Commenters argued that although people's personal experiences can be highly valuable, using a blog as a citation in rulemaking does not reflect evidence-based practice. Similarly, a few commenters criticized the Department's footnote reference in the NPRM to Laura Kipnis's book *Unwanted Advances* as, among things, evidence that the Department's sources listed in the NPRM suggest undue engagement with materials that promote pernicious gender stereotypes.

A few commenters referenced media reports of statements made by President Trump, Secretary DeVos, and former Acting Assistant Secretary for Civil Rights Candice Jackson as indications that the Department approached the NPRM with a motive of gender bias against women. A few commenters asserted that the Department's footnote citations in the NPRM suggest systematic inattention to the intersection of race and gender relating to Title IX and urged the Department to adopt an intersectional approach because failure to pay attention to how gender interacts with other social identities will result in a failure to effectively meet the Department's goal that all students are able to pursue their educations in federally-funded institutions free from sex discrimination.

Discussion: The source citations in the NPRM demonstrate a range of perspectives about Title IX sexual harassment and proceedings including views both supportive and critical of the status quo approach to campus sexual harassment, all of which the Department considered in preparing the NPRM. The Department believes that whether commenters are correct or not in characterizing certain NPRM footnoted references as personal opinions instead of case studies, the views expressed in the NPRM references warranted consideration. Similarly, the Department has reviewed and considered the views, perspectives, experiences, opinions, information, analyses, and data expressed in public comments, and the wide range of feedback is beneficial as the Department considers the most appropriate ways in which to regulate recipients' responses to sexual harassment under Title IX in schools, colleges, and universities.

The Department maintains that no reported statement on the part of the President, Secretary, or former Acting Assistant Secretary for Civil Rights suggests bias against women. The Department proceeded with the NPRM, and the final regulations, motivated by the commitment to the "non-negotiable principles" of Title IX regulations that Secretary DeVos stated in a speech about Title IX: the right of every survivor to be taken seriously and the right of every person accused to know that guilt is not predetermined.[295]

The Department appreciates that some commenters made assertions that the impact of sexual harassment, and the impact of lack of due process procedures, may differ across demographic groups based on sex, race, and the intersection of sex and race (as well as other characteristics such as disability status, sexual orientation, and gender identity). The Department

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

emphasizes that these final regulations apply to all individuals reporting, or accused of, Title IX sexual harassment, irrespective of race or other demographic characteristics. The Department believes that these final regulations provide the best balance to supportively, fairly, and accurately address allegations of sexual harassment for the benefit of every individual.

Changes: None.

Comments: Some commenters argued that the proposed regulations will cause social discord and make campuses unsafe because survivors will underreport and rates of sexual harassment will increase. Many commenters expressed concern that the proposed rules will discourage or have a chilling effect on reporting sexual harassment and violence, that reporting rates are already low, that the proposed rules would make things worse, and that schools could use the proposed rules to discourage students from reporting against faculty or staff in order to maintain the school's reputation. Commenters contended that this will adversely impact the ability of victims, especially from marginalized populations, to access their education.

Discussion: The Department disagrees that these final regulations will cause social discord or make campuses unsafe, because a predictable, consistent set of rules for when and how a recipient must respond to sexual harassment increases the likelihood that students and employees know that sexual harassment allegations will be responded to promptly, supportively, and fairly. The Department acknowledges data showing that reporting rates are lower than prevalence rates with respect to sexual harassment, including sexual violence, but disagrees that the final regulations will discourage or chill reporting. In response to commenters' concerns that students need greater clarity and ease of reporting, the final regulations provide that a report to any Title IX Coordinator, or any elementary or secondary school employee, will obligate the school to

respond,[296] require recipients to prominently display the contact information for the Title IX Coordinator on recipients' websites,[297] and specify that any person (i.e., the complainant or any third party) may report sexual harassment by using the Title IX Coordinator's listed contact information, and that a report may be made at any time (including during non-business hours) by using the listed telephone number or e-mail address (or by mail to the listed office address).[298] Recipients must respond by offering the complainant supportive measures, regardless of whether the complainant also files a formal complaint or otherwise participates in a grievance process.[299] Such supportive measures are designed precisely to help complainants preserve equal access to their education.

Changes: The Department has expanded the definition of "actual knowledge" in § 106.30 to include reports to any elementary or secondary school employee. We have revised § 106.8 to require recipients to prominently display on recipient websites the contact information for the recipient's Title IX Coordinator, and to state that any person may report sexual harassment by using the Title IX Coordinator's listed contact information, and that reports may be made at any time (including during non-business hours) by using the telephone number or e-mail address, or by mailing to the office address, listed for the Title IX Coordinator. We have revised § 106.44(a) to require recipients to offer supportive measures to every complainant whether or not a formal complaint is filed.

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[296] Section 106.30 (defining "actual knowledge").
[297] Section 106.8(b).
[298] Section 106.8(a).
[299] Section 106.44(a).

Comments: Many commenters stated that student survivors often rely on their academic institutions to allow them some justice and protection from their assailant and that the provisions provided by Title IX, as enforced under the Department's withdrawn 2011 Dear Colleague Letter and withdrawn 2014 Q&A, are important for the continued safety of student victims during and after assault and harassment investigations.

One commenter shared the commenter's own research showing that one of the benefits of the post-2011 Dear Colleague Letter era is that campuses have prioritized fairness and due process, creating more robust investigative and adjudicative procedures that value neutrality and balance the rights of claimants and respondents. Overall, campus administrators that this commenter has interviewed and surveyed say that the attention to Title IX has led to vast improvements on their campuses. Some commenters urged the Department to codify the withdrawn 2011 Dear Colleague Letter.

Other commenters asserted that research suggests that few accused students face serious sanctions like expulsion. Commenters referred to a study that found up to 25 percent of respondents were expelled for being found responsible of sexual assault prior to the withdrawn 2011 Dear Colleague Letter,[300] while a media outlet reported that data obtained under the Freedom of Information Act showed that among 100 institutions of higher education and 478 sanctions for sexual assault issued between 2012 and 2013, only 12 percent of those sanctions were expulsions.[301] Commenters argued that studies suggest that campuses with strong

[300] Commenters cited: Kristen Lombardi, *A Lack of Consequences for Sexual Assault*, THE CENTER FOR PUBLIC INTEGRITY (Feb. 24, 2010).
[301] Commenters cited: Nick Anderson, *Colleges often reluctant to expel for sexual violence*, THE WASHINGTON POST (Dec. 15, 2014).

protections for victims also have the strongest protections for due process, such that campuses that have devoted the most time and resources to addressing campus sexual assault are, in fact, protecting due process. Inconsistent implementation, commenters argued, is not a reason to change the regulations.

Other commenters argued that there is insufficient factual support for the Department's claim that educational institutions were confused about their legal obligations under previous guidance. They noted that the Department did not commission any research or study to specifically analyze schools' understanding of their legal obligation or determine whether there were any areas in which administrators were confused about their responsibilities. Commenters argued that under the withdrawn 2011 Dear Colleague Letter, compliance with expectations under Title IX significantly increased in nearly every major category including compliance with important aspects of due process, such as providing notice and procedural information to students participating in campus sexual violence proceedings. Commenters stated that under the prior administration, the pendulum did not swing "too far" in favor of victims, but instead was placed exactly where it should have been for a population that had previously been dismissed, ignored, and disenfranchised. Commenters argued that any issues with the Title IX grievance process are the result of individual colleges or Title IX Coordinators not following the process correctly and not due to issues with the process itself. Commenters argued that the solution should be additional resources and training for colleges rather than revising the process to favor respondents and make it more difficult for victims to report thereby increasing the already abysmal rate of under reporting.

Commenters asserted that the current Title IX regulations and withdrawn guidance have been supported by universities and the public. Commenters pointed out that when the

Department called for public comment on Department regulations in 2017 before withdrawing the 2011 Dear Colleague Letter, 12,035 comments were filed: 99 percent (11,893) were in support of Title IX and 96 percent of them explicitly supported the 2011 Dear Colleague Letter. When all of the individual comments as well as the petitions and jointly-signed comments are included, commenters stated that 60,796 expressions of support were filed by the public, and 137 comments were in opposition. Commenters requested that the Department build off the framework of the 2011 Dear Colleague Letter for a fair and compassionate method of reporting and adjudication so that both the victims and the accused are treated justly. Many of these commenters argued that due process is important, yet due process rights were always important in previous Department guidance and certainly are best practice. If the Department moves forward with its plans to revise the regulations regarding sexual assault and harassment, commenters argued the Department would be knowingly encouraging a continued culture of rape on campuses all across our country.

Discussion: The Department agrees with commenters who noted that many student survivors rely on their academic institutions to provide justice and protection from their assailant; for these reasons, the final regulations require recipients to offer supportive measures to every complainant whether or not a grievance process is pending, and prescribe a grievance process under which complainants and respondents are treated fairly and under which a victim of sexual harassment must be provided with remedies designed to restore or preserve the victim's equal access to education. The Department recognizes that educational institutions largely have strived in good faith over the last several years to provide meaningful support for complainants while applying grievance procedures fairly and that many institutions have made improvements in their Title IX compliance over the past several years. However, the Department disagrees with

commenters' assertions that the only deficiency with Department guidance (including withdrawn guidance such as the 2011 Dear Colleague Letter and current guidance such as the 2001 Guidance) was inconsistent implementation. Because guidance documents do not have the force and effect of law, the Department's Title IX guidance could not impose legally binding obligations on recipients. By following the regulatory process, the Department through these final regulations ensures that students and employees can better hold their schools, colleges, and universities responsible for legally binding obligations with respect to sexual harassment allegations. The Department appreciates that members of the public expressed support for the 2011 Dear Colleague Letter in 2017; however, the need for regulations to replace mere guidance on a subject as serious as sexual harassment weighed in favor of undertaking the rulemaking process to develop these final regulations. The Department believes that issuing regulations rather than guidance brings clarity, permanence, and accountability to Title IX enforcement. As discussed in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section and the "Role of Due Process in the Grievance Process" section of this preamble, the approach in these final regulations is similar in some ways, and different in other ways, from Department guidance, including the 1997 Guidance, the 2001 Guidance, the withdrawn 2011 Dear Colleague Letter, the withdrawn 2014 Q&A, and the 2017 Q&A. The Department believes that these final regulations provide protections for complainants while ensuring that investigations and adjudications of sexual harassment are handled in a grievance process designed to impartially evaluate all relevant evidence so that determinations regarding responsibility are accurate and reliable, ensuring that victims of sexual harassment receive justice in the form of remedies.

The Department disputes that the approach in these final regulations governing recipient responses to sexual harassment in any way encourages a culture of rape; to the contrary, the Department specifically included sexual assault in the definition of Title IX sexual harassment to ensure no confusion would exist as to whether even a single instance of rape is tolerable under Title IX.

Changes: None.

Comments: The Department received many comments opposing the proposed rules, including personal experiences shared by: survivors; parents, relatives, and friends of survivors; students; educators (current and retired); medical and mental health professionals who treat and work with sexual assault victims; Title IX college officials; law enforcement officials; business owners; religious figures; and commenters who have been accused of sexual assault, who recounted the devastating effects of sexual assault on survivors, stated their opposition to the proposed rules, and affirmed their belief the proposed rules will retraumatize victims, worsen Title IX protections, and embolden predators by making schools less safe. Some commenters believed that if a student is being harassed in the classroom, the proposed rules would lessen the teacher's ability to protect the class effectively.

Commenters also stated that the proposed rules failed to acknowledge how traumatic experiences like sexual violence can impact an individual's neurobiological and physiological functioning. Such commenters asserted that the brain processes traumatic experiences differently than day-to-day, non-threatening experiences; often physiological reactions, emotional responses, and somatic memories react at different times in different parts of the brain, resulting in a non-linear recall (or lack of recall at all) of the traumatic event. Other commenters argued

that trauma-informed approaches result in sexual harassment investigations and adjudications that prejudge the facts and bias proceedings in favor of complainants.

Commenters viewed the proposed rules as allowing schools to intervene only when they deem the abuse is pervasive and severe enough, leaving many survivors in the position to prove their abuse is worthy of their school's attention and action. These commenters asserted that Title IX needs reformation and greater enforcement so that survivors have more recourse in their healing experiences, in addition to preventing these incidents from occurring in the first place, as this is a deeply cultural and systemic problem. Some commenters asserted that those who start these harassing behaviors at a young age will escalate such behaviors in future years, and, as such, the proposed rules would negatively impact the behaviors of our future generations by curtailing punishment and reporting at an early age.

Some commenters stated that, through the proposed rules, many sexual assaults would not be covered by Title IX, and survivors, especially students of color, would not feel protected against possible discrimination and retaliation should they consider disclosure of sexual crimes against them. These commenters argued this would impact all future statistical reporting on nationwide sexual assaults and harassment, thereby affecting funding sources that support survivors of sexual assault that rely on accurate data collection.

Another commenter asserted that the Centers for Disease Control and Prevention has concluded that while risk factors do not cause sexual violence they are associated with a greater likelihood of perpetration, and that "weak community sanctions against sexual violence perpetrators" was a risk factor at the community level while "weak laws and policies related to

sexual violence and gender equity" is a risk factor at the societal level.[302] The commenter argued that the perception and reality is that the proposed rules will weaken efforts to hold perpetrators accountable and increase the likelihood of sexual violence perpetration.

Discussion: The Department appreciates that commenters of myriad backgrounds and experiences emphasized the devastating effects of sexual assault on survivors and the need for strong Title IX protections that do not retraumatize victims. The Department believes that the final regulations provide victims with strong protections from sexual harassment under Title IX and set clear expectations for when and how a school must respond to restore or preserve complainants' equal educational access. Nothing in the final regulations reduces or limits the ability of a teacher to respond to classroom behavior. If the in-class behavior constitutes Title IX sexual harassment, the school is responsible for responding promptly without deliberate indifference, including offering appropriate supportive measures to the complainant, which may include separating the complainant from the respondent, counseling the respondent about appropriate behavior, and taking other actions that meet the § 106.30 definition of "supportive measures" while a grievance process resolves any factual issues about the sexual harassment incident. If the in-class behavior does not constitute Title IX sexual harassment (for example, because the conduct is not severe, or is not pervasive), then the final regulations do not apply and do not affect a decision made by the teacher as to how best to discipline the offending student or keep order in the classroom.

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[302] Commenters cited: Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, Division of Violence Prevention, *Sexual Violence, Risk and Protective Factors*, https://www.cdc.gov/violenceprevention/sexualviolence/riskprotectivefactors html (last reviewed by the CDC on Jan. 17, 2020); Jenny Dills *et al.*, *Continuing the Dialogue: Learning from the Past and Looking to the Future of Intimate Partner Violence and Sexual Violence Prevention*, National Center for Injury Prevention and Control, Centers for Disease Control and Prevention (2019).

The Department understands from anecdotal evidence and research studies that sexual violence is a traumatic experience for survivors. The Department is aware that the neurobiology of trauma and the impact of trauma on a survivor's neurobiological functioning is a developing field of study with application to the way in which investigators of sexual violence offenses interact with victims in criminal justice systems and campus sexual misconduct proceedings.[303] The final regulations require impartiality in investigations and emphasize the truth-seeking function of a grievance process. The Department wishes to emphasize that treating all parties with dignity, respect, and sensitivity without bias, prejudice, or stereotypes infecting interactions with parties fosters impartiality and truth-seeking. Further, the final regulations contain provisions specifically intended to take into account that complainants may be suffering results of trauma; for instance, § 106.44(a) has been revised to require that recipients promptly offer supportive measures in response to each complainant and inform each complainant of the availability of supportive measures with or without filing a formal complaint. To protect traumatized complainants from facing the respondent in person, cross-examination in live hearings held by postsecondary institutions must never involve parties personally questioning each other, and at a party's request, the live hearing must occur with the parties in separate rooms with technology enabling participants to see and hear each other.[304]

The Department disagrees that the final regulations make survivors prove their abuse is worthy of attention or action, because the § 106.30 definition of sexual harassment includes

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[303] *E.g.*, Jeffrey J. Nolan, *Fair, Equitable Trauma-Informed Investigation Training* (Holland & Knight updated July 19, 2019) (white paper summarizing trauma-informed approaches to sexual misconduct investigations, identifying scientific and media support and opposition to such approaches, and cautioning institutions to apply trauma-informed approaches carefully to ensure impartial investigations).
[304] Section 106.45(b)(6)(i).

sexual assault, domestic violence, dating violence, and stalking. Such abuse jeopardizes a complainant's equal educational access and is not subject to scrutiny or question as to whether such abuse is worthy of a recipient's response. Title IX coverage of sexual assault requires that the recipient have actual knowledge that the incident occurred in the recipient's education program or activity against a person in the United States. We have revised the § 106.30 definition of "actual knowledge" to include notice to any elementary and secondary school employee, and to expressly include a report to the Title IX Coordinator as described in § 106.8(a) (which, in turn, requires a recipient to notify its educational community of the contact information for the Title IX Coordinator and allows any person to report using that contact information, whether or not the person who reports is the alleged victim or a third party). We have revised the § 106.30 definition of "complainant" to mean any individual "who is alleged to be the victim" of sexual harassment, to clarify that a recipient must offer supportive measures to any person alleged to be the victim, even if the complainant is not the person who made the report of sexual harassment. We have revised § 106.44(a) to require the Title IX Coordinator promptly to contact a complainant to discuss supportive measures, consider the complainant's wishes with respect to supportive measures, and explain to the complainant the process and option of filing a formal complaint. Within the scope of Title IX's reach, no sexual assault needs to remain unaddressed.

The Department understands that sexual harassment occurs throughout society and not just in educational environments, that data support the proposition that harassing behavior can escalate if left unaddressed, and that prevention of sexual harassment incidents before they occur is a worthy and desirable goal. The final regulations describe the Title IX legal obligations to which the Department will vigorously hold schools, colleges, and universities accountable in

responding to sexual harassment incidents. Identifying the root causes and reducing the prevalence of sexual harassment across our Nation's schools and campuses remains within the province of schools, colleges, universities, advocates, and experts.

In response to commenters' concerns that many complainants fear retaliation for reporting sexual crimes, the final regulations add § 106.71 expressly prohibiting retaliation, which protects complainants (and respondents and witnesses) regardless of race, ethnicity, or other characteristic. The Department intends for complainants to understand that their right to report under Title IX (including the right to participate or refuse to participate in a grievance process) is protected against retaliation. The Department is aware that nationwide data regarding the prevalence and reporting rates of sexual assault is challenging to assess, but does not believe that these final regulations will impact the accuracy of such data collection efforts.

The Department does not dispute the proposition that weak sanctions against sexual violence perpetrators and weak laws and policies related to sexual violence and sex equality are associated with a greater likelihood of perpetration. The Department believes that Title IX is a strong law, and that these final regulations constitute strong policy, standing against sexual violence and aiming to remedy the effects of sexual violence in education programs and activities. Because Title IX is a civil rights law concerned with equal educational access, these final regulations do not require or prescribe disciplinary sanctions. The Department's charge under Title IX is to preserve victims' equal access to access, leaving discipline decisions within the discretion of recipients.

Changes: We have revised the § 106.30 definition of "actual knowledge" to include notice to any elementary and secondary school employee, and to expressly include a report to the Title IX Coordinator as described in § 106.8(a). We have revised § 106.8(a) to expressly allow any

person (whether the alleged victim, or a third party) to report sexual harassment using the contact information that must be listed for the Title IX Coordinator. We have revised the § 106.30 definition of "complainant" to mean any individual "who is alleged to be the victim" of sexual harassment. We have revised § 106.44(a) to require the Title IX Coordinator promptly to contact a complainant to discuss supportive measures, consider the complainant's wishes with respect to supportive measures, and explain to the complainant the process and option of filing a formal complaint. We have also added § 106.71, prohibiting retaliation against individuals exercising rights under Title IX including participating or refusing to participate in a Title IX grievance process.

Comments: Some commenters suggested alternate approaches to the proposed rules or offered alternative practices. For example, commenters suggested: zero-tolerance policies; requiring schools to install cameras in public or shared spaces on campus to discourage sexual harassment, provide proof and greater fairness for all parties involved, and decrease the cost and time spent in such cases; requiring recipients to provide an accounting of all funds used to comply with Title IX; creating Federal or State-individualized written protocols with directions on interviewing parties in Title IX investigations; requiring schools to adopt broader harassment policies that allow complaints to be addressed by an independent board with parent, educational, medical or law enforcement professionals, and peers with appeal to a second board; providing increased funding and staff for Title IX programs; third-party monitoring of Title IX compliance; and requiring universities to provide more thorough reports on gender-based violence in their systems. Some commenters emphasized the importance of prevention practices, suggesting various approaches such as: adopting the prevention measures in the withdrawn 2011 Dear Colleague Letter; setting incentives to reward schools for fewer Title IX cases; and curtailing

schools' use of confidential sexual harassment settlement payments that hide or erase evidence of harassment and protect predatory behavior.

Other commenters requested more training for organizations such as fraternities, arguing that sexual assault statistics would improve by enforcing better standards of behavior at fraternities. Commenters proposed the Department should rate schools on their compliance to Title IX standards similar to FIRE's "Spotlight on Due Process"[305] or the Human Rights Campaign's Equality Index.[306] Commenters proposed that any new rule should build upon, rather than abrogate, the requirements of the Campus Sex Crimes Prevention Act of 2000, which requires institutions of higher education to advise the campus community where it can obtain information about sex offenders provided by the State. One commenter urged the Department to add into the final regulations the statutory exemptions from the Title IX non-discrimination mandate found in the Title IX statute including Boys State/Nation or Girls State/Nation conferences (20 U.S.C. 1681(a)(7)); father-son or mother-daughter activities at educational institutions (20 U.S.C. 1681(a)(8)); and institution of higher education scholarship awards in "beauty" pageants (20 U.S.C. 1681(a)(9)).

Another commenter requested that the final regulations commit to ensuring culturally-sensitive services for students of color, who experience higher rates of sexual violence and more barriers to reporting, to help make prevention and support more effective. Commenters proposed to have each educational institution follow a guideline when employing staff from "Women

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[305] Commenters cited: Foundation for Individual Rights in Education (FIRE), *Spotlight on Due Process 2018* (2018), https://www.thefire.org/resources/spotlight/due-process-reports/due-process-report-2018/#top.
[306] Commenters referenced how the Human Rights Campaign (HRC) rates workplaces and health care providers on an Equality Index, for example the *Corporate Equality Index Archive*, https://www hrc.org/resources/corporate-equality-index-archives.

Centers" as Title IX Coordinators and staff in Title IX offices, and as student residence hall directors, to ensure that there is fair judgment in every case of sexual misconduct that occurs. Commenters argued that justice for all could be served by less press coverage of high-profile incidents and that investigations should be kept private until all facts are gathered, preserving the reputation of all involved.

Discussion: The Department appreciates and has considered the numerous approaches suggested by commenters, some of whom urged the Department to take additional measures and others who desired alternatives to the proposed rules.

The Department has determined, in light of the Supreme Court's framework for responding to Title IX sexual harassment and extensive stakeholder feedback concerning those procedures most needed to improve the consistency, fairness, and accuracy of Title IX investigations and adjudications, that the final regulations reasonably and appropriately obligate recipients to respond supportively and resolve allegations fairly without encroaching on recipients' discretion to control their internal affairs (including academic, administrative, and disciplinary decisions). Many of the commenters' suggestions for additions or alternatives to the final regulations concern subjects that lie within recipients' discretion and it may be possible for recipients to adopt them while also complying with these final regulations. To the extent that the commenters' suggestions require action by the Department, we decline to implement or require those practices, in the interest of preserving recipients' flexibility and retaining the focus of these regulations on prescribing recipient responses to Title IX sexual harassment. The Department cannot enforce Title IX in a manner that requires recipients to restrict any rights protected under

the First Amendment, including freedom of the press.[307] We have added § 106.71 which prohibits retaliation against an individual for the purpose of interfering with the exercise of Title IX rights. Section 106.71(a) requires recipients to keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness (unless permitted by FERPA, or required under law, or as necessary to conduct proceedings under Title IX), and § 106.71(b) states that exercise of rights protected by the First Amendment is not retaliation. Section 106.30 defining "supportive measures" instructs recipients to keep confidential the provision of supportive measures except as necessary to provide the supportive measures. These provisions are intended to protect the confidentiality of complainants, respondents, and witnesses during a Title IX process, subject to the recipient's ability to meet its Title IX obligations consistent with constitutional protections.

The statutory exceptions to Title IX mentioned by at least one commenter (i.e., Boys State or Girls' State conferences, father-son or mother-daughter activities, certain "beauty" pageant scholarships) have full force and effect by virtue of their express inclusion in 20 U.S.C. 1681(a), and the Department declines to repeat those exemptions in these final regulations, which mainly address a recipient's response to sexual harassment.

Changes: We have added § 106.71 which prohibits retaliation against an individual for the purpose of interfering with the exercise of Title IX rights. Section 106.71(a) requires recipients to keep confidential the identity of any individual who has made a report or complaint of sex

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[307] *See Peterson v. City of Greenville*, 373 U.S. 244 (1963); *Truax v. Raich*, 239 U.S. 33, 38 (1915); § 106.6(d)(1).

discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness (unless permitted by FERPA, or required under law, or as necessary to conduct proceedings under Title IX), and § 106.71(b) states that exercise of rights protected by the First Amendment is not retaliation.

Comments: Some commenters suggested broadening the scope of the proposed rules to address other issues, for example: providing guidance on pregnancy and parenting obligations under Title IX; evaluating coverage of fraternities and sororities under Title IX; funding to protect women and young adults on campus; girls losing access to sports, academic, and vocational programs as schools choose to save money by cutting girls' programs; investigating whether speech and conduct codes impose a disparate impact on men; covering other forms of harassment (e.g., race, age, national origin).

A few commenters expressed concern about the lack of clarity for cases alleging harassment on multiple grounds, such as whether the proposed provisions regarding mandatory dismissal, the clear and convincing evidence standard, interim remedies, and cross-examination would apply to the non-sex allegations. A few commenters requested that the final regulations address student harassment of staff and faculty by changing "employee" or "student" to "member" in the final regulations.

Discussion: The NPRM focused on the problem of recipient responses to sexual harassment, and the scope of matters addressed by the final regulations is defined by the subjects presented in the NPRM. Therefore, the Department declines to address other topics outside of this original scope, such as pregnancy, parenting, or athletics under Title IX, coverage of Title IX to fraternities and sororities, whether speech codes discriminate based on sex, funding intended to protect women

or young adults on campus, funding cuts to girls' programs by recipients, or forms of harassment other than sexual harassment. The Department notes that inquiries about the application of Title IX to particular organizations may be referred to the organization's Title IX Coordinator or to the Assistant Secretary as indicated in § 106.8(b)(1), and that complaints alleging sex discrimination that does not constitute sexual harassment may be referred to the recipient's Title IX Coordinator for handling under the equitable grievance procedures that recipients must adopt under § 106.8(c).

The Department appreciates commenters' questions regarding the handling of allegations that involve sexual harassment as well as harassment based on race (or on a basis other than sex) and appreciates the opportunity to clarify that the response obligations in § 106.44 and the grievance process in § 106.45 apply only to allegations of Title IX sexual harassment; the final regulations impose no new obligations or requirements with respect to non-Title IX sexual harassment and do not alter existing regulations under civil rights laws such as Title VI (discrimination on the basis of race, color, or national origin) or regulations under disability laws such as IDEA, Section 504, or ADA. The Department will continue to enforce regulations under those laws and recipients must comply with all regulations that apply to a particular allegation of discrimination (including allegations of harassment on multiple bases) accordingly.

The Department declines to change the words "students" and "employees" to "members" in the final regulations, because doing so could create inconsistencies with the current regulations, and the meaning of the term "member" is not readily understood by reference to other State and Federal laws, in the way that "employee" is. However, the Department

appreciates the opportunity to reiterate that the definitions of "complainant"[308] and "respondent"[309] do not restrict either party to being a student or employee, and, therefore, the final regulations do apply to allegations that an employee was sexually harassed by a student.

Changes: None.

Comments: Commenters expressed concern that there is no point in revising a rule without enforcement and proposed that the Department should use its enforcement authority to sanction non-compliance of Title IX, since no school has ever had its funding withdrawn. Other commenters asked the Department to disallow private rights of action and the payment of attorney fees, damages, or costs. Other commenters proposed that the Department revise OCR's existing Case Processing Manual to: eliminate biases toward specific groups when handling charges of rape, sexual harassment, and assault; protect undocumented students who file Title IX complaints with OCR so they do not have to fear doing so would lead to their deportation; avoid psychological bias by OCR investigators; and revise the 180-day complaint timeliness requirement to allow for complaints to be filed after the 180-day filing time frame with OCR for allegations involving sexual misconduct, under certain conditions. Other commenters proposed adding a provision that expressly releases institutions that are currently subject to settlement agreements with the Department from provisions that set forth ongoing obligations that are inconsistent with the new regulations.

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[308] Section 106.30 (*Complainant* "means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.").

[309] Section 106.30 (*Respondent* "means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.").

Discussion: The Department agrees with commenters who asserted that administrative enforcement of Title IX obligations is vital to the protection of students' and employees' civil rights, and the Department will vigorously enforce the final regulations. Nothing in these final regulations alters the existing statutory and regulatory framework under which the Department exercises its administrative authority to take enforcement actions against recipients for non-compliance with Title IX including the circumstances under which a recipient's Federal financial assistance may be terminated. The Department does not have authority or ability to affect the existence of judicially-implied private rights of action under Title IX or the remedies available through such private lawsuits.

Changes to OCR's Case Processing Manual are outside the scope of this rulemaking process. The Department will not enforce the final regulations retroactively; whether prospective enforcement of the final regulations will impact any existing resolution agreements between recipients and OCR requires examination of the circumstances of those resolution agreements. The Department will provide technical assistance to recipients with questions about the enforceability of existing resolution agreements.

Changes: None.

Comments: Some commenters expressed general support for Title IX without reference to sexual misconduct or the proposed rules, for example, asserting: that Title IX is important to rebuilding the country's education system; that Title IX has made great strides for equality in girls' sports; and that Title IX has helped equalize the power imbalance between women and men. Other commenters expressed opposition to Title IX generally, for example, arguing: that Title IX has become a war on men, is biased against men, has set up kangaroo courts against males, and has fed into destructive identity politics; that women and men are different and men need to be men;

and that Title IX is no longer needed because women outperform men in several areas (e.g., college admissions).

A number of commenters expressed support for equality and non-discrimination, or support for safe schools, public education, environments conducive to learning, schools operating *in loco parentis*, the well-being of children, protection of sex workers, fighting rape culture, respect for everyone's feelings, or anti-bullying, without expressing a position on the proposed rules. Without expressing a view about the proposed rules, some commenters expressed concern about a young woman murdered at a prominent university, and others expressed concern that it is too easy to get away with rape already due to "date rape" drugs, online dating sites, and powerful networks of people with bad intentions helping cover up incidents. A few commenters asked rhetorical questions such as: Does the government as "Protector of Citizens" devalue sexual assaults in educational institutions? Three million college students will be sexually assaulted this year: What are you going to do about it? What if something happened to your child?

A few commenters suggested changes to other agencies' rules, such as one suggestion that the Department of Labor employment discrimination rules should address the loss of jobs for female coaches due to gender-separate sports teams.

Discussion: The Department appreciates the range of opinions expressed by commenters on the general impact of Title IX. The Department believes that Title IX has improved educational access for millions of students since its enactment decades ago, and believes that these final regulations continue the national effort to make Title IX's non-discrimination mandate a meaningful reality for all students. The Department also appreciates commenters' viewpoints about topics related to gender equality and sexual abuse unrelated to the proposed rules. As an

executive branch agency of the Federal government charged with enforcing Title IX, the Department believes that sexual assaults in education programs or activities warrant the extensive attention and concern demonstrated by the obligations set forth in these final regulations and that these final regulations will provide millions of college (and elementary and secondary school) students with clarity about what to expect from their educational institutions in response to any incident of sexual assault or other sexual harassment that constitutes sex discrimination under Title IX.

Comments regarding other agencies' regulations are outside the scope of this rulemaking process and the Department's jurisdiction.

The Department notes that for comments submitted with no substantive text, names of survivor advocacy organizations, or pictures or graphics depicting, e.g., feminist icons, protest marches featuring cardboard signs with slogans such as "We Stand With Survivors" or "Hands Off IX," and similar depictions, the Department has considered the viewpoints that such pictures, graphics, and slogans appear to convey.

Changes: None.

Commonly Cited Sources

In explaining opposition to many provisions of the NPRM (most commonly, use of the Supreme Court's framework to address sexual harassment, i.e., the definition of sexual harassment, the actual knowledge requirement, the deliberate indifference standard, the education program or activity and "against a person in the U.S." jurisdictional limitations, and aspects of the grievance process, e.g., permitting a clear and convincing evidence standard, live hearings with cross-examination in postsecondary institutions, presumption of the respondent's non-responsibility, permitting informal resolution processes such as mediation) commenters

urged the Department to consult works in the literature concerning the prevalence and impact of sexual harassment, dynamics of sexual violence, sexual abuse, and violence against women, institutional betrayal, rates of reporting, and reasons why victims do not report sexual harassment. These sources included:

- W. David Allen, *The Reporting and Underreporting of Rape*, 73 S. ECON. J. 3 (2007).
- The Association of American Universities, *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct* (Westat 2015) (commonly referred to as "AAU/Westat Report" or "AAU Survey").
- American Association of University Women, *Crossing the Line: Sexual Harassment at School* (2011).
- American Association of University Women Educational Foundation, *Drawing the Line: Sexual Harassment on Campus* (2005).
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The Department has considered the sources cited to by commenters. For reasons described in this preamble, the Department believes that the final regulations create a predictable framework governing recipients' responses to allegations of sexual harassment in furtherance of Title IX's non-discrimination mandate.

Data – Overview

Many commenters referred the Department to statistics, data, research, and studies about the prevalence of sexual harassment, the impact of sexual harassment, the cost to victims of sexual harassment, underreporting of sexual harassment, problematic patterns of survivors facing negative stereotypes or being accused of "lying" when reporting sexual harassment, and rates of false accusations. Many commenters pointed to such data and information as part of general opposition to the proposed rules, expressing concern that the proposed rules as a whole would exacerbate the prevalence and negative impact of sexual harassment for all victims and with respect to specific demographic groups. Many commenters cited to such data and information in opposition to specific parts of the proposed rules, most commonly: use of the Supreme Court's framework to address sexual harassment (i.e., the definition of sexual harassment, the actual knowledge requirement, the deliberate indifference standard), the education program or activity and "against a person in the U.S." jurisdictional limitations, and aspects of the grievance process (e.g., permitting a clear and convincing evidence standard, live hearings with cross-examination in postsecondary institutions, presumption of the respondent's non-responsibility, permitting informal resolution processes such as mediation). The Department has carefully considered the

data and information presented by commenters with respect to the aforementioned aspects of the final regulations and with respect to the overall approach and framework of the final regulations.

Prevalence Data – Elementary and Secondary Schools

Comments: Many commenters referred the Department to statistics, data, research, and studies showing the prevalence of sexual harassment against children and adolescents, and in elementary and secondary schools, including as follows:

- Data show that sexual assault is most prevalent among adolescents as compared to any other group. School was reported as the most common location for this peer-on-peer victimization to occur. Fifty-one percent of high school girls and 26 percent of high school boys experienced adolescent peer-on-peer sexual assault victimization.[310]
- One in four young women experiences sexual assault before the age of 18.[311]
- One study found that ten percent of children were targets of educator sexual misconduct by the time they graduated from high school.[312]
- Nearly half (48 percent) of U.S. students are subject to sexual harassment or assault at school before they graduate high school (56 percent of girls and 40 percent of boys).[313] There were at least 17,000 official reports of sexual assaults of K-12 students by their

[310] Commenters cited: Amy M. Young *et al.*, *Adolescents' Experiences of Sexual Assault by Peers: Prevalence and Nature of Victimization Occurring Within and Outside of School*, 38 JOURNAL OF YOUTH & ADOLESCENCE 1072 (2009).
[311] Commenters cited: Girls, Inc., *2018 Strong, Smart, and Bold outcomes survey report* (2018) (citing David Finklehor *et al.*, *The lifetime prevalence of child sexual abuse and sexual assault assessed in late adolescence*, 55 JOURNAL OF ADOLESCENT HEALTH 3 (2014)).
[312] Commenters cited: Charol Shakeshaft, *Educator Sexual Misconduct: A Synthesis of Existing Literature* (2004) (prepared for the U.S. Dep't. of Education).
[313] Commenters cited: American Association of University Women, *Crossing the Line: Sexual Harassment at School* (2011).

peers between 2011 and 2015.[314] A longitudinal study found that 68 percent of girls and 55 percent of boys surveyed had at least one sexual harassment victimization experience in high school.[315] A survey of 2,064 students in grades eight through11 indicated: 83 percent of girls have been sexually harassed; 78 percent of boys have been sexually harassed; 38 percent of the students were harassed by teachers or school employees; 36 percent of school employees or teachers were harassed by students; and 42 percent of school employees or teachers had been harassed by each other.[316]

- One sexual assault study surveyed 18,030 high school students and found that 18.5 percent reported victimization and eight percent reported perpetration in the past year; although females were more likely to report unwanted sexual activities due to feeling pressured, there were no significant sex differences among those reporting physical force or unwanted sexual activities due to alcohol or drug use.[317] In another study in which 18,090 high school students completed a survey, 30 percent disclosed sexual harassment victimization (37 percent of females, 21 percent of males) and 8.5 percent reported perpetration (five percent of females, 12 percent of males).[318]

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[314] Commenters cited: Robin McDowell *et al.*, *Hidden Horror of school sex assaults revealed by AP*, ASSOCIATED PRESS (May 1, 2017).
[315] Commenters cited: Dorothy Espelage *et al.*, *Longitudinal Associations Among Bullying, Homophobic Teasing, and Sexual Violence Perpetration Among Middle School Students*, 30 JOURNAL OF INTERPERSONAL VIOLENCE 14 (2014).
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[318] Commenters cited: Emily R. Clear *et al.*, *Sexual Harassment Victimization and Perpetration Among High School Students*, 20 VIOLENCE AGAINST WOMEN 10 (2014).

- In one study designed to examine sexual harassment victimization among American middle school youth (grades five through eight), verbal victimization was more frequent than physical victimization and sexual assault; the types of sexual harassment experienced and the perpetrators varied by sex, race, and grade level; nearly half (43 percent) of middle school students experienced verbal sexual harassment the previous year; 21 percent of middle school students reported having been pinched, touched, or grabbed in a sexual way, 14 percent reported having been the target of sexual rumors, and nine percent had been victimized with sexually explicit graffiti in school locker rooms or bathrooms.[319]
- One study's data reveal that, while boys' violence towards girls comprises a substantial proportion of sexual violence in the middle school population, same-sex violence and girls' violence towards boys are also prevalent.[320]
- In the 2010-2011 school year, 36 percent of girls, 24 percent of boys, and 30 percent of all students in grades seven through 12 experienced sexual harassment online.[321]
- Analysis of the Civil Rights Data Collection for 2015-16, with data from 96,000 public and public charter P-12 educational institutions including magnet schools, special education schools, alternative schools, and juvenile justice facilities showed that: more than three-fourths (79 percent) of the 48,000 public schools with students in grades seven

[319] Commenters cited: Dorothy L. Espelage *et al.*, *Understanding types, locations, & perpetrators of peer-to-peer sexual harassment in U.S. middle schools: A focus on sex, racial, and grade differences*, 71 CHILDREN & YOUTH SERV. REV. 174 (2016).
[320] Commenters cited: Ethan Levin, *Sexual Violence Among Middle School Students: The Effects of Gender and Dating Experience*, 32 JOURNAL OF INTERPERSONAL VIOLENCE 14 (2015).
[321] Commenters cited: American Association of University Women, *Crossing the Line: Sexual Harassment at School* (2011).

through 12 disclosed zero reported allegations of harassment or bullying on the basis of sex, showing that students experience far more sexual harassment than schools report.[322]

Discussion: The data referred to by commenters, among other data, indicates that sexual harassment affects children, adolescents, and students throughout elementary and secondary schools across the country. When sexual harassment constitutes sex discrimination covered by Title IX, the final regulations hold schools accountable for responding in ways that restore or preserve a complainant's equal access to education.

Changes: None.

Prevalence Data – Postsecondary Institutions

Comments: Many commenters referred the Department to statistics, data, research, and studies showing the prevalence of sexual harassment in postsecondary institutions, including as follows:

- One in five college women experience attempted or completed sexual assault in college;[323] some studies state one in four.[324] One in 16 men are sexually assaulted while in college.[325] One poll reported that 20 percent of women, and five percent of men, are sexually assaulted in college.[326]

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[322] Commenters cited: American Association of University Women, *Schools are Still Underreporting Sexual Harassment and Assault* (Nov. 2, 2018), https://www.aauw.org/article/schools-still-underreporting-sexual-harassment-and-assault/.
[323] Commenters cited: Christopher Krebs *et al.*, *Bureau of Justice Statistics Research and Development Series: Campus Climate Survey Validation Study Final Technical Report* (2016); Lisa Wade, *American Hookup: The New Culture of Sex on Campus* (W.W. Norton & Co. 2016).
[324] Commenters cited: The Association of American Universities, *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct* (Westat 2015).
[325] Commenters cited: National Sexual Violence Resource Center: Info and Stats for Journalists, *Statistics About Sexual Violence* (2015) (citing National Institute of Justice, *The Campus Sexual Assault (CSA) Study: Final Report* (2007)).
[326] Commenters cited: Kaiser Family Foundation & The Washington Post, *Survey of Current and Recent College Students on Sexual Assault* (2015).

- 62 percent of women and 61 percent of men experience sexual harassment during college.[327]
- Among undergraduate students, 23.1 percent of females and 5.4 percent of males experience rape or sexual assault; among graduate and undergraduate students 11.2 percent experience rape or sexual assault through physical force, violence, or incapacitation; 4.2 percent have experienced stalking since entering college.[328]
- More than 50 percent of college sexual assaults occur in August, September, October, or November, and students are at an increased risk during the first few months of their first and second semesters in college; 84 percent of the women who reported sexually coercive experiences experienced the incident during their first four semesters on campus.[329]
- Seven out of ten rapes are committed by someone known to the victim;[330] for most women victimized by attempted or completed rape, the perpetrator was a boyfriend, ex-boyfriend, classmate, friend, acquaintance, or coworker. [331]
- A study showed that 63.3 percent of men at one university who self-reported acts qualifying as rape or attempted rape admitted to committing repeat rapes.[332]

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[327] Commenters cited: American Association of University Women Educational Foundation, *Drawing the Line: Sexual Harassment on Campus* (2005).
[328] Commenters cited: Rape, Abuse & Incest National Network (RAINN), *Campus Sexual Violence: Statistics*, https://www.rainn.org/statistics/campus-sexual-violence.
[329] Commenters cited: Matthew Kimble *et al.*, *Risk of Unwanted Sex for College Women: Evidence for a Red Zone*, 57 JOURNAL OF AM. COLL. HEALTH 3 (2010).
[330] Commenters cited: U.S. Dep't. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *National Crime Victimization Survey* (2015).
[331] Commenters cited: U.S. Dep't. of Justice, Office of Justice Programs, National Institute of Justice, *Research Report: The Sexual Victimization of College Women* (2000).
[332] Commenters cited: David Lisak & Paul Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 1 (2002).

- Of college students in fraternity and sorority life, 48.1 percent of females and 23.6 percent of males have experienced nonconsensual sexual contact, compared with 33.1 percent of females and 7.9 percent of males not in fraternity and sorority life.[333]
- Fifty-eight percent of female academic faculty and staff experienced sexual harassment across all U.S. colleges and universities, and one in ten female graduate students at most major research universities reports being sexually harassed by a faculty member.[334]
- Twenty-one to 38 percent of college students experience faculty/staff-perpetrated sexual harassment and 39 to 64.5 percent experience student-perpetrated sexual harassment during their time at their university.[335]

Discussion: The data referred to by commenters, among other data, indicates that sexual harassment affects students and employees in postsecondary institutions across the country. When sexual harassment constitutes sex discrimination covered by Title IX, the final regulations hold colleges and universities accountable for responding in ways that restore or preserve a complainant's equal access to education.

Changes: None.

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[333] Commenters cited: Jennifer J. Freyd, *The UO Sexual Violence and Institutional Betrayal Surveys: 2014, 2015, and 2015-2016*, https://dynamic.uoregon.edu/jjf/campus/.
[334] Commenters cited: National Academies of Science, Engineering, and Medicine, *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine* (Frasier F. Benya *et al.* eds., 2018).
[335] Commenters cited: Marina N. Rosenthal *et al.*, *Still second class: Sexual harassment of graduate students*, 40 PSYCHOL. OF WOMEN QUARTERLY 3 (2016).

Prevalence Data – Women

Comments: Many commenters referred the Department to statistics, data, research, and studies showing the prevalence of sexual harassment against girls and women, including as follows:

- Sexual assault disproportionately harms women; 84 percent of sexual assault and rape victims are female.[336] Among females, the highest rate of domestic abuse victimization occurs between the ages of 16-24, ages when someone is most likely to be a high school or college student.[337] Among college-aged female homicide victims, 42.9 percent were killed by an intimate partner.[338]
- One out of every six American women has been the victim of an attempted or completed rape in her lifetime (14.8 percent completed rape, 2.8 percent attempted rape for a total of 17.6 percent).[339] The national rape-related pregnancy rate is five percent among victims of reproductive age (aged 12 to 45); among adult women an estimated 32,101 pregnancies result from rape each year.[340] Fifty-six percent of girls ages 14-18 who are pregnant or parenting are kissed or touched without their consent.[341]

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[336] Commenters cited: U.S. Dep't. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *National Crime Victimization Survey* (2017).
[337] Commenters cited: U.S. Dep't. of Justice, Office of Justice Programs, *Bureau of Justice Statistics Factbook: Violence by Intimates* (1998).
[338] Commenters cited: U.S. Dep't. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Homicide Trends in the United States: 1980-2008: Annual Rates for 2009 and 2010* (2011).
[339] Commenters cited: Rape, Abuse & Incest National Network (RAINN), *Campus Sexual Violence: Statistics*, https://www.rainn.org/statistics/campus-sexual-violence.
[340] Commenters cited: Melissa M. Holmes, *Rape-related pregnancy: estimates and descriptive characteristics from a national sample of women*, 17 AM. J. OF OBSTETRICS & GYNECOLOGY 2 (1996).
[341] Commenters cited: National Women's Law Center (NWLC), *Let Her Learn: Stopping Push Out for Girls who are Pregnant or Parenting* (2017).

- A few commenters argued that the prevalence rate for sexual assault against college-age women is lower than shown by the above data, with the rate of rape and sexual assault being lower for female college students (6.1 per 1,000) than for female college-age nonstudents (7.6 per 1,000). [342]

Discussion: The data referred to by commenters, among other data, indicates that sexual harassment affects girls and women in significant numbers. When sexual harassment constitutes sex discrimination covered by Title IX, the final regulations hold schools accountable for responding in ways that restore or preserve a complainant's equal access to education.

Changes: None.

Prevalence Data – Men

Comments: Many commenters referred the Department to statistics, data, research, and studies showing the prevalence of sexual harassment against boys and men, including as follows:

- Approximately one in six men have experienced some form of sexual violence in their lifetime.[343] Sixteen percent of men were sexually assaulted by the age of 18.[344] Approximately one in 33 American men has experienced an attempted or completed rape in their lifetime.[345]

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[342] Commenters cited: U.S. Dep't. of Justice, Office of Justice Programs, *Bureau of Justice Statistics Special Report: Rape and Sexual Assault Victimization Among College-Age Females*, *1995-2013* (2014).
[343] Commenters cited: Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Summary Report* (Nov. 2011).
[344] Commenters cited: Shanta R. Dube, *Long-term consequences of childhood sexual abuse by gender of victim*, 28 AM. J. OF PREVENTIVE MED. 5 (2005).
[345] Commenters cited: Rape, Abuse, & Incest National Network (RAINN), *Scope of the Problem: Statistics*, https://www.rainn.org/statistics/scope-problem.

- College-age male victims accounted for 17 percent of rape and sexual assault victimizations against students and four percent against nonstudents.[346] Approximately 15 percent of college men are victims of forced sex during their time in college.[347]
- Approximately 26 percent of gay men, and 37 percent of bisexual men, experience rape, physical violence, or stalking by an intimate partner.[348]
- Men are more likely to be assaulted than falsely accused of assault.[349]

Discussion: The data referred to by commenters, among other data, indicates that sexual harassment affects boys and men in significant numbers. When sexual harassment constitutes sex discrimination covered by Title IX, the final regulations hold schools accountable for responding in ways that restore or preserve a complainant's equal access to education.

Changes: None.

Prevalence Data – LGBTQ Persons

Comments: Many commenters referred the Department to statistics, data, research, and studies showing the prevalence of sexual harassment against LGBTQ individuals, including as follows:

- A 2015 survey found that 47 percent of transgender people are sexually assaulted at some point in their lifetime: transgender women have been sexually assaulted at

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[346] Commenters cited: U.S. Dep't. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Special Report: Rape and Sexual Assault Victimization Among College-Age Females, 1995-2013* (2014).
[347] Commenters cited: U.S. Dep't. of Justice, Office of Justice Programs, National Institute of Justice, *Research Report: The Sexual Victimization of College Women* (2000).
[348] Commenters cited: Human Rights Campaign, *Sexual Assault and the LGBTQ Community*, https://www.hrc.org/resources/sexual-assault-and-the-lgbt-community; Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, *The National Intimate Partner and Sexual Violence Survey (NISVS): An Overview of 2010 Findings on Victimization by Sexual Orientation*.
[349] Commenters cited: Tyler Kingkade, *Males are More Likely to Suffer Sexual Assault Than to be Falsely Accused of it*, THE HUFFINGTON POST (Dec. 8, 2014).

a rate of 37 percent; nonbinary people assigned male at birth have been sexually assaulted at a rate of 41 percent; transgender men have been sexually assaulted at a rate of 51 percent; and nonbinary people assigned female at birth have been sexually assaulted at a rate of 58 percent.[350] Another study, which drew from interviews of over 16,500 adults, indicated that gay and bisexual individuals experienced a higher lifetime prevalence of sexual violence than their heterosexual counterparts.[351]

- A study found that transgender students, who represented 1.8 percent of high school respondents to a survey, faced far higher rates of assault and harassment than their peers: 24 percent of transgender students had been forced to have sexual intercourse, compared to four percent of male cisgender students and 11 percent of female cisgender students; 23 percent of transgender students experienced sexual dating violence, compared to four percent of male cisgender students and 12 percent of female cisgender students; more than one-quarter (26 percent) experienced physical dating violence, compared to six percent of male cisgender students and nine percent of female cisgender students; transgender students were more likely to face bullying and violence in school overall compared to cisgender students.[352]

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[350] Commenters cited: National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey* (Dec. 2016).
[351] Commenters cited: Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, *The National Intimate Partner and Sexual Violence Survey (NISVS): An Overview of 2010 Findings on Victimization by Sexual Orientation*.
[352] Commenters cited: Michelle M. Johns *et al.*, *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students – 19 States and Large Urban School Districts, 2017*, 68 MORBIDITY & MORTALITY WEEKLY REPORT 3 (Jan. 25, 2019).

- Lesbian, gay, and bisexual students are more likely to experience nonconsensual sexual contact by physical force or incapacitation than heterosexual students: 14 percent of gay or lesbian students and 25 percent of bisexual students reported experiencing nonconsensual sexual contact while in college or graduate school compared to 11 percent of heterosexual students.[353]
- A 2018 study found that 57.3 percent of LGBTQ students were sexually harassed at school during the past year.[354] Another survey showed that 38 percent of LGBTQ girls had been kissed or touched without their consent.[355] Eighty-six percent of high school transgender individuals had experienced a form of sexual violence due to their gender identity, often perpetrated by other students.[356] Nearly 25 percent of transgender, genderqueer, and gender nonconforming or questioning students experience sexual violence during their undergraduate education.[357]
- Twenty-two percent of lesbian, gay, and bisexual youth have experienced sexual violence, more than double the rate reported by heterosexual youth.[358] According to another survey: 44 percent of lesbians and 61 percent of bisexual women

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[353] Commenters cited: The Association of American Universities, *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct* (Westat 2015).
[354] Commenters cited: Gay, Lesbian and Straight Education Network (GLSEN), *The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools* (2018).
[355] Commenters cited: National Women's Law Center (NWLC), *Let Her Learn: Stopping Push Out for Girls who are Pregnant or Parenting* (2017).
[356] Commenters cited: Rebecca L. Stotzer, *Violence Against Transgender People: A Review of United States Data*, 14 AGGRESSION & VIOLENT BEHAVIOR 3 (2009).
[357] Commenters cited: The Association of American Universities, *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct* (Westat 2015).
[358] Commenters cited: Centers for Disease Control & Prevention, Division of Adolescent & School Health, *Youth Risk Behavior Survey Data Summary and Trends Report: 2007-2017* (2018).

experience rape, physical violence, or stalking by an intimate partner, compared to 35 percent of heterosexual women; 26 percent of gay men and 37 percent of bisexual men experience rape, physical violence, or stalking by an intimate partner, compared to 29 percent of heterosexual men; 46 percent of bisexual women have been raped, compared to 17 percent of heterosexual women; 13 percent of lesbians and 22 percent of bisexual women have been raped by an intimate partner, compared to nine percent of heterosexual women; 40 percent of gay men and 47 percent of bisexual men have experienced sexual violence other than rape, compared to 21 percent of heterosexual men; and 46.4 percent of lesbians, 74.9 percent of bisexual women, and 43.3 percent of heterosexual women, reported sexual violence other than rape during their lifetimes, while 40.2 percent of gay men, 47.4 percent of bisexual men, and 20.8 percent of heterosexual men reported sexual violence other than rape during their lifetimes.[359]

- More than eight in ten LGBTQ students experienced harassment or assault at school and more than half (57 percent) were sexually harassed at school; 70 percent of LGBTQ students said that they were verbally harassed, 29 percent said that they were physically harassed, and 12 percent said that they were physically assaulted because of their sexual orientation; 60 percent of LGBTQ students said that they were verbally harassed, 24 percent said that they were physically

[359] Commenters cited: Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, *The National Intimate Partner and Sexual Violence Survey (NISVS): An Overview of 2010 Findings on Victimization by Sexual Orientation*.

harassed, and 11 percent said that they were physically assaulted because of their gender expression.[360]

- A survey of students in grades nine through 12 found that lesbian, gay, and bisexual ("LGB") students were more likely to say that they experienced bullying than heterosexual students: one-third of LGB students said that they had been bullied on school property in the past year compared to 17 percent of heterosexual students; 27 percent of LGB students reported that they had been electronically bullied in the past year compared to 13 percent of heterosexual students; nearly half of middle and high school students report being sexually harassed, with harassment especially extensive among LGBTQ students, causing nearly one-third to say that they felt unsafe or uncomfortable enough to miss school.[361]
- Seventy-three percent of LGBTQ college students have been sexually harassed, compared to 61 percent of non-LGBTQ students;[362] 75.2 percent of undergraduate and 69.4 percent of graduate/professional students who identify as transgender, queer, and gender nonconforming reported being sexually harassed, compared with 62 percent of cisgender female undergraduates, 43 percent of cisgender male undergraduates, 44 percent of cisgender female graduate students, and 30 percent of cisgender male graduate students.[363]

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[360] Commenters cited: Gay, Lesbian and Straight Education Network (GLSEN), *The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools* (2018).
[361] Commenters cited: Laura Kann *et al.*, *Youth Risk Behavior Surveillance – United States, 2017*, 67 MORBIDITY & MORTALITY WEEKLY REPORT 8 (Jun. 15, 2018).
[362] Commenters cited: American Association of University Women Educational Foundation, *Drawing the Line: Sexual Harassment on Campus* (2005).
[363] Commenters cited: The Association of American Universities, *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct* (Westat 2015).

Discussion: The data referred to by commenters, among other data, indicates that sexual harassment affects LGBTQ individuals in significant numbers. When sexual harassment constitutes sex discrimination covered by Title IX, the final regulations hold schools accountable for responding in ways that restore or preserve a complainant's equal access to education.

Changes: None.

Prevalence Data – Persons of Color

Comments: Many commenters referred the Department to statistics, data, research, and studies showing the prevalence of sexual harassment against persons of color, including as follows:

- Women who have intersecting identities, for example women who are women of color and LGBTQ, experience certain types of harassment, including gender and sexual harassment, at even greater rates than other women, and often experience sexual harassment as a manifestation of both gender and other kinds of discrimination.[364] A survey of 1,003 girls between the ages of 14 and 18, with a focus on Black, Latina, Asian, Native American, and LGBTQ individuals, found that 31 percent had survived sexual assault.[365] Of women who identify as multiracial, 32.3 percent are sexually assaulted.[366]

[364] Commenters cited: National Academies of Science, Engineering, and Medicine, *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine* (Frasier F. Benya *et al.* eds., 2018).
[365] Commenters cited: National Women's Law Center (NWLC), *Let Her Learn: Stopping Push Out for Girls who are Pregnant or Parenting* (2017).
[366] Commenters cited: Matthew J. Breiding *et al.*, *Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization – National Intimate Partner and Sexual Violence Survey, United States, 2011*, 63 MORBIDITY & MORTALITY WEEKLY REPORT 8 (Sept. 5, 2014).

- Of Black women in school, 16.5 percent reported being raped in high school and 36 percent were raped in college.[367] Among Black women, 21.2 percent are survivors of sexual assault.[368] Sixty percent of Black girls are sexually harassed before the age of 18.[369]
- Among Hispanic women, 13.6 percent are survivors of sexual assault.[370]
- In a 2015 study of 313 participants of Korean, Chinese, Filipino, and other Asian backgrounds: 53.5 percent of female participants reported experiencing sexual violence, including forced sexual relations (12.4 percent), sexual harassment (17.3 percent), unwanted touching (31.7 percent), or pressure to have unwanted sex (25.2 percent); out of all participants, 38.7 percent said they knew someone who had experienced sexual violence, and, of those, 70 percent said they knew two or more survivors. Of male participants, 8.1 percent reported experiencing sexual violence; 56.1 percent of the survivors first experienced sexual violence when they were ten to 19 years old and 26.3 percent when they were in their twenties.[371]
- Of Asian Pacific Islander women, 23 percent experienced sexual violence. Of Asian Pacific Islander men, nine percent experienced sexual violence.[372]

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[367] Commenters cited: Carolyn M. West & Kalimah Johnson, *Sexual Violence in the Lives of African American Women: Risk, Response, and Resilience*, VAWNET.ORG: NATIONAL ONLINE RESOURCE CENTER ON DOMESTIC VIOLENCE (2013).
[368] Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, *STOP SV: A Technical Package to Prevent Sexual Violence* (2016).
[369] Commenters cited: Hannah Giorgis, *Many women of color don't go to the police after sexual assault for a reason*, THE GUARDIAN (Mar. 25, 2015).
[370] Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, *STOP SV: A Technical Package to Prevent Sexual Violence* (2016).
[371] Commenters cited: KAN-WIN, *Community Survey Report on Sexual Violence in the Asian American/Immigrant Community* (2017), http://www kanwin.org/downloads/sareport.pdf.
[372] Commenters cited: Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010-2012 State Report* (2017).

- Of women who identify as American Indian or Alaska Native, over one-quarter have experienced rape and 56 percent have experienced rape, physical violence, or stalking by an intimate partner in their lifetime.[373] Seven out of every 1,000 American Indian (including Alaska Native) women experience rape or sexual assault, compared to two out of every 1,000 women of all races.[374]

Discussion: The data referred to by commenters, among other data, indicates that sexual harassment affects persons of color, particularly girls and women of color and persons with intersecting identities, in significant numbers. When sexual harassment constitutes sex discrimination covered by Title IX, the final regulations hold schools accountable for responding in ways that restore or preserve a complainant's equal access to education.

Changes: None.

Prevalence Data – Individuals with Disabilities

Comments: Many commenters referred the Department to statistics, data, research, and studies showing the prevalence of sexual harassment against individuals with disabilities, including as follows:

- Students with disabilities are 2.9 times more likely than their peers to be sexually assaulted.[375] As many as 40 percent of women with disabilities experience sexual

[373] Commenters cited: Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Summary Report* (Nov. 2011).
[374] Commenters cited: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *American Indians and Crime* (1999).
[375] Commenters cited: National Women's Law Center (NWLC), *Let Her Learn: Stopping Push Out for Girls who are Pregnant or Parenting* (2017).

assault or physical violence in their lifetimes.[376] Almost 20 percent of women with disabilities will have undesired sex with an intimate partner.[377]

- An exploratory study conducted to learn the rates of abuse among university students who have identified as having a disability found: 22 percent of participants reported some form of abuse over the last year and nearly 62 percent had experienced some form of physical or sexual abuse before the age of 17; only 27 percent reported the incident, and 40 percent of students with disabilities who reported abuse in the past year said they had little or no knowledge of abuse-related resources.[378]
- More than 90 percent of all people with developmental disabilities will experience sexual assault.[379] Forty-nine percent of people with developmental disabilities who are victims of sexual violence will experience ten or more abusive incidents.[380] Thirty percent of men and 80 percent of women with intellectual disabilities have been sexually assaulted.[381]
- Individuals with intellectual disabilities are sexually assaulted and raped at more than seven times the rate of individuals without disabilities; women with

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[376] Commenters cited: University of Michigan Sexual Assault Awareness and Prevention Center, *Sexual Assault and Survivors with Disabilities*, https://sapac.umich.edu/article/56.
[377] Commenters cited: Disabled World, *People with Disabilities and Sexual Assault* (2012), https://www.disabled-world.com/disability/sexuality/assaults.php.
[378] Commenters cited: Patricia A. Findley *et al.*, *Exploring the experiences of abuse of college students with disabilities*, 31 JOURNAL OF INTERPERSONAL VIOLENCE 17 (2015).
[379] Commenters cited: University of Michigan Sexual Assault Awareness and Prevention Center, *Sexual Assault and Survivors with Disabilities*, https://sapac.umich.edu/article/56.
[380] Commenters cited: Valenti-Hein & Schwartz, *The Sexual Abuse Interview for Those with Developmental Disabilities* (James Stanfield Co. 1995).
[381] Commenters cited: Disabled World, *People with Disabilities and Sexual Assault* (2012), https://www.disabled-world.com/disability/sexuality/assaults.php.

intellectual disabilities are 12 times more likely to be sexually assaulted or raped than women without disabilities.[382]

- Fifty-four percent of boys who are deaf and 25 percent of girls who are deaf, have been sexually assaulted, compared to ten percent of boys who are hearing and 25 percent of girls who are hearing.[383]

Discussion: The data referred to by commenters, among other data, indicates that sexual harassment affects individuals with disabilities in significant numbers. When sexual harassment constitutes sex discrimination covered by Title IX, the final regulations hold schools accountable for responding in ways that restore or preserve a complainant's equal access to education.

Changes: None.

Prevalence Data – Immigrants

Comments: Commenters referred the Department to data showing that immigrant girls and young women are almost twice as likely as their non-immigrant peers to have experienced incidents of sexual assault.[384]

Discussion: The data referred to by commenters, among other data, indicates that sexual harassment affects immigrant girls and women in significant numbers. When sexual harassment constitutes sex discrimination covered by Title IX, the final regulations hold schools accountable for responding in ways that restore or preserve a complainant's equal access to education.

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[382] Commenters cited: Joseph Shapiro, *The Sexual Assault Epidemic No One Talks About*, NPR (Jan. 8, 2018).
[383] Commenters cited: Disabled World, *People with Disabilities and Sexual Assault* (2012), https://www.disabled-world.com/disability/sexuality/assaults.php.
[384] Commenters cited: National Immigrant Women's Advocacy Project, *Empowering Survivors: Legal Rights of Immigrant Victims of Sexual Assault* (Leslye Orloff *ed*., 2013), https://www.evawintl.org/library/documentlibraryhandler.ashx?id=456 (using the term "immigrant" to include documented persons, refugees and migrants, others present in the United States on temporary visas, such as visitors, students, temporary workers, as well as undocumented individuals.).

Changes: None.

Impact Data

Comments: Many commenters referred the Department to statistics, data, research, and studies showing the impact of sexual harassment on victims, including as follows:

- Among students who are harassed, a vast majority of students (87 percent) report that the harassment had a negative effect on them, causing 37 percent of girls to not want to go to school, versus 25 percent of boys; female students were more likely in every case to say they continued to feel detrimental effects for "quite a while" compared with male students.[385]
- Approximately half of LGBTQ students who said that they experienced frequent or severe verbal harassment because of their sexual orientation or gender identity missed school at least once a month, and about 70 percent who said they experienced frequent or severe physical harassment missed school more than once a month.[386]
- In one study of transgender students, of those who faced harassment, 16 percent left college or vocational school because of the severity of the mistreatment they faced; and 17 percent of people who were out as transgender when they were K-12 students said that they experienced such severe harassment as a student that they had to leave school as a result.[387]

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[385] Commenters cited: American Association of University Women, *Crossing the Line: Sexual Harassment at School* (2011).
[386] Commenters cited: Gay, Lesbian and Straight Education Network (GLSEN), *The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools* (2018).
[387] Commenters cited: National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey* (Dec. 2016).

- The negative emotional effects of sexual harassment take a toll on girls' education, resulting in decreased productivity and increased absenteeism from school; in the 2010-2011 school year, 18 percent of abused children and teens did not want to go to school, 13 percent found it hard to study, 17 percent had trouble sleeping, and eight percent stayed home from school.[388]
- The impact of sexual harassment on students occurs at all grade levels and includes lowered motivation to attend class, paying less attention in class, lower grades, avoiding teachers with a reputation for engaging in harassment, dropping classes, changing majors, changing advisors, avoiding informal activities that enhance the educational experience, feeling less safe on campus, and dropping out of school.[389]
- Twenty percent of children and youth in schools have an identified mental health problem;[390] bullying, sexual harassment, and sexual assault contribute to mental health challenges for individuals when left unreported.
- Adverse childhood experiences can contribute significantly to negative adult physical and mental health outcomes and affect more than 60 percent of adults; every instance of sexual harassment against women undermines their potential for long-term economic

[388] Commenters cited: American Association of University Women, *Crossing the Line: Sexual Harassment at School* (2011).
[389] Commenters cited: National Academies of Science, Engineering, and Medicine, *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine* (Frasier F. Benya *et al.* eds., 2018).
[390] Commenters cited: Amy J. Houtrow & Megumi J. Okumura, *Pediatric Mental Health Problems and Associated Burden on Families*, 6 VULNERABLE CHILDREN & YOUTH STUDIES 3 (2011).

productivity and, by extension, the productivity of their family, their community, and the United States.[391]

- Secondary victimization and institutional betrayal have been shown to exacerbate trauma symptoms following a sexual assault, including increased anxiety, and more than 40 percent of college students who were sexually victimized reported experiences of institutional betrayal.[392]
- Being a victim of sexual assault can cause both immediate and long-term physical and mental health consequences; at least 89 percent of victims face emotional and physical consequences.[393] Approximately 70 percent of rape or sexual assault victims experience moderate to severe distress, a larger percentage than for any other violent crime.[394] The dropout rate of sexual harassment victims is much higher than percentage of college students who drop out of school; 34 percent of victims dropout of college.[395] Many schools have expelled survivors when their grades suffer as a result of trauma.[396]
- Eighty-one percent of women and 35 percent of men report significant short- or long-term impacts of sexual assault, such as post-traumatic stress disorder (PTSD); women

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[391] Commenters cited: American Academy of Pediatrics, *Adverse Childhood Experiences and the Lifelong Consequences of Trauma* (2014), https://www.aap.org/en-us/Documents/ttb_aces_consequences.pdf.
[392] Commenters cited: Carly Parnitzke Smith & Jennifer J. Freyd, *Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma*, 26 JOURNAL OF TRAUMATIC STRESS 1 (2013); John Briere & Carol E. Jordan, *Violence Against Women: Outcome Complexity and Implications for Assessment and Treatment*, 19 JOURNAL OF INTERPERSONAL VIOLENCE 11 (2004).
[393] Commenters cited: Andrew Van Dam, *Less than 1% of rapes lead to felony convictions. At least 89% of victims face emotional and physical consequences*, THE WASHINGTON POST (Oct. 6, 2018).
[394] Commenters cited: U.S. Dep't. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Special Report: Socio-emotional impact of violent crime* (2014).
[395] Commenters cited: Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18 JOURNAL OF COLL. STUDENT RETENTION: RESEARCH, THEORY & PRACTICE 2 (2015).
[396] Commenters cited: Alexandra Brodsky, *How much does sexual assault cost college students every year*, THE WASHINGTON POST (Nov. 18, 2014).

who are sexually assaulted or abused are over twice as likely to have PTSD, depression, and chronic pain following the violence compared to non-abused women.[397] Thirty percent of the college women who said they had been raped contemplated suicide after the incident.[398] Male victims of sexual abuse experience problems such as depression, suicidal ideation, anxiety, sexual dysfunction, loss of self-esteem, and long-term relationship difficulties.[399]

- Rape victims suffer long-term negative outcomes including PTSD, depression, generalized anxiety, eating disorders, sexual dysfunction, alcohol and illicit drug use, nonfatal suicidal behavior and suicidal threats, attempted and completed suicide, physical symptoms in the absence of medical conditions, low self-esteem, self-blame, and severe preoccupations with physical appearances; short-term negative impacts include shock, denial, fear, confusion, anxiety, withdrawal, shame or guilt, nervousness, distrust of others, symptoms of PTSD, emotional detachment, sleep disturbances, flashbacks, and mental replay of the assault.[400]
- If a sexual assault survivor ends up dropping out of high school, the survivor will earn 84 percent less than a typical graduate from a four-year college; student debt is a greater

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[397] Commenters cited: Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Summary Report* (Nov. 2011).
[398] Commenters cited: National Victim Center and Crime Victims Research and Treatment Center, *Rape in America: A Report to the Nation* (1992).
[399] Commenters cited: Lara Stemple, *The Sexual Victimization of Men in America: New Data Challenge Old Assumptions*, 104 AM. J. OF PUB. HEALTH 6 (2014).
[400] Commenters cited: Nicole P. Yuan, *The Psychological Consequences of Sexual Trauma*, VAWNET.ORG: NATIONAL RESOURCE CENTER ON DOMESTIC VIOLENCE (2006); Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, Division of Violence Prevention, *Preventing Sexual Violence* (last reviewed by the CDC on Jan. 17, 2020), https://www.cdc.gov/violenceprevention/sexualviolence/fastfact.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fviolenceprevention%2Fsexualviolence%2Fconsequences html; Rape, Abuse, & Incest National Network (RAINN), *Victims of Sexual Violence: Statistics*, https://www rainn.org/statistics/victims-sexual-violence.

burden for low income students who drop out, as those students will earn significantly less; and dropping out can have dire consequences as the lack of a high school diploma or General Equivalency Diploma (GED) directly correlates with higher risks of experiencing homelessness. [401]

Discussion: The data referred to by commenters, among other data, indicate that many sexual harassment victims suffer serious, negative consequences. Because sexual harassment causes serious detriment to victims, when sex discrimination covered by Title IX takes the form of sexual harassment, the final regulations require recipients to respond to complainants by offering supportive measures (irrespective of whether the complainant files a formal complaint), and when a complainant chooses to file a formal complaint, requiring remedies for a complainant when a respondent is found responsible. Supportive measures, and remedies, are designed to restore or preserve equal access to education.

Recognizing that Title IX governs the conduct of recipients themselves, the Department believes that the final regulations appropriately prescribe the actions recipients must take in response to reports and formal complaints of sexual harassment, so that complainants are not faced with institutional betrayal from a recipient's refusal to respond, or non-supportive response.

Changes: None.

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[401] Commenters cited: Eduardo Porter, *Dropping Out of College, and Paying the Price*, THE NEW YORK TIMES (June 26, 2013).

Cost Data

Comments: Many commenters referred to data showing that rape and sexual assault survivors often incur significant financial costs such as medical and psychological treatment, lost time at work, and leaves of absence from school, including as follows:

- The average lifetime cost of being a rape victim is estimated at $122,461, which calculates to roughly $3.1 trillion of lifetime costs across the 25 million reported victims in the United States.[402] A single rape costs a victim between $87,000 to $240,776.[403]
- More than one-fifth of intimate partner rape survivors lose an average of eight days of paid work per assault, and that does not include the subsequent job loss, psychological trauma, and cost (of treatment and to society at large).[404]

Many commenters asserted that the proposed rules would exacerbate the economic costs suffered by sexual assault survivors.

Discussion: The Department understands that sexual assault survivors often incur significant financial costs, both in the short-term and long-term. The final regulations require recipients to offer supportive measures to complainants and provide remedies to complainants when a fair grievance process has determined that a respondent is responsible for sexual harassment. Supportive measures and remedies are designed to restore or preserve equal access to education. The Department believes these responses by recipients will help complainants avoid costs that flow from loss of educational opportunities.

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[402] Commenters cited: Cora Peterson *et al.*, *Lifetime Economic Burden of Rape Among U.S. Adults*, 52 AM. J. PREVENTIVE MED. 6 (2017).
[403] Commenters cited: Ted R. Miller *et al.*, *Victim Costs of Violent Crime and Resulting Injuries*, 12 HEALTH AFFAIRS 4 (1993).
[404] Commenters cited: Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, *Costs of Intimate Partner Violence Against Women in the United States* (2003).

Changes: None.

Reporting Data

Comments: Many commenters referred the Department to statistics, data, research, and studies regarding rates of reporting of sexual harassment and sexual violence, and reasons why some victims do not report their victimization to authorities, including as follows:

- Only about half of all adolescent victims of peer-on-peer sexual assault will tell anyone about having been sexually harassed or assaulted and only six percent will actually report the incident to an official who might be able help them. Such underreporting may be due to individual student fears of reporting to school authorities or law enforcement; procedural gaps in how institutions record or respond to incidents; a reluctance on the part of institutions to be associated with these problems; or a combination of these factors.[405]
- At least 35 percent of college students who experience sexual harassment do not report it[406] because shame, fear of retaliation, and fear of not being believed prevent victims from coming forward. Only five to 28 percent of sexual harassment incidents are reported to Title IX offices; less than 30 percent of the most serious incidents of nonconsensual sexual contact are reported to an organization or agency like a university's Title IX office or law enforcement; the most common reason for not reporting was the victim did not consider the incident serious enough, while other reasons included embarrassment,

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[405] Commenters cited: Amy M. Young *et al.*, *Adolescents' Experiences of Sexual Assault by Peers: Prevalence and Nature of Victimization Occurring Within and Outside of School*, 38 JOURNAL OF YOUTH & ADOLESCENCE 1072 (2009).
[406] Commenters cited: American Association of University Women Educational Foundation, *Drawing the Line: Sexual Harassment on Campus* (2005).

shame, feeling it would be too emotionally difficult, and lack of confidence that anything would be done about it.[407]

- Survivors often do not report cases of sexual violence to their schools because they do not know how to report on their campus, because of fear of being disbelieved, or because of fear of having their assault not taken seriously.[408] Some survivors choose not to report sexual violence to authorities for a multitude of reasons, one of which is a fear that their perpetrator will retaliate or escalate the violence.[409]
- Research shows that students are deterred from reporting sexual harassment and assault for the following reasons: policies that compromise or restrict the victim's ability to make informed choices about how to proceed; concerns about confidentiality; a desire to avoid public disclosure; uncertainty as to whether they can prove the sexual violence or whether the perpetrator will be punished; campus policies on drug and alcohol use; policies requiring victims to participate in adjudication; trauma response; the desire to avoid the perceived or real stigma of having been victimized.[410]

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[407] Commenters cited: The Association of American Universities, *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct* (Westat 2015).
[408] Commenters cited: Kathryn J. Holland & Lilia M. Cortina, *"It happens to girls all the time": Examining sexual assault survivors' reasons for not using campus supports*, 59 AM. J. OF COMMUNITY PSYCHOL. 1-2 (2017).
[409] Commenters cited: Marjorie R. Sable *et al.*, *Barriers to Reporting Sexual Assault for Women and Men: Perspectives of College Students*, 55 JOURNAL OF AM. COLL. HEALTH 3 (2006); Ruth E. Fleury *et al.*, *When Ending the Relationship Does Not End the Violence*, 6 VIOLENCE AGAINST WOMEN 12 (2000); T.K. Logan & Robert Walker, *Stalking: A Multidimensional Framework for Assessment and Safety Planning*, 18 TRAUMA, VIOLENCE, & ABUSE 2 (2017).
[410] Commenters cited: U.S. Dep't. of Justice, Office of Justice Programs, National Institute of Justice, *Sexual Assault on Campus: What Colleges and Universities Are Doing About It* (2005).

- According to one study, 20 percent of students ages 18-24 did not report assault because they feared reprisal, nine percent believed the police would not or could not do anything to help, and four percent reported, but not to police.[411]
- One national 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.[412]
- Campus sexual assault is grossly underreported with only two percent of incapacitated sexual assault survivors and 13 percent of forcible rape survivors reporting to crisis or healthcare centers and even fewer to law enforcement.[413] About 65 percent of surveyed rape victims reported the incident to a friend, a family member, or roommate but only ten percent reported to police or campus officials.[414]
- Male victims often resist reporting due to contemporary social narratives, including jokes about prison rape, the notion that "real men" can protect themselves, the fallacy that gay male victims likely "asked for it," and the belief that reporting itself is "un-masculine."[415]
- Some students – especially students of color, undocumented students, LGBTQ students, and students with disabilities – are less likely than their peers to report sexual assault to

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[411] Commenters cited: U.S. Dep't. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Special Report: Rape and Sexual Assault Victimization Among College-Age Females, 1995-2013* (2014).
[412] Commenters cited: New Jersey Task Force on Campus Sexual Assault, *2017 Report and Recommendations* (June 2017).
[413] Commenters cited: National Sexual Violence Resource Center: Info and Stats for Journalists, *Statistics About Sexual Violence* (2015) (citing National Institute of Justice, *The Campus Sexual Assault (CSA) Study: Final Report* (2007)).
[414] Commenters cited: U.S. Dep't. of Justice, Office of Justice Programs, Office for Victims of Crime, *2017 National Crime Victims' Rights Week Resource Guide: Crime and Victimization Fact Sheets* (2017).
[415] Commenters cited: Lara Stemple, *The Sexual Victimization of Men in America: New Data Challenge Old Assumptions*, 104 AM. J. OF PUB. HEALTH 6 (2014).

the police due to increased risk of being subjected to police violence or deportation.[416] Survivors of color may not want to report to the police and add to the criminalization of men and boys of color; for these students, schools are often the only avenue for relief. Many LGBTQ students and students of color may feel mistrustful, unwelcomed, invisible, or discriminated against, which makes reporting their experience of sexual assault even more difficult.[417]

- LGBTQ students also experience unique barriers that prevent them from reporting these incidents:[418] the most common reason students gave for their failure to report were doubts that the school staff would do anything about the harassment; almost two-thirds (60 percent) of students who did report their harassment said that school staff did nothing in response or just told the students to ignore the harassment; and more than one in five students were told to change their behavior to avoid harassment, such as changing the way they dress or acting less "gay." Another reason LGBTQ students gave for not reporting was fear they would be "outed" to the school staff or their families, or face additional violence from their harasser. Over 40 percent of LGBTQ students stated that they did not report because they were not comfortable with school staff, often because of the belief that staff was discriminatory or complicit in the harassment.

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[416] Commenters cited: Jennifer Medina, *Too Scared to Report Sexual Abuse. The Fear: Deportation*, THE NEW YORK TIMES (April 30, 2017); National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey* (Dec. 2016); Audrey Chu, *I Dropped Out of College Because I Couldn't Bear to See My Rapist on Campus*, VICE (Sept. 26, 2017).
[417] Commenters cited: L. Ebony Boulware, *Race and trust in the health care system*, 118 PUB. HEALTH REPORTS 4 (2003).
[418] Commenters cited: Gay, Lesbian and Straight Education Network (GLSEN), *The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools* (2018).

- Sixty-nine percent of sexual abuse survivors said that police officers discouraged them from filing a report and one-third of survivors had police refuse to take their report; 80 percent of sexual assault survivors are reluctant to seek help and 91 percent report feeling depressed after their interaction with law enforcement.[419]
- Native American women are reluctant to report crimes because of the belief that nothing will be done; according to a 2010 study, the government declined to prosecute 67 percent of sexual abuse, homicide, and other violent crimes against Native American women.[420]
- Students with disabilities are less likely to be believed when they report sexual harassment experiences and often have greater difficulty describing the harassment they experience, because of stereotypes that people with disabilities are less credible or because they may have greater difficulty describing or communicating about the harassment they experienced, particularly if they have a cognitive or developmental disability.[421]

Discussion: The Department appreciates commenters' concerns that sexual harassment is underreported and references to data explaining the variety of factors that contribute to complainants choosing not to report incidents of sexual harassment.

We have revised the final regulations in several ways in order to provide students, employees, and third parties with clear, accessible reporting channels, predictability as to how a

[419] Commenters cited: Rebecca Campbell, *Survivors' Help-Seeking Experiences with the Legal and Medical Systems*, 20 VIOLENCE & VICTIMS 1 (2005).
[420] Commenters cited: *Gender Based Violence and Intersecting Challenges Impacting Native American & Alaskan Village Communities*, VAWNET.ORG: NATIONAL ONLINE RESOURCE CENTER ON DOMESTIC VIOLENCE (2016), https://vawnet.org/sc/gender-based-violence-and-intersecting-challenges-impacting-native-american-alaskan-village.
[421] Commenters cited: U.S. Dep't. of Justice, Office of Justice Programs, National Institute for Justice, *The Many Challenges Facing Sexual Assault Survivors with Disabilities* (2017).

recipient must respond to a report, informed options on how a complainant may choose to proceed, and requirements that Title IX personnel serve impartially, free from bias. Under the final regulations, any person may report sexual harassment to trigger the recipient's response obligations, and the complainant (i.e., the person alleged to be the victim) retains the right to receive available supportive measures irrespective of whether the complainant also decides to file a formal complaint that initiates a grievance process.

To emphasize that any person may report sexual harassment (not just the complainant), we have revised § 106.8 to state that any person may report sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sexual harassment) using the contact information listed for the Title IX Coordinator, which must include an office address, telephone number, and e-mail address, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report. In elementary and secondary schools, § 106.30 defining "actual knowledge" now provides that notice of sexual harassment to any employee triggers the recipient's response obligations, and in postsecondary institutions, students retain more autonomy and control over deciding whether, when, or to whom to disclose a sexual harassment experience without automatically triggering a report to the Title IX office.[422] The Department therefore aims to give every complainant (i.e., person alleged to be the victim) and all third parties clear reporting channels (which differ for postsecondary institution students than for elementary and secondary school students), and predictability as to the recipient's response obligations (i.e., under revised § 106.44(a) the Title IX Coordinator must contact the

[422] *See* discussion in the "Actual Knowledge" subsection of the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble.

complainant to discuss supportive measures, consider the complainant's wishes with respect to supportive measures, and explain the option for filing a formal complaint).

Every Title IX Coordinator must be free from conflicts of interest and bias and, under revised § 106.45(b)(1)(iii), trained in how to serve impartially and avoid prejudgment of the facts at issue. No recipient is permitted to ignore a sexual harassment report, regardless of the identity of the person alleged to have been victimized, and whether or not a school administrator might be inclined to apply harmful stereotypes against believing complainants generally or based on the complainant's personal characteristics or identity. The Department will enforce the final regulations vigorously to ensure that each complainant receives the response owed to them by the recipient.

We have added § 106.71 prohibiting retaliation against any individual exercising Title IX rights (including the right to refuse to participate in a grievance process). When complainants do decide to initiate a grievance process, or participate in a grievance process, recipients also may choose to offer informal resolution processes as alternatives to a full investigation and adjudication of the formal complaint, with the voluntary consent of both the complainant and respondent, which may encourage some complainants to file a formal complaint where they may have been reluctant to do so if a full investigation and adjudication was the only option. Where a respondent is found responsible for sexual harassment as defined in § 106.30, the recipient must provide remedies to the complainant designed to restore or preserve the complainant's equal access to education. In response to comments concerned that such remedies may not be effective, the final regulations expressly require the Title IX Coordinator to be responsible for the effective implementation of remedies.

The final regulations present a consistent, predictable framework for when and how a recipient must respond to Title IX sexual harassment. Although reporting sexual harassment is often inherently difficult, complainants who desire supportive measures, or factual investigation and adjudication, or both, may expect prompt, meaningful responses from their schools, colleges, or universities.

Changes: We have revised § 106.8 to state that any person may report sexual harassment (whether or not the person reporting is the person alleged to be the victim of sexual harassment) by using the contact information listed for the Title IX Coordinator, which must include an office address, telephone number, and e-mail address; reports may be made at any time, including during non-business hours, by using the telephone number or e-mail address or by mailing to the office address. We have revised § 106.30 defining "actual knowledge" to provide that notice of sexual harassment to any elementary and secondary school employee constitutes actual knowledge to the recipient, and to state that "notice" includes but is not limited to reporting to the Title IX Coordinator as described in § 106.8(a).

We have revised § 106.44(a) to specifically require the Title IX Coordinator to contact the complainant to discuss supportive measures, consider the complainant's wishes with respect to supportive measures, and explain the process for filing a formal complaint. We have revised § 106.45(b)(1)(iii) to require that Title IX personnel be trained on how to serve impartially, without prejudgment of the facts. We have added § 106.71 prohibiting retaliation against any person exercising rights under Title IX, and § 106.45(b)(7)(iv) requiring Title IX Coordinators to be responsible for effective implementation of any remedies.

Stereotypes / Punishment for "Lying"

Comments: Some commenters asserted that the proposed rules will be particularly harmful to women and girls of color, who experience explicit and implicit bias in the investigation of claims of sexual harassment and assault. Commenters argued that due to harmful race and sex stereotypes that label women of color as "promiscuous," schools are more likely to ignore, blame, and punish women and girls of color who report sexual harassment.[423] Student concerns about reporting are especially common among members of historically marginalized communities, who are often more likely to be disbelieved or even punished by schools for reporting sexual assault. Commenters stated that Black women and girls are commonly stereotyped as "Jezebels," Latina women and girls as "hot-blooded," Asian American and Asian Pacific Islander women and girls as "submissive, and naturally erotic," Native American women and girls as "sexually violable as a tool of war and colonization," and multiracial women and girls as "tragic and vulnerable, historically, products of sexual and racial domination." Commenters stated that schools are also more likely to punish Black women and girls by labeling them as aggressors based on stereotypes that they are "angry" and "aggressive." Commenters pointed out that the Department's 2013-14 Civil Rights Data Collection shows that Black girls are five times more likely than white girls to be suspended in K-12, and that while Black girls represented 20 percent of all preschool enrolled students, they were 54 percent of

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[423] Commenters cited: Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 HARV. J. OF L. & GENDER 1 (2018); National Women's Law Center & Girls for Gender Equity, *Listening Session on the Needs of Young Women of Color* (2015); Sonja C. Tonnesen, *Commentary: "Hit It and Quit It": Responses to Black Girls' Victimization in School*, 28 BERKELEY J. OF GENDER, L. & JUSTICE 1 (2013); NAACP Legal Defense and Educational Fund, Inc. & National Women's Law Center, *Unlocking Opportunity for African American Girls: A Call to Action for Educational Equity* (2014).

preschool students who were suspended. Commenters argued that schools should require all officials involved in Title IX proceedings to attend implicit bias trainings.

One commenter argued that the negative effects of harmful stereotypes are exacerbated by the fact that the proposed rules would allow schools to punish students whom the school believes are lying, and this could have a significant effect on survivors of color. Commenters asserted that many Black girls who defend themselves against perpetrators are often misidentified as the aggressors. Similarly, commenters asserted that the proposed rules would allow a school to punish any person, including a witness, who "knowingly provides false information" to the school, which makes it even easier for schools to punish girls and women of color who report sexual harassment for "lying" about it, when such a conclusion by the school is often based on negative stereotypes rather than the truth.

Commenters also expressed concern that many students who report sexual assault and other forms of sexual harassment to their school face discipline instead of support: for example, schools punish complainants for engaging in so-called "consensual" sexual activity; for engaging in premarital sex; for defending themselves against their harassers; or for merely talking about their assault with other students in violation of a "gag order" or nondisclosure agreement imposed by their school.

Discussion: The Department shares the concerns of commenters who asserted, and cited to data and articles showing, that some complainants, including or especially girls of color, face school-level responses to their reports of sexual harassment infected by bias, prejudice, or stereotypes. In response to such concerns, the Department adds to § 106.45(b)(1)(iii), prohibiting Title IX Coordinators, investigators, and decision-makers, and persons who facilitate informal resolution processes from having conflicts of interest or bias against complainants or respondents generally,

or against an individual complainant or respondent, training that also includes "how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias." No complainant reporting Title IX sexual harassment or respondent defending against allegations of sexual harassment should be ignored or be met with prejudgment, and the final regulations require recipients to meet response obligations impartially and free from bias. The Department will vigorously enforce the final regulations in a manner that holds recipients responsible for responding to complainants, and treating all parties during any § 106.45 grievance process, impartially without prejudgment of the facts at issue or bias, including bias against an individual's sex, race, ethnicity, sexual orientation, gender identity, disability or immigration status, financial ability, or other characteristic. Any person can be a complainant, and any person can be a respondent, and every individual is entitled to impartial, unbiased treatment regardless of personal characteristics. The Department declines to specify that training of Title IX personnel must include implicit bias training; the nature of the training required under § 106.45(b)(1)(iii) is left to the recipient's discretion so long as it achieves the provision's directive that such training provide instruction on how to serve impartially and avoid prejudgment of the facts at issue, conflicts of interest, and bias, and that materials used in such training avoid sex stereotypes.

In response to commenters' concerns that biases and stereotypes may lead a recipient to punish students reporting sexual harassment allegations, the Department adds § 106.71(a) to expressly prohibit retaliation and specifically state that intimidation, threats, coercion, discrimination, or charging an individual with a code of conduct violation, arising out of the same facts or circumstances as a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX, constitutes retaliation. This

provision draws recipients' attention to the fact that punishing a complainant with non-sexual harassment conduct code violations (e.g., "consensual" sexual activity when the complainant has reported the activity to be nonconsensual, or underage drinking, or fighting back against physical aggression) is retaliation when done for the purpose of deterring the complainant from pursuing rights under Title IX. The Department notes that this section applies to respondents as well.

In further response to commenters' concerns about parties being unfairly punished for lying, § 106.71(b)(2) provides that charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding does not constitute retaliation but a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith. This provision leaves open the possibility that punishment for lying or making false statements might be retaliation, unless the recipient has concluded that the party made a materially false statement in bad faith (and that conclusion cannot be based solely on the outcome of the case).

While commenters are correct that § 106.45(b)(2) requires the written notice of allegations to 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, this provision appropriately alerts parties where the recipient's own code of conduct has a policy against making false statements during a disciplinary proceeding so that both parties understand that risk. Section 106.71 protects complainants – and respondents and witnesses – from being charged with code of conduct violations arising from the same facts or circumstances as sexual harassment allegations if such a charge is brought for the purpose of curtailing rights or privileges secured by Title IX or these final regulations, and leaves open the

possibility that punishment for lying might be retaliation unless the disciplined party made a materially false statement in bad faith.

The Department notes that commenters' concerns that complainants are sometimes punished unfairly for merely talking about their assault with fellow students in violation of a school-imposed "gag order" is addressed by § 106.45(b)(5)(iii).

Changes: The Department has revised § 106.45(b)(1)(iii) to include in the required training how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. We have added § 106.71(a), which prohibits retaliation and states that charging an individual with a code of conduct violation that does not involve sexual harassment but arises out of the same facts or circumstances as sexual harassment allegations, for the purpose of interfering with rights under Title IX, constitutes retaliation. The Department has also added § 106.71(b)(2) to provide that charging an individual with a code of conduct violation for making a materially false statement in bad faith does not constitute retaliation, provided that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a such a false statement.

False Allegations

Comments: A number of commenters referred the Department to statistics, data, research, and studies relating to the frequency of false accusations of sexual misconduct. Most commenters who raised the issue of false allegations cited data for the proposition that somewhere between

two to ten percent of sexual assault reports are false or unfounded.[424] Commenters asserted that despite the low frequency of false allegations, police officers tend to believe false allegations of rape are much more common than they actually are,[425] reflecting a society-wide misconception about women falsely alleging rape.

Many commenters concluded that such data shows that nationwide, overreporting and false allegations are not nearly as concerning as underreporting and perpetrators "getting away with it," and thus protection of respondents from false allegations should not be the motive or purpose of Title IX rules.

Other commenters argued that whether the rate of false allegations is as low as two to ten percent or somewhat higher, the reality is that some complainants do bring false or unfounded accusations for a variety of reasons.[426] A few commenters referred to the Duke lacrosse rape case and the University of Virginia gang rape situation as specific instances where rape accusations were revealed to be false only after prejudgment of the facts in favor of the complainants had led to unfair penalization of the accused students. One commenter referred to a 2017 National Center

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[424] Commenters cited: National Sexual Violence Resource Center, *False Reporting: Overview* (2012); David Lisak *et al.*, *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 12 (2010); Kimberly A. Lonsway, *et al.*, *False reports: moving beyond the issue*, 3 THE VOICE 1 (2009); U.S. Dep't. of Justice, Federal Bureau of Investigation, *Crime in the United States: 1996 Uniform Crime Reports* (1997); State of Victoria, Office of Women's Policy, *Study of Reported Rapes in Victoria 2000-2003: Summary Research Report* (2006).

[425] Commenters cited: David Lisak *et al.*, *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 12 (2010).

[426] Commenters cited, *e.g.*, Cassia Spohn & Katharine Tellis, *Policing and Prosecuting Sexual Assault in Los Angeles City and County: A Collaborative Study in Partnership with the Los Angeles Police Department, the Los Angeles County Sheriff's Department, and the Los Angeles County District Attorney's Office* (2012) ("Complainants' motivations for filing false reports, which fell into five overlapping categories, included a desire to avoid trouble or a need for an alibi for consensual sex with someone other than a current partner, a desire to retaliate against a current or former partner, a need for attention or sympathy, and guilt or remorse as a result of consensual sexual activity. Many complainants in the unfounded cases also had mental health issues that made it difficult for them to separate fact from fantasy.").

for Higher Education Risk Management (NCHERM) report that noted that the recent trend of increased reports "brings allegations of all kinds out of the woodwork, some based strongly in fact, others that are baseless, and most that are somewhere in between."[427]

One commenter, on behalf of an organization representing student affairs professionals in higher education, described campus sexual assault proceedings as complicated under the best of circumstances because these cases involve navigating allegations that frequently involve different personal recollections of what happened, with few or no witnesses or physical evidence, and possibly colored by alcohol use by one or both parties. Commenters argued that just because a victim does not have corroborating evidence does not mean that a sexual assault claim is false.

Discussion: Under the final regulations, recipients must offer supportive measures to a complainant; the final regulations make this an explicit part of a recipient's prompt, non-deliberately indifferent response.[428] Such a requirement advances the non-discrimination mandate of Title IX by imposing an obligation on recipients to support complainants even without a factual determination regarding the allegations. In order to determine that a complainant has been victimized and is entitled to remedies (which, unlike supportive measures,

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[427] Commenters cited: National Center for Higher Education Risk Management (NCHERM), *The 2017 NCHERM Group Whitepaper: Due Process and the Sex Police* 15 (2017) ("What is needed for all of our students is a balanced process that centers on their respective rights while showing favoritism to neither. Not only is that best, it is required by law. Title IX Coordinators write to us, worried that their annual summaries show that they are finding no violation of policy 60% of the time in their total case decisions. They feel like somehow that is wrong, or not as it should be, as if there is some proper ratio of findings that we are supposed to be reaching. . . . With all the training and education being directed at students, more are coming forward, and that education brings allegations of all kinds out of the woodwork, some based strongly in fact, others that are baseless, and most that are somewhere in between.").

[428] Section 106.44(a).

need not avoid burdening a respondent),[429] allegations of Title IX sexual harassment must be resolved through the § 106.45 grievance process, designed to reach reliable factual determinations. This approach is necessary to promote accurate resolution of allegations in each situation presented in a formal complaint, regardless of how frequently or infrequently false accusations statistically occur.

The Department disputes that a choice must be made between caring about underreporting and caring about overreporting, or prioritizing protection of complainants' right to receive support and remedies, over protection of respondents from unfounded accusations. The Department understands that false allegations may occur infrequently, but believes that in every case in which Title IX sexual harassment is alleged, the facts must be resolved accurately to further the non-discrimination mandate of Title IX, including providing remedies to victims and ensuring that no party is treated differently based on sex. Under the final regulations, complainants are entitled to a prompt response that is not clearly unreasonable under the known circumstances, which response must include offering supportive measures even in the absence of factual investigation into the allegations. Complainants and respondents are owed an impartial grievance process that reaches reliable factual determinations of the allegations before remedies are owed to a victim or disciplinary sanctions are imposed on the respondent. Such an approach protects the interests of complainants and respondents in each unique situation, without assuming

[429] The final regulations revise § 106.45(b)(1)(i) to expressly state that remedies, unlike supportive measures, may be punitive or disciplinary and need not avoid burdening the respondent. This distinction between supportive measures and remedies is because remedies are required after a respondent has been determined responsible under a grievance process that complies with § 106.45.

the truth or falsity of particular allegations based on statistical information about the prevalence or reasons for false accusations.

The Department appreciates the commenters who described campus sexual assault proceedings as difficult to navigate and complex because they nearly always involve different personal recollections about what happened, with few or no witnesses or physical evidence, possibly influenced by alcohol use by one or both parties. Some commenters emphasized, and the Department agrees, that the difficult, complex nature of Title IX sexual harassment situations cautions against concluding that allegations are "false" based solely on the outcome of the case, because lack of evidence sufficient to conclude responsibility does not necessarily imply that the allegations were unfounded or false. In response to commenters addressing this topic, these final regulations contain a provision expressly prohibiting retaliation[430] and specifying that charging an individual with a code of conduct violation for making a materially false statement in bad faith does not constitute retaliation, but a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith. This provision cautions recipients to avoid stating or implying to complainants whose formal complaints end in a determination of non-responsibility that the determination, alone, means that the complainant's allegations were false or show bad faith on the part of the complainant, because such statements or implications may constitute retaliation. The Department further notes that the new provision in § 106.71(b)(2) applies equally to respondents and complainants, such that a determination of responsibility against a respondent, alone, is insufficient to justify punishing the respondent for making a materially false statement in bad faith. The Department

[430] Section 106.71.

agrees with commenters who asserted that a complainant's allegations may be determined to be accurate and valid even if there is no evidence corroborating the complainant's statements. The final regulations are designed to result in accurate outcomes regardless of the type of evidence available in particular cases.

Changes: The Department has added § 106.71(b)(2), which provides that charging an individual with a code of conduct violation for making a materially false statement in bad faith does not constitute retaliation, provided that a determination regarding responsibility, alone, is not sufficient to conclude that such a false statement was made.

General Support and Opposition for Supreme Court Framework Adopted in § 106.44(a)

Comments: A number of commenters expressed general support for § 106.44(a). Several commenters supported the provision because they believed it was fair and thoughtful or made common sense. Commenters stated that this provision brings clarity and accountability. One commenter opined that the proposed rules would restore public confidence in these proceedings.

Other commenters expressed satisfaction that the provisions in § 106.44(a) are consistent with basic constitutional principles and operative practices in our criminal justice system. A number of commenters argued that the proposed rules were necessary because the processes under previous rules have been inadequate. Some commenters argued that this provision is necessary because there needs to be more due process provided after the withdrawn 2011 Dear Colleague Letter. Commenters expressed concern the previous approach in guidance lacked protections for the accused, and the proposed rules balance protection for the accused with justice for victims. Commenters asserted the proposed rules bring back the rule of law to these proceedings. Other commenters expressed concern that past Department guidance has led to violations of students' free speech rights. Another commenter asserted that by nature,

universities are ill-equipped to handle criminal assault charges and asserted that if universities are going to deal with serious charges like sexual assault, it is critical that the sanctions they wield, which often can have significant consequences, are applied only after a fair process to determine facts and guilt; the commenter supported the process that the proposed regulations provide.

Commenters expressed support for the Department's general approach because it is flexible. Commenters supported the "not clearly unreasonable standard" in particular for this reason. Commenters also expressed support for this approach because it brings clarity to a very confusing and complicated issue. Some commenters expressed support for the proposed rules because they are pro-women. Other commenters asserted that the proposed rules add needed clarity to what is required by recipients under Title IX. Some commenters also stated that responding to sexual harassment is a uniquely difficult challenge because, unlike sexual assault, it is intertwined with free speech.

Commenters also expressed support for the Department's choice to respect survivors' autonomy in deciding whether to initiate a grievance process in the higher education setting. Some commenters suggested expanding the deliberately indifferent standard to include the respondent so that recipients must respond in a manner that is not deliberately indifferent toward a complainant or respondent. Other commenters asserted that not all cases of sexual harassment warrant discipline because sometimes a reporting party just wants the respondent to understand why what they did was wrong.

Some commenters suggested adding a statute of limitations requirement in the filing of a complaint that aligns to that jurisdiction so as to preserve evidence and protect both parties.

Other commenters expressed disapproval of the notion of third-party reporting and bystander intervention because posters plastered all over campuses that command students to make reporting a habit have a totalitarian feel. Other commenters asked if the Department would consider encouraging schools to inquire into anonymous and third-party reports as a means of preventing harassment from worsening.

Discussion: The Department appreciates the comments in support of the deliberate indifference standard in § 106.44(a). The deliberate indifference standard provides consistency with the Title IX rubric for judicial and administrative enforcement and gives a recipient sufficient flexibility and discretion to address sexual harassment. At the same time, for reasons explained in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, the Department has tailored a deliberate indifference standard for administrative enforcement purposes by adding specific obligations that every recipient must meet as part of every response to sexual harassment, including offering supportive measures to complainants through the Title IX Coordinator engaging in an interactive discussion with the complainant about the complainant's wishes, and explaining to the complainant the option and process for filing a formal complaint.

The Department acknowledges that some commenters think that these final regulations are pro-women while others think that these final regulations are pro-men. The final regulations are structured to avoid any favoritism on the basis of sex, and the Department will enforce them in a manner that does not discriminate on the basis of sex.

The Department appreciates the commenters who would like the Department to make it clear that the deliberate indifference standard applies to both complainants and respondents. To address this concern, the Department is revising § 106.44(a) to clarify that a recipient must treat

complainants and respondents equitably, which for a respondent means following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30.

We also appreciate commenters who would like us to respect the autonomy of the complainant. A complainant may only want supportive measures, may wish to go through an informal process, or may want to file a formal complaint. The Department revised § 106.44(a) to clarify that an equitable response for a complainant means offering supportive measures irrespective of whether the complainant also chooses to file a formal complaint. Additionally, a recipient may choose to offer an informal resolution process under § 106.45(b)(9) (except as to allegations that an employee sexually harassed a student). These final regulations thus respect a complainant's autonomy in determining how the complainant would like to proceed after a recipient becomes aware (through the complainant's own report, or any third party reporting the complainant's alleged victimization) that a complainant has allegedly suffered from sexual harassment.

The Department does not wish to impose a statute of limitations for filing a formal complaint of sexual harassment under Title IX. Each State may have a different statute of limitations for filing a complaint, which goes against the Department's objective of creating uniformity and consistency. Additionally, a State's statute of limitations for each category of sexual harassment may be different as jurisdictions may have a different statute of limitations for criminal offenses versus civil torts, adding yet another level of complexity to a recipient's response. The Department notes that a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed as provided in the revised definition of "formal complaint" in § 106.30; this provision

tethers a recipient's obligation to investigate a complainant's formal complaint to the complainant's involvement (or desire to be involved) in the recipient's education program or activity so that recipients are not required to investigate and adjudicate allegations where the complainant no longer has any involvement with the recipient while recognizing that complainants may be affiliated with a recipient over the course of many years and sometimes complainants choose not to pursue remedial action in the immediate aftermath of a sexual harassment incident. The Department believes that applying a statute of limitations may result in arbitrarily denying remedies to sexual harassment victims. At the same time, the § 106.45 grievance process contains procedures designed to take into account the effect of passage of time on a recipient's ability to resolve allegations of sexual harassment. For example, if a formal complaint of sexual harassment is made several years after the sexual harassment allegedly occurred, § 106.45(b)(3)(ii) provides that if the respondent is no longer enrolled or employed by the recipient, or if specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein, then the recipient has the discretion to dismiss the formal complaint or any allegations therein.

Similarly, the Department does not take a position in the NPRM or these final regulations on whether recipients should encourage anonymous reports of sexual harassment, but we have revised § 106.8(a) and § 106.30 defining "actual knowledge" to emphasize that third party (including "bystander") reporting, as well as anonymous reporting (by the complainant or by a

third party) is a permissible manner of triggering a recipient's response obligations.[431] Irrespective of whether a report of sexual harassment is anonymous, a recipient with actual knowledge of sexual harassment or allegations of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent generally and must meet the specific obligations set forth in revised § 106.44(a). On the other hand, if a recipient cannot identify any of the parties involved in the alleged sexual harassment based on the anonymous report, then a response that is not clearly unreasonable under light of these known circumstances will differ from a response under circumstances where the recipient knows the identity of the parties involved in the alleged harassment, and the recipient may not be able to meet its obligation to, for instance, offer supportive measures to the unknown complainant.

Changes: The Department revised § 106.44(a) to require recipients to respond *promptly* in a manner that is not deliberately indifferent. We also added to that paragraph: A recipient's response must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30,

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[431] Section 106.8(a) states that any person may report sexual harassment (whether or not the person reporting is the person alleged to be the victim of sexual harassment) by using the contact information listed for the Title IX Coordinator, and that such a report may be made "at any time (including during non-business hours)" by using the listed telephone number or e-mail address, or by mail to the listed office address. Section 106.30 defines "actual knowledge" and includes a statement that "notice" charging a recipient with actual knowledge includes a report to the Title IX Coordinator as described in § 106.8(a). *See also* discussion of anonymous reporting in the "Formal Complaint" subsection of the "Section 106.30 Definitions" section of this preamble.

consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.

The Department also has revised § 106.45(b)(3)(ii) to state that if a respondent is no longer enrolled or employed by a recipient, or if specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein, then the recipient may dismiss the formal complaint or any allegations therein.

We have also revised § 106.8(a) and § 106.30 defining "actual knowledge" to expressly state that any person may report sexual harassment in person, by mail, telephone, or e-mail, by using the contact information required to be listed for the Title IX Coordinator.

Comments: A number of commenters asserted that § 106.44(a) does not adequately protect students in both elementary and secondary and postsecondary education. Some commenters stated that no harassment at all should be tolerated under Title IX. Other commenters asserted that the provision would hinder Title IX enforcement. Still other commenters opined that the provision creates a situation in which systematic sexual harassment and misconduct can continue. Other commenters gave examples of the need to protect students evidenced by high-profile sexual abuse scandals at postsecondary institutions. Some commenters asserted that the proposed rules change schools' current responsibilities to take prompt and effective steps to end harassment, arguing that the current standard is more protective of students than the new deliberate indifference standard. Other commenters stated that the provision allows schools to "check boxes" in investigating complaints of sexual misconduct and will lead to a less prompt, less equitable response. Commenters stated the proposed rules would require schools to ignore

all sexual harassment unless the student has been denied equal access to education, even if the student has to sit next to their harasser or rapist in class every day, which creates a hostile environment for victims and negatively affects victims' ability to proceed with their education. Commenters argued schools will become more dangerous because the proposed rules perpetuate rape culture.

Discussion: The Department agrees with commenters inasmuch as proposed § 106.44(a), in conjunction with the way that actual knowledge was defined in § 106.30, did not adequately protect students in the elementary and secondary context. As discussed in the "Actual Knowledge" subsection of the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, we have revised § 106.30 defining actual knowledge to include notice to any elementary and secondary school employee.

We also agree with commenters to the extent that proposed § 106.44(a) did not impose sufficient specific, mandatory requirements as to what a recipient's non-deliberately indifferent response must consist of in order to protect complainants and be fair to respondents, in the context of elementary and secondary schools as well as the postsecondary institution context. As revised, § 106.44(a) requires all recipients to treat complainants and respondents equitably when responding to a report or formal complaint of sexual harassment (by offering supportive measures to complainants, and by disciplining respondents only after applying a grievance process that complies with § 106.45).

When a recipient has actual knowledge of sexual harassment in its education program or activity, the Department will not tolerate, and the final regulations do not allow recipients to tolerate, sexual harassment, including systematic sexual harassment or the perpetuation of a rape culture. Contrary to commenters' assertions, recipients will not be allowed to ignore sexual

harassment until it leads to the denial of equal access to education and must respond to every report of sexual harassment by offering supportive measures by engaging in an interactive discussion with the complainant to consider the complainant's wishes regarding available supportive measures, with or without the filing of a formal complaint. Supportive measures for complainants may include a different seating assignment or other accommodation so that the complainant does not need to sit next to the respondent in class every day. By requiring a recipient to offer supportive measures, these final regulations do not create or further a hostile environment and expressly require recipients to provide measures designed to restore or preserve a complainant's equal access to education.

In response to comments, the Department also revised § 106.44(a) to clarify that a recipient must respond *promptly* in a manner that is not deliberately indifferent. This clarifies that whether or not a formal complaint triggers a grievance process, the recipient must promptly offer supportive measures to the complainant. Where a formal complaint does trigger a grievance process, § 106.45(b)(1)(v) requires recipients to have a reasonably prompt time frame for the conclusion of the grievance process, including any appeals or informal resolution process.

Changes: As previously noted, the Department revised § 106.44(a) to require that the recipient respond promptly, and by offering supportive measures to complainants while refraining from punishing a respondent without following the § 106.45 grievance process.

Comments: Commenters expressed concern that the trauma suffered by victims is too great to hold schools to the deliberate indifference standard, which commenters characterized as too low a standard. Commenters noted the severe long-term effects of sexual assault and harassment on victims, including depression and suicide. Commenters expressed concern with the "clearly unreasonable" standard because false reporting is much less likely to happen than actual rape.

Commenters stated the proposed rules promote the misconception that survivors are making false accusations of sexual assault.

Commenters expressed concern that the proposed rules allow perpetrators in positions of authority to abuse the system. Commenters stated that by allowing institutions to create complex and opaque systems for reporting sexual harassment or sexual assault, perpetrators in positions of authority can continue to victimize students over long periods.

Discussion: The Department disagrees that the deliberate indifference standard in § 106.44(a) is too low of a standard to protect complainants and hold schools, colleges, and universities responsible for responding to sexual harassment in education programs or activities. As adapted from the *Gebser/Davis* framework and revised in these final regulations, this standard requires recipients to offer supportive measures to a complainant through an interactive process whereby the Title IX Coordinator must contact the complainant to discuss availability of supportive measures (with or without the filing of a formal complaint), consider the complainant's wishes regarding supportive measures, and explain to the complainant the process for filing a formal complaint. The Department has not previously imposed a legally binding requirement on recipients to offer supportive measures to a complainant in response to a report of sexual harassment. The Department acknowledges that sexual assault and sexual harassment may have severe, long-term consequences, which is why the Department requires recipients to respond promptly and to offer a complainant supportive measures. The final regulations' emphasis on supportive measures recognizes that educational institutions are uniquely positioned to take prompt action to protect complainants' equal access to education when the educational institution is made aware of sexual harassment in its education program or activity, often in ways that even a court-issued restraining order or criminal prosecution of the respondent would not accomplish

(e.g., approving a leave of absence for a complainant healing from trauma, or accommodating the re-taking of an examination missed in the aftermath of sexual violence, or arranging for counseling or mental health therapy for a sexual harassment victim experiencing PTSD symptoms). While we recognize that the range of supportive measures (defined in § 106.30 as individualized services, reasonably available, without fee or charge to the party) will vary among recipients, we believe that every recipient has the ability to consider, offer, and provide some kind of individualized services reasonably available, designed to meet the needs of a particular complainant to help the complainant stay in school and on track academically and with respect to the complainant's educational benefits and opportunities, as well as to protect parties' safety or deter sexual harassment. These final regulations impose on recipients a legal obligation to do what recipient educational institutions have the ability and responsibility to do to respond promptly and supportively to help complainants, while treating respondents fairly.

Commenters erroneously asserted that the Department is adopting the standard in § 106.44(a) because of a belief that false reporting occurs more frequently than rape; these final regulations are not premised on, and do not promote, this notion. As explained previously, the Department is adopting this standard to require recipients to respond promptly and in a manner that provides a complainant with supportive measures and presents the complainant with more control over the process by which the recipient will respond to the report of sexual harassment.

This standard will not allow perpetrators in positions of authority to abuse the system or to continue to victimize students over long periods of time. Contrary to the commenters' assertions, these final regulations do not allow institutions to create complex and opaque systems for reporting sexual harassment or sexual assault. These final regulations require recipients to notify all students and employees (and parents and guardians of elementary and secondary

school students) of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator pursuant to § 106.8(a) so that students and employees will know to whom they may report sexual harassment and how to make such a report, including options for reporting during non-business hours. Each recipient also must prominently display the contact information required to be listed for the Title IX Coordinator on its website, if any, and in each handbook or catalog that it makes available to applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, pursuant to § 106.8(c). Additionally, a recipient must respond when the recipient has actual knowledge of sexual harassment, even if the complainant (i.e., the person alleged to be the victim) is not the person who reports the sexual harassment. As explained above, "actual knowledge" is defined in § 106.30 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 any employee of an elementary and secondary school. Far from being complex or opaque, the final regulations ensure that recipients and their educational communities (including their students, employees, and parents of elementary and secondary school students) understand how to report sexual harassment and what the recipient's response will be. Regardless of whether a recipient desires to absolve itself of actual knowledge of sexual harassment, a recipient cannot avoid actual knowledge triggering prompt response obligations, because any person (not only the complainant – i.e., the alleged victim – but any third party) may report sexual harassment allegations to the Title IX Coordinator, to an official with authority to

take corrective action, or to any elementary or secondary school employee.[432] The final regulations require recipients to post on their websites the contact information for the recipient's Title IX Coordinator and to send notice to every student, employee, and parent of every elementary and secondary school student of the Title IX Coordinator's contact information.[433] The final regulations thus create clear, accessible channels for any person to report sexual harassment in a way that triggers a recipient's response obligations. A recipient must promptly respond if it has actual knowledge that any person, including someone in a position of authority, is sexually harassing or assaulting students; failure to do so violates these final regulations. As previously stated, the deliberate indifference standard is flexible and may require a different response depending on the unique circumstances of each report of sexual harassment. If a recipient has actual knowledge of a pattern of alleged sexual harassment by a perpetrator in a position of authority, then a response that is not deliberately indifferent or clearly unreasonable may require the recipient's Title IX Coordinator to sign a formal complaint obligating the recipient to investigate in accordance with § 106.45, even if the complainant (i.e., the person alleged to be the victim) does not wish to file a formal complaint or participate in a grievance process.

Changes: None.

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[432] *See* § 106.30 defining "actual knowledge" and § 106.44(a) requiring a prompt response to actual knowledge of sexual harassment in a recipient's program or activity against a person in the United States.

[433] Section 106.8 (expressly stating that any person may report sexual harassment by using the contact information required to be listed for the Title IX Coordinator or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report; requiring the contact information to be prominently displayed on recipients' websites; and stating that reports may be made at any time including during non-business hours by using the listed telephone number or e-mail address or by mail to the listed office address).

Comments: A number of commenters expressed concern that the proposed rules create more obstacles for survivors. Commenters stated that the proposed rules are not based in science and that reducing existing standards by not providing support and services to survivors of sexual assault and harassment is harmful and out of step with data and research. Other commenters expressed concern that the proposed rules prevent survivors from coming forward by cutting off their access to resources. Commenters expressed concern that the proposed rules are unfair to, unreasonable, or indifferent toward survivors and allows schools to do very little to help survivors. Commenters stated the proposed rules make it impossible for survivors to seek meaningful redress from their schools after having experienced sexual harassment.

Some commenters expressed concern that the standard for opening an investigation is too high. Other commenters suggested that the standard for opening an investigation into an individual student's complaint of harassment should not be as high as the standard for actually holding a school liable as an institution. Commenters stated that the Title IX Coordinator determining if a complaint meets certain criteria is an unnecessary obstacle.

Commenters argued that requiring a formal complaint places additional burdens on the individual who has experienced trauma. Commenters stated the process could retraumatize the survivor and discourage others from coming forward. Commenters stated a plaintiff would normally be able to access equitable relief to remedy unintentional discrimination through a court order, but the Department would not attempt to secure a remedy on the same facts.

Discussion: Contrary to commenters' assertions, these final regulations remove obstacles for complainants by clearly requiring recipients to offer supportive measures irrespective of whether the complainant files a formal complaint and without any showing of proof of the complainant's allegations. The final regulations provide greater choice and control for complainants.

Complainants may choose whether to receive supportive measures without filing a formal complaint, may choose to receive supportive measures and file a formal complaint, or may choose to receive supportive measures and request any informal resolution process that the recipient may offer. Accordingly, these final regulations respect complainants' autonomy and require recipients to consider the wishes of each complainant with respect to the type of response that best suits a complainant's particular needs.[434]

We disagree that the standard for opening an investigation is the same standard for holding a recipient liable and that this standard is too high. If a recipient has actual knowledge of sexual harassment (or allegations of sexual harassment) in its education program or activity against a person in the United States, then it must begin an investigation as soon as the complainant requests an investigation by filing a formal complaint (or when the Title IX Coordinator determines that circumstances require or justify signing a formal complaint). The actual knowledge standard is discussed in greater depth under the "Actual Knowledge" subsection of the "Section 106.30 Definitions" section of this preamble.

Title IX Coordinators have always had to consider whether a report satisfies the criteria in the recipient's policy, and these final regulations are not creating new obstacles in that regard. The criteria that the Title IX Coordinator must consider are statutory criteria under Title IX or criteria under case law interpreting Title IX's non-discrimination mandate with respect to discrimination on the basis of sex in the recipient's education program or activity against a

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[434] While the final regulations at § 106.30 (defining "formal complaint") give Title IX Coordinators discretion to sign a formal complaint even where the complainant does not wish to participate in a grievance process, the final regulations also protect every complainant's right not to participate. § 106.71 (prohibiting retaliation against any person exercising rights under Title IX, including participation or refusal to participate in any grievance process).

person in the United States, tailored for administrative enforcement.[435] Additionally, these final regulations do not preclude action under another provision of the recipient's code of conduct, as clearly stated in revised § 106.45(b)(3)(i), if the conduct alleged does not meet the definition of Title IX sexual harassment.

The Department understands commenters' concerns that requiring complainants to go through a formal complaint process may cause further trauma, which is why the Department's final regulations provide that a recipient must offer supportive measures even if the complainant does not choose to file a formal complaint. We do not think that giving a complainant the choice to file a formal complaint will further traumatize the complainant. Giving complainants the option to choose a formal complaint process rather than mandating such a process gives complainants more autonomy and control over their circumstances, which survivor advocates have emphasized is crucial to supporting survivors, and may make more complainants feel comfortable enough to report allegations of sexual harassment. Where a complainant does file a formal complaint raising allegations of sexual harassment, both parties must have full and fair opportunity to participate in a fair grievance process designed to reach an accurate outcome. The final regulations endeavor to take into account the fact that navigating a formal process can be difficult for both complainants and respondents.[436]

The Department does not understand the comment that these final regulations do not require recipients to address unintentional discrimination that a court would address. These final regulations require a recipient to respond to allegations of sexual harassment as defined in §

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[435] *See* the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble.
[436] *E.g.*, § 106.45(b)(5)(iv) gives both parties equal opportunity to be assisted by an advisor of choice.

106.30, irrespective of whether the alleged conduct was intentional or unintentional on the part of the respondent[437] and similarly, a recipient's response obligations will be enforced without any regard for whether a recipient "intentionally" violated these final regulations. If a complainant received a court order remedying unintentional discrimination, the recipient would have to follow any court order that by its terms applied to that recipient.

Changes: We have revised § 106.44(a) to require recipients to treat complainants and respondents equitably meaning offering supportive measures to a complainant and refraining from disciplining a respondent with following the § 106.45 grievance process; specifically, a recipient's Title IX Coordinator must contact the complainant to discuss the availability of supportive measures (with or without the filing of a formal complaint), consider the complainant's wishes with respect to supportive measures, and explain to the complainant the process for filing a formal complaint.

Comments: Some commenters argued that the proposed rules would allow a school to treat survivors poorly and impose little or no sanctions for rapists. Other commenters stated the proposed rules would dissolve free speech for survivors.

Some commenters expressed concern that the proposed rules allow schools to evade responsibility and accountability. Other commenters expressed concern that the proposed rules give too much deference to school districts. At least one commenter expressed concern that the

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[437] Section 106.30 defining "sexual harassment" does not impose an independent intent or *mens rea* requirement on conduct that constitutes sexual harassment; however, the Department notes that the sexual offense of "fondling," which is an offense under "sexual assault" as defined under the Clery Act and made part of Title IX sexual harassment under § 106.30, includes as an element of fondling touching "for the purpose of sexual gratification." Courts have interpreted similar "purpose of" elements in sex offense legislation as an intent requirement, and recipients should take care to apply that intent requirement to incidents of alleged fondling so that, for example, unwanted touching committed by young children – with no sexualized intent or purpose – is distinguished from Title IX sexual harassment and can be addressed by a recipient outside these final regulations.

Department's decision to adopt the deliberate indifference standard essentially negates the Department's ability to perform regulatory oversight, one of its primary functions. Commenters argued that deferring to a school district's determination is not always appropriate, and accountability is necessary to ensure schools are free of sexual harassment. Other commenters expressed concern that universities can expediently reduce liability by simply checking boxes and doing nothing. Commenters argued that the responsibilities of university administrators and educators extend beyond the minimal standard set by the rule. Commenters expressed concern that the proposed rules allow the Department to defer to local leaders rather than ensuring universally agreed-upon standards. Other commenters argued that institutions need to be labeled publicly as offenders.

Discussion: As previously noted, the recipient cannot ignore a complainant's report of sexual harassment, and these final regulations do not prevent punishment of perpetrators of sexual assault; the recipient must offer supportive measures to the complainant under § 106.44(a) and Title IX Coordinators must be trained to serve impartially, without prejudgment of the facts and without bias, under § 106.45(b)(1)(iii). A recipient may impose disciplinary sanctions upon a respondent after a grievance process that complies with § 106.45. Requiring recipients to offer supportive measures to the complainant and follow a grievance process under § 106.45 prior to disciplining the respondent helps ensure that a recipient's response treats complainants and respondents fairly. Moreover, the final regulations add § 106.71 to assure complainants and respondents that the recipient cannot retaliate against any party.

Contrary to commenters' assertions, these final regulations do not dissolve free speech for complainants. The Department revised § 106.44(a) to clarify that no recipient is required to restrict a person's rights under the U.S. Constitution, including the First Amendment, to satisfy

its obligation not to be deliberately indifferent in response to sexual harassment. Although this premise is expressed in § 106.6(d), which applies to the entirety of Part 106 of Title 34 of the Code of Federal Regulations, in recognition of commenters' concerns that a recipient subject to constitutional restraints may believe that the recipient must restrict constitutional rights in order to comply with the recipient's obligation to respond to a Title IX sexual harassment incident, the Department reinforces in § 106.44(a) that responding in a non-deliberately indifferent manner to a complainant does not require restricting constitutional rights.[438]

The Department is not negating its duties or unduly deferring to a recipient with respect to compliance with Title IX. The Department is clarifying the recipient's legally enforceable obligations through these final regulations and providing greater consistency. Every complainant who reports sexual harassment, as defined in § 106.30, will know that the recipient must offer supportive measures in response to such a report, and every respondent will know that a recipient must provide a grievance process under § 106.45 prior to imposing disciplinary sanctions. The Department will continue to exercise regulatory oversight in enforcing these final regulations. Recipients, including universities, will not be able to simply check off boxes without doing anything. Recipients will need to engage in the detailed and thoughtful work of informing a complainant of options, offering supportive measures to complainants through an interactive process described in revised § 106.44(a), and providing a formal complaint process with robust due process protections beneficial to both parties as described in § 106.45. Where a formal complaint triggers a grievance process, § 106.45 requires recipients to do much more than simply

[438] Similarly, the Department emphasizes the purpose of § 106.6(d) in new § 106.71(b) (prohibiting retaliation) to remind recipients that in the context of deciding if conduct constitutes retaliation, the Department will interpret the retaliation prohibition in a manner consistent with constitutional rights such as rights under the First Amendment.

have a process "on paper" or "check off boxes." These final regulations require a recipient to investigate and adjudicate a complaint in a way that gives both parties a meaningful opportunity to participate, including by requiring the recipient to objectively evaluate relevant evidence, permitting parties to inspect and review evidence, and providing the parties a copy of an investigative report prior to any hearing or other determination regarding responsibility. These procedures, and all the provisions in § 106.45, must be followed by the recipient using personnel who are free from bias and conflicts of interest and who are trained to serve impartially.

With respect to commenters who asserted that recipients should have greater obligations than those imposed under these final regulations, the Department notes that nothing in these final regulations precludes action under another provision of the recipient's code of conduct that these final regulations do not address. For example, a recipient may choose to address conduct outside of or not in its "education program or activity," even though Title IX does not require a recipient to do so. The Department believes that these final regulations hold recipients to appropriately high, legally enforceable standards of compliance to effectuate Title IX's non-discrimination mandate.

The Department disagrees that all institutions should be labeled publicly as offenders for violating Title IX. The Department will make findings against recipients that violate these final regulations and will continue to make such letters of findings publicly available.

Changes: The Department revised § 106.44(a) to clarify that the Department will not deem a recipient not deliberately indifferent based on the recipient's restriction of rights protected under the U.S. Constitution, including the First Amendment, the Fifth Amendment, and the Fourteenth Amendment.

Comments: A number of commenters argued that the 2011 Dear Colleague Letter was better for protecting survivors and was fair to both sides. One commenter urged the Department to reject the NPRM and to reinstate the 2011 Dear Colleague Letter and 2014 Q&A to keep students safe. This commenter argued that Title IX is a critical safety net because applicable State laws and school policies may vary widely and leave students unprotected. The commenter also cited studies showing a widespread problem of educator sexual misconduct against students.[439] Another commenter suggested that the proposed rules should be replaced with affirmative obligations from the 2011 Dear Colleague Letter requiring the recipient to take immediate action to eliminate the harassment, prevent its reoccurrence, and address its effects.

A number of commenters argued that the 2001 Guidance was adequate and protected survivors. Commenters asserted that the 2001 Guidance standards were superior to the *Gebser/Davis* standards. Other commenters expressed concern that even under the 2001 Guidance standards, schools failed to adopt policies that would develop responses to sexual harassment designed to reduce occurrence and remedy effects. Similarly, commenters expressed concern that many cases demonstrate that even when students and parents were well informed on the 2001 Guidance standards, and brought legitimate concerns directly to institutions, institutions continued to fail students. Commenters argued that schools conducted an in-name-only investigation and refused to discipline respondents, resulting in escalating sexual harassment, in some cases leading to rape.

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[439] Commenters cited, *e.g.*: Magnolia Consulting, *Characteristics of School Employee Sexual Misconduct: What We Know from a 2014 Sample* (Feb. 1, 2018), https://magnoliaconsulting.org/news/2018/02/characteristics-school-employee-sexual-misconduct (noting one in three employee-respondents in elementary and secondary schools sexually abuse multiple student victims).

A number of commenters opposed the use of the *Gebser/Davis* standards. Commenters disapproved of the use of the higher bar erected by the U.S. Supreme Court in the very specific and narrow context of a civil Title IX lawsuit seeking monetary damages against a school due to its response (or lack thereof) to actual notice of sexual harassment. Commenters argued these standards have no place in the far different context of administrative enforcement with its iterative process and focus on voluntary corrective action by schools. Other commenters argued that the 2001 Guidance directly addressed this precedent, concluding that it was inappropriate for the Department to limit its enforcement activities by applying the more stringent standard, stating that the Department would continue to enforce the broader protections provided under Title IX, and noting that the Department acknowledges that it is "not required to adopt the liability standards applied by the Supreme Court in private suits for money damages." Other commenters expressed concern about the *Davis* progeny, where Federal courts have determined that only the most severe cases can meet the deliberate indifference standard. Other commenters suggested that the liability standard should be higher than what was set by the Supreme Court, and 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.

Discussion: Although the Department is not required to adopt the deliberate indifference standard articulated by the Supreme Court, we are persuaded by the rationales relied on by the Supreme Court and believe that the deliberate indifference standard represents the best policy approach. As the Supreme 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."[440] The Department believes this standard holds recipients accountable for providing a meaningful response to every report, without depriving recipients of legitimate and necessary flexibility to make disciplinary decisions and provide supportive measures that best respond to particular incidents of sexual harassment. Sexual harassment incidents present context-driven, fact-specific needs and concerns for each complainant, and the Department believes that teachers and local school leaders with unique knowledge of the school climate and student body are best positioned to make decisions about supportive measures and potential disciplinary measures; thus, unless the recipient's response to sexual harassment is clearly unreasonable in light of the known circumstances, the Department will not second guess such decisions.[441] In response to commenters' concerns that the liability standard of deliberate indifference gives recipients too much leeway to respond to the sexual harassment ineffectively, the Department has specified certain steps a recipient must take in all circumstances. For example, a response that is not deliberately indifferent must include promptly informing each complainant of the method for filing a formal complaint, offering supportive measures for that complainant, and imposing discipline on a respondent only after complying with the grievance process set forth in § 106.45. Where a respondent has been found responsible for sexual harassment, any disciplinary sanction decision rests within the discretion of the recipient, and the Department's concern under Title IX is to mandate that the recipient provide remedies, as

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[440] *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 648-49 (1999).

[441] *Id.* Indeed, the Supreme Court observed in *Davis* that courts must not second guess recipients' disciplinary decisions. As a matter of policy, the Department believes that the Department should not second guess recipients' disciplinary decisions through the administrative enforcement process. When a recipient finds a respondent responsible for Title IX sexual harassment, the Department requires the recipient to effectively implement remedies for the complainant, and will not second guess the recipient's determination of responsibility solely based on the fact that the Department would have weighed the evidence in the case differently than the recipient's decision-maker did. §§ 106.45(b)(1)(i), 106.45(b)(7)(iv), 106.44(b)(2).

appropriate, to the victim, designed to restore or preserve the victim's equal educational access.[442]

The Department acknowledges that the deliberate indifference standard in § 106.44(a) departs from standards set forth in prior guidance and applied in OCR enforcement of Title IX. In its previous guidance and enforcement practices, the Department took the position that constructive notice – as opposed to actual knowledge – 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 rules; and that recipients' response to sexual harassment should be effective and should be judged under a reasonableness or even strict liability standard, rather than under the deliberate indifference standard.[443]

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 over 124,000 comments, the Department departs from its prior guidance that set forth a standard different from the deliberate indifference standard. We discuss the reasons for the ways in which we have adopted, but tailored, the three-part *Gebser/Davis* framework in these final regulations, in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, including the ways in which these final regulations are similar to, and different from, Department guidance.

In response to commenters who asserted that recipients should only be liable for conduct over which they have control, the Department agrees with that statement and, in response, adds

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[442] Section 106.45(b)(1)(i).
[443] 2001 Guidance at iv, vi.

to § 106.44(a) the statement that "education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs. The Department derives this language from the holding in *Davis* that a recipient should be held liable for "circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs."[444] Accordingly, the Department does not need to adopt a higher standard than what the *Gebser/Davis* framework set forth in order to hold a recipient responsible for circumstances under the recipient's control. These final regulations apply to employees who sexually harass a student and will provide uniformity and consistency with respect to how a recipient responds to employee-on-student sexual harassment.

The Department acknowledges that some recipients failed to satisfy the requirements in the Department's past guidance and does not believe that the past failures of these recipients require the Department to adopt a different standard. The standards we adopt cannot ensure recipients' compliance in every instance. Any failure to comply would be handled as an enforcement matter, but such failure to comply, alone, does not warrant changing the standard.

Changes: In addition to the changes previously noted, § 106.44(a) now includes a statement that "education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs.

Comments: Commenters expressed concern that the proposed rules would result in less predictable outcomes for schools. Commenters reasoned that if the Department applies a

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[444] *Davis*, 526 U.S. at 645.

standard for monetary damages to its administrative enforcement scheme, plaintiffs will ask the courts to play the role that the Department abdicated. Commenters expressed concern that the proposed rules will cause a massive increase in lawsuits against colleges because individuals who would have filed administrative complaints with the Department will instead file court actions for equitable relief against recipients of Federal funds thus depriving schools of an opportunity to comply voluntarily. Commenters asserted that such a system would be both less efficient and far slower than the status quo, because the costs of litigation would dwarf the costs of negotiating a voluntary resolution agreement and recipients of Federal funds would be unable to engage in informal negotiations with the court over the extent of the remedy. Commenters argued that if the Department adopts the same standards as the Court adopted for monetary damages, students with viable claims will likely bypass the Department altogether, undercutting the Department's efforts to promote systemic reforms that would benefit individuals without the means to engage in litigation.

Commenters expressed concern that the Department is the wrong entity to enact Title IX reforms and that survivors should be the ones who create or enact these regulations. Commenters likened the proposed rules to laws restricting abortions inasmuch as people who are not women should not dictate how a woman's body is treated, with respect to having an abortion or how a school responds to the sexual assault of a woman's body.

Discussion: The Department respectfully disagrees that the proposed rules or these final regulations would result in less predictable outcomes for schools. As previously explained, the Department revised § 106.44(a) to specify that a recipient must offer supportive measures to a complainant, and must include a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as

defined in § 106.30. Additionally, as explained in more detail below, the Department has revised § 106.44(b) to remove the safe harbors that were proposed in the NPRM, replacing the concept of safe harbors with more specific obligations: mandatory steps that a recipient must take as part of every response to sexual harassment, in § 106.44(a); and a requirement to investigate and adjudicate in accordance with § 106.45 in response to a formal complaint, in § 106.44(b).

The Department disagrees that it is abdicating its role to courts and that litigation will significantly increase as a result of these final regulations. The Department recognizes that its approach to Title IX enforcement may have caused much litigation in the past, as recipients that complied with the Department's recommendations in past guidance may have risked not providing adequate due process protections, resulting in litigation. Going forward, the Department believes that the balanced approach in these final regulations will provide complainants with supportive, meaningful responses to all reports, and provide both parties with due process protections during investigations and adjudications, which may result in decreased litigation against recipients by complainants and respondents. The Department will be the arbiter of whether a recipient complies with the requirements of these final regulations. Additionally, failure to comply with the Department's regulations may not always result in legal liability before a court. For example, although the final regulations require that a recipient must offer supportive measures to a complainant, a court may determine that a recipient was not deliberately indifferent even though that recipient did not offer supportive measures. If a recipient complies with the Department's regulations and offers supportive measures in response to a complaint of sexual harassment, then such action may persuade a court that the recipient was not deliberately indifferent. Accordingly, the Department retains its proper role as the enforcer of its regulations, and these final regulations may help decrease litigation.

Congress charged the Department with the responsibility to administer Title IX, and the Department has carefully considered the input of survivors as well as other communities through the notice-and-comment rulemaking process before issuing these final regulations. The Department is sensitive to the unique trauma that sexual violence often inflicts on women (as well as men, and LGBTQ individuals); while the Department disagrees with a commenter's assertion that these regulations are similar to laws restricting abortions, we endeavor in these final regulations to give each complainant (regardless of sex) more control over the response of the complainant's school, college, or university in the wake of sexual harassment that violates a woman or other complainant's physical and emotional dignity and autonomy.

Changes: We have removed the "safe harbor" provisions in proposed § 106.44(b).

Comments: Commenters expressed concern that new sets of formal relationships between faculty members and students are established every four months, when students enroll in new courses each academic term and that any given student may not currently be under the supervision of a particular faculty member, but that situation could change in a matter of a few weeks. Such reconfigurations every semester add to the difficulty of determining whether a particular circumstance is or is not within the scope of Title IX pursuant to § 106.44(a).

Discussion: The Department is aware that students will change classes and also have different instructors throughout their education, and these final regulations provide the same clarity and consistency in case law under the Supreme Court's rubric in *Gebser/Davis*. The Department notes that "program or activity" has been defined in detail by Congress[445] and is reflected in

[445] 20 U.S.C. 1687.

existing Department regulations.[446] The Department will interpret a recipient's education "program or activity" in accordance with the Title IX statute and its implementing regulations, which generally provide that an educational institution's program or activity includes "all of the operations of" a postsecondary institution or elementary and secondary school. For instance, incidents that occur in housing that is part of a recipient's operations such as dormitories that a recipient provides for students or employees whether on or off campus are part of the recipient's education program or activity. For example, a recipient must respond to an alleged of sexual harassment between two students in one student's dormitory room provided by the recipient. In order to clarify that a recipient's "education program or activity" may also include situations that occur off campus, the Department adds to § 106.44(a) the statement that "education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs. This helps clarify that even if a situation arises off campus, it may still be part of the recipient's education program or activity if the recipient exercised substantial control over the context and the alleged harasser. While such situations may be fact specific, recipients must consider whether, for example, a sexual harassment incident between two students that occurs in an off-campus apartment (i.e., not a dorm room provided by the recipient) is a situation over which the recipient exercised substantial control; if so, the recipient must respond to notice of sexual harassment that occurred there. The Department has also revised § 106.45(b)(1)(iii) to specifically require recipients to provide Title IX personnel with training about the scope of the recipient's education program or activity, so that recipients accurately identify situations that

[446] 34 CFR 106.2(h).

require a response under Title IX. We further note that we have revised § 106.45(b)(3) to clarify that even if alleged sexual harassment did not occur in the recipient's education program or activity, dismissal of a formal complaint for Title IX purposes does not preclude the recipient from addressing that alleged sexual harassment under the recipient's own code of conduct. Recipients may also choose to provide supportive measures to any complainant, regardless of whether the alleged sexual harassment is covered under Title IX.

The Department is revising the definition of "formal complaint" in § 106.30 to make it clear that the student must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed; no similar condition exists with respect to *reporting* sexual harassment.[447] Changing classes or changing instructors does not necessarily mean that a student is not participating or attempting to participate in a recipient's education program or activity. To the extent that a recipient needs further clarity in this regard, the Department will be relying on statutory and regulatory definitions of a recipient's education "program or activity."[448]

Changes: The Department has revised § 106.44(a) to state that "education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs.

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[447] We have revised § 106.8(a) to clarify that any person may report sexual harassment (whether or not the person reporting is also the person who is alleged to be the victim of sexual harassment) by using any of the listed contact information for the Title IX Coordinator, and a report can be made at any time (including during non-business hours) by using the telephone number or e-mail address, or by mail to the office address, listed for the Title IX Coordinator.

[448] For further discussion, see the "Section 106.44(a) 'education program or activity'" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this preamble.

Comments: Commenters stated the proposed rules constitute clear violations of the purpose of Title IX. Commenters expressed concern that the proposed regulations will eliminate the Department's enforcement of Title IX or hurt Title IX, or are contrary to the congressional purpose of Title IX. Commenters expressed concern that OCR would not be able to investigate a school or begin the processes required for enforcement unless a school's actions already reached the levels necessary for enforcement, effectively eliminating OCR's ability to seek the informal means of enforcement built into the statute, such as resolution agreements with schools.

Discussion: These final regulations adhere closely to both the plain meaning of Title IX and to Federal case law interpreting Title IX; therefore, they are not a violation of the text or purpose of Title IX. These final regulations provide greater clarity for recipients, as recipients will know how the Department requires recipients to respond to reports of sexual harassment.

OCR will continue to vigorously enforce Title IX to achieve recipients' compliance, including by reaching voluntary resolution agreements. Nothing in these final regulations prevents the Department from carrying out its enforcement obligations under Title IX. For example, if the Department receives a complaint that a recipient did not offer supportive measures in response to a report of sexual harassment, the Department may enter into a resolution agreement with the recipient in which the recipient agrees to offer supportive measures for that complainant and for other complainants prospectively.

Changes: None.

Comments: Commenters suggested the final regulations should abolish or limit peer harassment liability for schools. Commenters argued that the *Davis* decision applying peer harassment liability does not prevent the Department from abolishing such liability as long as there are informed reasons for doing so. Commenters asserted that courts will defer to agency

reinterpretations of statutes when the agency supplies a reasoned explanation for its decision, under *Chevron* deference.[449]

Discussion: The Department acknowledged in the NPRM that it is not required to adopt the deliberate indifference standard articulated by the Supreme Court.[450] As explained in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, the Department is persuaded by the policy rationales relied on by the Court and continues to believe that the Supreme Court's rubric for addressing sexual harassment – including peer sexual harassment – is the best policy approach, with the adaptions made in these final regulations for administrative enforcement.

Changes: None.

General Support and Opposition for the Grievance Process in § 106.45

Comments: Many commenters favored the § 106.45 grievance process on grounds that it would provide greater clarity, bring fairness to all parties, increase public confidence in school-level Title IX proceedings, and decrease the likelihood that recipients will be sued in court for mishandling Title IX sexual harassment cases. Several commenters expressed support for § 106.45 on the ground that whether false accusations occur at a low rate or a higher rate, false accusations against accused students and employees, and their support networks of family and friends, have devastating consequences. Several commenters included personal stories of being

[449] Commenters cited: *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984) (holding that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer").

[450] 83 FR 61468. For discussion of the way these final regulations adopt the Supreme Court's deliberate indifference liability standard, but tailor that standard to achieve policy aims of administrative enforcement of Title IX's non-discrimination mandate, see the "Deliberate Indifference" subsection of the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble.

falsely accused, or having family members falsely accused, including where the complainant recanted the allegations after the commenter's loved one had committed suicide. One commenter asserted that the "fraud triangle" theory that explains the dynamics around fraud-related offenses can also illustrate the importance of due process protections in the sexual misconduct context, because rationalization is one of the three legs of the triangle (the other two being pressure and opportunity), and due process protections serve to discourage people from rationalizing dishonesty by ensuring that allegations are investigated before being acted upon.

Some commenters believed that § 106.45 will rectify sex discrimination against men, and some believed that it will correct sex discrimination against women. A few commenters supported the due process protections in § 106.45 on the ground that lack of due process in any system, whether courts of law or educational institution tribunals, often results in persons of color and persons of low socioeconomic status being wrongly or falsely convicted or punished. Several commenters asserted that men of color are more likely than white men to be accused of sexual misconduct and a system that lacks due process thus results in men of color being unfairly denied educational opportunities. One commenter asserted that due process exists not only to protect all individuals irrespective of sex, race, or ethnicity from persecution by those in power but also exists to ensure those in authority are enacting real justice, and that when due process is abandoned it is always the most marginalized and vulnerable who suffer; other commenters echoed that theme. A few commenters claimed that innocent people do not need due process, or that due process only helps those who are guilty.

Several commenters noted that principles of due process developed over centuries of Western legal history, while imperfect, are most apt to find truth in matters involving high-stakes factual disputes, and that no cause or movement justifies abandoning such principles to equate an

accusation with a determination of responsibility. A few commenters expressed support for the due process protections in § 106.45 by noting that Supreme Court Justice Ruth Bader Ginsburg has expressed public support for enhancing campus due process, and that public opinion polls have shown public support for due process on college campuses.

Some commenters supported § 106.45 because Title IX sexual harassment proceedings often involve contested proceedings with plausible competing narratives and a lack of disinterested witnesses, and the proposed rules do not give an advantage to either complainants or respondents, but rather provide a web of protections for both sides formulated to ensure as fair and unbiased a result as possible. One commenter recounted a personal experience managing a university's sexual assault response program and opined that because that university's process was widely viewed as fair and impartial to both sides, the program held students responsible where the evidence showed responsibility, including against star athletes; the commenter believed that due process was essential to the program's credibility.[451]

At least one commenter supported the § 106.45 grievance process as a lawful method of implementing Title IX's directive that the Department "effectuate the provisions of" Title IX, citing 20 U.S.C. 1681 and 1682, arguing that the Department's proposed grievance process: adopts procedures designed to reduce or eliminate sex discrimination; prevents violations of substantive non-discrimination mandates; and constitutes a reasonable means of guarding against sex discrimination and unlawful retaliation, particularly because the § 106.45 requirements are

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[451] Commenters cited: Gary Pavela & Gregory Pavela, *The Ethical and Educational Imperative of Due Process*, 38 JOURNAL OF COLL. & UNIV. L. 567 (2012) (arguing that "due process – broadly defined as an inclusive mechanism for disciplined and impartial decision making – is essential to the educational aims of contemporary higher education and to fostering a sense of legitimacy in college and university policies.").

sex neutral and narrowly tailored to prevent sex discrimination. One commenter asserted with approval that the § 106.45 grievance process not only expressly prohibits bias and conflicts of interest, but also promotes full and fair adversarial procedures and requires decision-makers to give reasons that explain their decisions – all of which have been shown to prevent biased outcomes.

One commenter suggested improving § 106.45 by clarifying whether the procedures in the "investigations" section apply throughout the entire grievance process or only to the investigation portion of a grievance process. Another commenter expressed concern that recipients wishing to avoid applying the § 106.45 grievance process will process complaints about sexual misconduct outside their Title IX offices under non-Title IX code of conduct provisions and suggested the Department take action to ensure that recipients cannot circumvent § 106.45 by charging students with non-Title IX student conduct code violations. One commenter asked the Department to clarify whether § 106.45 applies to non-sexual harassment sex discrimination complaints.

Discussion: The Department appreciates the variety of reasons for which commenters expressed support for the § 106.45 grievance process. The provisions in § 106.45 are grounded in principles of due process to promote equitable treatment of complainants and respondents and protect each individual involved in a grievance process without bias against an individual's sex, race, ethnicity, socioeconomic status, or other characteristics, by focusing the proceeding on unbiased, impartial determinations of fact based on relevant evidence. The Department understands that some commenters believe § 106.45 primarily benefits women and others believe such provisions primarily benefit men; however, the Department agrees with still other commenters who support § 106.45 because its procedural protections provide all complainants and respondents with a

consistent, reliable process without regard to sex. The Department will enforce § 106.45 in a manner that does not discriminate based on sex. The Department agrees that due process of law exists to protect all individuals, and disagrees with commenters who claim that only guilty people need due process protections; the evolution of the American concept of due process of law has revolved around recognition that for justice to be done, procedural protections must be offered to those accused of even the most heinous offenses – precisely because only through a fair process can a just conclusion of responsibility be made. Further, the § 106.45 grievance process grants procedural rights to complainants and respondents so that both parties benefit from strong, clear due process protections.

In response to a commenter's request, the final regulations include two changes to clarify that procedures and requirements listed in §106.45 apply throughout the entirety of a grievance process. First, the Department uses the phrase "grievance process" and "a grievance process that complies with § 106.45" throughout the final regulations rather than "grievance procedures" or "due process protections" to reinforce that the entirety of § 106.45 applies when a formal complaint necessitates a grievance process. Second, and in particular response to the commenter's concern, the final regulations revise the investigation portion of § 106.45 to begin with the phrase "When investigating a formal complaint, *and throughout the grievance process*, a recipient must…" (emphasis added) to clarify that the procedures and protections in § 106.45(b)(5) apply to investigations but also throughout the grievance process.

The Department appreciates the commenter's concern that § 106.45 not be circumvented by processing sexual harassment complaints under non-Title IX provisions of a recipient's code of conduct. The definition of "sexual harassment" in § 106.30 constitutes the conduct that these final regulations, implementing Title IX, address. Allegations of conduct that do not meet the

definition of "sexual harassment" in § 106.30 may be addressed by the recipient under other provisions of the recipient's code of conduct, and we have revised § 106.45(b)(3) to clarify that intent; however, where a formal complaint alleges conduct that meets the Title IX definition of "sexual harassment," a recipient must comply with § 106.45.[452]

In response to a commenter's request for clarification, § 106.45 applies to formal complaints alleging sexual harassment under Title IX, but not to complaints alleging sex discrimination that does not constitute sexual harassment ("non-sexual harassment sex discrimination"). Complaints of non-sexual harassment sex discrimination may be filed with a recipient's Title IX Coordinator for handling under the "prompt and equitable" grievance procedures that recipients must adopt and publish pursuant to § 106.8(c).

Changes: To clarify that the ten groups of provisions that comprise § 106.45[453] apply as a cohesive whole to the handling of a formal complaint of sexual harassment, the Department has changed terminology throughout the final regulations to refer to "a grievance process complying with § 106.45" (for example, in § 106.44(a)), and uses the phrase "grievance process" rather than "grievance procedures" within § 106.45. Additionally, § 106.45(b)(5) now clarifies that the procedures a recipient must follow during investigation of a formal complaint also must apply throughout the entire grievance process.

Comments: Two commenters representing trade associations of men's fraternities and women's sororities requested that the Department specify that an individual's Title IX sexual harassment

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[452] Section 106.45(b) ("For the purpose of addressing formal complaints of sexual harassment, a recipient's grievance process must comply with the requirements of this section.").

[453] *See* the "Summary of § 106.45" subsection of the "Role of Due Process in the Grievance Process" section of this preamble.

violation must be adjudicated as an individual case unless specific evidence clearly implicates group responsibility, in which case the recipient must apply a separate grievance process (with the same due process protections contained in § 106.45) to adjudicate group or organizational responsibility. These commenters asserted that in the past few years more than 20 postsecondary institutions have suspended entire systems of fraternities and sororities upon reports of a group member sexually harassing a complainant, and that such action chills and deters victims from reporting sexual harassment because some victims do not wish to see broad groups of people punished for the wrongdoing of an individual perpetrator.

One commenter supported § 106.45 but asked the Department to require recipients to punish individuals who make false accusations.

Discussion: The final regulations address recipients' obligations to respond to sexual harassment, and § 106.45 obligates a recipient to follow a consistent grievance process to investigate and adjudicate allegations of sexual harassment. In § 106.30, "respondent" is defined as "an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment." The § 106.45 grievance process, therefore, contemplates a proceeding against an individual respondent to determine responsibility for sexual harassment.[454] The Department declines to require recipients to apply § 106.45 to groups or organizations against whom a recipient wishes to impose sanctions arising from a group member being accused of sexual harassment because such potential sanctions by the recipient against the group do not involve

[454] As discussed in the "Dismissal and Consolidation of Formal Complaints" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble, § 106.45(b)(4) gives recipients the discretion to consolidate formal complaints involving multiple parties where the allegations of sexual harassment arise from the same facts or circumstances; in such consolidated matters, the grievance process applies to more than one complainant and/or more than one respondent, but each party is still an "individual" and not a group or organization.

determining responsibility for perpetrating Title IX sexual harassment but rather involve determination of whether the group violated the recipient's code of conduct. Application of non-Title IX provisions of a recipient's code of conduct lies outside the Department's authority under Title IX. For the same reason, the Department declines to require a recipient to punish individuals who make false accusations, even if the accusations involve sexual harassment. An individual, or group of individuals, who believe a recipient has treated them differently on the basis of sex in a manner prohibited under Title IX may file a complaint of sex discrimination with the recipient's Title IX Coordinator for handling under the "prompt and equitable" grievance procedures recipients must adopt and publish pursuant to § 106.8(c).

Changes: None.

Comments: Many commenters expressed concern that the § 106.45 grievance process unduly restricts recipients' flexibility and discretion in structuring and applying recipients' codes of conduct and that it ignores unique needs of the wide array of schools, colleges, and universities that differ in size, location, mission, public or private status, and resources, and imposes a Federal one-size-fits-all mandate on recipients. In support of granting flexibility and discretion to recipients, several commenters pointed the Department to Federal and State court opinions for the proposition that the internal decisions of colleges and universities, including academic and disciplinary matters, are given considerable deference by courts.[455]

Many commenters expressed concerns that the § 106.45 grievance process is too quasi-judicial to be applied in a setting where schools and colleges are not courts of law and that it

[455] Commenters cited, *e.g.*: *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *Doe v. Hamilton Cnty. Bd. of Educ.*, 329 F. Supp. 3d 543, 470 (E.D. Tenn. 2018).

ignores the educational purpose of school discipline. A few commenters requested that the Department incorporate more features of legal and court systems into § 106.45, including importing the Federal Rules of Evidence, the Federal Rules of Civil Procedure, and the Federal Rules of Criminal Procedure, and some of the rights afforded to criminal defendants under the U.S. Constitution such as protection against double jeopardy, protection against self-incrimination, and provision of public defenders (or provision of attorneys for both parties in a school-level Title IX proceeding).

Many commenters objected to § 106.45 on the ground that it will be burdensome and costly for many recipients to adopt and implement.

Some commenters believed that § 106.45 heightens the adversarial aspects of a grievance process, and others asserted that increasing the adversarial nature of the process undermines Title IX as a civil rights mechanism. Some commenters asserted that adversarial proceedings advantage students with greater financial resources who can afford to hire an attorney over socioeconomically disadvantaged students.

Discussion: The Department acknowledges the vast diversity among schools, colleges, and universities, the variety of systems historically used to enforce codes of conduct, and the desirability of each recipient retaining flexibility and discretion to manage its own affairs. With respect to Title IX sexual harassment, however, recipients are not simply enforcing their own codes of conduct; rather, they are complying with a Federal civil rights law, the protections and benefits of which extend uniformly to every person in the education program or activity of a recipient of Federal financial assistance. The need for Title IX to be consistently, predictably enforced weighs in favor of Federal rules standardizing the investigation and adjudication of sexual harassment allegations under these final regulations, implementing Title IX.

The Department agrees with commenters that numerous Federal and State court opinions confirm the proposition that schools, colleges, and universities deserve considerable deference as to their internal affairs including academic and disciplinary decisions. The final regulations respect the right of recipients to make such decisions without being second guessed by the Department. The final regulations do not address recipients' academic decisions (including curricula, or dismissals for failure to meet academic standards), and do not second guess disciplinary decisions. The Department does not require disciplinary sanctions after a determination of responsibility, and does not prescribe any particular form of sanctions.[456] Rather, § 106.45 prescribes a grievance process focused on reaching an accurate determination regarding responsibility so that recipients and the Department can ensure that victims of sexual harassment receive remedies designed to restore or preserve a victim's equal access to the recipient's education program or activity. Because § 106.45 provides a grievance process designed to effectuate the purpose of Title IX, a Federal civil rights statute, the Title IX grievance process is not purely an internal decision of the recipient. The Department believes that the § 106.45 grievance process will promote consistency, transparency, and predictability for students, employees, and recipients, ensuring that enforcement of Title IX sexual harassment rules does not vary needlessly from school to school or college to college. The Department notes

[456] The Department acknowledges that this approach departs from the 2001 Guidance, which stated that where a school has determined that sexual harassment occurred, effective corrective action "tailored to the specific situation" may include particular sanctions against the respondent, such as counseling, warning, disciplinary action, or escalating consequences. 2001 Guidance at 16. For reasons described throughout this preamble, the final regulations modify this approach to focus on *remedies* for the complainant who was victimized rather than on second guessing the recipient's disciplinary sanction decisions with respect to the respondent. However, the final regulations are consistent with the 2001 Guidance's approach inasmuch as § 106.45(b)(1)(i) clarifies that "remedies" may consist of individualized services similar to those described in § 106.30 as "supportive measures" except that remedies need not avoid disciplining or burdening the respondent.

that courts have traditionally distinguished between student dismissal for misconduct, where more due process is required, and dismissal for academic failure, where less due process is owed, because of the subjectivity of a school's conclusion that a student has failed to meet academic standards. Where misconduct is at issue, however, conclusions about whether the misconduct took place involve objective factual determinations rather than subjective academic judgments, and procedures rooted in fundamental due process principles can "safeguard" the accuracy of determinations about misconduct.[457]

Within the standardized § 106.45 grievance process, recipients retain significant flexibility and discretion, including decisions to: designate the reasonable time frames that will apply to the grievance process; use a recipient's own employees as investigators and decision-makers or outsource those functions to contractors; determine whether a party's advisor of choice may actively participate in the grievance process; select the standard of evidence to apply in reaching determinations regarding responsibility; use an individual decision-maker or a panel of decision-makers; offer informal resolution options; impose disciplinary sanctions against a respondent following a determination of responsibility; and select procedures to use for appeals.

The Department agrees with commenters that schools, colleges, and universities are educational institutions and not courts of law. The § 106.45 grievance process does not attempt

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[457] Lisa L. Swem, *Due Process Rights in Student Disciplinary Matters*, 14 JOURNAL OF COLL. & UNIV. L. 359, 361-62 (1987) (citing *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1978) where the Supreme Court held that procedures leading to medical student's dismissal for failing to meet academic standards did not violate due process of law under the Fourteenth Amendment) (noting that courts often distinguish between student dismissal for misconduct, where more due process is required, and dismissal for academic failure, where less due process is owed, because of the subjectivity of a school's conclusion that a student has failed to meet academic standards); *Horowitz*, 435 U.S. at 95 fn. 5 (Powell, J., concurring) ("A decision relating to the misconduct of a student requires a factual determination as to whether the conduct took place or not. The accuracy of that determination can be safeguarded by the sorts of procedural protections traditionally imposed under the Due Process Clause.").

to transform schools into courts; rather, the prescribed framework provides a structure by which schools reach the factual determinations needed to discern when victims of sexual harassment are entitled to remedies. The Department declines to import into § 106.45 comprehensive rules of evidence, rules of civil or criminal procedure, or constitutional protections available to criminal defendants. The Department recognizes that schools are neither civil nor criminal courts, and acknowledges that the purpose of the § 106.45 grievance process is to resolve formal complaints of sexual harassment in an education program or activity, which is a different purpose carried out in a different forum from private lawsuits in civil courts or criminal charges prosecuted by the government in criminal courts. The Department believes that the final regulations prescribe a grievance process with procedures fundamental to a truth-seeking process reasonably adapted for implementation in an education program or activity.

The Department understands commenters' objections that § 106.45 will be burdensome and costly for many recipients to adopt and implement. The Department also appreciates that many of these commenters, and additional commenters, recognized that receipt of Federal financial assistance requires recipients to comply with regulations effectuating Title IX's non-discrimination mandate and that the benefits of protecting civil rights outweigh the monetary costs of compliance. While the Department is required to estimate the benefits and costs of every regulation, and has considered those benefits and costs for these final regulations, our decisions regarding the final regulations rely on legal and policy considerations designed to effectuate Title IX's civil rights objectives, and not on the estimated cost likely to result from these final regulations.

The Department further acknowledges commenters' concerns that schools, colleges, and universities exist primarily to educate, and are not courts with a primary purpose, focus, or

expertise in administering proceedings to resolve factual disputes. Many commenters expressed a similar concern, that recipients may view a recipient's code of conduct as an educational process rather than a punitive process, and these recipients are thus uncomfortable with a grievance process premised on adversarial aspects of resolving the truth of factual allegations. With respect to Title IX sexual harassment, however, in order to carry out a recipient's responsibility to provide appropriate remedies to victims suffering from that form of sex discrimination, the recipient must administer a grievance process designed to reach reliable factual determinations and do so in a manner free from sex-based bias. In the context of sexual harassment that process is often inescapably adversarial in nature where contested allegations of serious misconduct carry high stakes for all participants. The standardized framework of the § 106.45 grievance process will thus assist recipients in complying with the recipients' Title IX obligation to provide remedies for sexual harassment victims when a respondent is found responsible for sexual harassment, by providing recipients with a prescribed structure for resolving highly contested factual disputes between members of the recipient's own community consistent with due process principles, in recognition that recipients may not already have such a structure in place.

Recipients retain the right and ability to use the disciplinary process as an educational tool rather than a punitive tool because the § 106.45 grievance process leaves recipients with wide discretion to utilize informal resolution processes[458] and does not mandate or second guess disciplinary sanctions.[459] Rather, the § 106.45 grievance process focuses on the purpose of Title IX: to give individuals protections against discriminatory practices and ensure that recipients

[458] Section 106.45(b)(9).
[459] Section 106.44(b)(2).

provide victims of sexual harassment with remedies to help overcome the denial of equal access to education caused by sex discrimination in the form of sexual harassment.[460]

The Department disagrees with commenters who believe that § 106.45 heightens the adversarial nature of the grievance process. The Department believes that sexual harassment allegations inherently present an adversarial situation; as some commenters pointed out, campus sexual misconduct situations often present plausible competing narratives under circumstances that pose challenges to reaching accurate factual determinations.[461] A grievance process that standardizes procedures by which parties participate equally serves the purpose of reaching reliable determinations resolving factual disputes presented in formal complaints alleging sexual harassment, in a manner free from sex-based bias, and increasing confidence in the outcomes of such cases. Acknowledging that sexual harassment allegations present adversarial circumstances and that parties may benefit from guidance, advice, and assistance in such a setting, the Department requires recipients to allow the parties to select advisors of choice to assist each party throughout the grievance process.[462] In recognition that Title IX governs recipients, not parties, the Department obligates the recipient to carry both the burden of proof and the burden of collecting evidence sufficient to reach a determination regarding responsibility, while also

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[460] As discussed throughout this preamble, including in the "Section 106.44(a) Deliberate Indifference Standard" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this preamble, the final regulations also mandate that recipients offer supportive measures to complainants with or without a formal complaint so that complainants receive meaningful assistance from their school in restoring or preserving equal access to education even in situations that do not result in an investigation and adjudication under § 106.45.

[461] *See, e.g.*, EduRisk by United Educators, *Confronting Campus Sexual Assault: An Examination of Higher Education Claims* 1 (2015) ("Recent legal and regulatory mandates require virtually all colleges and universities to investigate and adjudicate reports of sexual assault. An analysis of claims reported to United Educators (UE) reveals that institutions respond to cases of sexual assault that the criminal justice system often considers too difficult to succeed at trial and obtain a conviction. Our data indicates these challenging cases involve little or no forensic evidence, delays in reporting, use of alcohol, and differing accounts of consent.").

[462] Section 106.45(b)(5)(iv).

providing parties equal opportunity (but not the burden or obligation) to gather and present witnesses and other evidence, review and challenge the evidence collected, and question other parties and witnesses.[463]

The Department does not agree that an adversarial process runs contrary to Title IX as a civil rights mechanism. To the extent that commenters raising this concern believe that adversarial systems, historically or generally, disadvantage people already marginalized due to sex, race, ethnicity, and other characteristics, the Department will enforce all provisions of § 106.45 without regard to any party's sex, race, ethnicity, or other characteristic, and expects recipients to implement § 106.45 without bias of any kind. The Department further notes that the § 106.45 grievance process is one particular part of a recipient's response to a formal complaint; § 106.44(a) obligates a recipient to provide a prompt, non-deliberately indifferent response to each complainant including offering supportive measures, whether or not the complainant files a formal complaint or participates in a § 106.45 grievance process. The Department believes that § 106.45 serves the important purpose of effectuating Title IX as a civil rights non-discrimination mandate, and the final regulations provide for complainants to receive supportive measures to preserve or restore equal access to education even where a complainant does not wish to participate in the adversarial aspects of a § 106.45 grievance process.

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[463] Section 106.45(b)(5)(i) through (vii); § 106.45(b)(6). We also note that § 106.45(b)(9) gives recipients the discretion to offer and facilitate informal resolution processes, such as mediation or restorative justice, subject to each party voluntarily agreeing after giving informed, written consent. Informal resolution may present a way to resolve sexual harassment allegations in a less adversarial manner than the investigation and adjudication procedures that comprise the § 106.45 grievance process. Informal resolution may only be offered after a formal complaint has been filed, so that the parties understand what the grievance process entails and can decide whether to voluntarily attempt informal resolution as an alternative. Recipients may never require any person to participate in information resolution, and may never condition enrollment, employment, or enjoyment of any other right or privilege upon agreeing to informal resolution. Informal resolution is not an option to resolve allegations that an employee sexually harassed a student.

The Department acknowledges that a party's choice of advisor may be limited by whether the party can afford to hire an advisor or must rely on an advisor to assist the party without fee or charge. The Department wishes to emphasize that the status of any party's advisor (i.e., whether a party's advisor is an attorney or not), the financial resources of any party, and the potential of any party to yield financial benefits to a recipient, must not affect the recipient's compliance with § 106.45, including the obligation to objectively evaluate relevant evidence and use investigators and decision-makers free from bias or conflicts of interest.

Changes: In response to comments concerning specific topics addressed in § 106.45, the Department has made changes in the final regulations that increase recipients' flexibility and discretion while preserving the benefits of a standardized grievance process that promotes reliable fact-finding.[464]

Comments: Some commenters argued that educational institutions should not have the authority to adjudicate criminal accusations, that sexual assault and harassment should be treated like a crime, and that investigations into sex crimes should be solely in the hands of law enforcement (such as the police, district attorneys, State attorney's offices, or U.S. Department of Justice). Some commenters believed the alleged victim should be required to report directly to law enforcement and schools should facilitate survivors' access to the appropriate authorities. Some commenters expressed concern that the proposed rules exclude law enforcement from the

[464] *See, e.g.*, the discussion in the "Other Language/Terminology Comments" subsection of the "Section 106.30 Definitions" section of this preamble (noting that recipients may decide whether to calculate time frames using calendar days, school days, or other method); § 106.45(b)(6)(i) (allowing, but not requiring, live hearings to be held virtually through use of technology); § 106.45(b)(5)(vi) (removing the requirement that evidence in the investigation be provided to the parties using a file-sharing platform); § 106.45(b)(7)(i) (removing the requirement that the preponderance of the evidence standard may be used only if that standard is also used for recipients' non-sexual harassment code of conduct violations).

investigation process. Several commenters concluded that student conduct hearings are too different from criminal trials to be capable of addressing criminal allegations. One commenter believed that universities are incapable of fair assessment in criminal sex offense matters because universities have a strong desire to be seen as advocates for social change; another commenter believed schools have already made a mockery out of campus sexual assault proceedings shown by a practice the commenter characterized as "the first to accuse wins" that has led to an epidemic of false allegations. One commenter argued that the Department must decide if recipients can defer completely to the criminal justice system regarding sexual assault, or else require recipients to implement procedures that are fair, transparent, and adhere to constitutional protections. One commenter believed that alleged assailants should be held responsible in a court of law and that victims should have the right to pursue court action at any point in time.

Some commenters argued that the proposed rules are too similar to criminal court procedures that should not apply to Title IX proceedings because a university disciplinary proceeding does not result in loss of life or liberty for the respondent. Other commenters expressed support for the proposed rules on the belief that the proposed rules require many due process protections existing in criminal proceedings, which these commenters supported because the high consequences in Title IX cases justify procedural safeguards similar to those in court systems. One commenter suggested that before resorting to the formal "court-like" proceedings in the proposed rules, parties to a sexual assault allegation should always first attempt mediation.

Several commenters suggested that the Department establish "regional centers" for investigation and adjudication of Title IX sexual harassment (or at least as to sexual assault), or at least advise colleges and universities that such recipients can join with other similar institutions in their geographic area to form regional centers charged with conducting the

investigations and adjudications required under the proposed rules. These commenters asserted using such a regional center model may benefit recipients because instead of performing investigations and conducting hearings with recipients' own personnel (who may not have sufficient training and experience, and who have inherent potential conflicts of interest), recipients could outsource these functions to centers employing personnel with sufficient expertise and experience to perform investigations and adjudications without conflicts of interest, impartially, and in compliance with the final regulations. One commenter examined variations on potential models for such regional centers, noting that one model might involve a consortium of institutions forming independent 501(c)(3) organizations to cooperatively handle member institutions' needs for investigation and adjudication of Title IX sexual harassment, and a variation of that model would involve those functions handled under the auspices of State government (such as a State attorney general's office); this commenter urged the Department to remind recipients that such models exist as possible methods for better handling obligations under these final regulations, contended that suggesting such models without mandating them is consistent with the Department's overall approach of not dictating specific details more than might be reasonably necessary, and expressed the belief that different types of regional centers with different structures can be tried out and continually improved and refined for what works best in practice for different types of institutions, thus innovating better ways for recipients to competently handle Title IX sexual harassment allegations.

Discussion: The Department understands the concerns of some commenters who believe that educational institutions should not have authority to adjudicate criminal accusations and that law enforcement and criminal justice systems are the appropriate bodies to investigate, prosecute, and penalize criminal charges. However, the Supreme Court has held that sexual misconduct that

constitutes a crime under State law may also constitute sex discrimination under Title IX, and the Department has the responsibility of enforcing Title IX.[465] The Department is not regulating sex crimes, *per se*, but rather is addressing a type of discrimination based on sex. That some Title IX sexual harassment might constitute criminal conduct does not alter the importance of identifying and responding to sex discrimination that is prohibited by Title IX. By requiring recipients to address sex discrimination that takes the form of sexual harassment in a recipient's education program or activity, the Department is not requiring recipients to adjudicate criminal charges or replace the criminal justice system. Rather, the Department is requiring recipients to adjudicate allegations that sex-based conduct has deprived a complainant of equal access to education and remedy such situations to further Title IX's non-discrimination mandate.

The Department recognizes that some Title IX sexual harassment also constitutes criminal conduct under a variety of State laws and that the potential exists for the same set of allegations to result in proceedings under both § 106.45 and criminal laws. Where appropriate, the final regulations acknowledge this intersection;[466] however, a recipient cannot discharge its

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[465] *See, e.g.*, *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 278, 292 (1998) (holding that a sex offense by a teacher against a student – and noting that the offense was one for which the teacher had been arrested – constituted sex discrimination prohibited under Title IX).

[466] Section 106.45(b)(1)(v) provides that the recipient's designated reasonably prompt time frame for completion of a grievance process is subject to temporary delay or limited extension for good cause, which may include concurrent law enforcement activity. Section 106.45(b)(6)(i) provides that the decision-maker cannot draw any inference about the responsibility or non-responsibility of the respondent solely based on a party's failure to appear or answer cross-examination questions at a hearing; this provision applies to situations where, for example, a respondent is concurrently facing criminal charges and chooses not to appear or answer questions to avoid self-incrimination that could be used against the respondent in the criminal proceeding. Further, subject to the requirements in § 106.45 such as that evidence sent to the parties for inspection and review must be directly related to the allegations under investigation, and that a grievance process must provide for objective evaluation of all relevant evidence, inculpatory and exculpatory, nothing in the final regulations precludes a recipient from using evidence obtained from law enforcement in a § 106.45 grievance process. § 106.45(b)(5)(vi) (specifying that the evidence directly related to the allegations may have been gathered by the recipient "from a party *or other source*" which could include evidence obtained by the recipient from law enforcement) (emphasis added); § 106.45(b)(1)(ii).

legal obligation to provide education programs or activities free from sex discrimination by referring Title IX sexual harassment allegations to law enforcement (or requiring or advising complainants to do so),[467] because the purpose of law enforcement differs from the purpose of a recipient offering education programs or activities free from sex discrimination. Whether or not particular allegations of Title IX sexual harassment also meet definitions of criminal offenses, the recipient's obligation is to respond supportively to the complainant and provide remedies where appropriate, to ensure that sex discrimination does not deny any person equal access to educational opportunities. Nothing in the final regulations prohibits or discourages a complainant from pursuing criminal charges in addition to a § 106.45 grievance process.

The Department disagrees with commenters who argued that recipients are not capable of addressing Title IX sexual harassment allegations when such allegations also constitute allegations of criminal activity. The Department has carefully constructed the § 106.45 grievance process for application by a recipient in an education program or activity keeping in mind that schools, colleges, and universities exist first and foremost to educate and do not function as courts of law. The Department understands commenters' assertions that some recipients desire to advocate social change and that some have conducted unfair, biased sexual misconduct proceedings; however, the Department believes that the § 106.45 grievance process reflects a standardized framework that recipients are capable of applying to reach fair, unbiased determinations about sex discrimination in the form of sexual harassment in recipients' education

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[467] The 2001 Guidance takes a similar position: "In some instances, a complainant may allege harassing conduct that constitutes both sex discrimination and possible criminal conduct. Police investigations or reports may be useful in terms of fact gathering. However, 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." 2001 Guidance at 22.

programs or activities. The procedures required under § 106.45 are those the Department has determined are most likely to lead to reliable outcomes in the context of Title IX sexual harassment. The § 106.45 grievance process is inspired by principles of due process; however, the final regulations do not incorporate by reference constitutional due process required for criminal defendants, precisely because recipients are reaching conclusions about sex discrimination in a very different context than criminal courts reaching conclusions about defendants' guilt or innocence of criminal charges. While the final regulations permit recipients wide discretion to facilitate informal resolution of formal complaints of sexual harassment,[468] the Department declines to require parties to attempt mediation before initiating the formal grievance process. Every party should know that a formal, impartial, fair process is available to resolve Title IX sexual harassment allegations; where a recipient believes that parties may benefit from mediation or other informal resolution process as an alternative to the formal grievance process, the decision to attempt mediation or other form of informal resolution should remain with each party.

The Department appreciates commenters' recommendations for using regional center models and similar models involving voluntary, cooperative efforts among recipients to outsource the investigation and adjudication functions required under the final regulations. The Department believes these models represent the potential for innovation with respect to how recipients might best fulfill the obligation to impartially reach accurate factual determinations while treating both parties fairly. The Department encourages recipients to consider innovative

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[468] Section 106.45(b)(9) allows informal resolution processes, but only with the written, voluntary consent of both parties, notice to the parties about ramifications of such processes, and with the exception that no such informal resolution may be offered with respect to allegations that an employee sexually harassed a student.

solutions to the challenges presented by the legal obligation for recipients to fairly and impartially investigate and adjudicate these difficult cases, and the Department will provide technical assistance for recipients with questions about pursuing regional center models.

Changes: None.

Comments: Several commenters challenged the Department's legal authority to prescribe a standardized grievance process on the ground that the Department's charge under Title IX is to prevent sex discrimination, not to enforce constitutional due process or ensure that respondents are disciplined fairly. These commenters pointed to Federal court opinions holding that unfair discipline in a sexual harassment proceeding does not, by itself, demonstrate that a respondent was subjected to discrimination on the basis of sex, and Federal court opinions holding that a university using a "victim-centered approach," or otherwise allegedly favoring sexual assault complainants over respondents, is not necessarily discriminating against respondents based on sex.[469] These commenters argued that the Department cannot therefore prescribe a grievance process premised on the fairness of discipline as a way of furthering Title IX's prohibition against sex discrimination.

At least one commenter argued that the Supreme Court held in *Gebser* that a school's failure to adopt grievance procedures for resolving sexual harassment does not itself constitute discrimination under Title IX, and the commenter argued that this shows that failure to have any grievance procedures at all, much less a grievance process with specific procedural protections, does not violate Title IX absent a showing that such a failure was motivated by a student's sex.

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[469] *See, e.g.*, cases cited by commenters referenced in the "Section 106.45(a) Treatment of Complainants or Respondents Can Violate Title IX" subsection of the "General Requirements for § 106.45 Grievance Process" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble.

Several commenters opposed § 106.45 by noting that Federal courts have not required the particular procedures required under § 106.45, and challenging the Department's rationale for prescribing a grievance process that provides more procedural protections than the Supreme Court has required under constitutional due process. Some commenters argued that the Department's authority under Title IX permits the Department to regulate recipients' grievance procedures only to ensure that the formal complaint process does not discriminate against any party based on sex.

Several commenters requested that the Department reserve the "stringent" grievance process required under § 106.45 only for complaints that allege sexual assault, involve allegations of violence, or otherwise subject a respondent to a potential sanction of expulsion.

A few commenters asserted that to the extent that bias and lack of impartiality in school-level Title IX proceedings have resulted in sex discrimination sometimes against women and other times against men, the provisions in § 106.45 prohibiting bias, conflicts of interest, and sex stereotypes used in training materials, and requiring objective evaluation of all relevant evidence and equal opportunity for the parties to present, review, and challenge testimony and other evidence, will reduce the likelihood that sex discrimination will occur in Title IX proceedings because even if school officials harbor intentional or unintentional sex-based biases or prejudices, such improper biases and prejudices are less likely to affect the handling of the matter when the process requires application of procedures grounded in principles of due process.

Some commenters objected to the use of the words "due process" and "due process protections" in § 106.45, believing that using the term "due process" blurs the line between constitutional due process owed by recipients that are State actors, and a "fair process" that all recipients, including private institutions, generally owe by contract with students and employees.

These commenters believe that using the term "due process" in § 106.45 will lead to confusion and misplaced expectations for students, and possibly lead to increased litigation as students try to enforce constitutional due process against private institutions that do not owe constitutional protections. These commenters suggested that the phrase "fair process" replace "due process" in § 106.45.

Discussion: The § 106.45 grievance process prescribed by the final regulations directly serves the purposes of Title IX by providing a framework under which recipients reliably determine the facts of sexual harassment allegations in order to provide appropriate remedies for victims of sexual harassment when the recipient has determined the respondent is responsible. The Department recognizes that some recipients are State actors with responsibilities to provide due process of law to students and employees under the U.S. Constitution, while other recipients are private institutions that do not have constitutional obligations to their students and employees. The Department believes that conforming to the § 106.45 grievance process likely will meet constitutional due process obligations in Title IX sexual harassment proceedings, and as the Department has recognized in guidance for nearly 20 years, Title IX rights must be interpreted consistent with due process guarantees.[470] However, independent of constitutional due process, the purpose of the § 106.45 grievance process is to provide individuals with effective protection from discriminatory practices, including remedies for sexual harassment victims, by consistent application of procedures that improve perceptions that Title IX sexual harassment allegations are resolved fairly, avoid injection of sex-based biases and stereotypes into Title IX proceedings, and promote reliable outcomes.

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[470] 2001 Guidance at 22.

The Department agrees with commenters who asserted that unfair imposition of discipline, even in a way that violates constitutional due process rights, does not necessarily equate to sex discrimination prohibited by Title IX, and this is reflected in the final regulations. Section 106.45(a), for example, states that a recipient's treatment of a respondent "*may* also constitute discrimination on the basis of sex under title IX" (emphasis added). The § 106.45 grievance process aims to provide both parties with equal rights and opportunities to participate in the process, and to promote impartiality without favor to complainants or respondents, both because treating a complainant or respondent differently based on sex would violate Title IX, and because a process lacking principles of due process risks bias that in the context of sexual harassment allegations is likely to involve bias based on stereotypes and generalizations on the basis of sex.

To the extent that the Supreme Court has not held that the specific procedures required under § 106.45 are required under constitutional due process, § 106.45 is both consistent with constitutional due process, and an appropriate exercise of the Department's authority to prescribe a consistent framework for handling the unique circumstances presented by sexual harassment allegations.[471] For reasons discussed in this preamble with respect to each provision in § 106.45, the Department believes that each provision appropriately incorporates principles of due process that provide individuals with effective protection from discriminatory practices, including remedies for sexual harassment victims, by improving perceptions that Title IX sexual harassment allegations are resolved fairly, avoiding injection of sex-based biases and stereotypes into Title IX proceedings, and promoting reliable outcomes.

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[471] *See* discussion in the "Role of Due Process in the Grievance Process" section of this preamble.

While commenters correctly observe that the Supreme Court's Title IX opinions do not equate failure to adopt a grievance procedure with sex discrimination under Title IX,[472] the Supreme Court has also acknowledged that the Department, under its administrative authority to enforce Title IX, may impose regulatory requirements (such as adoption and publication of grievance procedures) that further the purpose of Title IX to prevent recipients of Federal financial assistance from engaging in sex discriminatory practices and provide individuals with effective protection against sex discriminatory practices.[473] The Department believes that § 106.45 not only incorporates basic principles of due process appropriately translated into the particular context of sexual harassment in education programs and activities but also serves to prevent, reduce, and root out sex-based bias that might otherwise cause recipients to favor one party over the other.

The Department appreciates commenters' recognition that many provisions of § 106.45, which serve the purpose of increasing the reliability of fact-finding, also decrease the likelihood that sex-based biases, prejudices, or stereotypes will affect the investigation and adjudication process in violation of Title IX's prohibition against sex discrimination. The § 106.45 grievance process effectuates Title IX's non-discrimination mandate both by reducing the opportunity for sex discrimination to impact investigation and adjudication procedures through the recipient's own actions during the handling of a complaint, and by promoting a reliable fact-finding process so that recipients are held liable for providing remedies to victims of sex discrimination in the

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[472] *See, e.g.*, *Gebser*, 524 U.S. at 291-92.
[473] *Id.* at 292 ("Agencies generally have authority to promulgate and enforce requirements that effectuate the statute's non-discrimination mandate, 20 U.S.C. 1682, even if those requirements do not purport to represent a definition of discrimination under the statute.").

form of sexual harassment perpetrated in the recipient's education program or activity. While the Department believes that the § 106.45 grievance process provides an appropriately fair framework for many types of school disciplinary matters, the Department is authorized to prescribe § 106.45 for resolution of formal complaints of Title IX sexual harassment because consistent processes reaching reliable factual determinations are needed in order to provide remedies to sexual harassment victims (to further Title IX's purpose) and because Title IX sexual harassment allegations inherently invite intentional or unintentional application of sex-based assumptions, generalizations, and stereotypes (which violate Title IX's non-discrimination mandate).

The Department declines to apply the § 106.45 grievance process only to formal complaints alleging sexual assault, involving allegations of violence, or otherwise subjecting a respondent to expulsion. As discussed under § 106.44(a) and § 106.30, the Department has defined sexual harassment to include three categories of misconduct on the basis of sex (*quid pro quo* harassment by an employee; severe, pervasive, and objectively offensive unwelcome conduct; and sexual assault, dating violence, domestic violence, or stalking as defined under the Clery Act and VAWA). Each of these categories of misconduct is a serious violation that jeopardizes a victim's equal access to education. Formal complaints alleging any type of sexual harassment, as defined in § 106.30, must be handled under a process designed to reliably determine the facts surrounding each allegation so that recipients provide remedies to victims subjected to that serious misconduct. The final regulations do not prescribe any particular form of disciplinary sanction for sexual harassment. Therefore, the Department declines to apply § 106.45 only when a respondent faces expulsion; rather, § 106.45 applies to formal complaints

alleging Title IX sexual harassment regardless of what potential discipline a recipient may impose on a respondent who is found responsible.

In response to commenters concerned that the term "due process" or "due process protections" needlessly confuses whether the Department is referring to a fair process that applies equally to both public and private institutions, or constitutional due process that only public institutions are required to provide, the final regulations use the phrase "grievance process that complies with § 106.45" instead of "due process" or "due process protections."[474] In this way, the Department clarifies that all recipients must, where indicated, apply the § 106.45 grievance process, which requires procedures the Department believes draw from principles of due process but remain distinct from constitutional due process owed by public institutions.

Changes: The final regulations use the phrase "grievance process that complies with § 106.45" instead of "due process" or "due process protections."

Comments: A few commenters noted that existing Title IX regulations provide for prompt and equitable grievance procedures to resolve complaints of sex discrimination, and argued that existing regulations and the 2001 Guidance advising that an equitable grievance procedure means ensuring adequate, reliable, and impartial investigations of complaints, have long provided adequate due process protections for all parties, and thus the more detailed procedural requirements in § 106.45 are unnecessary and only serve to protect respondents at the expense of complainants. A few commenters pointed out that at least two of the Department's Title IX enforcement actions in 2015 and 2016 concluded under then-applicable guidance that university complaint resolution processes were inequitable for complainants, respondents, or both. These

[474] *E.g.*, § 106.8(c); § 106.44(a); § 106.45(b)(1)(i).

commenters argued that this shows that the Department's guidance has sufficiently protected each party's right to a fair process.

Discussion: As discussed in the "Role of Due Process in the Grievance Process" section of this preamble, the Department in its guidance has interpreted the regulatory requirement for recipients to adopt equitable grievance procedures to mean such procedures must ensure adequate, reliable, and impartial investigations of complaints. While the Department still believes that adequate, reliable, and impartial investigation of complaints is necessary for the handling of sexual harassment complaints under Title IX, setting forth that interpretation of equitable grievance procedures in guidance lacks the force and effect of law. Furthermore, the Department does not believe that codifying the "adequate, reliable, and impartial investigation of complaints" standard into the final regulations would sufficiently promote consistency and reliability because such a conclusory standard does not helpfully interpret for recipients what procedures rooted in principles of due process are needed to achieve fairness and factual reliability in the context of Title IX sexual harassment allegations.

To the extent that the Department has in the past used enforcement actions to identify particular ways in which a recipient's grievance process failed to ensure "adequate, reliable, and impartial investigations," the enforcement actions and resulting letters of finding and resolution agreements apply only to the particular recipient under investigation and do not substitute for the transparency of regulations that specify the actions required of all recipients. Through these final regulations, we seek to provide with more certainty that recipients' investigations will be held to consistent standards of adequacy, reliability, and impartiality.

Changes: None.

Comments: One commenter characterized the requirements of § 106.45 as elaborate and multitudinous, predicted that many recipients will fail to comply with every requirement, and asked the Department to answer (i) whether the Department will find a recipient in violation of § 106.45 only if the recipient violated a provision with deliberate indifference? (ii) Will the Department require parties to preserve objections based on a recipient's failure to follow § 106.45 by raising the objection before the decision-maker and on appeal? (iii) Will any violation of § 106.45 result in the Department requiring the recipient to set aside its determination regarding responsibility and hold a new hearing, or only if the violation of § 106.45 affected the outcome?

Discussion: In response to the commenter's questions, the Department will enforce § 106.45 by holding recipients responsible for compliance regardless of any intent on the part of the recipient to violate § 106.45. The Department notes that under existing regulations and OCR enforcement practice, the Department does not pursue termination of Federal financial assistance unless a recipient refuses to correct a violation after the Department has notified the recipient of the violation. The Department will not impose on parties a requirement to preserve objections based on a recipient's failure to comply with § 106.45, because the recipient's obligation to comply exists whether or not the recipient is informed of the violation by a party. The corrective action a recipient must take after the Department identifies violations of statutory or regulatory requirements depends on the facts of each particular enforcement action, and the Department cannot predict every circumstance that may present itself in the future and, thus, declines to state under which circumstances a § 106.45 violation may require a recipient to set aside a determination regarding responsibility.

Changes: None.

Comments: Many commenters believe that due process protections unfairly favor respondents over complainants, and expressed concern that the proposed rules will cause sexual harassment victims to suffer additional trauma because investigations will be biased against complainants, will favor harassers over victims, and retraumatize survivors of sexual violence. A few commenters shared personal stories of feeling deterred from filing a sexual assault complaint because the legal process, including the Title IX campus process, would be harrowing or intimidating. Some commenters asserted that because complainants are disproportionately female, due process that benefits respondents constitutes sex discrimination against women.

Some commenters asserted that treating complainants and respondents equally is insufficient to address the reality that sexual violence is prevalent throughout American society and because women historically have faced biased responses when women report being victims of sexual violence, equity under Title IX requires procedures that favor complainants. At least one commenter asserted that Title IX exists to address systemic gender inequality in education and was not enacted from a place of neutrality. A few commenters asserted that because rape victims often face blame and disbelief when they try to report being raped, and only approximately five in every 1,000 perpetrators of rape will face criminal conviction,[475] the system is already tilted in favor of perpetrators and Title IX needs to provide complainants with more protections than respondents.

Several commenters asserted that because studies have shown the rate of false reports of sexual assault to be low and because rates of sexual assault are high, Title IX must offer

[475] Commenters cited: Rape, Abuse & Incest National Network (RAINN), *Campus Sexual Violence: Statistics*, https://www.rainn.org/statistics/campus-sexual-violence.

protections to complainants rather than seek to protect rights of respondents. Other commenters asserted that the rate of false or unfounded accusations of sexual misconduct may be higher than ten percent, and others disputed that the prevalence of campus sexual assault is as high as 20 percent.

Other commenters argued that relatively few respondents found responsible for sexual misconduct are actually expelled,[476] showing that the scales are not tipped in favor of complainants because even when found responsible, perpetrators are not receiving harsh sanctions.

Commenters asserted that a regulation concerned with avoiding violations of respondents' due process rights ignores the way complainants are still being pushed out of school due to inadequate, unfair responses to their reports of sexual harassment. Several commenters described retaliatory, punitive school and college responses to girls and women who reported suffering sexual harassment. At least one commenter asserted that while data show that boys of color are not disciplined in elementary and secondary schools for sexual harassment at rates much higher than white boys, data show that girls of color not only suffer sexual harassment at higher rates than white girls, but also are more likely to have their reports of sexual harassment ignored or be blamed or punished for reporting.

Discussion: The Department disagrees that due process protections generally, and the procedures drawn from due process principles in § 106.45 particularly, unfairly favor respondents over

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[476] Commenters cited: Kristen Lombardi, *A Lack of Consequences for Sexual Assault*, THE CENTER FOR PUBLIC INTEGRITY (Feb. 24, 2010) (noting that up to 25 percent of respondents are expelled); Nick Anderson, *Colleges often reluctant to expel for sexual violence*, THE WASHINGTON POST (Dec. 15, 2014) (noting that only 12 percent of sanctions against respondents were expulsions).

complainants or sexual harassment perpetrators over victims, or that § 106.45 is biased against complainants, victims, or women. Section 106.45(a) states that a recipient's treatment of a complainant, or a respondent, may constitute sex discrimination prohibited by Title IX. Section 106.45(b)(1)(iii) requires Title IX Coordinators, investigators, decision-makers, and individuals who facilitate any informal resolution process to be free of bias or conflicts of interest for or against complainants or respondents and to be trained on how to serve impartially. Section 106.45(b)(1)(ii) precludes credibility determinations based on a person's status as a complainant, respondent, or witness. With the exceptions noted below, the other provisions of § 106.45 also apply equally to both parties. The exceptions are three provisions that distinguish between complainants and respondents; each exception results from the need to take into account the party's position as a complainant or respondent specifically in the context of Title IX sexual harassment, to reasonably promote truth-seeking in a grievance process particular to sexual harassment allegations. Thus, § 106.45(b)(1)(i) requires recipients to treat complainants and respondents equitably by providing remedies for a complainant where a respondent has been found responsible, and by imposing disciplinary sanctions on a respondent only after following a § 106.45 grievance process; because remedies concern a complainant and disciplinary sanctions concern a respondent, this provision requires equitable treatment rather than strictly equal treatment. Section 106.45(b)(1)(iv) requires recipients to presume the respondent is not responsible until conclusion of the grievance process, because such a presumption reinforces that the burden of proof remains on recipients (not on the respondent, or the complainant) and reinforces correct application of the standard of evidence. Section 106.45(b)(6)(i)-(ii) protects complainants (but not respondents) from questions or evidence about the complainant's prior sexual behavior or sexual predisposition, mirroring rape shield protections applied in Federal

courts. The § 106.45 grievance process, therefore, treats complainants and respondents equally in nearly every regard, with three exceptions (one imposing equitable treatment for both parties, one applicable only to respondents, and one applicable only to complainants). The Department disagrees with commenters who argued that any provision conferring a right or protection only to respondents treats complainants inequitably or constitutes sex discrimination against women. The sole provision that applies only to respondents (§ 106.45(b)(1)(iv)) does not treat complainants inequitably because the provision helps ensure that the burden of proof remains on the recipient, not on the complainant (or respondent), and the presumption serves to reinforce correct application of whichever standard of evidence the recipient has selected. The Department also notes that any person regardless of sex may be a complainant or a respondent, and, thus, provisions that treat complainants and respondents equitably based on party status or apply only to complainants or only to respondents for the purpose of fostering truth-seeking, do not discriminate based on sex but rather distinguish interests unique to a person's party status.

The Department is sensitive to the concerns from commenters that the experience of a grievance process may indeed feel traumatizing or intimidating to complainants,[477] yet the facts surrounding sexual harassment incidents must be reliably determined in order to provide remedies to a victim. In deference to the autonomy of each complainant to decide whether to participate in a grievance process, the final regulations require recipients to offer supportive

[477] The Department does not equate the trauma experienced by a sexual harassment victim with the experience of a perpetrator of sexual harassment or the experience of a person accused of sexual harassment. Nonetheless, the Department acknowledges that a grievance process may be difficult and stressful for both parties. Further, supportive measures may be offered to complainants and respondents (*see* § 106.30 defining "supportive measures"), and § 106.45(b)(5)(iv) requires recipients to provide both parties the same opportunity to select an advisor of the party's choice. These provisions recognize that the stress of participating in a grievance process affects both complainants and respondents and may necessitate support and assistance for both parties.

measures to each complainant whether or not the complainant files a formal complaint or otherwise participates in a grievance process.[478]

The Department disagrees that the historical or general societal bias against women or against victims of sexual harassment requires or justifies a grievance process designed to favor women or complainants. Title IX protects every "person" (20 U.S.C. 1681) without regard for the person's sex or status as a complainant or respondent; the statute's use of the word "person" and not "female" or "woman" indicates that contrary to a commenter's assertion otherwise, Title IX was designed to operate neutrally with respect to the sex of persons protected by the non-discrimination mandate.

Whether or not commenters correctly describe the criminal justice system as "tilted in favor of perpetrators" demonstrated by data showing that only five in every 1,000 perpetrators of rape face criminal conviction, the grievance process under Title IX protects against, and through enforcement the Department will not tolerate, blaming or shaming women or any person pursuing a formal complaint of sexual harassment. Section 106.45 is premised on the principle that an accurate resolution of each allegation of sexual harassment requires objective evaluation of all relevant evidence without bias and without prejudgment of the facts. Under § 106.45, neither complainants nor respondents are automatically or prematurely believed or disbelieved, until and unless credibility determinations are made as part of the grievance process.[479] Implementation of the § 106.45 grievance process will increase the likelihood that whatever

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[478] Section 106.44(a); § 106.30 (defining "supportive measures").

[479] Contrary to many commenters' assertions, the presumption of non-responsibility does not permit (much less require) recipients automatically or prematurely to "believe respondents" or "disbelieve complainants." *See* discussion in the "Section 106.45(b)(1)(iv) Presumption of Non-Responsibility" subsection of the "General Requirements for § 106.45 Grievance Process" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble.

biases and prejudices exist in criminal justice systems will not affect Title IX grievance processes because Title IX Coordinators, investigators, decision-makers and any person who facilitates an informal resolution process must receive training on how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias under § 106.45(b)(1)(iii). Additionally, either party may file an appeal on the ground that the Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias for or against complainants or respondents generally, or the individual complainant or respondent, that affected the outcome of the matter, under § 106.45(b)(8). Accordingly, proceedings to investigate and adjudicate a formal complaint of sexual harassment under these final regulations are designed to reach accurate determinations regarding responsibility so that students and employees are protected from sex discrimination in the form of sexual harassment.

The Department believes that § 106.45 serves the purposes of Title IX by focusing on accurate factual determinations regardless of whether the rate of campus sexual assault, and the rate of false or unfounded accusations, is as high as some commenters stated or as low as other commenters stated. Every complainant and every respondent deserve an impartial, truth-seeking process to resolve the allegations in each particular situation, regardless of the frequency or infrequency of victimization and false accusations. Similarly, every allegation warrants an accurate factual resolution regardless of how many recipients decide that expulsion is the appropriate sanction against respondents found responsible for sexual harassment. No matter what decision a recipient makes with respect to disciplinary sanctions, Title IX requires recipients to provide victims with remedies designed to restore or preserve the victim's access to education, and that obligation can be met only after a reliable determination regarding responsibility.

In response to commenters' concerns that girls and women who report sexual harassment are sometimes ignored or retaliated against by their school, the Department does not believe that such wrongful acts and omissions by recipients justify a grievance process that favors complainants over respondents. The final regulations require recipients to respond promptly to every report of sexual harassment (of which the recipient has actual knowledge, and that occurs in the recipient's education program or activity, against a person in the United States) in a non-deliberately indifferent manner, and, thus, any recipient ignoring a complainant's report of sexual harassment would violate the final regulations, and the Department will vigorously enforce recipients' obligations.

In response to many commenters concerned about retaliation, the final regulations include § 106.71 stating retaliation against any individual making a report, filing a complaint, or participating in a Title IX investigation or proceeding is prohibited. Whether or not the commenter correctly asserted that boys of color are not punished for sexual harassment at much higher rates than white boys but that girls of color are ignored and retaliated against at rates higher than white girls, the protections extended to complainants and respondents under the final regulations apply without bias against an individual's sex, race, ethnicity, or other characteristic of the complainant or respondent.

Changes: Section 106.71 prohibits retaliation against any individual making a report, filing a complaint, or participating in a Title IX investigation or proceeding.

Comments: Some commenters suggested that the Department should proactively intervene and monitor the recipient's disciplinary practices to ensure they are fair, proportionate, and not discriminatory. Some commenters wanted § 106.45 to specifically address topics such as the quality of the information gathered during the investigation, the candid participation of parties

and witnesses, and the skills and experience (as well as the content of training) of Title IX Coordinators, investigators, and decision-makers, arguing that § 106.45 leaves too much discretion to recipients to devise their own strategies and approaches for the grievance process that may run contrary to improving the reliability of outcomes for the parties.

Some commenters proposed adding a provision clarifying that nothing in these regulations shall be interpreted to prevent the accused student from choosing to have their case adjudicated in an administrative law setting, provided that the institution advises the accused student in writing that it is the accused student's sole choice as to whether to have their case decided under those procedures or those offered on campus.

Some commenters proposed that a case should not be adjudicated unless there is quantifiable evidence to determine reasonable cause and suggested forming a compliance team to review the complaint and response from the accused to assess the validity of the accusation. Other commenters asserted that recipients have limited resources and should triage cases with priority based on severity of the conduct alleged. One commenter requested a requirement that attorneys working on these tribunals must have passed the State bar exam of the university's host State(s) and be a current member of the bar. Some commenters expressed concern about the power imbalance between students and professors, asserting that this power imbalance is already a deterrent to reporting an incident. Some postsecondary institutions commented that their institution already follows most of the procedures in § 106.45. Several commenters supported adopting the grievance procedures already in use by specific institutions, published by advocacy organizations, or under Federal laws applicable to Native American Institutions.

Discussion: The Department understands commenters' requests for intervention in and monitoring of the fairness, proportionality, and prevention of any discrimination in disciplinary

sanctions that recipients impose at the conclusion of a § 106.45 grievance process. The grievance process for Title IX sexual harassment is intended and designed to ensure that recipients reach reliable outcomes and provide remedies to victims of sexual harassment. The Department does not prescribe whether disciplinary sanctions must be imposed, nor restrict recipient's discretion in that regard. As the Supreme Court noted, Federal courts should not second guess schools' disciplinary decisions,[480] and the Department likewise believes that disciplinary decisions are best left to the sound discretion of recipients. The Department believes that a standardized framework for resolution of Title IX sexual harassment allegations provides needed consistency in how recipients reach reliable outcomes. The Department's authority to effectuate the purposes of Title IX justifies the Department's concern for reaching reliable outcomes, so that sexual harassment victims receive appropriate remedies, but the Department does not believe that prescribing Federal rules about disciplinary decisions is necessary in order to further Title IX's non-discrimination mandate. The Department notes that while Title IX does not give the Department a basis to impose a Federal standard of fairness or proportionality onto disciplinary decisions, Title IX does, of course, require that actions taken by a recipient must not constitute sex discrimination; Title IX's non-discrimination mandate applies as much to a recipient's disciplinary actions as to any other action taken by a recipient with respect to its education programs or activities.

The Department understands that some commenters would like the Department to issue more specific requirements to address topics such as the quality of information or evidence gathered during investigation, the candid participation of parties and witnesses, and the skills,

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[480] *Davis*, 526 U.S. at 648-49.

experience, and type of training, of Title IX Coordinators, investigators, and decision-makers. We believe, however, that § 106.45 strikes an appropriate balance between prescribing procedures specific enough to result in a standardized Title IX sexual harassment grievance process that promotes impartiality and avoidance of bias, while leaving flexibility for recipients to make reasonable decisions about how to implement a § 106.45-compliant grievance process. For example, while § 106.45 does not set parameters around the "quality" of evidence that can be relied on, § 106.45 does prescribe that all relevant evidence, inculpatory and exculpatory, whether obtained by the recipient from a party or from another source, must be objectively evaluated by investigators and decision-makers free from conflicts of interest or bias and who have been trained in (among other matters) how to serve impartially.

The Department appreciates the commenters' request that the Department provide for alternatives to a § 106.45 grievance process including, for example, adjudication in a State administrative law setting. The Department has tailored the § 106.45 grievance process to provide the procedures and protections we have determined are most needed to promote reliable outcomes resolving Title IX sexual harassment allegations in the context of education programs or activities that receive Federal financial assistance. While the Department does not dispute that other administrative proceedings could provide similarly reliable outcomes, for purposes of enforcing Title IX, a Federal civil rights statute, § 106.45 provides a standardized framework. The Department notes that nothing in the final regulations precludes a recipient from carrying out its responsibilities under § 106.45 by outsourcing such responsibilities to professionally trained investigators and adjudicators outside the recipient's own operations. The Department declines to impose a requirement that Title IX Coordinators, investigators, or decision-makers be licensed attorneys (or otherwise to specify the qualifications or experience needed for a recipient

to fill such positions), because leaving recipients as much flexibility as possible to fulfill the obligations that must be performed by such individuals will make it more likely that all recipients reasonably can meet their Title IX responsibilities.

The Department declines to add a reasonable cause threshold into § 106.45. The very purpose of the § 106.45 grievance process is to ensure that accurate determinations regarding responsibility are reached, impartially and based on objective evaluation of relevant evidence; the Department believes that goal could be impeded if a recipient's administrators were to pass judgment on the sufficiency of evidence to decide if reasonable or probable cause justifies completing an investigation. In response to commenters' concerns that the proposed rules did not permit reasonable discretion to dismiss allegations where an adjudication seemed futile, the final regulations add § 106.45(b)(3)(ii), allowing the recipient, in its discretion, to dismiss a formal complaint, if the complainant notifies the Title IX Coordinator in writing that the complainant wishes to withdraw it, if the respondent is no longer enrolled or employed by the recipient, or if specific circumstances prevent the recipient from collecting evidence sufficient to reach a determination (for example, where the complainant has ceased participating in the process). The Department rejects the notion that Title IX sexual harassment cases can or should be "triaged" or treated differently based on a purported effort to distinguish them based on severity. The Department has defined Title IX sexual harassment as any of three categories of sex-based conduct each of which constitutes serious behavior likely to effectively deny a victim equal access to education, and thus any type of sexual harassment as defined in § 106.30 warrants the § 106.45 grievance process.

The Department appreciates that some commenters on behalf of certain postsecondary institutions believed that their institution's policies already embody most or many of the

requirements of § 106.45. The Department has reviewed and considered the grievance procedures utilized in the codes of conduct in use by many different recipients, as well as the recommended fair procedures set forth by advocacy organizations, and the Federal laws applicable to Native American Institutions with respect to student misconduct proceedings, as referenced by commenters. While the Department declines to adopt wholesale the procedures used or recommended by any particular institution or organization, the Department notes that § 106.45 contains provisions that some commenters, including submissions on behalf of institutions and organizations, described or recommended in their comments.

Changes: Section 106.45(b)(3)(ii) allows the recipient, in its discretion, to dismiss a formal complaint if the complainant notifies the Title IX Coordinator in writing that the complainant wishes to withdraw it, if the respondent is no longer enrolled or employed by the recipient, or if specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination.

Section 106.30 Definitions[481]

Actual Knowledge

Support for Actual Knowledge Requirement and General Safety Concerns

Comments: Several commenters who supported the definition of actual knowledge in § 106.30 and the actual knowledge requirement in § 106.44(a) stated that using an actual knowledge

[481] The NPRM proposed that the definitions in § 106.30 apply only to Subpart D, Part 106 of Title 34 of the Code of Federal Regulations. 83 FR 61496. Aside from the words "elementary and secondary school" and "postsecondary institution," the words that are defined in § 106.30 do not appear elsewhere in Part 106 of Title 34 of the Code of Federal Regulations. Upon further consideration and for the reasons articulated in this preamble, including in the "Section 106.6(f) Title VII and Directed Question 3 (Application to Employees)" subsection of the "Clarifying

requirement empowers victims of sexual harassment to choose when and to whom to report sexual misconduct, which commenters believed would help facilitate building more trusting relationships between students and school administrators. Multiple commenters also supported the way that the proposed regulations allow recipients to design internal reporting processes as recipients see fit, including mandatory reporting by all employees to the Title IX Coordinator or others with the authority to institute corrective measures on the recipient's behalf. One commenter cited the Supreme Court's *Davis* decision and stated that, while the commenter supported the Department's actual knowledge requirement, institutions should publicize a list of the officials who have authority to institute corrective measures, in a location easily accessible and known to the student body, so that those who wish to file complaints know how to do so.

Some commenters referred to the constructive notice standard set forth in Department guidance as a "mandatory reporting" system. Some commenters supported replacing constructive notice with actual knowledge, arguing that the mandatory reporting system recommended by Department guidance has resulted in requiring college and university employees to report allegations of sexual harassment and sexual violence even when a victim reported to an employee in confidence and even when the victim expressed no interest in an investigation.

Amendments to Existing Regulations" section of this preamble, the Department believes that the definitions in § 106.30 should apply to Part 106 of Title 34 of the Code of Federal Regulations, except for the definitions of the words "elementary and secondary school" and "postsecondary institution." The definitions of "elementary and secondary school" and "postsecondary institution" in § 106.30 will apply only to §§ 106.44 and 106.45. This revision is not a substantive revision because this revision does not change the definitions or meaning of existing words in Part 106 of Title 34 of the Code of Federal Regulations. Ensuring that the definitions in § 106.30 apply throughout Part 106 of Title 34 of the Code of Federal Regulations will provide clarity and consistency for future application. We also have clarified in § 106.81 that the definitions in § 106.30 do not apply to 34 CFR 100.6-100.11 and 34 CFR part 101, which are procedural provisions applicable to Title VI. Section 106.81 incorporates these procedural provisions by reference into Part 106 of Title 34 of the Code of Federal Regulations.

Other commenters objected to the Department removing "mandatory reporter" requirements and replacing constructive notice with actual knowledge. Several commenters asserted that the actual knowledge definition in § 106.30 and actual knowledge requirement in § 106.44(a) will harm survivors, especially women, by allowing "lower level employees" to intentionally bury reports of sexual harassment against serial perpetrators. Those commenters expressed concern that Title IX Coordinators will be less informed, which will make campuses more dangerous for students.

Several commenters asserted that survivors of campus assault have frequently experienced Title IX personnel being more concerned with protecting the recipient's institutional interests than with the welfare of victims. Commenters who work in postsecondary institutions, or for corporations, asserted that they are familiar with this dynamic in the context of human resources departments. Many commenters stated that the longstanding constructive notice standard (requiring a school to respond if a responsible employee knew or should have known of sexual harassment) was sufficient to ensure that employees would be held accountable for purposefully turning their backs on students who seek to report sexual harassment. Commenters asserted that employees at a particular university failed to take any action after students disclosed another employee's abuse to them, which resulted in a serial sexual perpetrator victimizing many people. Commenters expressed concern that the actual knowledge requirement requires the Department to be too trusting of recipients, and cited incidents of coaches and employees mishandling reports of sexual harassment at a number of institutions of higher education.

Discussion: The Department appreciates commenters' support for the § 106.30 definition of "actual knowledge" and the requirement in § 106.44(a) that recipients respond to sexual harassment when the recipient has actual knowledge. As explained in the "Actual Knowledge"

subsection of the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" we have revised the § 106.30 definition of "actual knowledge" to differentiate between elementary and secondary schools, and postsecondary institutions, with respect to which school or college employees who have "notice" of sexual harassment require the school or college to respond. Under revised § 106.30, notice to "any employee" of an elementary or secondary school charges the recipient with actual knowledge.

The Department disagrees with commenters that the actual knowledge requirement, as adopted from the *Gebser/Davis* framework and adapted in these final regulations for administrative enforcement, will result in recipients being less informed about, or less responsive to, patterns of sexual harassment and threats to students. With respect to postsecondary institutions, notice of sexual harassment or allegations of sexual harassment to the recipient's Title IX Coordinator or to an official with authority to institute corrective measures on behalf of the recipient (herein, "officials with authority") will trigger the recipient's obligation to respond. Postsecondary institution students have a clear channel through the Title IX Coordinator to report sexual harassment, and § 106.8(a) requires recipients to notify all students and employees (and others) of the Title IX Coordinator's contact information, so that "any person" may report sexual harassment in person, by mail, telephone, or e-mail (or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report), and specifies that a report may be made at any time (including during non-business hours) by mail to the Title IX Coordinator's office address or by using the listed telephone number or e-mail address. In the postsecondary institution context, the Department believes that making sure that complainants and third parties have clear, accessible ways to report to the Title IX Coordinator rather than requiring the recipient to respond each time any postsecondary institution employee has notice,

better respects the autonomy of postsecondary school students (and employees) to choose whether and when to report sexual harassment.[482]

With respect to elementary and secondary schools, the Department is persuaded by commenters' concerns that it is not reasonable to expect young students to report to specific school employees or to distinguish between a desire to disclose sexual harassment confidentially to a school employee, versus a desire to report sexual harassment for the purpose of triggering the school's response obligations. We have revised the § 106.30 definition of actual knowledge

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[482] The Department recognizes the many examples pointed to by commenters, of postsecondary institutions failing to respond appropriately to notice of sexual harassment allegations when at least some university employees knew of the alleged sexual harassment, resulting in some situations where serial predators victimized many people. We note that such failures by institutions occurred under the status quo; that is, under the Department's approach to notice in the Department's guidance. In these final regulations, the Department aims to respect the autonomy of students at postsecondary institutions, while ensuring that such students (and employees) clearly understand how to report sexual harassment. We believe that the best way to avoid reports "falling through the cracks" or successfully being "swept under the rug" by postsecondary institutions, is not to continue (as Department guidance did) to insist that all postsecondary institutions must have universal or near-universal mandatory reporting. As discussed in the "Actual Knowledge" subsection of the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, whether universal mandatory reporting for postsecondary institutions benefits victims or harms victims is a complicated issue as to which research is conflicting. We believe that allowing each postsecondary institution to implement its own policy regarding which employees must report sexual harassment to the Title IX Coordinator (and which may remain confidential resources for students at postsecondary institutions) is a better approach than requiring universal mandatory reporting. The benefits of universal mandatory reporting policies may not outweigh the negative impact of such policies, in terms of helping victims. Allowing postsecondary institutions to choose for themselves what kind of mandatory reporting policies to have is only beneficial if combined (as in these final regulations) with strong requirements that every postsecondary institution inform students and employees about how to report to the Title IX Coordinator and that every institution has in place accessible options for *any person* to report to the Title IX Coordinator. This is the approach taken in these final regulations, so that, for example, if an alleged victim discloses sexual harassment to a university "low-level" employee and the school does not respond by reaching out to the alleged victim (called "the complainant" in these final regulations) then the alleged victim also knows how to contact the Title IX Coordinator, a specially trained employee who must respond promptly to the alleged victim by offering supportive measures and confidentially discussing with the alleged victim the option of filing a formal complaint. A report to the Title IX Coordinator may also be made by any third party, such as the alleged victim's parent or friend. Thus, whether or not the "low level" employee to whom an alleged victim disclosed sexual harassment appropriately kept that disclosure confidential, or wrongfully violated the institution's mandatory reporting policy, the alleged victim is *not* left without recourse or options and the institution is *not* able to avoid responding to the alleged victim, because the alleged victim knows that *any report* made to the Title IX Coordinator, via any of several accessible options (e.g., e-mail or phone, which information must be prominently displayed on recipients' websites) that can be used day or night, will trigger the institution's prompt response obligations. § 106.8; § 106.30 (defining "actual knowledge" to include, but not be limited to, a report to the Title IX Coordinator).

to specifically state that notice to any employee of an elementary or secondary school charges the recipient with actual knowledge, triggering the recipient's obligation to respond to sexual harassment (including promptly offering supportive measures to the complainant). Accordingly, students in elementary and secondary schools do not need to report allegations of sexual harassment to a specific employee such as a Title IX Coordinator to trigger a recipient's obligation to respond to such allegations. A student in an elementary or secondary school may report sexual harassment to any employee. Similarly, if an employee of an elementary or secondary school personally observes sexual harassment,[483] then the elementary or secondary school recipient must respond to and address the sexual harassment in accordance with these final regulations. As previously noted in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment," elementary and secondary schools operate under the doctrine of *in loco parentis*, and employees at elementary and secondary schools typically are mandatory reporters of child abuse under State laws for purposes of child protective services.[484]

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[483] Section 106.30 defines "complainant" to mean "an individual who is alleged to be the victim of *conduct that could constitute sexual harassment*" and therefore, an employee witnessing or hearing about conduct that "could constitute" sexual harassment defined in § 106.30 triggers the elementary and secondary school recipient's response obligations, including having the Title IX Coordinator contact the complainant (and, where appropriate, the complainant's parent or legal guardian) to confidentially discuss the availability of supportive measures. Section 106.44(a). In other words, if an elementary or secondary school employee witnesses conduct but does not know "on the spot" whether the conduct meets the § 106.30 definition of sexual harassment (for example, because the employee cannot discern whether the conduct amounted to a sexual assault, or whether the conduct was "unwelcome" subjectively to the complainant, or whether non-*quid pro quo*, non-sexual assault conduct was "severe"), the person victimized by the conduct is a "complainant" entitled to the school's prompt response if the conduct "could" constitute sexual harassment.

[484] *See* Ala. Code § 26-14-3; Alaska Stat. § 47.17.020; Ariz. Rev. Stat. § 13-3620; Ark. Code Ann. § 12-18-402; Cal. Penal Code § 11165.7; Colo. Rev. Stat. § 19-3-304; Conn. Gen. Stat. § 17a-101; Del. Code Ann. tit. 16, § 903; D.C. Code § 4-1321.02; Fla. Stat. § 39.201; Ga. Code Ann. § 19-7-5; Haw. Rev. Stat. § 350-1.1; Idaho Code Ann. § 16-1605; 325 Ill. Comp. Stat. § 5/4; Ind. Code § 31-33-5-1; Iowa Code § 232.69; Kan. Stat. Ann. § 38-2223; Ky. Rev. Stat. Ann. § 620.030; La. Child Code Ann. art. 603(17); Me. Rev. Stat. tit. 22, § 4011-A; Md. Code Ann., Fam. Law § 5-704; Mass. Gen. Laws ch. 119, § 21; Mich. Comp. Laws § 722.623; Minn. Stat. § 626.556; Miss. Code. Ann. §

In addition to any obligations imposed on school employees under State child abuse laws, these final regulations require the recipient to respond to allegations of sexual harassment by offering supporting measures to any person alleged to be the victim of sexual harassment and taking the other actions required under § 106.44(a).

The Department agrees with commenters who noted that nothing in the proposed or final regulations prevents recipients (including postsecondary institutions) from instituting their own policies to require professors, instructors, or all employees to report to the Title IX Coordinator every incident and report of sexual harassment. A recipient also may empower as many officials as it wishes with the requisite authority to institute corrective measures on the recipient's behalf, and notice to these officials with authority constitutes the recipient's actual knowledge and triggers the recipient's response obligations. Recipients may also publicize lists of officials with authority. We have revised § 106.8 to require recipients to notify students, employees, and parents of elementary and secondary school students (among others) of the contact information for the recipient's Title IX Coordinator, to specify that any person may report sexual harassment in person, by mail, telephone, or e-mail using the Title IX Coordinator's contact information (or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report), to state that reports may be made at any time (including during non-business

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43-21-353; Mo. Ann Stat. § 210.115; Mont. Code Ann. § 41-3-201; Neb. Rev. Stat. § 28-711; Nev. Rev. Stat. § 432B.220; N.H. Rev. Stat. Ann. § 169-C:29; N.J. Stat. Ann. § 9:6-8.10; N.M. Stat. Ann. § 32A-4-3; N.Y. Soc. Serv. Law § 413; N.C. Gen. Stat. Ann. § 7B-301; N.D. Cent. Code Ann. § 50-25.1-03; Ohio Rev. Code Ann. § 2151.421; Okla. Stat. tit. 10A, § 1-2-101; Or. Rev. Stat. § 419B.010; 23 Pa. Cons. Stat. Ann § 6311; R.I. Gen. Laws § 40-11-3(a); S.C. Code Ann. § 63-7-310; S.D. Codified Laws § 26-8A-3; Tenn. Code Ann. § 37-1-403; Tex. Fam. Code § 261.101; Utah Code Ann. § 62A-4a-403; Vt. Stat. Ann. tit. 33, § 4913; Va. Code Ann. § 63.2-1509; Wash. Rev. Code § 26.44.030; W. Va. Code § 49-2-803; Wis. Stat. § 48.981; Wyo. Stat. Ann. § 14-3-205.

hours) by using the listed telephone number or e-mail address, and to require a recipient to post the Title IX Coordinator's contact information on the recipient's website.

The Department appreciates commenters' concerns about recipients purposely ignoring reports of sexual harassment. As the Department has acknowledged through guidance documents since 1997, schools, colleges, and universities have too often ignored sexual harassment affecting students' and employees' equal access to education. These final regulations ensure that every recipient is legally obligated to respond to sexual harassment (or allegations of sexual harassment) of which the recipient has notice. The final regulations use a definition of actual knowledge to address the unintended consequences that the constructive notice standard created for both recipients and students. As explained more fully in the "Actual Knowledge" subsection in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, the Department believes that the approach in these final regulations regarding notice of sexual harassment that triggers a recipient's response obligations is preferable to the constructive notice standard set forth in Department guidance. Additionally, as some commenters noted, the constructive notice standard coupled with the Department's mandate to investigate all allegations of sexual harassment[485] may have actually chilled reporting. Investigations almost always require some intrusion into the complainant's privacy, and some complainants simply wanted supportive measures but were not ready or did not desire to participate in a grievance process. These final regulations provide complainants with more

[485] 2011 Dear Colleague Letter at 4-5; 2001 Guidance at 15.

control over whether or when to report sexual harassment,[486] and clearly obligate a recipient to offer supportive measures to a complainant with or without a formal complaint ever being filed.

With respect to commenters' concerns that recipients have knowingly ignored reports of sexual harassment in the past, and may continue to do so in the future, such action constitutes deliberate indifference, if the other requirements of § 106.44(a) are met. When a recipient with actual knowledge of sexual harassment in its education program or activity refuses to respond to sexual harassment or a report of sexual harassment, such a refusal is clearly unreasonable under § 106.44(a) and constitutes a violation of these final regulations.

Changes: The Department expands the definition of actual knowledge in § 106.30 to include notice to "any employee of an elementary and secondary school" with respect to recipients that are elementary and secondary schools. We have also revised § 106.8 to require that recipients must prominently display the Title IX Coordinator's contact information on the recipient's

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[486] As noted previously, these final regulations ensure that reporting or disclosing sexual harassment to *any* elementary or secondary school employee triggers the recipient's response obligations, while postsecondary institutions are permitted to choose which of their employees must be mandatory reporters. This broader definition of "actual knowledge" for elementary and secondary schools does not reflect that the Department values the autonomy of elementary and secondary school students less than the autonomy of students at postsecondary institutions. The final regulations respect the autonomy of all complainants. However, recognizing the general differences between adults in postsecondary institutions, versus young students in elementary and secondary schools, we believe the better policy is to ensure that an elementary or secondary school responds promptly whenever any employee has notice of sexual harassment, while a postsecondary institution must respond promptly whenever a Title IX Coordinator or official with authority has notice of sexual harassment. This approach does not give as much control to a younger student over whether disclosure of sexual harassment results in a response from the Title IX Coordinator, compared to the control retained by a student at a postsecondary institution to disclose sexual harassment without automatically triggering a report to the Title IX Coordinator. However, the final regulations respect the autonomy of, and give options and control to, *all* complainants, by protecting each complainant's right to choose, for example, how to respond to the Title IX Coordinator's discussion of available supportive measures and whether to file a formal complaint asking the school to investigate the sexual harassment allegations. This approach ensures that an elementary or secondary school student is, for example, considering supportive measures and the option of filing a formal complaint with the Title IX Coordinator, who can involve the student's parent or legal guardian as appropriate. Thus, the final regulations respect the autonomy of all complainants and aim to give all complainants options and control over how a school responds to their sexual harassment experience, yet achieves these aims differently for elementary and secondary school students, than for students at postsecondary institutions.

website, and to state that any person may report sexual harassment in person, by mail, by telephone, or by e-mail using that contact information (or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report), and that a report may be made at any time (including during non-business hours) by using the telephone number or e-mail address, or by mail to the office address, listed for the Title IX Coordinator.

Student Populations Facing Additional Barriers to Reporting

Comments: Several commenters asserted that designating a single individual as the person to whom notice triggers a recipient's obligation to respond creates significant hurdles to reporting for certain populations of students, including students with disabilities, immigrant students, international students, transgender students, and homeless students.

Numerous commenters noted that students with disabilities are more vulnerable to sexual abuse than their peers without disabilities, are less likely to report experiences of abuse, and are less likely to have access to school officials who have the requisite authority to implement corrective measures under § 106.30. One commenter asserted that, while the actual knowledge requirement favors the rights and needs of students with disabilities who are accused of sexual harassment, this requirement disfavors students with disabilities who are victims of sexual harassment. The commenter expressed concern that students with disabilities may only be comfortable communicating sensitive issues to their own teachers, and in some cases may only be able to communicate with appropriately trained special education staff.

One commenter stated that, because immigrant students are even less likely to know to whom they should report, members of immigrant communities are disadvantaged by the actual knowledge requirement. Another commenter asserted that international students are more likely to confide in a teacher or advisor with whom they have close contact, because cultural and

linguistic barriers may make it difficult for international students to navigate official administrative channels.

Several commenters noted that transgender students, as well as non-binary students and students who identify with other gender identity communities, are less likely to report or seek services than students from other demographics. Commenters argued that replacing the constructive notice standard with the actual knowledge standard will reduce the services and support received by transgender students and students who identify with other gender identity communities.

One commenter asserted that the actual knowledge requirement disadvantages students who are homeless, students from economically disadvantaged backgrounds, or students from dysfunctional families; the commenter described having seen bruises, cuts, and left-over tape residue from when a student was hospitalized after getting into the student's parents' crystal methamphetamine. The commenter asserted that, under the proposed rules, students will lose support from teachers, placing students in greater danger. The commenter argued that it is imperative that all elementary and secondary school teachers be mandatory reporters.

Discussion: The Department requires all recipients to address sex discrimination against all students, including students in vulnerable populations. The revised definition of "actual knowledge" in § 106.30 includes notice to any elementary and secondary school employee, addressing the concerns raised by commenters that in the elementary and secondary school context, students with disabilities, LGBTQ students, students who are immigrants, and others, face barriers to reporting sexual harassment only to certain employees or officials. We have also revised § 106.8 to ensure that *all students and employees* are notified of the Title IX Coordinator's contact information, to require that contact information to be prominently

displayed on the recipient's website, and to clearly state that *any person* may report sexual harassment to the Title IX Coordinator using any of several accessible options, including by phone or e-mail at any time of day or night. Thus, as to students at postsecondary institutions, clear, accessible reporting options are available for any student (or third party, such as an alleged victim's friend or a bystander witness to sexual harassment) to contact the Title IX Coordinator and trigger the postsecondary institution's mandatory response obligations. We believe that the final regulations thus provide all students, including students with disabilities, LGBTQ students, students who are immigrants, and others, with accessible ways of reporting, and do not leave any student facing barriers or challenges with respect to how to report to the Title IX Coordinator.[487]

With respect to commenters who assert that the Department is removing a "mandatory reporting" requirement or eliminating "mandatory reporters," as discussed in the "Actual Knowledge" subsection of the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, the adapted actual knowledge requirement in these final regulations distinguishes between elementary and secondary schools (where notice to any employee now triggers the recipient's response obligations) and postsecondary institutions (where notice to the Title IX Coordinator and officials with authority triggers the recipient's response obligations, but postsecondary institution recipients have discretion to determine which

[487] Section 106.8(a) ("*Any person may report* sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), *in person, by mail, by telephone, or by electronic mail*, using the contact information listed for the Title IX Coordinator [which, under § 106.8(b) must be posted on the recipient's website], *or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report. Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail* to the office address, listed for the Title IX Coordinator.") (emphasis added).

of their employees should be mandatory reporters, and which employees may keep a postsecondary student's disclosure about sexual harassment confidential).

In response to commenters' concerns, in elementary and secondary schools, all students (including those in vulnerable populations) can report sexual harassment to any school employee to trigger the recipient's obligation to respond. While the imputation of knowledge based solely on the theories of vicarious liability[488] or constructive notice is insufficient, notice to any elementary and secondary school employee – including a teacher, teacher's aide, bus driver, cafeteria worker, counselor, school resource officer, maintenance staff worker, or other school employee – charges the recipient with actual knowledge, triggering the recipient's response obligations. This expanded definition of actual knowledge in elementary and secondary schools gives all students, including those with disabilities who may face challenges communicating, a wide pool of trusted employees of elementary and secondary schools (i.e., *any* employee) to whom the student can report. As to all recipients, § 106.30 defining "actual knowledge" is also revised to expressly state that "notice" includes a report to the Title IX Coordinator as described in § 106.8(a).[489] These final regulations thus ensure that all students and employees have clear, accessible reporting channels, and ensure that elementary and secondary school students can

[488] The Department has revised the § 106.30 definition of actual knowledge by replacing "respondeat superior" with "vicarious liability." "Vicarious liability" conveys the same meaning as "respondeat superior," but "vicarious liability" is more colloquial and is less likely to be confused with the word "respondent" used throughout these final regulations.

[489] We have revised § 106.8(a) to expressly state that any person may report sexual harassment using the contact information required to be listed for the Title IX Coordinator (which must include an office address, telephone number, and e-mail address), or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report, and that a report may be made at any time (including during non-business hours) by using the listed telephone number or e-mail address, or by mail to the listed office address.

disclose sexual harassment to *any* school employee and the recipient will be obligated to respond promptly and supportively in accordance with § 106.44(a).

While the Department acknowledges commenters' concerns about actual knowledge introducing an additional hurdle to the reporting process for certain students at postsecondary institutions, the Department believes the actual knowledge requirement will bring benefits to students that outweigh potential concerns. Under these final regulations, the recipient must notify and inform students of the right to report sexual harassment to the Title IX Coordinator, a trained professional who is well positioned to contact the complainant to confidentially discuss the complainant's wishes regarding supportive measures (which must be offered regardless of whether the complainant also chooses to file a formal complaint), and explain the process of filing a formal complaint. Students may choose to confide in postsecondary institution employees to whom notice does not trigger the recipient's response obligations, without such confidential conversations necessarily resulting in the student being contacted by the Title IX Coordinator. This results in greater respect for the autonomy of a college student over what kind of institutional response will best serve the student's needs and wishes. This gives students at postsecondary institutions greater control over whether or when to report than does a requirement of universal mandatory reporting.

The Department understands commenters' concerns that some students may not feel comfortable discussing a sexual harassment experience with a stranger. Partly in response to such concerns, the final regulations designate any school employee as someone with whom an elementary or secondary school student can share a report and know that the recipient is then responsible for responding promptly. The Department believes it is reasonable to expect students at a university or college to communicate with the Title IX Coordinator or other official with

authority, as students would with other professionals, including doctors, therapists, and attorneys, many of whom college students do not know personally when they first seek assistance with sensitive, personal issues. At the same time, these final regulations permit each postsecondary institution to decide whether or not to implement a universal mandatory reporting policy. As discussed in the "Actual Knowledge" subsection of the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, there is conflicting research about whether universal mandatory reporting policies for postsecondary institutions benefit victims, or harm victims.

Although these final regulations do not expressly require recipients to allow complainants to bring a supportive friend to an initial meeting with the Title IX Coordinator, nothing in these final regulations prohibits complainants from doing so. Indeed, many people bring a friend or family member to doctors' visits for extra support, whether to assist a person with a disability or for emotional support, and the same would be true for a complainant reporting to a Title IX Coordinator. Once a grievance process has been initiated, these final regulations require recipients to provide the parties with written notice of each party's right to select an advisor of choice, and nothing precludes a party from choosing a friend to serve as that advisor of choice.[490]

The Department agrees with the commenter who asserted that recipients should publish information to help students locate the Title IX Coordinator and other staff to whom notice conveys actual knowledge on the recipient. These final regulations in § 106.8 require recipients to designate and authorize a Title IX Coordinator, notify all students and employees of the name or title, office address, electronic mail address, and telephone number of the Title IX

[490] Section 106.45(b)(2); § 106.45(b)(5)(iv).

Coordinator, and prominently display the contact information for the Title IX Coordinator on recipients' websites.

The Department disagrees that the actual knowledge requirement favors respondents over complainants. The final regulations' approach to designating Title IX Coordinators, officials with authority, and elementary and secondary school employees as persons to whom notice triggers the recipients' response obligations, is designed to ensure that recipients are held responsible for meaningful responses to known incidents of sexual harassment, including by providing equitable responses to the complainant and respondent,[491] while taking into account the different needs and expectations of elementary and secondary school students, and postsecondary institution students. In elementary and secondary schools the recipient must respond to sexual harassment when notice is given to any school employee; in postsecondary institutions where complainants are more capable of exercising autonomy over when to report and seek institutional assistance, the complainant (or any third party) may report to a Title IX Coordinator or official with authority. We reiterate that "notice" may come to a Title IX Coordinator, an official with authority, or an elementary and secondary school employee, from any source (i.e., from the person alleged to be the victim of sexual harassment, from any third party such as a friend, parent, or witness to sexual harassment, or from the employee's or official's first-hand observation of conduct that could constitute sexual harassment).

Changes: The Department has revised the § 106.30 definition of "actual knowledge" to specify that actual knowledge includes notice of sexual harassment to "any employee" in an elementary

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[491] Section 106.44(a) (requiring the recipient to respond equitably by offering supportive measures to a complainant and by refraining from taking disciplinary action against a respondent without first following a grievance process that complies with § 106.45).

and secondary school. The Department revised the § 106.30 definition of "actual knowledge" by replacing "respondeat superior" with "vicarious liability."

Chilling Reporting

Comments: Many commenters asserted that sexual assault is chronically underreported, and that an actual knowledge requirement would create an additional barrier to reporting and chill victims' willingness to try to report sexual harassment. Several commenters noted that studies show that, although only five percent of rapes are reported to officials, nearly two-thirds of victims tell someone about their experience (e.g., friends or family),[492] and commenters argued that limiting the employees who are mandatory reporters will result in the Title IX Coordinator knowing about even fewer incidents and helping even fewer victims, whereas the current system centralizes reporting so that fewer victims fall through the cracks. Numerous commenters asserted that sexual harassment and assault is a sensitive issue that many individuals only feel comfortable discussing within a trusted relationship, if they feel bold enough to discuss it at all.

Another commenter characterized the proposed rules' definition of actual knowledge in § 106.30 as "loose." According to this commenter, the proposed rules' definition of actual knowledge would allow for a situation where a student reports to an agent whom the student trusts and thinks that the report has been conveyed to the recipient, but for some reason, that agent does not properly report the incident. The commenter contended that in this situation the school can claim that it did not have actual knowledge of the incident and therefore the school cannot be held accountable for inaction. Multiple commenters stated that complainants should be

[492] Commenters cited: Massachusetts Institute of Technology, *Survey Results: 2014 Community Attitudes on Sexual Assault* (2014).

able to go to any school official with whom the student feels comfortable, to report sexual harassment, and that complainants should not be forced to go to a few specific people within the school.

Several commenters opposed the actual knowledge definition in § 106.30, asserting that most students do not know which employees have the authority to redress sexual harassment and would not even know who to contact. Also, multiple commenters cited a study that found that survivors often do not report their sexual assaults because of fear of being disbelieved or fear that their assault will not taken seriously,[493] and many commenters argued that the actual knowledge requirement will exacerbate these fears, thereby resulting in even less reporting of sexual harassment. Commenters argued that narrowing the scope of trusted adults to whom survivors of sexual assault can speak to receive support is an unjust violation of their right to safety.

Numerous commenters asserted that giving complainants greater control over whether and when to report will encourage more people to come forward to report sexual misconduct. A few commenters stated that the actual knowledge requirement pushes back against mandatory reporting policies that undermine a student's trust in professors and university employees. Commenters argued that because recipients often require employees to report allegations of sexual harassment to the Title IX office even when disclosures are made to employees in confidence, including in instances in which the complainant expresses no interest in an investigation, and the proposed rules would not require recipients to have these mandatory

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[493] Commenters cited: Kathryn J. Holland & Lilia M. Cortina, *"It happens to girls all the time": Examining sexual assault survivors' reasons for not using campus supports*, 59 AM. J. OF COMMUNITY PSYCHOL. 1-2 (2017).

reporting policies, the actual knowledge requirement would encourage more complainants to report sexual harassment because the complainants have greater control over what action a school takes in response to each situation, including whether the report will proceed to an investigation without the complainant's permission. One commenter asserted that mandatory reporter policies frequently serves as a deterrent to complainants who are seeking resources rather than adjudication. The commenter stated that mandatory reporting enhances the risks of revictimization and penalizes students who wish to come forward and seek services rather than a grievance process.

Another commenter asserted that postsecondary institution recipients should have to require that any employee to whom a student discloses sexual harassment provide the student with information about how to report to the Title IX office, the option of reporting, and the availability of supportive services. The commenter argued that a student should be told (by any employee in whom a student confides a sexual harassment experience) that unless the student makes a report, the institution will not know of the incident and will therefore do nothing about it. Several commenters supporting § 106.30 asserted that the final regulations should allow complainants to meet directly with the Title IX Coordinator who can provide the array of options available to them before deciding to file a formal complaint. One commenter expressed support of the proposed rules' allowance of greater informality in adjudications, because research shows that victims want more informal options, with less mandatory reporting.[494]

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[494] Commenters cited: National Academies of Science, Engineering, and Medicine, *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine* (Frasier F. Benya *et al.* eds., 2018).

Discussion: As discussed above, the final regulations revise the definition of actual knowledge to include notice to any elementary and secondary school employee, thus alleviating many commenters' concerns about requiring young students to both know how, and be willing to, report sexual harassment incidents to a particular school official or to the Title IX Coordinator. As discussed above, the actual knowledge requirement in the postsecondary institution context means notice to the Title IX Coordinator or an official with authority, and the Department believes this approach respects a postsecondary institution complainant's autonomy and choice over whether or when to report sexual harassment, while still ensuring that complainants and third parties have clear, accessible ways of reporting sexual harassment.

The Department agrees with commenters who pointed out that the actual knowledge requirement in the postsecondary institution context appropriately gives more control and autonomy to each complainant to choose to discuss a private incident confidentially (for example, with a trusted professor or resident advisor), or to report the incident in order to seek supportive measures or a grievance process against the respondent. Numerous commenters asserted that preserving a survivor's autonomy and control in the aftermath of a traumatic experience of sexual violence can be crucial to the survivor's ability to heal and recover.[495] The Department agrees with commenters who asserted that victims want more informal options with less mandatory reporting because mandatory reporting policies may have the unintended consequence of penalizing complainants who wish to come forward and seek supportive

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[495] *E.g.*, Carly Parnitzke Smith & Jennifer J. Freyd, *Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma*, 26 JOURNAL OF TRAUMATIC STRESS 1, 120 (2013) (describing "institutional betrayal" as when an important institution, or a segment of it, acts in a way that betrays its member's trust); Merle H. Weiner, *Legal Counsel for Survivors of Campus Sexual Violence*, 29 YALE J. OF L. & FEMINISM 123, 140-141 (2017) (identifying one type of institutional betrayal as the harm that occurs when "the survivor thinks she is speaking to a confidential resource, but then finds out the advocate cannot keep their conversations private").

measures, by subjecting complainants to contact with the Title IX office, (which can lead to a formal grievance process even without the complainant choosing to file a formal complaint),[496] when that was not what some complainants desired.[497] Therefore, the Department believes the actual knowledge requirement may benefit complainants at postsecondary institutions whose reports were chilled under a system of constructive notice. In the postsecondary institution context, the final regulations respect a complainant's decision about whether or when to report, and ensure that a complainant may receive supportive measures irrespective of whether they file a formal complaint of sexual harassment.[498]

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[496] Under the final regulations, a complainant always retains the *option* of initiating a grievance process (by filing a formal complaint) and is never required to file a formal complaint in order to receive supportive measures. § 106.44(a); § 106.44(b)(1); § 106.30 (defining "formal complaint"). However, a Title IX Coordinator may, when it is not clearly unreasonable in light of the known circumstances, sign a formal complaint that initiates a grievance process against a respondent even when that is not what the complainant wished to have happen. § 106.30 (defining "formal complaint"); § 106.44(a). Thus, universal mandatory reporting policies may sometimes result in involving a complainant in a grievance process when that is not what the complainant wanted, and the final regulations aim to make that less likely in the postsecondary institution context by allowing each postsecondary institution to decide for itself whether to have a universal mandatory reporting policy.

[497] *E.g.*, Carmel Deamicis, *Which Matters More: Reporting Assault or Respecting a Victim's Wishes?*, THE ATLANTIC (May 20, 2013) (describing a campus "speak-out" event at which sexual violence survivors were supposed to be able to safely share their stories with other but the university's mandatory reporting policy required any residential advisor who "recognizes the voice of a speaker" to report "that person's name and story" to the university's Title IX Coordinator, resulting in many resident advisors choosing to respect victims' anonymity even knowing that to do so violated campus policy because "[w]hen a policy doesn't embody the values it's supposed to protect, sometimes it's worth breaking"); *id.* (noting that the university's mandatory reporting policy was a direct result of the Department's withdrawn 2011 Dear Colleague Letter, describing professors and staff members "angrily arguing against the new policy" because they "can't believe the school is asking them to violate their students' trust," quoting a victim advocate as wondering "if you want to help victims in their time of need, why not leave it up to the victim?" and quoting a student volunteer at the speak-out as stating: "Sexual harassment or assault is a crime of power . . . . The survivor is stripped of their power and control, and one of the only aspects that remains in their control is if, how, when, and to whom to share their story" and mandatory reporting "removes that last aspect of control that a survivor has."); Allie Grasgreen, *Mandatory Reporting Perils*, INSIDE HIGHER ED (Aug. 30, 2013) (quoting Title IX activist Andrea Pino as stating: "Mandatory reporting is supposed to alleviate that lack of transparency but putting students in this predicament in which they do not feel like they can trust people for confidentiality is doing the opposite. . . . It's literally putting students in situations in which they can't be honest.").

[498] Section 106.44(a) (requiring a recipient's response to include informing the complainant of the availability of supportive measures with or without the filing of a formal complaint and explaining to the complainant the option for filing a formal complaint). While elementary and secondary school students retain less control over when disclosure of sexual harassment triggers the school's mandatory response obligations, these students (with involvement of their parents as appropriate) do retain control over whether to accept supportive measures, and whether to also file a formal complaint. § 106.44(a); § 106.6(g).

In response to commenters' concerns that under the proposed rules complainants would have difficulty finding the Title IX Coordinator or that there would be an increased potential for misunderstandings about whether a complainant wanted the school to investigate, the final regulations strengthen existing regulatory requirements that recipients notify students and employees (and parents of elementary and secondary school students) of the contact information for the Title IX Coordinator, post the Title IX Coordinator's contact information on the recipient's website, and disseminate information about how to report sexual harassment and file a formal complaint.[499] Additionally, revised § 106.44(a) requires the Title IX Coordinator to contact each complainant (which includes a parent or legal guardian, as appropriate) to inform the complainant of the *option* of filing a formal complaint while assuring the complainant that supportive measures are available irrespective of whether the complainant chooses to file a formal complaint.

Under the rubric of actual knowledge, as applied by Federal courts interpreting Supreme Court precedent, whether certain recipient employees are officials with authority is a fact specific inquiry. Accordingly, the final regulations: (1) continue, as proposed in the NPRM, to ensure that notice to a recipient's Title IX Coordinator conveys actual knowledge, and (2) broaden the definition of actual knowledge for elementary and secondary schools to include notice to any school employee.[500] In this manner, the final regulations ensure that students in elementary and secondary schools can discuss, disclose, or report a sexual harassment incident to any school employee, conveying actual knowledge to the school and requiring the school to respond

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[499] Section 106.8.
[500] Section 106.30 (defining "actual knowledge").

appropriately, while postsecondary institutions have discretion to offer college and university students options to discuss or disclose sexual harassment experiences with institutional employees for the purpose of emotional support, or for the purpose of receiving supportive measures and/or initiating a grievance process against the respondent.

The Department acknowledges that the actual knowledge standard relies on the Title IX Coordinator as an essential component of the process to address sexual harassment, especially in the postsecondary institution context. Recipients have been required to designate a Title IX Coordinator for decades, and the Department believes that these final regulations ensure that all students have clear, accessible options for making reports that convey actual knowledge to the recipient.[501] Nothing in these final regulations prevents a postsecondary institution or any other recipient from requiring employees who are not Title IX Coordinators or officials with authority, to report allegations of sexual harassment to the Title IX Coordinator when such employees become aware of such allegations.[502]

The Department disagrees that the actual knowledge requirement will chill reports because complainants might worry that the Title IX Coordinator will not believe or take their reports seriously, or that the actual knowledge requirement violates complainants' "right to

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[501] Section 106.30 defines "actual knowledge" to include notice to any elementary and secondary school employee, or to any Title IX Coordinator, and expressly states that "notice" includes but is not limited to a report to the Title IX Coordinator as described in § 106.8(a) (which, in turn, states that any person may report to the Title IX Coordinator in person or by mail to the office address, by telephone, or by e-mail, using the contact information for the Title IX Coordinator that the recipient must send to students, employees, and parents and guardians of elementary and secondary school students). § 106.8(b) (requiring recipients to prominently display the Title IX Coordinator's contact information on recipients' websites).

[502] We have also revised § 106.30 defining "actual knowledge" to state that the mere fact that an individual is required to, or has been trained to, report sexual harassment, does not mean that individual is an "official with authority." We made this revision so that a recipient may require and/or train contractors, volunteers, or others to report to a Title IX Coordinator (or other appropriate school personnel) without automatically converting any such individual into a person to whom notice charges the recipient with actual knowledge.

safety." These final regulations require that a recipient's Title IX Coordinator receives training on how to serve impartially and without bias pursuant to § 106.45(b)(1)(iii), and must offer each complainant information about supportive measures (designed in part to protect the complainant's safety) and how to file a formal complaint, under § 106.44(a). If a Title IX Coordinator responds to a complainant by not taking a report seriously, or with bias against the complainant, the recipient has violated these final regulations.

Changes: Section 106.30 defining "actual knowledge" is revised to include notice to any elementary and secondary school employee. Section 106.44(a) adds specific requirements that the recipient must offer supportive measures to a complainant, and the Title IX Coordinator must contact each complainant to discuss availability of supportive measures with or without the filing of a formal complaint, consider the wishes of the complainant with respect to supportive measures, and explain the process for filing a formal complaint.

Generally Burdening Complainants

Comments: Many commenters asserted that the actual knowledge definition and requirement places the burden squarely on victims to report harm. One commenter asserted that under the proposed rules, complainants – rather than recipients – would bear the responsibility to report sexual harassment and assault. Numerous commenters stated that postsecondary students are not yet full adults, and that the proposed regulations unrealistically assume that an 18 year old freshman in college is ready to face the process required by the proposed regulations.

Many commenters asserted that eliminating the "responsible employees" rubric used in Department guidance will delay, if not totally hinder, the ability of complainants to get prompt assistance in the aftermath of trauma. Commenters stated that complainants will need to navigate the school's bureaucracy to locate and contact the Title IX Coordinator, which will take time,

and in the meantime this will force complainants to continue to see their perpetrators in classes or dormitories while the complainant navigates the school's bureaucracy. Another commenter asked why the proposed regulations removed the term "responsible employees" that was used in Department guidance.

Discussion: The Department acknowledges that the actual knowledge requirement in the final regulations departs from the constructive notice approach relied on in previous Department guidance, wherein the Department took the position that any "responsible employee" (in both elementary and secondary schools, and postsecondary institutions) who knew or should have known about sexual harassment triggered the recipient's obligation to address sexual harassment.[503] However, we disagree that the actual knowledge definition in § 106.30 (as revised) and the actual knowledge requirement in § 106.44(a), burden complainants or will result in delayed responses to reported sexual harassment. In response to commenters' concerns that students and employees may not know how to report to the Title IX Coordinator, we have revised § 106.8 to better ensure that students, employees, and others have clear, accessible options for reporting to the Title IX Coordinator (including options that can be utilized during non-business hours), and to emphasize that reports may be made by complainants (i.e., the person alleged to be the victim of sexual harassment) or by any other person. Revised § 106.8 now requires recipients to notify all students, employees, and parents of elementary and secondary school students (and others) of the Title IX Coordinator's contact information, to post that contact information prominently on the recipient's website, and specifies that "any person" may report using the listed contact information for the Title IX Coordinator.

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[503] *E.g.*, 2001 Guidance at 13.

We appreciate a commenter's inquiry about the omission of "responsible employees" in these final regulations. There are two ways in which the final regulations alter references to "responsible employees." First, existing Title IX regulations have long used a heading, "Designation of responsible employee," preceding 34 CFR 106.8(a); this reference to "responsible employee" has always, in reality, been a reference to the recipient's Title IX Coordinator, and the Department is revising § 106.8(a) to reflect this reality by using the phrase "Designation of Title IX Coordinator" in the header for § 106.8(a) and specifying in that section that the employee designated and authorized by the recipient to coordinate the recipient's Title IX responsibilities is known as, and must be referred to as, the "Title IX Coordinator." Second, the term "responsible employee" appears throughout the Department's past guidance documents. In the 2001 Guidance, the Department defined a responsible employee as "any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility."[504] As explained in the "Actual Knowledge" subsection of the "Adoption and Adaption of the Supreme Court Framework to Address Sexual Harassment" section of this preamble, these final regulations do not use the "responsible employees" rubric that was set forth in Department guidance. In the elementary and secondary school context, there is no need to decide which employees are "responsible employees" because under revised § 106.30 defining "actual knowledge," notice to *any* elementary and secondary school employee triggers the recipient's response obligations. In the postsecondary institution context, these final regulations

[504] 2001 Guidance at 13.

do not use the responsible employees rubric in its entirety, although the first of the three categories described in guidance as "responsible employees" are still used in these final regulations, because notice to an official with authority is the equivalent of the category referred to in guidance as an employee who has the authority to redress the harassment. In the postsecondary institution context, the Department believes that complainants will benefit from allowing postsecondary institutions to decide which of their employees (aside from the Title IX Coordinator, and officials with authority) may listen to a student's disclosure of sexual harassment without being mandated to report the sexual harassment incident to the Title IX Coordinator.

A recipient (including a postsecondary institution recipient) may give authority to as many officials as it wishes to institute corrective measures on behalf of the recipient, and notice to such officials with authority will trigger the recipient's response obligations. A recipient also may choose to train employees and other individuals, such as parent or alumni volunteers, on how to report or respond to sexual harassment, even if these employees and individuals do not have the authority to take corrective measures on the recipient's behalf. The Department will not penalize recipients for such training by declaring that having trained people results in notice to those people charging the recipient with actual knowledge. The Department recognizes that recipients may not engage in such training efforts if such efforts may increase the recipient's liability.[505] Accordingly, these final regulations specify in the definition of actual knowledge in §

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[505] *Id*. Under the 2001 Guidance and subsequent guidance documents, a recipient was required to "ensure that employees are trained so that . . . responsible employees know that they are obligated to report harassment to appropriate school officials." 2001 Guidance at 13. Accordingly, training an employee may have increased the

106.30 that: the "mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient."

The Department disagrees that the actual knowledge requirement will delay implementation of emergency or urgently needed supportive measures compared to policies developed under a constructive notice requirement. In elementary and secondary schools the final regulations provide that reporting to any school employee triggers the school's prompt response. Once the elementary or secondary school has actual knowledge of sexual harassment, under revised § 106.44(a), the recipient must promptly offer the complainant supportive measures, and the Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. The same obligations to respond promptly are triggered in postsecondary institutions whenever the Title IX Coordinator or an official with authority has notice of sexual harassment.

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recipient's liability, as such training indicated the recipient's intention to treat the trained employees as responsible employees. (For reasons explained in this subsection "Actual Knowledge" under the section "Section 106.30 Definitions" as well as the "Actual Knowledge" subsection of the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, the Department no longer adheres to the rubric of "responsible employees" for reasons that differ for elementary and secondary schools, than for postsecondary institutions.) These final regulations require training for Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. § 106.45(b)(1)(iii). A recipient may train more employees or other persons without fear of creating liability because the "mere ability or obligation to report sexual harassment or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient," as described in the definition of "actual knowledge" in § 106.30.

Although commenters asserted that some complainants, even at postsecondary institutions, are too young, immature, or traumatized to contact a Title IX Coordinator, the Department notes that nothing in the final regulations prevents a complainant from first discussing the harassment situation with a trusted mentor or having a supportive friend with them to meet with or otherwise report to the Title IX Coordinator. The Department reiterates that under the final regulations, a complainant may report to the Title IX Coordinator and receive supportive measures without filing a formal complaint or otherwise participating in a grievance process, that reports can be made using any of the contact information for the Title IX Coordinator including office address, telephone number, or e-mail address, and that reports by phone or e-mail may be made at any time, including during non-business hours. Thus, we believe that the final regulations provide clear, accessible reporting options and will not cause delays in the responsibility or ability of a Title IX Coordinator to receive a report and then respond promptly, including by discussing with the complainant services that may be urgently needed to preserve a complainant's equal educational access, protect the complainant's safety, and/or deter sexual harassment, offering supportive measures to the complainant, and remaining responsible for effective implementation of the supportive measures.[506]

Changes: The Department revised the definition of actual knowledge in § 106.30 to add that the mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual, as one who

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[506] Section 106.30 (defining "supportive measures" in pertinent part to mean individualized services, reasonably available, offered without fee or charge, designed to restore or preserve a complainant's equal access to the recipient's education program or activity without unreasonably burdening the other party, and/or designed to protect the complainant's safety or deter sexual harassment, and stating that the Title IX Coordinator is responsible for effective implementation of supportive measures).

has the authority to institute corrective measures on behalf of the recipient. We have also revised § 106.44(a) to require the recipient promptly to offer the complainant supportive measures and to require the Title IX Coordinator promptly to contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.

Employees' Obligations

Comments: Several commenters expressed concern that the definition of actual knowledge means that some employees previously designated as "responsible employees" or mandatory reporters under Department guidance would no longer undergo training about sexual violence on campus. Many commenters believed that under the proposed rules, fewer employees would be mandatory reporters and thus would be untrained when students disclose an incident of sexual harassment. Many commenters asserted that, without mandatory reporting, professors, coaches, resident advisors, or teaching assistants may respond to victims based on personal preferences or biases (perhaps because the employee knows the accused student, or is biased against believing complainants), and argued that this will impact victims' ability to obtain assistance from unbiased, trained personnel. Several commenters argued that this, in turn, will expose recipients to increased litigation for failure to respond to sexual misconduct known by their faculty and staff but not reported to their Title IX offices.

Another commenter asked the Department to reexamine existing regulations under the Clery Act to determine whether student employees who are campus security authorities (CSAs)

under the Clery Act have conflicting duties under the proposed regulations and the Clery Act regulations.

Another commenter asked the Department to clarify why coaches and athletic trainers were not designated in the proposed rules as responsible employees, when this poses a conflict with NCAA (National Collegiate Athletic Association) guidelines.

One commenter asked what officials the Department considers to have the "authority to initiate corrective measures," believing that the language in the proposed rules could be interpreted to limit that role to only the Title IX Coordinator. Relatedly, several commenters requested that the Department provide clarity on what constitutes "authority to initiate corrective measures" and what types of corrective measures would be included; commenters argued that all staff and faculty have at least some ability to initiate some types of corrective measures.

At least one commenter asserted that requiring institutions, such as the commenter's community college, to respond only when the institution has actual notice, is a positive development. The commenter asserted that the commenter's institution employs part-time and contract employees, and vendors, outside the institution's direct control with no authority to institute corrective measures. This commenter therefore appreciated the flexibility offered under the proposed rules, for postsecondary institutions to design their own mandatory reporting policies. One commenter, a graduate student instructor, asserted that the actual knowledge definition was helpful to clarify the commenter's role and asserted that current guidance is unclear.

One commenter, a Title IX Coordinator at a university, asserted that the constructive notice standard is difficult to implement. The commenter stated that those not directly involved

in Title IX compliance or student conduct, such as full-time faculty, seem to have trouble understanding the complexity of the law in that area, even with training.

Discussion: The 2001 Guidance indicated that responsible employees should be trained to report sexual harassment to appropriate school officials.[507] Not all employees, however, were responsible employees and, thus, not all employees had an obligation to report sexual harassment to the Title IX Coordinator or other school officials. With respect to training, the Department in its 2001 Guidance stated: "schools need to ensure that employees are trained so that those with authority to address [sexual] harassment know how to respond appropriately, and other responsible employees know that they are obligated to report [sexual] harassment to appropriate officials."[508] Under the 2001 Guidance, such "[t]raining for employees . . . include[s] practical information about how to identify [sexual] harassment and, as applicable, the person to whom it should be reported."[509] As discussed previously, these final regulations no longer use a responsible employees rubric, and instead define the pool of employees to whom notice triggers a recipient's response obligations differently for elementary and secondary schools, and for postsecondary institutions. Like the 2001 Guidance, these final regulations incentivize recipients to train their employees; however, rather than mandate training of all employees, these final regulations require robust, specific training of every recipient's Title IX Coordinator[510] and place

[507] 2001 Guidance at 13.
[508] 2001 Guidance at 13.
[509] *Id*.
[510] Section 106.45(b)(1)(iii).

specific response obligations on Title IX Coordinators.[511] The Department believes that this approach most effectively ensures that recipients meet their Title IX obligations: the Department will hold recipients accountable for meeting Title IX obligations, the Department requires Title IX Coordinators to be well trained, and the Department leaves recipients discretion to determine the kind of training to other employees that will best enable the recipient, and its Title IX Coordinator, to meet Title IX obligations. Accordingly, the Department disagrees with commenters that removing any "mandatory reporting" requirement or the "responsible employee" rubric allows employees to freely respond to victims out of personal preferences or biases. For example, an elementary or secondary school recipient must promptly offer supportive measures to a complainant under § 106.44(a) whenever one of its employees has notice of sexual harassment, and the Title IX Coordinator specifically must contact the complainant. This ensures that the recipient is responsible for having an employee specially trained in Title IX matters (including the obligation to be free from bias, impartial, and having been trained with materials that do not rely on sex stereotypes)[512] communicates with the complainant. Regardless of the training a recipient gives to employees, the Department will hold the recipient accountable for meeting the recipient's response obligations under § 106.44(a) and for designating and authorizing a Title IX Coordinator[513] who has been trained to serve free from bias. For reasons discussed previously, including in the "Actual Knowledge" subsection of the "Adoption and

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[511] *E.g.*, § 106.44(a) (the Title IX Coordinator must promptly contact each person alleged to be the victim of sexual harassment – i.e., each complainant – regardless of who reported the complainant's sexual harassment victimization, and must discuss with the complainant the availability of supportive measures with or without the filing of a formal complaint, the complainant's wishes with respect to supportive measures, and the option of filing a formal complaint that initiates a grievance process against a respondent).
[512] Section 106.45(b)(1)(iii) (describing mandatory training, and requirements to be free from bias, for the Title IX Coordinator).
[513] Section 106.8(a).

Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, the Department believes that allowing postsecondary institution recipients to decide how its employees (other than the Title IX Coordinator, and officials with authority) respond to notice of sexual harassment appropriately respects the autonomy of postsecondary students to choose to disclose sexual harassment to employees for the purpose of triggering the postsecondary institution's Title IX response obligations, or for another purpose (for example, receiving emotional support without desiring to "officially" report). In order to ensure that all students and employees have clear, accessible reporting channels, we have revised § 106.8 to require a recipient to notify its educational community of the contact information for the Title IX Coordinator[514] and post that contact information prominently on the recipient's website, and to expressly state that "any person" may report sexual harassment at any time, including during non-business hours, by using the telephone number or e-mail address (or by mail to the office address) listed for the Title IX Coordinator, to emphasize that giving the Title IX Coordinator notice of sexual harassment that triggers the recipient's response obligations does not require scheduling an in-person appointment with the Title IX Coordinator.

Additionally, if a postsecondary institution would like to train all employees or require all employees to report sexual harassment to the Title IX Coordinator through policies that these final regulations do not require, then the postsecondary institution may do so without fearing that the Department will hold the postsecondary institution responsible for responding to sexual

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[514] Section 106.8(a) is also revised to require recipients to refer to the employee designated and authorized to coordinate the recipient's Title IX obligations as "the Title IX Coordinator," in order to further clarify for students and employees the Title IX Coordinator's role and function. Thus, for example, a recipient may designate one employee to coordinate multiple types of anti-discrimination and diversity efforts, yet the recipient must use the title "Title IX Coordinator" in its notices to students and employees, on its website, and so forth so that the recipient's educational community knows who to contact to report sex discrimination, including sexual harassment.

harassment allegations unless the recipient's employee actually did give notice to the recipient's Title IX Coordinator (or to an official with authority).[515] The Department revised § 106.30 defining "actual knowledge" to expressly state that the mere ability or obligation to inform a student about how to report sexual harassment or having been trained to do so will not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient. Postsecondary institutions, thus, may train as many employees as they would like or impose mandatory reporting requirements on their employees without violating these final regulations, and may make those training decisions based on what the recipient believes is in the best interest of the recipient's educational community. A postsecondary institution's decisions regarding employee training and mandatory reporting for employees may, for example, take into account that students at postsecondary institutions may benefit from knowing they can discuss sexual harassment experiences with a trusted professor, resident advisor, or other recipient employee without such a discussion automatically triggering a report to the Title IX office, or may take into account whether the postsecondary institution has Clery Act obligations that require training on reporting obligations for CSAs, or whether the institution is expected to adhere to NCAA guidelines.

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[515] As noted by a commenter on behalf of a community college, this flexibility applies in the postsecondary institution context regarding how the institution decides to train, or have a mandatory reporting policy for, all employees who are not the Title IX Coordinator or an official with authority, such as the institution's part-time employees or vendors who are independent contractors to whom the institution has not given authority to institute corrective measures on behalf of the institution. In the elementary and secondary school context, this flexibility is more limited, because the final regulations hold the school responsible for responding whenever *any employee* has notice of sexual harassment. However, this flexibility (to train individuals, or to require individuals to report sexual harassment to the Title IX Coordinator) still applies to elementary and secondary school recipients, for example with respect to independent contractor vendors, or non-employee volunteers who interact with students.

With respect to both elementary and secondary schools as well as postsecondary institutions, the Department does not limit the manner in which the recipient may receive notice of sexual harassment. Although imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge, a Title IX Coordinator, an official with authority to institute corrective measures on behalf of the recipient, and any employee of an elementary and secondary school may receive notice through an oral report of sexual harassment by a complainant or anyone else, a written report, through personal observation, through a newspaper article, through an anonymous report, or through various other means. The Department will not permit a recipient to ignore sexual harassment if the recipient has actual knowledge of such sexual harassment in its education program or activity against a person in the U.S., and such a recipient is required to respond to sexual harassment as described in § 106.44(a).

The Department disagrees with commenters who are concerned that the actual knowledge requirement would expose recipients to increased litigation. Because the Department developed the actual knowledge requirement on the foundation of the Supreme Court's Title IX cases, the Department disagrees that recipients will be subject to increased litigation risk by adhering to these final regulations.[516] Indeed, if recipients comply with these final regulations, these final regulations may have the effect of decreasing litigation because recipients with actual knowledge would be able to demonstrate that they were not deliberately indifferent in responding to a report of sexual harassment. Recipients would be able to demonstrate that they offered supportive

[516] *See* the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section, and the "Litigation Risk" subsection of the "Miscellaneous" section, of this preamble.

measures in response to a report of sexual harassment, irrespective of whether the complainant chose to file a formal complaint, and informed the complainant about how to file such a formal complaint.

The Department has examined these final regulations in light of its regulations implementing the Clery Act, and has determined that these final regulations do not create any conflicts with respect to CSAs and their obligations under the regulations implementing the Clery Act. For discussion about these final regulations and the regulations implementing the Clery Act, see the discussion in the "Clery Act" subsection of the "Miscellaneous" section of this preamble. The Department is not under an obligation to conform these final regulations with NCAA compliance guidelines and declines to do so. Any recipient may give coaches and trainers authority to institute corrective measures on behalf of the recipient such that notice to coaches and trainers conveys actual knowledge to the recipient as defined in § 106.30. Additionally, or alternatively, any recipient may train coaches and athletic trainers to report notice of sexual harassment to the recipient's Title IX Coordinator. We reiterate that as to elementary and secondary schools, notice to a coach or trainer charges the recipient with actual knowledge, if the coach or trainer is an employee.

As discussed in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, the Supreme Court developed the concept of officials with authority to institute corrective measures on behalf of the recipient based on the administrative enforcement requirement in 20 U.S.C. 1682 that an agency must give notice of a Title IX violation to "an appropriate person" affiliated with the recipient before an agency seeks to terminate the recipient's Federal funding, and that an appropriate official is one who can make a decision to correct the violation. Whether a person constitutes an official of the recipient who

has authority to institute corrective measures on behalf of the recipient is a fact-specific determination[517] and the Department will look to Federal case law applying the *Gebser/Davis* framework. Because determining which employees may be officials with authority" is fact-specific, the Department focuses administrative enforcement on (1) requiring every recipient to designate a Title IX Coordinator, notice to whom the Department deems as conveying actual knowledge to the recipient, and (2) applying an expanded definition of actual knowledge in the elementary and secondary school context to include notice to any school employee. The Department notes that recipients may, at their discretion, expressly designate specific employees as officials with authority for purposes of Title IX sexual harassment, and may inform students of such designations.

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[517] *E.g.*, Julie Davies, *Assessing Institutional Responsibility for Sexual Harassment in Education*, 77 TULANE L. REV. 387, 398, 425-26 (2002) ("The requirement of actual notice to a person with corrective authority is more complex than it appears on its face. A person who has corrective authority in one sphere, such as a teacher with regard to students in his class, may lack such authority in other contexts. While one can understand the potential unfairness to educational institutions if liability were imposed for failure to take action when harassing conduct is described in some general manner to someone who is not in a capacity to evaluate, investigate, or intercede in any way, courts cannot rely exclusively on a job description. The legal authority of individuals to receive notice is clearly relevant and a basis for their inclusion as parties to whom notice may be given, but courts must also evaluate the factual reality. Reference to legal power to take the ultimate corrective action gives an incomplete picture of how power is wielded. The Court's policy goals permit a construction that is broad and flexible, both as to what constitutes notice and who is in a position to take action.") (internal citations omitted); Brian Bardwell, *No One is an Inappropriate Person: The Mistaken Application of Gebser's "Appropriate Person" Test to Title IX Peer-Harassment Cases*, 68 CASE W. RES. L. REV. 1343, 1356-64 (2018) (analyzing case law applying the "official with authority" standard and noting that some courts focus on whether the "appropriate person" to whom sexual harassment was reported had authority to discipline the harasser, or the authority to remediate the situation for the victim, or both types of authority, and arguing that only a broader interpretation of an "appropriate person" serves the goals of Title IX, such that any school employee authorized to "take action to ensure that a victim continues to enjoy the full benefits of her [or his] education, despite having been harassed or assaulted" should be deemed authority to institute "corrective action" and satisfy the *Gebser* actual knowledge condition). The final regulations essentially take this broader approach in the elementary and secondary school context, where notice to any employee charges the school with actual knowledge, but in the postsecondary institution context leaves institutions flexibility to choose the officials to whom the institution grants authority to institute corrective measures on the recipient's behalf. Recognizing that case law under the *Gebser/Davis* framework has taken different approaches to what constitutes "corrective action" the final regulations emphasize a recipient's obligation to ensure that its entire educational community knows how to readily, accessibly report sexual harassment to the Title IX Coordinator.

Changes: The Department revised § 106.30 to expressly state that the mere ability or obligation to inform a student about how to report sexual harassment or having been trained to do so will not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient.

Elementary and Secondary Schools

Comments: Many commenters expressed concerns about how the § 106.30 definition of "actual knowledge" will apply to students at elementary and secondary schools. Commenters asserted that elementary and secondary school students suffer a particular harm when adult employees prey upon them, and those same adults can pressure those students to stay silent. Some commenters asserted that the proposed rules conflict with robust State laws and regulations that require mandatory reporting of suspected child abuse or domestic violence. Several commenters characterized the actual knowledge requirement as dramatically narrowing the scope of elementary and secondary school employees' obligation to respond to sexual harassment by using an actual knowledge requirement instead of a constructive notice requirement. These commenters contended that the proposed rules' actual knowledge requirement would harm children because it would exclude school district personnel who regularly interact with students, including school principals, paraeducators, school counselors, coaches, school bus drivers, and others, from the group of officials to whom notice charges the school with actual knowledge.

Discussion: The Department is persuaded that students in elementary and secondary schools who are typically younger than students in postsecondary institutions must be able to report sexual harassment to an employee other than a teacher, Title IX Coordinator, or official with authority, to trigger the school's mandatory response obligations. We agree that it is unreasonable to expect young children to seek out specific employees for the purpose of disclosing Title IX sexual

harassment. Elementary and secondary school employees other than the Title IX Coordinator, teachers, or officials with authority may observe or witness sexual harassment or have notice of sexual harassment through other means such as a third-party report, and we agree that in the elementary and secondary school context such notice must trigger the school's mandatory response obligations because otherwise, a young complainant may not be offered supportive measures or know of the option to file a formal complaint that initiates a grievance process against the respondent. Further, we recognize that in the elementary and secondary school context, a young student's ability to make decisions regarding appropriate supportive measures, or about whether to file a formal complaint, would be impeded without the involvement of a parent or guardian who has the legal authority to act on the student's behalf. Accordingly, the Department expands the definition of actual knowledge in § 106.30 to include "any employee of an elementary and secondary school" and adds § 106.6(g) expressly recognizing the legal rights of parents and guardians to act on behalf of a complainant (or respondent) in any Title IX matter. While the imputation of knowledge based solely on the theories of vicarious liability or constructive notice is insufficient, notice of sexual harassment to elementary and secondary school employees, who may include school principals, teachers, school counselors, coaches, school bus drivers, and all other employees, will obligate the recipient to respond to Title IX sexual harassment.

The actual knowledge requirement is not satisfied when the only official or employee of the recipient with actual knowledge of the harassment is the respondent, because the recipient will not have opportunity to appropriately respond if the only official or employee who knows is the respondent. We understand that in some situations, a school employee may perpetrate sexual harassment against a student and then pressure the complainant to stay silent, and that if the

complainant does not disclose the misconduct to anyone other than the employee-perpetrator, this provision means that the school is not obligated to respond. However, if the complainant tells another school employee about the misconduct, the school is charged with actual knowledge and must respond. Further, if the complainant tells a parent, or a friend, or a trusted adult in the complainant's life, that third party has the right to report sexual harassment to the school's Title IX Coordinator, obligating the school to promptly respond, even if that third party has no affiliation with the school.[518]

As previously explained in the "Employees' Obligations" subsection of this "Actual Knowledge" section, the definition of actual knowledge in these final regulations does not necessarily narrow the scope of an elementary or secondary school's obligation to respond to Title IX sexual harassment as compared to the approach taken in Department guidance. Under the 2001 Guidance, a school had "notice if a responsible employee 'knew or in the exercise of reasonable care should have known,' about the harassment."[519] Responsible employees, however, did not include all employees. Under these final regulations, notice of sexual harassment or allegations of sexual harassment to any employee of an elementary or secondary school charges the recipient with actual knowledge to the elementary or secondary school and triggers the recipient's obligation to respond. The Department's revised definition of actual knowledge with respect to elementary and secondary schools, thus, arguably broadens and does not narrow an elementary or secondary school's obligation to respond to Title IX sexual harassment compared to the approach taken in Department guidance.

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[518] Section 106.8(a) (emphasizing that "any person" may report sexual harassment to the Title IX Coordinator).
[519] 2001 Guidance at 13.

The Department recognizes that most State laws require elementary and secondary school employees to report sexual harassment when it constitutes a form of child abuse. Even though the Department is not required to align these Federal regulations with mandatory reporter requirements in State laws, the Department chooses to do so in the context of elementary and secondary schools. The Department's prior guidance did not require an elementary or secondary school to respond to Title IX sexual harassment when any employee had notice of Title IX sexual harassment.[520] These final regulations do so. The Department acknowledges that State laws may exceed the requirements in these final regulations as long as State laws do not conflict with these final regulations as explained more fully in the "Section 106.6(h) Preemptive Effect" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble. Commenters have not identified a conflict with respect to the actual knowledge definition in § 106.30, and any State law, in the context of elementary and secondary schools.

Changes: The Department revised § 106.30 to specify that notice of sexual harassment to any employee of an elementary and secondary school constitutes actual knowledge to the recipient, and triggers the recipient's obligation to respond to sexual harassment.

Large Schools

Comments: Multiple commenters asserted that students at large institutions – such as schools with more than one campus or with enrollments over 5,000 students – are disadvantaged by the actual knowledge requirement because students will be required to seek out a single administrator (the Title IX Coordinator) whose office may be located on a different campus or in

[520] *Id*.

another zip code and who has responsibilities for tens of thousands of other students, faculty, and staff.

Several commenters also questioned how the proposed rules, including the actual knowledge definition in § 106.30, will burden Title IX Coordinators. Commenters asserted that the requirement for actual knowledge will significantly burden Title IX Coordinators who must now receive and process all sexual harassment and assault reports. Commenters expressed concern that for larger campuses, this could overwhelm an already overtaxed position on campuses, cause higher turnover rates for the position of Title IX Coordinator, and result in ineffective administration of Title IX. Many commenters argued that the proposed rules, and their focus on the Title IX Coordinator's responsibilities, would add to schools' overall administrative burdens.

Discussion: The Department's regulatory authority under Title IX extends to recipients of Federal financial assistance which operate education programs or activities.[521] Requirements such as designation of a Title IX Coordinator therefore apply to each "recipient," for example to a school district, or to a university system, regardless of the recipient's size in terms of student enrollment or number of schools or campuses. Title IX's non-discrimination mandate extends to every recipient's education programs or activities.[522] These final regulations at § 106.8(a), similar to current 34 CFR 106.9, require recipients to designate "at least one" employee to serve

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[521] 20 U.S.C. 1681(a) (referring to any education program or activity that receives Federal financial assistance); 34 CFR 106.2(i) (defining "recipient" to mean "any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives such assistance, including any subunit, successor, assignee, or transferee thereof").

[522] *See* 20 U.S.C. 1687 (defining "program or activity"); 34 CFR 106.2(h) (defining "program or activity").

as a Title IX Coordinator. As the Department has recognized in guidance documents,[523] some recipients serve so many students, or find it administratively convenient for other reasons, that the recipient may need to or wish to designate multiple employees as Title IX Coordinators, or designate a Title IX Coordinator and additional staff to serve as deputy Title IX Coordinators, or take other administrative steps to ensure that the Title IX Coordinator can adequately fulfill the recipient's Title IX obligations, including all obligations imposed under these final regulations. The Department is sensitive to the financial and resource challenges faced by many recipients, the Department's responsibility is to regulate in a manner that best effectuates the purposes of Title IX, to prevent recipients that allow discrimination on the basis of sex from receiving Federal financial assistance, and to provide individuals with effective protections against discriminatory practices.[524] The Department is aware that many recipients face high turnover rates with respect to the Title IX Coordinator position[525] and that some recipients struggle to understand the critical role that Title IX Coordinators need to have in fulfilling a recipient's Title

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[523] *E.g.*, 2001 Guidance at 21 ("Because it is possible that an employee designated to handle Title IX complaints may himself or herself engage in harassment, a school may want to designate more than one employee to be responsible for handling complaints in order to ensure that students have an effective means of reporting harassment."); 2011 Dear Colleague Letter at 7 (stating that each recipient must designate one Title IX Coordinator but may designate more than one). The Department's Title IX implementing regulations have, since 1975, required each recipient to designate at least one employee to coordinate the recipient's efforts to comply with Title IX. 34 CFR 106.8(a). These final regulations are thus consistent with current regulations and with all past Department guidance on this matter, but impose new legal obligations on recipients to, for example, include an e-mail address for the Title IX Coordinator and require all the contact information for the Title IX Coordinator to be posted on the recipient's website. § 106.8.

[524] *See, e.g.*, *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979) (describing the purposes of Title IX).

[525] *E.g.*, Sarah Brown, *Life Inside the Title IX Pressure Cooker*, CHRONICLE OF HIGHER EDUCATION (Sept. 5, 2019) ("Nationwide, the administrators who are in charge of dealing with campus sexual assault and harassment are turning over fast. Many colleges have had three, four, or even five different Title IX coordinators in the recent era of heightened enforcement, which began eight years ago. Two-thirds of Title IX coordinators say they've been in their jobs for less than three years, according to a 2018 survey by the Association of Title IX Administrators, or ATIXA, the field's national membership group. One-fifth have held their positions for less than a year."); Jacquelyn D. Wiersma-Mosley & James DiLoreto, *The Role of Title IX Coordinators on College and University Campuses*, 8 BEHAVIORAL. SCI. 4 (2018) (finding that most Title IX Coordinators have fewer than three years of experience, and approximately two-thirds are employed in positions in addition to serving as the Title IX Coordinator).

IX responsibilities. However, the Department intends through these final regulations to further stress the critical role of each recipient's Title IX Coordinator, a role that is emphasized throughout the final regulations[526] in ways that the Department is aware will require recipients to carefully "designate and authorize" Title IX Coordinators. The Department revised § 106.8(a) to require a recipient to give the Title IX Coordinator authority (i.e., authorize) to meet specific responsibilities as well as to coordinate the recipient's overall efforts to comply with Title IX and these final regulations. The Department believes this emphasis on the need for recipients to rely heavily on Title IX Coordinators to fulfill recipient's obligations will result in more recipients effectively responding to Title IX sexual harassment because recipients will be incentivized to properly train and authorize qualified individuals to serve this important function. The Department understands some commenters' concerns that Title IX Coordinators will be burdened by, and that recipients will face administrative burdens under, these final regulations, but the Department believes that the obligations in these final regulations are the most effective way to effectuate Title IX's non-discrimination mandate, and believes that the function of a Title IX Coordinator is necessary to increase the likelihood that recipients will fulfill those obligations. At the same time, the Department will not impose a requirement on recipients to

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[526] *E.g.*, § 106.8(a) (stating recipients now must not only designate, but also "authorize" a Title IX Coordinator, and must notify students and employees (and others) of the Title IX Coordinator's contact information); § 106.8(b)(2) (requiring a recipient to post contact information for any Title IX Coordinators on the recipient's website); § 106.30 (defining "actual knowledge" and stating notice to a Title IX Coordinator gives the recipient actual knowledge and "notice" includes but is not limited to a report to the Title IX Coordinator as described in § 106.8(a)); § 106.30 (defining "formal complaint" and stating a Title IX Coordinator may sign a formal complaint initiating a § 106.45 grievance process); § 106.44(a) (stating the Title IX Coordinator must contact each complainant to discuss the availability of supportive measures); § 106.30 (defining "supportive measures" and mandating that Title IX Coordinators are responsible for effective implementation of supportive measures); § 106.45(b)(1)(iii) (stating Title IX Coordinators must be free from conflicts of interest and bias, and must be trained on, among other things, how to serve impartially); § 106.45(b)(3)(ii) (stating a complainant may notify the Title IX Coordinator that the complainant wishes to withdraw a formal complaint); § 106.45(b)(7)(iv) (mandating that Title IX Coordinators are responsible for the effective implementation of remedies).

designate multiple Title IX Coordinators, so that recipients devote their resources in the most effective and efficient manner. If a recipient needs more than one Title IX Coordinator in order to meet the recipient's Title IX obligations, the recipient will take that administrative step, but the Department declines to assume the conditions under which a recipient needs more than one Title IX Coordinator in order to meet the recipient's Title IX obligations.

Because of the crucial role of Title IX Coordinators, the final regulations update and strengthen the requirements that recipients notify students, employees, parents of elementary and secondary school students, and others, of the Title IX Coordinator's contact information and about how to make a report or file a formal complaint.[527] In further response to commenters' concerns that students may not know how to contact a Title IX Coordinator, the final regulations require the Title IX Coordinator's contact information (which must include an office address, telephone number, and e-mail address) to be posted on recipients' websites,[528] expressly state that any person may report sexual harassment using the listed contact information for the Title IX Coordinator or any other means that results in the Title IX Coordinator receiving the person's verbal or written report, specify that such a report may be made "at any time (including during non-business hours)" using the Title IX Coordinator's listed telephone number or e-mail address.[529] The final regulations also revise the definition of "formal complaint" to specify that a formal complaint may be filed in person, by mail, or by e-mail using the listed contact information for the Title IX Coordinator.[530] The Department's intent is to increase the likelihood

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[527] *E.g.*, § 106.8(a); § 106.8(c). These requirements apply specifically to reports and formal complaints of sexual harassment, but also apply to reports and complaints of non-sexual harassment forms of sex discrimination.
[528] Section 106.8(b)(2).
[529] Section 106.8(a).
[530] Section 106.30 (defining "formal complaint").

that students and employees know how to contact, and receive supportive measures and accurate information from, a trained Title IX Coordinator.[531] Requiring the contact information for a Title IX Coordinator to include an office address, e-mail address, and telephone number pursuant to § 106.8(a) obviates some commenters' concerns that complainants will need to travel to physically report in person or face-to-face with a Title IX Coordinator.[532] Thus, even if the recipient's Title IX Coordinator is located on a different campus from the student or in an administrative building outside the school building where a student attends classes, any person may report to the Title IX Coordinator using the Title IX Coordinator's listed contact information, providing accessible reporting options.[533] The Department believes these requirements concerning a Title IX Coordinator are sufficient to hold recipients accountable for complying with these final regulations, while leaving recipients flexibility to decide, in a recipient's discretion, whether designation of multiple Title IX Coordinators, or deputy Title IX Coordinators, might be necessary and where any Title IX office(s) should be located, given a recipient's needs in terms of enrollment, geographic campus locations, and other factors.

Changes: Section 106.8(a) is revised to require that recipients must not only designate, but also "authorize" a Title IX Coordinator to coordinate the recipient's Title IX obligations. This provision is also revised to require recipients to notify students, employees, parents of elementary and secondary school students, and others, of the Title IX Coordinator's contact

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[531] Section 106.45(b)(1)(iii) (describing required training for Title IX Coordinators and other Title IX personnel).
[532] This requirement also mirrors the requirement (updated to include modern communication via e-mail) in the 2001 Guidance that the "school must notify all of its students and employees of the name, office address, and telephone number of the employee or employees designated" to coordinate its efforts to comply with and carry out its Title IX responsibilities. 2001 Guidance at 21.
[533] For additional accessibility and ease of reporting, revised § 106.8(a) further states that any person may report at any time (including during non-business hours) by using the telephone number or e-mail address, or by mail to the office address, listed for the Title IX Coordinator.

information including office address, telephone number, and electronic mail address and to state that any person may report to the Title IX Coordinator using the contact information listed for the Title IX Coordinator (or any other means that results in the Title IX Coordinator receiving the person's verbal or written report). This provision is also revised to state that a report may be made at any time (including during non-business hours) by using the telephone number or e-mail address or by mail to the office address, listed for the Title IX Coordinator. Section 106.8(b)(2) is revised to require the contact information for Title IX Coordinator(s) to be prominently displayed on the recipient's website and in each of the recipient's handbooks or catalogs.

Miscellaneous Comments and Questions

Comments: One commenter recommended that the final sentence of § 106.30 be deleted, and that the word "apparent" be inserted before "authority" in the first sentence of the same provision.

One commenter asked whether a Title IX Coordinator can initiate a grievance process in the absence of a signed complaint (for example, when evidence is readily available and/or an ongoing threat to campus exists). The same commenter also asked whether the Title IX Coordinator may serve as a complainant or whether such a case must proceed outside the Title IX process.

Several commenters asked whether the Department would provide training recommendations dedicated to addressing a responsible employee's obligation to respond to sexual assault reports. Some of these commenters also asked whether the Department would provide guidance on disseminating this information to students.

One commenter recommended adding to the final regulations a statement that meeting with confidential resources on campus, such as organizational ombudspersons who comply with

industry standards of practice and codes of ethics, does not constitute notice conveying actual knowledge to a recipient. The commenter reasoned that organizational ombudspersons are not "responsible employees" under the Department's current guidance, and that to ensure that organizational ombudspersons continue to be a valuable resource providing informal, confidential services to complainants and respondents, the final regulations should note that organizational ombudspersons are a confidential resource exempt from the categories of persons to whom notice charges a recipient with actual knowledge.

Discussion: The Department declines to follow a commenter's suggestion to delete the sentence of § 106.30[534] concerning reporting obligations and training, or to insert the word "apparent" before the word "authority" in the first sentence of § 106.30.[535] The framework for holding a recipient responsible for the recipient's response to peer-on-peer or employee-on-student sexual harassment adopted in the final regulations is the *Gebser/Davis* condition of actual knowledge, adapted as the Department has deemed reasonable for the administrative enforcement context with differences in elementary and secondary schools, and postsecondary institutions. The sentence of the actual knowledge definition regarding reporting obligations represents a proposition applied by Federal courts under the Supreme Court's *Gebser/Davis* framework.[536] If an employee's mere ability or obligation to report "up" the employee's supervisory chain were

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[534] The last sentence of § 106.30 defining "actual knowledge" to which a commenter referred, is now the second to last sentence in that section in the final regulations and provides: "The mere ability or obligation to report sexual harassment *or to inform a student about how to report sexual harassment, or having been trained to do so*, does not qualify an *individual* as one who has authority to institute corrective measures on behalf of the recipient." (Emphasis added. The italicized portions in this quotation have been added in the final regulations.).

[535] The first sentence of § 106.30, defining "actual knowledge" in the final regulations, provides: "*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 *any employee of an elementary and secondary school*." (Emphasis added. The italicized portions in this quotation have been added in the final regulations.).

[536] *Davis*, 526 U.S. at 646-48, *Gebser*, 524 U.S. at 289-91.

sufficient to qualify that employee as an "official with authority to institute corrective measures," then the rationale underlying actual knowledge would be undercut because virtually every employee might have the "ability" to report "up."[537] For the reasons described above and in the "Actual Knowledge" subsection of the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, the Department believes that administrative enforcement of Title IX's non-discrimination mandate is best served by distinguishing between elementary and secondary schools (where notice to any employee triggers a recipient's response obligations) and postsecondary institutions (where notice to the Title IX Coordinator or officials with authority triggers a recipient's response obligations).

As explained above, the final sentence in § 106.30 does not have as much applicability for recipients that are elementary and secondary schools under the final regulations due to the Department's expanded definition of actual knowledge in that context to include notice to any school employee. As explained in the "Employees' Obligations" subsection of this "Actual Knowledge" section, we have revised the final sentence in § 106.30 to expressly state that the mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient. Accordingly, elementary and secondary schools may choose to train non-employees such as volunteers about how to report sexual harassment or require volunteers to do so even though these final requirements do not impose such a requirement, and such schools would not face expanded Title IX liability by doing so. Similarly, a postsecondary institution may choose to require all employees to report sexual

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[537] *See id*.

harassment or to inform a student about how to report sexual harassment, or train all employees to do so, without fearing adverse repercussions from the Department. Recipients might not be willing to engage in training or impose reporting requirements that these final regulations do not impose, if doing so would cause the recipient to incur additional liability.

Pursuant to § 106.8, the burden is on the recipient to designate a Title IX Coordinator, and the definition of "actual knowledge" in revised § 106.30 clearly provides that notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator constitutes actual knowledge, which triggers a recipient's obligation to respond to sexual harassment. The recipient must notify all its students, employees, and others of the name or title, office address, e-mail address, and telephone number of the employee or employees designated as the Title IX Coordinator (and post that contact information on its website), under § 106.8. Accordingly, all students and employees have clear, accessible channels through which to make a report of sexual harassment such that a recipient is obligated to respond to that report. Additionally, notice to other officials who have the authority to institute corrective measures on behalf of the recipient will convey actual knowledge to a recipient, and a recipient may choose to identify such officials by providing a list of such officials to students and employees. The level of authority that a person may have to take corrective measures is generally known to students and employees. For example, employees generally know that a supervisor but not a co-worker has authority to institute corrective measures. Similarly, a student in a postsecondary institution likely understands that deans generally have the authority to institute corrective measures. Students in elementary and secondary schools may report sexual harassment or allegations of sexual harassment to any employee. Students in postsecondary institutions can always report sexual harassment to the Title IX Coordinator.

For reasons discussed in the "Formal Complaint" subsection of the "Section 106.30 Definitions" section of this preamble, the final regulations retain the discretion of a Title IX Coordinator to sign a formal complaint initiating a grievance process against a respondent, but the final regulations clarify that in such situations, the Title IX Coordinator is not a complainant or otherwise a party to the grievance process.[538] The Department believes this preserves the ability of a recipient to utilize the § 106.45 grievance process when safety or similar concerns lead a recipient to conclude that a non-deliberately indifferent response to actual knowledge of Title IX sexual harassment may require the recipient to investigate and potentially sanction a respondent in situations where the complainant does not wish to file a formal complaint.

Although the Department recognizes that recipients may desire guidance on training (particularly now that the final regulations in § 106.45(b)(10)(i)(D) require the recipients to publish all training materials on recipient websites), the Department declines to recommend certain training practices or techniques aside from the requirements of § 106.45(b)(1)(iii),[539] leaving flexibility to recipients to determine how to meet training requirements in a manner that best fits the recipient's unique educational community. Regarding the dissemination of information to students, the Department notes that § 106.8 requires recipients to notify students and employees of the recipient's policy of non-discrimination under Title IX, the Title IX Coordinator's contact information, and information about how to report and file complaints of sex discrimination and how to report and file formal complaints of sexual harassment.

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[538] Section 106.30 (defining "formal complaint" by stating that a formal complaint may be filed by a complainant or signed by a Title IX Coordinator, and adding language providing that where a Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party in the grievance process, and must remain free from conflicts of interest and bias).

[539] Section 106.45(b)(1)(iii) (requiring training of Title IX Coordinators, investigators, decision-makers, and any person who facilitates informal resolution processes).

The Department appreciates the opportunity to emphasize that whether a person affiliated with a recipient, such as an organizational ombudsperson, is or is not an "official with authority to institute corrective measures" requires a fact-specific inquiry, and understands the commenter's assertion that an organizational ombudsperson adhering to industry standards and codes of ethics should be deemed categorically a "confidential resource" and not an official with authority. The Department encourages postsecondary institution recipients to examine campus resources such as organizational ombudspersons and determine whether, given how such ombudspersons work within a particular recipient's system, such ombudspersons are or are not officials with authority to take corrective measures so that students and employees know with greater certainty the persons to whom parties can discuss matters confidentially without such discussion triggering a recipient's obligation to respond to sexual harassment. We note that with respect to elementary and secondary schools, notice to any employee, including an ombudsperson, triggers the recipient's response obligations.

Changes: None.

Complainant

Comments: A few commenters supported the proposed rules' definition of "complainant" in § 106.30 as an appropriate, sensible definition. Commenters asserted that using neutral terms like "complainant" and "respondent" avoids injecting bias generated by referring to anyone who makes an allegation as a "victim." One commenter asserted that labeling an accuser a "victim"

before there has been any investigation or adjudication turns the principle of innocent until proven guilty on its head.[540]

In contrast, many commenters urged the Department to use a term such as "reporting party" instead of "complainant." Commenters argued that "complainant" suggests that a person is making a complaint (as opposed to reporting), or that the term "complainant" suggests a negative connotation that a person is "complaining" about discrimination which could create a barrier to reporting, and that "reporting party" is current, best practice terminology that better avoids bias and negative implications that a person is "complaining." One commenter asserted that the Clery Act uses the term "victim" throughout its statute and regulations and asked why the § 106.30 definition of "complainant" uses the word victim without referring to that person as a victim throughout the proposed regulations.

Some commenters asserted that the definition of complainant unfairly excluded third parties (non-victims, such as bystanders or witnesses to sexual harassment) from reporting sexual harassment because the definition of complainant referred to an individual "who has reported being the victim" and because the definition also stated that the person to whom the individual has reported must be the Title IX Coordinator or other person to whom notice constitutes actual knowledge. Commenters argued that in order to further Title IX's non-discrimination mandate, a school must be required to respond to sexual harassment regardless of who has reported it and regardless of the school employee to whom a person reports. Commenters argued that if the survivor is the only person who can be a complainant, even fewer sexual assaults will be

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[540] Commenter cited: *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 573 (D. Mass. 2016) ("Whether someone is a 'victim' is a conclusion to be reached at the end of a fair process, not an assumption to be made at the beginning.").

reported, and that third-party intervention can save lives and educational opportunities.[541] Commenters argued that some students are non-verbal due to young age, disability, language barriers, or severe trauma, and the definition of complainant would exclude these students because these students are incapable of being the individual "who has reported being the victim." Commenters argued that Federal courts have held schools liable for deliberate indifference to third-party reports of sexual harassment and the proposed rules should not set a lower threshold by excusing schools from responding to reports that come from anyone other than the victim.[542] Commenters asserted that the definition of complainant should be modified to include parents of minor students, or parents of students with disabilities. A few commenters supported the definition of complainant believing that the definition appropriately excluded third-party reporting; these commenters argued that a school should only respond to alleged sexual harassment where the victim has personally reported the conduct.

Some commenters suggested changing the definition of complainant to a person who has reported being "the victim of sex-based discriminatory conduct" instead of a person who has reporting being the victim of "sexual harassment," arguing that the general public understands sexual harassment to be broader than how "sexual harassment" is defined in § 106.30 and these regulations should only apply to sex discrimination under Title IX.

One commenter asserted that the phrase "or on whose behalf the Title IX Coordinator has filed a formal complaint" in the definition of "complainant" created confusion because proposed

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[541] Commenters cited: *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 180 (2005) ("teachers and coaches . . . are often in the best position to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators. Indeed, sometimes adult employees are 'the only effective adversar[ies]' of discrimination in schools.") (internal citation omitted; brackets in original).
[542] *Id*.

§ 106.44(b)(2) required a Title IX Coordinator to file a formal complaint upon receiving multiple reports against a respondent, but that proposed provision did not indicate on which complainant's behalf such a formal complaint would be filed.

Discussion: The Department appreciates commenters' support for the proposed definition of "complainant" in § 106.30 as a sensible, neutral term to describe a person alleged to be the victim of sexual harassment. We appreciate commenters who asserted that "reporting party" would be a preferable term due to concerns that "complainant" suggests that the person has filed a complaint (as opposed to having reported conduct), or that there is a negative connotation to the word "complainant" suggesting that the person is complaining about discrimination. The Department does not disagree that a term such as "reporting party" could be an appropriate equivalent term for "complainant" in terms of neutrality; however, the Department believes that both terms reflect the neutral, impartial intent of describing a person who is an alleged victim but a fair process has not yet factually determined whether the person was victimized. Further, the final regulations ensure that a person must be treated as a "complainant" any time such a person has been alleged to be the victim of sexual harassment; "reporting party" would imply that the alleged victim themselves had to be the person who reported. The Department retains the word "complainant" in these final regulations, instead of using "reporting party," also to avoid potential confusion with respect to the phrase "reporting party," and the use throughout the final regulations of the word "party" to refer to either a complainant or respondent, and also to reinforce that a recipient must treat a person as a complainant (i.e., an alleged victim) no matter who reported to the school that the alleged victim may have suffered conduct that may constitute sexual harassment. We believe that the context of the final regulations makes it clear that a "complainant" (as the definition states in the final regulations) is a person who is alleged to be

the victim of sexual harassment irrespective of whether a formal complaint has been filed. The Department notes that "complainant" and "complaint" are commonly used terms in various proceedings designed to resolve disputed allegations without pejoratively implying that a person is unjustifiably "complaining" about something but instead neutrally describing that the person has brought allegations or charges of some kind.[543] While the definition of "complainant" uses the word "victim" to refer to the complainant as a person alleged to be the victim of sexual harassment, we do not use the word victim throughout the final regulations because the word "victim" suggests a factual determination that a person has been victimized by the conduct alleged, and that conclusion cannot be made unless a fair process has reached that determination. We acknowledge that the Clery Act uses the word "victim" throughout that statute and regulations, but we believe the term "complainant" more neutrally, accurately describes a person who is allegedly a victim without suggesting that the facts of the situation have been prejudged.

The proposed definition of complainant did not prevent third-party reporting, and while the final regulations revise the § 106.30 definition of complainant, the final regulations also do not prevent third-party reporting. Under both the proposed and final regulations, any person (i.e., the victim of alleged sexual harassment, a bystander, a witness, a friend, or any other person) may report sexual harassment and trigger a recipient's obligation to respond to the sexual

[543] For example, OCR refers to a "complainant" as a person who files a "complaint" with OCR, alleging a civil rights law violation. *E.g.*, U.S. Dep't. of Education, Office for Civil Rights, *How the Office for Civil Rights Handles Complaints* (Nov. 2018), https://www2.ed.gov/about/offices/list/ocr/complaints-how.html.

harassment.[544] Nothing in the final regulations requires an alleged victim to be the person who reports; any person may report that another person has been sexually harassed.

We agree that third party reporting of sexual harassment promotes Title IX's non-discrimination mandate. In response to commenters' concerns, we have revised § 106.8(a) to expressly state that "any person" may report sexual harassment "whether or not the person reporting is the person alleged to be the victim" by using the Title IX Coordinator's listed contact information. Further, such a report may be made at any time including during non-business hours, using the telephone number or e-mail address (or by mail to the office address) listed for the Title IX Coordinator. We have also revised § 106.30 defining "actual knowledge" to expressly state that "notice" triggering a recipient's response obligations includes reporting to the Title IX Coordinator as described in § 106.8(a). The intent of these final regulations is to ensure that any person (whether that person is the alleged victim, or anyone else) has clear, accessible channels for reporting sexual harassment to trigger a recipient's response obligations (which include promptly offering supportive measures to the person alleged to be the victim). While any person (including third parties) can report, the person to whom notice (i.e., a report) of sexual harassment is given must be the Title IX Coordinator or official with authority to take corrective action, or any employee in the elementary and secondary school context, in order to trigger the

[544] Section 106.44(a) (stating that a recipient with actual knowledge of sexual harassment in the recipient's education program or activity against a person in the United States must respond promptly and in a manner that is not clearly unreasonable in light of the known circumstances, including by offering supportive measures to the complainant, informing the complainant of the availability of supportive measures with or without the filing of a formal complaint, considering the complainant's wishes with respect to supportive measures, and explaining to the complainant how to file a formal complaint).

recipient's response obligations – but *any person* can report.[545] The benefits of third-party reporting do not, however, require the third party themselves to become the "complainant" because, for example, supportive measures must be offered to the alleged victim, not to the third party who reported the complainant's alleged victimization. Similarly, while we agree that where a parent or guardian has a legal right to act on behalf of an individual, the parent or guardian must be allowed to report the individual's victimization (and to make other decisions on behalf of the individual, such as considering which supportive measures would be desirable and whether to exercise the option of filing a formal complaint), in such a situation the parent or guardian does not, themselves, *become* the complainant; rather, the parent or guardian acts *on behalf of* the complainant (i.e., the individual allegedly victimized by sexual harassment). We have added § 106.6(g) to expressly acknowledge the legal rights of parents or guardians to act on behalf of a complainant (or any other individual with respect to exercising Title IX rights).

We agree with commenters that allowing third-party reporting is necessary to further Title IX's non-discrimination mandate for a variety of reasons, including, as commenters asserted, that some complainants (i.e., alleged victims) cannot verbalize their own experience or

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[545] For reasons explained in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section, and the "Actual Knowledge" subsection of the "Section 106.30 Definitions" section, of this preamble, the final regulations expand the definition of actual knowledge in the elementary and secondary school context, but the final regulations retain the requirement that a recipient must have actual knowledge of sexual harassment in order to be required to respond. We have revised the definition of actual knowledge to state expressly that notice conveying actual knowledge includes, but is not limited to, reporting sexual harassment to the Title IX Coordinator as described in § 106.8(a). We have revised § 106.8(a) to expressly state that any person may report sexual harassment (whether or not the person reporting is the person alleged to be the victim of sexual harassment, or is a third party) by using the contact information for the Title IX Coordinator (which must include an office address, telephone number, and e-mail address), and stating that a report may be made at any time (including during non-business hours) by using the Title IX Coordinator's listed telephone number or e-mail address (or by mailing to the listed office address). Thus, any person (including a non-victim third party) may report sexual harassment, but in order to trigger a recipient's response obligations the report must give notice to a Title IX Coordinator or to an official with authority to institute corrective measures, or to any employee in the elementary and secondary school context.

report it (whether verbally or in writing) yet when parents, bystanders, witnesses, teachers, friends, or other third parties report sexual harassment to a person to whom notice charges the recipient with actual knowledge, then the recipient must be obligated to respond. In response to commenters' confusion as to whether the proposed definition of complainant in § 106.30 allowed or prohibited third-party reporting, and in agreement with commenters' assertions that third-party reporting is a critical part of furthering Title IX's purposes, we have revised the definition of complainant in the final regulations to state (emphasis added): "An individual *who is alleged to be the victim* of conduct that could constitute sexual harassment" and removed the sentence in the NPRM that referenced to whom the report of sexual harassment was made. This revision clarifies that the person alleged to be the victim does not need to be the same person who reported the sexual harassment. This revision also ensures that any person reported to be the victim of sexual harassment (whether the report was made by the alleged victim themselves or by a third party) will be treated by the recipient as a "complainant" entitled to, for example, the right to be informed of the availability of supportive measures and of the process for filing a formal complaint, under § 106.44(a).

The final regulations, like the proposed rules, draw a distinction between a recipient's general response to reported incidents of sexual harassment (including offering supportive measures to the complainant), on the one hand, and the circumstances that obligate a recipient to initiate a grievance process, on the other hand. With respect to a grievance process, the final regulations retain the proposed rules' approach that a recipient is obligated to begin a grievance process against a respondent (that is, to investigate and adjudicate allegations) only where a complainant has filed a formal complaint or a Title IX Coordinator has signed a formal complaint. Other than the Title IX Coordinator (who is in a specially trained position to evaluate

whether a grievance process is necessary under particular circumstances even without a complainant desiring to file the formal complaint or participate in the grievance process), a person who does not meet the definition of "complainant" under § 106.30 cannot file a formal complaint requiring the recipient to initiate a grievance process. Other than a Title IX Coordinator, third parties cannot file formal complaints.[546] The Department believes the final regulations appropriately delineate between the recipient's obligation to respond promptly and meaningfully to actual knowledge of sexual harassment in its education program or activity (including where the actual knowledge comes from a third party), with the reality that permitting third parties to file formal complaints would result in situations where a complainant's autonomy is not respected (i.e., where the complainant does not wish to file a formal complaint or participate in a grievance process),[547] and other situations where recipients are required to

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[546] As discussed above, a parent or guardian with the legal right to act on a complainant's behalf may file a formal complaint on the complainant's behalf. § 106.6(g).

[547] As one aspect of respect for complainant autonomy, every complainant retains the right to refuse to participate in a grievance process, and the Department has added § 106.71 to the final regulations, prohibiting retaliation generally, and specifically protecting the right of any individual who chooses *not to participate* in a grievance process. When a grievance process is initiated in situations where the complainant did not wish to file a formal complaint, this results in the complainant being treated as a party throughout the grievance process (e.g., the recipient must send *both parties* written notice of allegations, a copy of the evidence for inspection and review, written notice of interviews requested, a copy of the investigative report, written notice of any hearing, and a copy of the written determination regarding responsibility). This means that the complainant will receive notifications about the grievance process even where the complainant does not wish to participate in the process. The Department agrees with commenters who urged the Department to recognize the importance of a survivor's autonomy and control over what occurs in the aftermath of a sexual harassment incident. The Department thus desires to restrict situations where a grievance process is initiated contrary to the wishes of the complainant to situations where the Title IX Coordinator (and not a third party) has determined that signing a formal complaint even without a complainant's participation is necessary because not initiating a grievance process against the respondent would be clearly unreasonable in light of the known circumstances. Although a complainant who did not wish to file a formal complaint and does not want to participate in a grievance process may not want to receive notifications throughout the grievance process, the recipient must treat the complainant as a party by sending required notices, and must not retaliate against the complainant for choosing not to participate. Nothing in the final regulations precludes a recipient from communicating to a non-participating complainant that the recipient is required under these final regulations to send the complainant notices throughout the grievance process and that such a requirement is intended to preserve the complainant's right to choose to participate, not to pressure the complainant into participating. Such a practice adopted by a recipient would need to be applied equally to respondents who choose not to participate in a grievance process; *see* introductory sentence of § 106.45(b).

undertake investigations that may be futile in terms of lack of evidence because the complainant does not wish to participate.

In response to commenters' concerns that the definitions of "complainant" and "formal complaint" do not allow for situations where a parent or guardian appropriately must be the person who makes the decision to file a formal complaint on behalf of a minor child or student with a disability, the final regulations add § 106.6(g) acknowledging that nothing about the final regulations may be read in derogation of the legal rights of parents or guardians to act on behalf of any individual in the exercise of rights under Title IX, including filing a formal complaint on a complainant's behalf. In such a situation, the parent or guardian does not become the "complainant" yet § 106.6(g) clarifies that any parent or guardian may act on behalf of the complainant (i.e., the person alleged to be the victim of sexual harassment). If a parent or guardian has a legal right to act on a person's behalf, the parent or guardian may always be the one who files a formal complaint for a complainant. This parental or guardianship authority to act on behalf of a party applies throughout all aspects of a Title IX matter, from reporting sexual harassment to considering appropriate and beneficial supportive measures, and from choosing to file a formal complaint to participating in the grievance process.[548]

We decline commenters' suggestions to define a complainant as a person reported to be the victim of "sex-discriminatory conduct" instead of "conduct that could constitute sexual harassment," because these final regulations specifically address a recipient's response to allegations of sexual harassment and clearly define the term "sexual harassment" in § 106.30.

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[548] *See* discussion in the "Section 106.6(g) Exercise of Rights by Parents/Guardians" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble.

In the response to commenters' concerns that the phrase "or on whose behalf the Title IX Coordinator has filed a formal complaint" in the proposed definition of § 106.30 created confusion in situations where the Title IX Coordinator would have been required to file a formal complaint upon receiving multiple reports against a respondent,[549] we have removed the phrase "or on whose behalf the Title IX Coordinator has filed a formal complaint" from the definition of complainant in § 106.30. Numerous commenters urged the Department to respect the autonomy of survivors, and we have concluded that when a Title IX Coordinator signs a formal complaint, that action is not taken "on behalf of" a complainant (who may not wish to file a formal complaint or participate in a grievance process).[550] Removal of this phrase is more consistent with the Department's goal of ensuring that every complainant receives a prompt, meaningful response when a recipient has actual knowledge of sexual harassment in a manner that better respects a complainant's autonomy by not implying that a Title IX Coordinator has the ability to act "on behalf of" a complainant when the Title IX Coordinator signs a formal complaint. Removal of this phrase also helps clarify that when a Title IX Coordinator signs a formal complaint, that action does not place the Title IX Coordinator in a position adverse to the respondent; the Title IX Coordinator is initiating an investigation based on allegations of which the Title IX Coordinator has been made aware, but that does not prevent the Title IX Coordinator from being free from bias or conflict of interest with respect to any party.

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[549] For reasons discussed in the "Proposed § 106.44(b)(2) [removed in the final regulations]" subsection of the "Recipient's Response in Specific Circumstances" section of this preamble, we have removed the provision in the NPRM that would have required the Title IX Coordinator to file a formal complaint upon receiving multiple reports against a respondent. However, the final regulations still grant a Title IX Coordinator the discretion to decide to sign a formal complaint, and the Title IX Coordinator's decision will be evaluated based on what was not clearly unreasonable in light of the known circumstances.

[550] We have also revised the definition of "formal complaint" in § 106.30 to clarify that signing a formal complaint does not mean the Title IX Coordinator has become a complainant or otherwise a party to the grievance process.

Changes: The final regulations revise the definition of "complainant' in § 106.30 by revising this provision to state that complainant means "an individual who is alleged to be the victim of conduct that could constitute sexual harassment" thereby removing the phrase "who has reported to be the victim," the phrase "or on whose behalf the Title IX Coordinator has filed a formal complaint," and the sentence describing to whom a complainant had to make a report.

The final regulations add § 106.6(g) addressing "Exercise of rights by parents or guardians" and providing that nothing in the final regulations may be read in derogation of any legal right of a parent or guardian to act on behalf of a "complainant," "respondent," "party," or other individual.

Consent

Comments: Some commenters supported the proposed rules because the proposed rules did not mandate an "affirmative consent" standard for recipients to use in adjudicating sexual assault allegations. One commenter expressed general support for the proposed rules and asserted that courts across the country are ruling in favor of accused males for reasons including schools' misuse of affirmative consent policies. One commenter agreed with the fact that the proposed rules do not mandate affirmative consent, arguing that affirmative consent often ends up shifting the burden to the accused to prove innocence. One commenter supported the proposed rules, asserting that under current policies the responsibility to obtain and prove consent is on men, but the commenter believed that under the proposed rules women will speak up and learn to be more assertive.

One commenter expressed concern about not defining consent in the proposed rules, asserting that with respect to rape, consent definitions may vary across States and in some States there is no consent element. One commenter discussed the importance of consent because every

person at every moment has the right to do whatever they choose with their own body, and argued that sexual consent should be as obvious as other kinds of consent in our society; for example, asserted the commenter, a restaurant does not beg a patron incessantly to finish a burger until the patron feels reluctantly forced to eat. This commenter referenced internet videos sharing personal examples of the results of violations of consent.[551]

One commenter recommended that language be added requiring the complainant to prove absence of consent as opposed to requiring the respondent to prove presence of consent. The commenter asserted that this would make it clear that the burden of proof stays with the complainant (or the school). One commenter urged the Department to adopt the concept of implied consent as a safe harbor against sexual assault claims in dating situations. One commenter advocated a definition of sexual assault that recognizes that consent can be negated by explicit and implicit threats, so that "coercive sexual violence" that "often includes a layer of nominal and deeply guilt inducing ambiguity" (due to a victim verbally expressing consent but only because of fear based on the perpetrator's threats) would also be covered under Title IX.

One commenter stated that some institutions use affirmative consent while others use "no means no" and asked the Department to clarify whether recipients are expected to use a specific definition for consent because sexual assault depends on whether a victim consented.

Several commenters stated that universities should strive to provide clear rules with respect to what is considered consensual sexual conduct.

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[551] Commenter cited, *e.g.*: Jennifer Gunsaullus, *Sex and The Price of Masculinity: My personal story of consent violation*, THE GOOD MEN PROJECT (Aug. 8, 2016), https://goodmenproject.com/featured-content/sex-and-the-price-of-masculinity-gmp/.

Some commenters urged the Department to provide additional clarification for how schools should handle consent in situations where both students were drunk. One commenter suggested that the Department should clarify that Title IX's non-discrimination language means that when male and female students are both drunk and have sex, the school may not automatically assign blame to the male and victimhood to the female because, the commenter asserted, this approach is based on outdated gender stereotypes and violates Title IX. Another commenter opined that while drunken hookups are never a good idea, colleges must recognize that students do get intoxicated and have sex, as do many non-students, yet a young couple getting married and drinking champagne are not raping each other if they consummate the marriage later that night while their blood alcohol is beyond the legal limit to drive; the commenter asserted that colleges can make their policies stricter than the law, but must make that language clear. A few commenters asserted that schools have often failed to recognize the idea that when school policies states that any sign of intoxication means consent is invalid, that policy should go both ways (i.e., applied equally to men and women).

One commenter, a female university student, expressed concern that under current consent rules, being drunk while consenting is often not truly considered consent, and that in situations where both parties could be perceived as assaulting each other – because both had been drinking so that neither party gave valid consent – the woman's position is usually the only one taken into account, leading the commenter to believe that if a woman has an encounter she regrets, but did not communicate lack of consent at the time, she can report to the school and it will be investigated without getting the partner's perspective in a fair manner. Another commenter supported treating women and men equally when it comes to drug or alcohol-infused sex.

Some commenters provided articles discussing the meaning of consent, including whether the level of intoxication is relevant to the definition of consent. One commenter stated that one of the areas recipients appear to be struggling with is that lack of consent may be based on temporary or permanent mental or physical incapacity of the victim, and the commenter recommended that the Department inform recipients that inebriation is not equivalent to incapacitation.

Several commenters were concerned that the proposed rules did not impose an affirmative consent standard. One commenter argued that failing to include affirmative consent buys into rape myths including that silence is consent. One commenter criticized the proposed rules for ignoring the best practice standard of affirmative consent, or the "yes means yes" model for consent to any sexual activity, and the commenter argued that not imposing an affirmative consent standard will do a disservice to people who do not give a clear "No," who freeze, or revoke consent, and that this will override the important work many institutions have done to get students to understand the value and intricacies of affirmative consent. One commenter stated that affirmative consent policies are not best practices, are often confusing and difficult to enforce in a consistent, non-arbitrary manner, and end up shifting the burden onto a respondent to prove innocence; this commenter cited a law review article noting that affirmative consent policies often require the accused to show clear, unambiguous (and in some policies, "enthusiastic") consent.[552] One commenter argued that affirmative consent policies violate Title

[552] Commenter cited: Jacob E. Gerson & Jeannie Suk Gersen, *The Sex Bureaucracy*, 104 CAL. L. REV. 881 (2016).

IX because such policies discriminate against men.[553] Another commenter asserted that based on personal experience representing respondents in campus Title IX proceedings, many schools require the respondent to prove that there was consent, either by using an affirmative consent standard or by placing undue emphasis on a common provision in institutional policies and practices, that consent to one sexual act does not necessarily imply consent to another sexual act but that in either scenario, institutions often shift the burden of proof to respondents to prove their innocence, which the commenter asserted is inconsistent with centuries-old understandings of due process.

One commenter was concerned that the proposed rules do not prevent a school from using an affirmative consent standard and recommended that the Department clarify that an affirmative consent standard violates Title IX because it unfairly shifts the burden of proof to respondents and has a disparate impact on men because, the commenter argued, women are content to let men initiate sexual conduct even when sexual advances turn out to be welcome. One commenter expressed concern about affirmative consent and asserted that college administrators have no right to regulate the private lives of adults when neither person is compelled by threats or force. One commenter opined that while affirmative consent makes sense when gauging overt sexual initiatives between strangers, it is a ridiculous standard to apply to people in sexual relationships, or even to the typical college party situation, because under

[553] Commenter cited: Samantha Harris, *University of Miami Law Prof: Affirmative Consent Effectively Shifts Burden of Proof to Accused*, Foundation for Individual Rights in Education (FIRE) (Sept. 11, 2015), https://www.thefire.org/university-of-miami-law-prof-affirmative-consent-effectively-shifts-burden-of-proof-to-accused/.

affirmative consent, waking up a lover with a kiss is sexual assault, as is every thrust if consent is not somehow re-communicated in between.

One commenter expressed concern that some sexual assault laws say that "not saying no" can be considered assault. One commenter argued that "overthinking" about sexual consent causes men not to approach women as much, and the commenter stated this is not good for society because it causes educated folks not to approach each other.

Another commenter stated that while the idea of affirmative consent sounds good, in practice it seems as if colleges look at this as the responsibility of one person, usually the male; the commenter suggested rebranding affirmative consent as affirmative communication, and recommended that colleges make clear that both parties have a duty to seek consent, but also that both parties are responsible for communicating discomfort or communicating if they do not want to proceed with sexual activity.

One commenter recommended that the Department address training standards for decision-makers, including faculty, to address what commenters believed is shoddy research from dubious sources used in training materials that contributes to unjust decisions. The commenter referenced training around topics such as the amount of inebriation that violates consent and situations in which both parties are too drunk to consent.

One commenter expressed concern that the proposed rules would permit the introduction of evidence regarding the complainant's sexual history, when offered to prove consent. The commenter asserted that by permitting this evidence to prove consent, but not providing a definition of consent, the proposed rules will lead to an increase in ambiguity and the possibility of abuse by the accused in using evidence about a complainant's sexual history.

Discussion: The third prong of the § 106.30 definition of sexual harassment includes "sexual assault" as used in the Clery Act, 20 U.S.C. 1092(f)(6)(A)(v), which, in turn, refers to the FBI's Uniform Crime Reporting Program (FBI UCR) and includes forcible and nonforcible sex offenses such as rape, fondling, and statutory rape which contain elements of "without the consent of the victim." The Department acknowledges that the Clery Act, FBI UCR, and these final regulations do not contain a definition of consent. The Department believes that the definition of what constitutes consent for purposes of sexual assault within a recipient's educational community is a matter best left to the discretion of recipients, many of whom are under State law requirements to apply particular definitions of consent for purposes of campus sexual misconduct policies. The Department's focus in these final regulations is on recipients' response to sexual harassment when such conduct constitutes sex discrimination prohibited by Title IX. The Department believes that the definition of sexual assault used by the Federal government for crime reporting purposes appropriately captures conduct that constitutes sex discrimination under Title IX, regardless of whether the "without the consent" element in certain sex offenses is as narrow as some State criminal laws define consent, or broader as some State laws have required for use in campus sexual assault situations. Recipients may consider relevant State laws in adopting a definition of consent. For these reasons, the Department declines to impose a federalized definition of consent for Title IX purposes, notwithstanding commenters who would like the Department to adopt an affirmative consent standard, a "no means no" standard, an implied consent doctrine, or definitions of terms commonly used to indicate the absence or negation of consent (such as coercion, duress, or incapacity). In response to commenters asking for clarification, the Department has revised § 106.30 to include an entry for

"Consent" confirming that the Department will not require recipients to adopt a particular definition of consent with respect to sexual assault.

The Department agrees that recipients must clearly define consent and must apply that definition consistently, including as between men and women and as between the complainant and respondent in a particular Title IX grievance process because to do otherwise would indicate bias for or against complainants or respondents generally, or for or against an individual complainant or respondent, in contravention of § 106.45(b)(1)(iii), and could potentially be "treatment of a complainant" or "treatment of a respondent" that § 106.45(a) recognizes may constitute sex discrimination in violation of Title IX. We have revised the introductory sentence of § 106.45(b)(3) to state that any rules or practices that a recipient adopts and applies to its grievance process must equally apply to both parties.

The Department appreciates the variety of commenters' views regarding whether intoxication negates consent, whether verbal pressure amounts to coercion negating consent, and whether affirmative consent standards do, or do not, represent a best practice. However, for the reasons discussed above, the Department declines to impose on recipients a particular definition of consent, or terms used to describe the absence or negation of consent (such as coercion or incapacity).

The Department disagrees that affirmative consent standards inherently place the burden of proof on a respondent, but agrees with commenters who observed that to the extent recipients "misuse affirmative consent" (or any definition of consent) by applying an instruction that the respondent must prove the existence of consent, such a practice would not be permitted under a §

106.45 grievance process.[554] Regardless of how a recipient's policy defines consent for sexual assault purposes, the burden of proof and the burden of collecting evidence sufficient to reach a determination regarding responsibility, rest on the recipient under § 106.45(b)(5)(i). The final regulations do not permit the recipient to shift that burden to a respondent to prove consent, and do not permit the recipient to shift that burden to a complainant to prove absence of consent.

The final regulations require Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution, to be trained on how to conduct an investigation and grievance process; this would include how to apply definitions used by the recipient with respect to consent (or the absence or negation of consent) consistently, impartially, and in accordance with the other provisions of § 106.45.

Because a recipient's definition of consent must be consistently applied, the Department does not believe that the reference to consent in the "rape shield" protections contained in § 106.45(b)(6)(i)-(ii) will cause the proceedings contemplated in those provisions to be ambiguous or subject to abuse by a respondent. While the Department declines to impose a definition of consent on recipients, a recipient selecting its own definition of consent must apply such definition consistently both in terms of not varying a definition from one grievance process to the next and as between a complainant and respondent in the same grievance process. The scope of the questions or evidence permitted and excluded under the rape shield language in § 106.45(b)(6)(i)-(ii) will depend in part on the recipient's definition of consent, but, whatever that definition is, the recipient must apply it consistently and equally to both parties, thereby avoiding the ambiguity feared by the commenter. In further response to the commenter's concern, we have

[554] Section 106.45(b)(5)(i) (stating burden of proof must rest on the recipient and not on the parties).

revised § 106.45(b)(1)(iii) specifically to require investigators and decision-makers to be trained on issues of relevance, including how to apply the rape shield provisions (which deem questions and evidence about a complainant's prior sexual history to be irrelevant with two limited exceptions). Because a recipient cannot place the burden of proving consent on a respondent (or on a complainant to prove absence of consent), while questions and evidence subject to the rape shield language in § 106.45(b)(6)(i)-(ii) *may* come from a respondent, it is not the respondent's burden to prove or establish consent; questions and evidence may also be posed or presented by the recipient during the recipient's investigation and adjudication.

Changes: The Department revises § 106.30 to state that the Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault.

Comments: Some commenters emphasized the need to teach about sexual consent. One commenter supported providing greater consent education to students, including treating both parties equally with respect to situations where both parties were under the influence of alcohol or drugs. One commenter stated that there needs to be more teaching about consent because there is a lot of confusion, and another commenter urged the Department to make it mandatory for every freshman in college to attend a course on bullying, sexual harassment, and consent.

One commenter expressed general opposition for the proposed rules, asserting that children should live in a world that takes consent and assault seriously. One commenter, who works as a counselor at a university, expressed opposition to the proposed rules, stating that they would undo the important work of educators to instill in young people an understanding of how consent works. One commenter who works as a prevention educator teaching students about consent argued that the proposed rules paint women as liars, which makes useless the work of teaching students that consent should be celebrated, and ends up failing the young people of our

country. One commenter expressed general opposition to the proposed rules and stated "consent first." One commenter expressed general opposition to the proposed rules and asserted a belief in sex education and teaching consent. One commenter stated that the commenter's school requires mandatory courses on sexuality and rape prevention that stress the importance of consent, open communication, and bystander intervention. The commenter stated that even with this training the commenter has still been subjected to sexual harassment in college and asserted that the absence of Title IX protections will ruin the commenter's ability to learn.

Discussion: The Department appreciates commenters who expressed a belief in the importance of educating students about consent, healthy relationships and communication, drug and alcohol issues, and sexual assault prevention (as well as bullying and harassment, generally). The Department shares commenters' beliefs that measures preventing sexual harassment from occurring in the first place are beneficial and desirable. Although the Department does not control school curricula and does not require recipients to provide instruction regarding sexual consent, nothing in these final regulations impedes a recipient's discretion to provide educational information to students.

Changes: None.

Elementary and Secondary Schools

Comments: At least one commenter requested clarity as to the definition of "schools."

Discussion: In the proposed regulations, the Department referred to recipients that are elementary and secondary schools,[555] but did not provide a definition for "elementary and secondary schools." To provide clarity, the Department adds a definition of "elementary and

[555] 83 FR 61498.

secondary schools" that aligns with the definition of "educational institutions" in 34 CFR 106.2(k), which is a definition that applies to Part 106 of Title 34 of the Code of Federal Regulations. Section 106.2(k) defines an educational institution in relevant part as a local educational agency as defined in the Elementary and Secondary Education Act of 1965, which has been amended by the Every Student Succeeds Act (hereinafter "ESEA"), a preschool, or a private elementary or secondary school. Consistent with the first part of the definition in 34 CFR 106.2(k), the Department includes a definition of "elementary and secondary schools" to mean a local educational agency (LEA), as defined in the ESEA, a preschool, or a private elementary or secondary school. The remainder of the entities described as educational institutions in 34 CFR 106.2(k) constitute postsecondary institutions as explained in the section, below, on the definition of "postsecondary institutions." The definitions of "elementary and secondary school" and "postsecondary institution" apply only to §§ 106.44 and 106.45 of these final regulations.

Changes: The Department includes a definition of elementary and secondary schools as used in §§ 106.44 and 106.45 to mean a LEA as defined in the ESEA, a preschool, or a private elementary or secondary school.

Formal Complaint

Support for Formal Complaint Definition

Comments: Some commenters supported the definition of a "formal complaint" in § 106.30, and asserted that requiring a formal complaint to initiate an investigation is reasonable and appropriate, and will bring clarity to the process of investigating allegations of sexual harassment. Some commenters supported the formal complaint definition as a benefit to complainants by giving complainants control over what happens to their report, and a benefit to

institutions by ensuring the institution has written documentation indicating that the complainant wanted an investigation to begin.

Commenters supported requiring a formal complaint before an investigation begins because, commenters asserted, complainants may wish for informal discussions to remain confidential and the formal complaint requirement will empower complainants to decide when to report and when to start an investigation. Commenters asserted that the process for filing a formal complaint described in § 106.30 did not seem much different or more burdensome from other formal processes that students are accustomed to following in college, such as registering for classes or applying to study abroad. Commenters asserted that under the withdrawn 2011 Dear Colleague Letter, survivor advocates often worked with survivors who found themselves involved in Title IX processes that the survivor had not wished to initiate, due to disclosing sexual assault to an individual the survivor did not know was required to report to the Title IX Coordinator. Commenters asserted that many survivors choose not to report for a variety of reasons,[556] and involuntary participation in a conduct process goes against standard knowledge of trauma and sexual violence recovery that emphasizes the importance of allowing survivors to retain control of their recovery to the extent possible. Commenters argued that when victims are unexpectedly or unwillingly involved in Title IX processes, this contradicts best practices because healing from the trauma of sexual violence is promoted when victims are able to maintain control of their recovery. Commenters argued that implementing a formal complaint process will empower survivors to report to higher education institutions if and when they are

[556] Commenters cited: U.S. Dep't. Of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Criminal Victimization: 2016 Revised* 5 (2018).

ready, and to file a formal complaint to institutions by the victim's own informed choice, on their own terms, by their own volition.

Other commenters supported the formal complaint definition as a benefit to respondents, so that schools begin investigations only after a complainant has signed a document describing the allegations; commenters argued this is important for due process given the serious nature of the accusations at issue and the potential punishment. Commenters asserted that requiring a formal complaint will encourage only complainants with serious accusations to come forward.

One commenter expressed support for the formal complaint requirement, but urged the Department to require that formal complaints be filed "without undue delay" because, the commenter asserted, passage of time can prejudice a fair investigation due to memories fading and evidence being lost.

Discussion: The Department appreciates the support from commenters for the definition of "formal complaint" in § 106.30 and the requirement that recipients must investigate the allegations in a formal complaint.[557] We agree that defining a formal complaint and requiring a recipient to initiate a grievance process in response to a formal complaint brings clarity to the circumstances under which a recipient is required to initiate an investigation into allegations of sexual harassment. The Department believes that complainants, respondents, and recipients benefit from the clarity and transparency of specifying the conditions that trigger the initiation of a grievance process. As explained below, in response to commenters' concerns and questions we

[557] *E.g.*, § 106.44(b)(1); § 106.45(b)(3)(i).

have revised the definition of "formal complaint"[558] and made revisions throughout the final regulations,[559] to clarify how a recipient must respond to any report or notice of sexual harassment, versus when a recipient specifically must respond by initiating a grievance process.

The Department believes that the final regulations benefit complainants by obligating recipients to offer complainants supportive measures regardless of whether the complainant files a formal complaint, and informing complainants of how to file a formal complaint; obligating recipients to initiate a grievance process if the complainant decides to file a formal complaint; and giving strong due process protections to a complainant who decides to participate in a grievance process.

The Department believes that the final regulations benefit respondents by ensuring that recipients do not impose disciplinary sanctions against a respondent without following a grievance process that complies with § 106.45, [560] and that the prescribed grievance process gives strong due process protections to both parties.

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[558] As discussed throughout this section of the preamble, we have revised the § 106.30 definition of "formal complaint" to broaden the definition of what constitutes a written, signed document, simplify, clarify, and make more accessible the process for filing, and provide that signing a formal complaint does not mean a Title IX Coordinator becomes a party to a grievance process.

[559] For example, we have revised § 106.44(a) to clarify specific steps a recipient must take as part of a prompt, non-deliberately indifferent response, including offering supportive measures with or without the filing of a formal complaint, and explaining to a complainant how to file a formal complaint, so that if a complainant wants to exercise the option of filing, the complainant (including a parent or legal guardian, as appropriate) knows how to do so. We have added § 106.6(g) to acknowledge the legal rights of parents or guardians to act on behalf of a complainant, respondent, or other party, including with respect to the filing of a formal complaint.

[560] Revised §§ 106.44(a) and 106.45(b)(1)(i) state that a recipient must treat respondents equitably by not imposing disciplinary sanctions or other actions that are not "supportive measures" as defined in § 106.30, against a respondent without first following the § 106.45 grievance process. Exceptions to this prohibition are that any respondent may be removed from an education program or activity on an emergency basis, whether or not a grievance process is pending, under § 106.44(c), and a non-student employee respondent may be placed on administrative leave during the pendency of an investigation, under § 106.44(d), for reasons described in the "Additional Rules Governing Recipients' Responses to Sexual Harassment" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this preamble.

The Department believes that the final regulations benefit recipients by specifying a recipient's obligation to respond promptly and without deliberate indifference to every complainant (i.e., a person alleged to be the victim of sexual harassment), while clarifying the recipient's obligation to conduct an investigation and adjudication of allegations of sexual harassment when the complainant files, or the Title IX Coordinator signs, a formal complaint.

We do not agree that a formal complaint requirement encourages only complainants with "serious accusations" to come forward. While certain acts of sexual harassment may have even greater traumatic, harmful impact than other such acts, the Department believes that all conduct that constitutes sexual harassment under § 106.30 is serious misconduct that warrants a serious response. All the conduct defined as "sexual harassment" in § 106.30 is misconduct that is likely to deny a person equal access to education, and recipients must respond promptly and supportively to every known allegation of sexual harassment whether or not a complainant wants to also file a formal complaint.[561] Filing a formal complaint is not required for a complainant to receive supportive measures.

We decline to impose a requirement that formal complaints be filed "without undue delay." The Department believes that imposing a statute of limitations or similar time limit on the filing of a formal complaint would be unfair to complainants because, as many commenters noted, for a variety of reasons complainants sometimes wait various periods of time before desiring to pursue a grievance process in the aftermath of sexual harassment, and it would be difficult to discern what "undue" delay means in the context of a particular complainant's

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[561] Section 106.44(a) (requiring a prompt, non-deliberately indifferent response any time a recipient has actual knowledge of sexual harassment in the recipient's education program or activity, against a person in the United States).

experience. Title IX obligates recipients to operate education programs or activities free from sex discrimination, and we do not believe Title IX's non-discrimination mandate would be furthered by imposing a time limit on a complainant's decision to file a formal complaint. The Department does not believe that a statute of limitations or "without undue delay" requirement is needed to safeguard the rights of respondents, because the extensive due process protections afforded under the § 106.45 grievance process appropriately safeguard the fundamental fairness and reliability of Title IX proceedings by requiring procedures that take into account any effect of passage of time on party or witness memories or the availability or quality of other evidence.[562] We have, however, revised the § 106.30 definition of formal complaint to state that at the time of filing a formal complaint, the complainant must be participating in or attempting to participate in the recipient's education program or activity. This ensures that a recipient is not required to expend resources investigating allegations in circumstances where the complainant has no affiliation with the recipient, yet refrains from imposing a time limit on a complainant's decision to file a formal complaint.

Changes: As discussed in more detail throughout this section of the preamble, we have revised the § 106.30 definition of "formal complaint" to: broaden the definition of what constitutes a written, signed document, simplify the process for filing, state that at the time of filing the formal complaint the complainant must be participating or attempting to participate in the recipient's

[562] For example, the final regulations provide both parties equal opportunity to gather, present, and review relevant evidence, such that parties can note whether passage of time has resulted in unavailability of evidence and raise arguments about how the decision-maker should weigh the evidence that remains. Further, the final regulations provide in § 106.45(b)(3)(ii) that a recipient has discretion to dismiss a formal complaint where specific circumstances prevent the recipient from meeting the recipient's burden to gather sufficient evidence. Passage of time could in certain fact-specific circumstances result in the recipient's inability to gather evidence sufficient to reach a determination regarding responsibility.

education program or activity, and clarify that signing a formal complaint does not mean a Title IX Coordinator becomes a party to a grievance process.

We have revised § 106.44(a) to clarify specific steps a recipient must take as part of a prompt, non-deliberately indifferent response to actual knowledge of any sexual harassment incident (regardless of whether any formal complaint has been filed), including offering supportive measures to the complainant irrespective of whether a formal complaint is filed, and explaining to the complainant how to file a formal complaint. We have added § 106.6(g) to acknowledge the legal rights of parents or guardians to act on behalf of a complainant, respondent, or other party, including with respect to filing a formal complaint.

No Formal Complaint Required to Report Sexual Harassment

Comments: Several commenters believed that the proposed rules required complainants to file formal complaints in order to report sexual harassment, or that a formal complaint meeting the definition in § 106.30 was required before a school would have to take any action to help a student who reported sexual harassment, including offering supportive measures. Commenters argued that effective reporting systems must be flexible enough to give survivors as much control as possible over how they report sexual harassment and assault, including the option to remain anonymous or to report the crime without pursuing charges. Commenters asserted that when a victim reports shortly after a sexual harassment incident, the victim is often overwhelmed with emotions, and requiring them to provide formal, written, signed documentation would be an enormous emotional task that would cause some victims to question whether reporting is worth it at all.

Commenters argued that requiring a formal complaint before a school must respond to notice of sexual harassment would violate the Supreme Court's standards in *Davis*, which

requires an institutional response without a written or signed complaint. Commenters argued that a "formal complaint standard" imposes a more rigorous notice standard than the *Davis* standard, contradicts the Department's stated intent to use the *Davis* standard, and leaves recipients vulnerable to private litigation.

Some commenters believed that the proposed rules would require survivors to file formal complaints such that every report would trigger an investigation; commenters argued that this would violate survivors' autonomy and reduce the likelihood that survivors would come forward to get help. Commenters argued that formal complaints initiating a grievance process should not be required in order to report sexual assault, because not every survivor wants an investigation after experiencing sexual assault. Commenters argued that requiring survivors to report sexual harassment by filing formal complaints, involving writing down details of a traumatic experience in a signed document, would deter survivors from ever coming forward. Commenters believed that the proposed rules would require a formal complaint in order for the recipient to respond to a report and argued that this would chill reporting of sexual assault, which would affect the number of Clery crime reports and artificially make campuses appear safer than they are. Commenters argued that instead, schools should have to respond to any information about sexual harassment, assess the information, and take appropriate steps to stop the harassment.

Commenters believed that the proposed rules created two different "prompt and equitable" grievance systems – one process for a school's response to a "formal complaint" of sexual harassment, and a different process for a school's response to an "informal complaint" of sexual harassment.

Discussion: Contrary to some commenters' understanding, neither the proposed rules, nor the final regulations, requires a formal complaint as a condition for any person to report sexual

harassment to trigger a recipient's obligation to respond promptly and meaningfully. Like the proposed rules, the final regulations obligate a recipient to respond[563] in a manner that is not clearly unreasonable in light of the known circumstances, whenever a recipient has actual knowledge of sexual harassment in the recipient's education program or activity, against a person in the United States.[564] The requirement that a recipient must investigate allegations in a formal complaint does not change the fact that a recipient must respond, every time the recipient has actual knowledge, in a way that is not deliberately indifferent – even in the absence of a formal complaint.[565] The requirement that a recipient must investigate allegations in a formal complaint provides clarity to complainants, respondents, and recipients as to when a recipient's response must *also* consist of investigating allegations. Under the final regulations, a Title IX Coordinator has discretion to sign a formal complaint that initiates a grievance process; thus, if a non-deliberately indifferent response to actual knowledge of sexual harassment necessitates investigating allegations, the recipient (via the Title IX Coordinator) has the authority to take that action. As discussed in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment," the conditions triggering a recipient's response obligations (i.e., actionable sexual harassment, and actual knowledge) are built on the foundation of the same concepts used in the *Gebser/Davis* framework. Similarly, the deliberate indifference standard is built on the same concept used in the *Gebser/Davis* framework, but these final regulations tailor

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[563] The final regulations revise § 106.44(a) to require a recipient to respond "promptly."
[564] Revised § 106.44(a) specifies that a recipient's response must include offering supportive measures to a complainant (i.e., the person alleged to be the victim of conduct that could constitute sexual harassment), and requires the Title IX Coordinator promptly to contact the complainant to discuss the availability of supportive measures with or without the filing of a formal complaint, consider the complainant's wishes, and explain to the complainant the option of filing a formal complaint.
[565] Section 106.44(b)(1) (stating that with or without a formal complaint, a recipient must comply with all the response obligations described in § 106.44(a)).

that standard to require the recipient to take actions in response to every instance of actual knowledge of sexual harassment, including specific obligations that are not required under the *Gebser/Davis* framework. These final regulations clarify that a recipient's response obligations must always include offering supportive measures to the complainant, and must also include initiating a grievance process against the respondent when the complainant files, or the Title IX Coordinator signs, a formal complaint. The formal complaint definition, and the requirement that recipients must investigate formal complaints, therefore comport with the *Gebser/Davis* framework used in private Title IX lawsuits and do not increase recipients' vulnerability to legal challenges.

While we adopt the *Gebser/Davis* framework, we adapt that framework by requiring recipients to take certain steps as part of every non-deliberately indifferent response to actual knowledge of sexual harassment, irrespective of whether a formal complaint is filed.[566] We have revised § 106.44(a) to specify that a recipient's prompt, non-deliberately indifferent response must include offering supportive measures to each complainant (i.e., a person who is alleged to be the victim), and specifically having the Title IX Coordinator contact the complainant to discuss the availability of supportive measures with or without the filing of a formal complaint, consider the complainant's wishes regarding supportive measures, and explain to the complainant the process for filing a formal complaint.

We agree with commenters who asserted that requiring a complainant to sign formal documentation describing allegations of sexual harassment in order to report and receive

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[566] Section 106.44(b)(1) clarifies that whether or not a formal complaint requiring investigation has also been filed, the recipient must provide the prompt, non-deliberately indifferent response described in § 106.44(a), which includes offering supportive measures to the complainant.

supportive measures would place an unreasonable burden on survivors, and the final regulations obligate recipients to respond promptly and meaningfully – including by offering supportive measures – whenever the recipient has actual knowledge that a person has been allegedly victimized by sexual harassment in the recipient's education program or activity, regardless of whether the complainant or Title IX Coordinator initiates a grievance process by filing or signing a formal complaint. The manner by which a recipient receives actual knowledge need not be a written statement, much less a formal complaint; actual knowledge may be conveyed on a recipient via "notice" from any person – not only from the complainant (i.e., person alleged to be the victim) – regardless of whether the person who reports does so anonymously.[567] The final regulations thus effectuate the purpose of Title IX's non-discrimination mandate by requiring recipients to respond to information about sexual harassment in the recipient's education program or activity, from whatever source that information comes,[568] while reserving the specific obligation to respond by investigating and adjudicating allegations to situations where the complainant (i.e., the person alleged to be the victim) or Title IX Coordinator has decided to file

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[567] Section 106.30 (defining "actual knowledge"). Where a person reports anonymously (regardless of whether the person is the complainant (i.e., the person alleged to be the victim) or a third party), the nature of the recipient's non-deliberately indifferent response may depend on whether the report contains information identifying the alleged victim; for example, § 106.44(a) requires a recipient to respond to actual knowledge by offering the complainant supportive measures, but a recipient may not be capable of taking that action if the person who reported refuses to identify the complainant. A recipient's response is judged on whether the response is clearly unreasonable in light of the known circumstances, which includes what information the recipient received about the identity of the complainant.

[568] To ensure that a recipient's educational community has clear, accessible reporting options, and understands that any person may report sexual harassment to trigger the recipient's obligation to offer supportive measures and explain the option of filing a formal complaint to a person allegedly victimized by sexual harassment, we have revised § 106.8 to: state that any person may report, using contact information that a recipient must list for the Title IX Coordinator; state that reports may be made in person, by mail, phone, or e-mail, or by any other method that results in a Title IX Coordinator receiving the person's written or verbal report; and require recipients to post the Title IX Coordinator's contact information on the recipient's website. We have also revised § 106.30 (defining "actual knowledge") to provide that notice of sexual harassment allegations to any elementary or secondary school employee triggers the school's response obligations.

a formal complaint. The formal complaint definition thus ensures that complainants retain more autonomy and control over when the complainant's reported victimization leads to a formal grievance process, and recipients are not forced to expend resources investigating situations over the wishes of a complainant, unless the Title IX Coordinator has determined that such an investigation is necessary. We agree with commenters that not every complainant wants a recipient to respond to reported sexual harassment by initiating a grievance process; some complainants want an investigation, others do not, and some do not initially desire an investigation but later decide they do want to file formal "charges." The final regulations ensure that every complainant is informed of the option and process for filing a formal complaint, yet never require a complainant to file a formal complaint in order to receive supportive measures. We believe that by respecting complainants' autonomy the final regulations will not chill reporting of sexual harassment, but instead will provide complainants with clearer options and greater control over the process.[569]

Contrary to some commenters' understanding, the final regulations do not create two separate systems of "prompt and equitable grievance procedures" for how a recipient responds to sexual harassment based on whether the recipient receives a formal complaint or informal

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[569] Denying a survivor control over how a disclosure of sexual assault is handled by the survivor's school can also constitute a harmful form of institutional betrayal, and the final regulations desire to mitigate such harm by giving the complainant a clear, accessible *option* to file, or not file, a formal complaint (while receiving supportive measures either way) and by protecting the complainant's right to participate, or choose not to participate, in a grievance process whether the grievance process is initiated by the complainant or by the Title IX Coordinator. *See, e.g.*, Merle H. Weiner, *Legal Counsel for Survivors of Campus Sexual Violence*, 29 YALE J. OF L. & FEMINISM 123, 140-141 (2017) (identifying one type of institutional betrayal as the harm that occurs when "the survivor thinks she [or he] is speaking to a confidential resource, but then finds out the advocate cannot keep their conversations private"); Carly Parnitzke Smith & Jennifer J. Freyd, *Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma*, 26 J. OF TRAUMATIC STRESS 1, 120 (2013) (describing "institutional betrayal" as when an important institution, or a segment of it, acts in a way that betrays its member's trust). Where a Title IX Coordinator signs a formal complaint knowing the complainant did not wish to do so, the recipient must respect the complainant's wishes regarding whether to participate or not in the grievance process. § 106.71 (prohibiting retaliation).

complaint. Rather, the final regulations obligate the recipient to respond to every known allegation of sexual harassment (regardless of how, or from whom, the recipient receives notice) promptly and non-deliberately indifferently, and obligate the recipient to respond by initiating a grievance process when the recipient receives a formal complaint of sexual harassment. If commenters referred to an "informal complaint of sexual harassment" to describe a report or disclosure of sexual harassment that is not a "formal complaint" as defined in § 106.30, the final regulations require recipients to respond promptly and non-deliberately indifferently (including by offering the complainant supportive measures) to such a report or disclosure, but the recipient need not initiate investigation or adjudication procedures unless the recipient receives a "formal complaint of sexual harassment." Furthermore, § 106.44(a) precludes recipients from responding to reports, disclosures, or notice of alleged sexual harassment by imposing disciplinary sanctions on a respondent without first following a grievance process that complies with § 106.45. The "prompt and equitable" grievance procedures to which commenters referred still must be adopted, published, and used by a recipient to address complaints of *non-sexual harassment* sex discrimination, under § 106.8(c), while recipients must respond to formal complaints of sexual harassment by following a grievance process that complies with § 106.45.

Changes: None.

Burden on Complainants to File a Formal Complaint

Comments: Commenters argued that requiring a formal complaint in order to begin an investigation places an unfair burden on victims who want an investigation but should not have to comply with specific paperwork and procedures, or because requiring a victim to put their name in writing and flesh out the details of a harrowing experience in a written narrative may be retraumatizing. Commenters argued that many institutions follow a principle that a victim should

only have to make a single statement about an incident, and therefore a victim's written or oral disclosure to a police officer, or to any responsible campus employee, should be sufficient to trigger an investigation. Commenters asserted that some State protocols for sexual assault investigations (for example, in New Hampshire) caution against collecting written statements from victims.

Commenters argued that making victims sign a document with a statement of facts is inappropriate due to the potential effect of such a document on any future litigation. Commenters argued that it is unfair to make victims sign a written statement to start an investigation because the written statement could be wrongfully used to discredit a victim during the investigation if the victim's later statements show any inconsistencies with the formal complaint, and victims in the immediate aftermath of sexual violence may have trouble focusing or recalling details, due to trauma.[570] One commenter proposed a detailed alternate process for starting investigations, under which the complainant would orally describe an incident to a compliance team, the compliance team would inform the complainant of the option for signing a written statement initiating an investigation, and the complainant would have 72 hours to decide whether to sign such a written statement.

Commenters argued that any report of a sexual assault, to any school or college employee, whether oral or written, formal or informal, should be sufficient to start an investigation because otherwise a significant number of sexual assaults will go un-investigated, and because schools could ignore openly hostile environments just because no one filed a formal

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[570] Commenters cited: Russell W. Strand, *The Forensic Experiential Trauma Interview (FETI)*, https://responsesystemspanel.whs mil/Public/docs/meetings/20130627/01_Victim_Overview/Rumburg_FETI_Interview.pdf.

document. Commenters argued there are many ways schools can investigate a report without involving the victim, so victims should never be forced to file complaints but schools should still investigate all credible reports. Commenters argued that the burden of starting an investigation should be on the school, not on the survivor to jump through the hoop of filing a formal complaint. Commenters argued that in order to maintain a safe, non-discriminatory learning environment, institutions must not be confined by the formalities of signatures on a complaint before they are able to move forward with an investigation. Commenters argued that if schools can ignore known sexual harassment just because no one has filed a formal complaint, institutions of higher education will have even less incentive to try to stop sex abuse scandals by their employees. Commenters argued that it is expecting a student to undergo too much risk to file a written complaint against a faculty member who is sexually abusing the student, so more students will fall prey to serial abuse by faculty.

Commenters argued that the § 106.30 definition of "formal complaint" would preclude third parties (such as teachers, witnesses, or school employees other than the Title IX Coordinator) from filing complaints to initiate grievance procedures, representing a departure from past Department guidance and reducing schools' efforts to redress offending behavior. Other commenters supported restricting third parties from filing formal complaints because confiding in a resident advisor or professor should not trigger an obligation for that employee to file a formal complaint on the victim's behalf. Some commenters argued that no investigation should be initiated without the consent of the victim because the victim should be the one with the power to initiate a formal process, and victims should be given the opportunity to be educated on the law, process, and rights of victims.

Commenters argued that the burden of filing a formal complaint would fall especially hard on K-12 students because the proposed safe harbor in § 106.44(b)(2) only ensured that students in higher education would receive supportive measures in the absence of a formal complaint, so younger students, who may not even be capable of writing down a description of sexual harassment, would get no help at all.

Discussion: The Department appreciates commenters' concerns that requiring complainants who wish to initiate an investigation to sign a written document may seem like an unnecessary "paperwork" procedure, or that a victim may find it retraumatizing to write out details of a sexual harassment experience. However, absent a written document signed by the complainant alleging sexual harassment against a respondent and requesting an investigation,[571] the Department believes that complainants and recipients may face confusion about whether an investigation is initiated because the complainant desires it, because the Title IX Coordinator believes it necessary, both, or neither. We reiterate that when a recipient has actual knowledge of sexual harassment, the recipient must offer supportive measures to the complainant whether or not a formal complaint is ever filed. However, a complainant's decision to initiate a grievance process should be clear, to avoid situations where a recipient involves a complainant in a grievance process when that was neither what the complainant wanted nor what the Title IX Coordinator believed was necessary. A grievance process is a weighty, serious process with consequences that affect the complainant, the respondent, and the recipient. Clarity as to the

[571] As discussed herein, the final regulations broaden the meaning of a "document filed by a complainant" to include a document or electronic submission (such as an e-mail, or use of an online portal provided for this purpose by the recipient) that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.

nature and scope of the investigation necessitates that a formal complaint initiating the grievance process contain allegations of sexual harassment against the respondent, so the recipient may then prepare the written notice of allegations to be sent to both parties (under § 106.45(b)(2)), which advises both parties of essential details of allegations under investigation, and of important rights available to both parties under the grievance process.

The Department acknowledges the principle, followed by some institutions and State protocols, that avoids asking victims for written statements or avoids asking victims to recount allegations more than once. We reiterate that a complainant may report (once, and verbally) in order to require a recipient to respond promptly by offering supportive measures. Reports of sexual harassment (whether made by the alleged victim themselves or by any third party) do not need to be in writing, much less in the form of a signed document.[572] The final regulations desire to ensure that every complainant receives this prompt, supportive response regardless of whether a grievance process is ever initiated. The formal complaint requirement ensures that a grievance process is the result of an intentional decision on the part of either the complainant or the Title IX Coordinator. A complainant (or a third party) may report sexual harassment to a school for a different purpose than desiring an investigation. Thus, if an investigation is an action the complainant desires, the complainant must file a written document requesting an investigation. No written document is required to put a school on notice (i.e., convey actual knowledge) of sexual harassment triggering the recipient's response obligations under § 106.44(a).

The § 106.30 definition of "formal complaint" requires a document "alleging sexual harassment against a respondent," but contains no requirement as to a detailed statement of facts.

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[572] Section 106.8(a).

Whether or not statements made during a Title IX grievance process might be used in subsequent litigation, clarity, predictability, and fairness in the Title IX process require both parties, and the recipient, to understand that allegations of sexual harassment have been made against the respondent before initiating a grievance process. We reiterate that no written statement is required in order to receive supportive measures,[573] and that there is no time limit on a complainant's decision to file a formal complaint, so the decision to sign and file a formal complaint need not occur in the immediate aftermath of sexual violence when a survivor may have the greatest difficulty focusing, recalling details, or making decisions. A complainant may disclose or report immediately (if the complainant desires) to receive supportive measures and receive information about the option for filing a formal complaint, and that disclosure or report may be verbal, in writing, or by any other means of giving notice.[574] But such a disclosure or report may be entirely separate from a complainant's later decision to pursue a grievance process by filing a formal complaint. We disagree with a commenter's suggestion to require a complainant to decide within 72 hours whether to file a formal complaint; even with the detailed steps in such a process suggested by the commenter, for reasons explained above it does not further Title IX's non-discrimination mandate to impose a time limit on a complainant's decision to file a formal complaint.

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[573] We have revised § 106.8(a) to specify that any person may report sexual harassment using the Title IX Coordinator's contact information (including during non-business hours by using the listed telephone number or e-mail address) "or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report."

[574] *See* § 106.30 defining "actual knowledge" to mean "notice" to the Title IX Coordinator, to any official with authority to take corrective action, or to any elementary or secondary school employee, where "notice" includes (but is not limited to) a report of sexual harassment to the Title IX Coordinator as described in § 106.8(a).

The Department disagrees that every report of a sexual assault to any recipient employee should be sufficient to start an investigation. We believe that every allegation of sexual harassment of which the recipient becomes aware[575] must be responded to, promptly and meaningfully, including by offering supportive measures to the person alleged to be the victim of conduct that could constitute sexual harassment.[576] However, we believe that complainants should retain as much control as possible[577] over whether a school's response includes involving the complainant in a grievance process. When a complainant believes that investigation and adjudication of allegations is in the complainant's best interest, the complainant should be able to require the recipient to initiate a grievance process.[578] When a Title IX Coordinator believes that with or without the complainant's desire to participate in a grievance process, a non-deliberately indifferent response to the allegations requires an investigation, the Title IX Coordinator should have the discretion to initiate a grievance process. Not investigating every report of sexual harassment will not allow schools to ignore complainants or ignore "openly hostile environments," because § 106.44(a) requires the recipient to respond promptly in a manner that is not unreasonable in light of the known circumstances, to every instance of alleged sexual harassment in the recipient's education program or activity of which the recipient becomes aware, including offering supportive measures to the complainant with or without a grievance

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[575] As discussed above, a recipient is charged with actual knowledge of sexual harassment when notice is given to a Title IX Coordinator, an official with authority to take corrective action, or any elementary or secondary school employee. § 106.30 (defining "actual knowledge").
[576] Section 106.44(a) § 106.30 (defining "complainant").
[577] A complainant's control over a school's response may be circumscribed by a recipient's obligations under laws other than these final regulations; for example, State laws mandating schools to report suspected child sexual abuse to law enforcement or child welfare authorities. However, these final regulations protect a complainant against being intimidated, threatened, coerced, or discriminated against for participating, or refusing to participate, in a Title IX grievance process. § 106.71.
[578] Section 106.6(g) (acknowledging that where a parent or guardian has the legal right to act on a complainant's behalf, the parent or guardian may file a formal complaint on behalf of the complainant).

process. Part of whether a decision not to investigate is "clearly unreasonable" may include a Title IX Coordinator's communication with the complainant to understand the complainant's desires with respect to a grievance process against the respondent. When a Title IX Coordinator determines that an investigation is necessary even where the complainant (i.e., the person alleged to be the victim) does not want such an investigation, the grievance process can proceed without the complainant's participation; however, the complainant will still be treated as a party in such a grievance process. The grievance process will therefore impact the complainant even if the complainant refuses to participate. The Department desires to respect a complainant's autonomy as much as possible and thus, if a grievance process is initiated against the wishes of the complainant, that decision should be reached thoughtfully and intentionally by the Title IX Coordinator, not as an automatic result that occurs any time a recipient has notice that a complainant was allegedly victimized by sexual harassment. We do not believe this places "the burden" of starting an investigation on the complainant. Rather, the final regulations enable a complainant, or the Title IX Coordinator, to initiate an investigation. The final regulations appropriately leave recipients flexibility to investigate allegations even where the complainant does not wish to file a formal complaint where initiating a grievance process is not clearly unreasonable in light of the known circumstances (including the circumstances under which a complainant does not desire an investigation to take place), so that recipients may, for example, pursue a grievance process against a potential serial sexual perpetrator. The recipient is required to document its reasons why its response to sexual harassment was not deliberately indifferent, under § 106.45(b)(10), thereby emphasizing the need for a decision to initiate a grievance process over the wishes of a complainant to be intentionally, carefully made taking into account the circumstances of each situation.

The § 106.30 definition of "formal complaint" does preclude third parties from filing formal complaints.[579] For the reasons discussed above, we believe that respecting a complainant's autonomy to the greatest degree possible means that an investigation against a complainant's wishes or without a complainant's willingness to participate, should happen only when the Title IX Coordinator has determined that the investigation is necessary under the particular circumstances.[580] We reiterate that any person may disclose or report a sexual harassment incident, whether that person is the complainant (i.e., the individual who is alleged to be the victim) or any third party, such as a teacher, witness, parent, or school employee.[581] When the disclosure or report gives notice of sexual harassment allegations to a Title IX Coordinator,[582] an official with authority to institute corrective measures on the recipient's behalf, or any elementary and secondary school employee,[583] the recipient must respond promptly in a non-deliberately indifferent manner. Thus, even if neither the complainant nor the Title IX Coordinator decides to file a formal complaint, the recipient must still respond to the

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[579] *Cf.* § 106.6(g).
[580] *See* Michelle L. Meloy & Susan L. Miller, *The Victimization of Women: Law, Policies, and Politics* 147-48 (Oxford University Press 2010) (anti-violence policies must embrace "notions of victim empowerment for self-protection by allowing victims to drop criminal charges"). The Title IX equivalent of this premise is that the Department should not require schools to investigate in the absence of a complainant's consent. The formal complaint definition in § 106.30 ensures that schools *must* investigate when the complainant desires that action (*see also* § 106.44(b)(1)), and ensures that a school only overrides a complainant's desire for the school *not* to investigate if the Title IX Coordinator has determined on behalf of the recipient that an investigation is needed, and in such circumstances the final regulations protect the complainant's right to refuse to participate in the grievance process. § 106.71.
[581] Section 106.8(a) (expressly stating that any person may report sexual harassment using the listed contact information for the Title IX Coordinator, whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sexual harassment).
[582] Section 106.30 (defining "actual knowledge" and expressly stating that "notice" includes a report to the Title IX Coordinator as described in § 106.8(a)).
[583] Section 106.30 (defining "actual knowledge").

reported sexual harassment incident by offering supportive measures to the complainant and informing the complainant of the option of filing a formal complaint.[584]

We disagree that no formal complaint should ever be filed without the consent of the victim, because some circumstances may require a recipient (via the Title IX Coordinator) to initiate an investigation and adjudication of sexual harassment allegations in order to protect the recipient's educational community or otherwise avoid being deliberately indifferent to known sexual harassment. However, we have added § 106.71 to prohibit retaliation against any person exercising rights under Title IX, including the right not to participate in a Title IX grievance process, so that a complainant is protected from being coerced, intimated, threatened, or otherwise discriminated against based on the complainant's refusal to participate in a grievance process. We agree that complainants should be given the opportunity to be informed of the law, process, and victims' rights, and the final regulations require recipients to notify students, employees, and parents of elementary and secondary school students (among others) of the recipient's Title IX non-discrimination policy, contact information for the Title IX Coordinator, how to report sexual harassment, and the recipient's grievance process for formal complaints of sexual harassment.[585] The final regulations further require recipients to offer supportive measures to a complainant, discuss with each individual complainant the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.[586]

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[584] Sections 106.44(a), 106.44(b)(1).
[585] Section 106.8.
[586] Section 106.44(a).

In response to commenters' concerns that elementary and secondary school students might not receive supportive measures in the absence of a formal complaint because the supportive measures safe harbor in proposed § 106.44(b)(2) applied only to postsecondary institutions, we have removed the safe harbor in proposed § 106.44(b)(2), and revised § 106.44(a) to require all recipients to offer supportive measures to every complainant, obviating the need for a "safe harbor" that results from providing supportive measures. As to all recipients, the final regulations enable the complainant (i.e., the individual who is alleged to be the victim) or the Title IX Coordinator, to file a formal complainant that initiates a grievance process. As discussed below in this section of the preamble, the final regulations also acknowledge the legal right of a parent to act on behalf of their child, addressing the concern that children are expected to write or sign a formal complaint.

Changes: We have removed the supportive measures safe harbor in proposed § 106.44(b)(2) and have revised § 106.44(a) to require all recipients to offer supportive measures to each complainant irrespective of whether a formal complaint is ever filed. We have added § 106.6(g) acknowledging the legal rights of parents or guardians to act on behalf of a complainant, respondent, or other individual, including but not limited to the filing of a formal complaint. We have added § 106.71 to prohibit retaliation against any person exercising rights under Title IX, including the right not to participate in a Title IX grievance process.

Anonymous Reporting and Anonymous Filing of Formal Complaints

Comments: Commenters requested clarification as to whether the proposed rules discouraged or prohibited anonymous reporting; some commenters asserted that anonymous reports may disclose valid information about openly hostile environments on campus that should be investigated even though the reporting party is anonymous. Commenters argued that disallowing

confidential and anonymous reporting would deter reporting because research shows that concern about confidentiality is one reason why victims of sexual crimes do not report.[587] Commenters argued that requiring a signed statement may act as a deterrent to reporting, citing to a report finding that several police departments have permitted victims to report anonymously in an effort to allow a victim more options and control over whether to participate in an investigation, and that police find it advantageous because they can learn more about crimes committed in the area, and anonymous reporting may allow them to track a predator who commits multiple offenses.[588] Commenters argued that prohibiting victims from filing formal complaints anonymously would conflict with State law (such as in Illinois, and Texas) where institutions are required to provide an option for anonymous reporting and State law (such as Texas) that requires electronic reporting to be an option.

Discussion: The Department appreciates the opportunity to clarify that the final regulations do not prohibit recipients from implementing anonymous (sometimes called "blind") reporting options. Anonymous or blind reporting options that have been implemented by law enforcement agencies, for example, may enable the police to gain more information about crimes and may assist in identifying patterns of repeat offenders, while providing victims with "another option for healing – an option that falls in between not reporting the crime, and being involved in a full criminal investigation."[589] As commenters noted, anonymous reports sometimes disclose valid information about sexual harassment on campus. Under the final regulations, when a recipient

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[587] Commenters cited: U.S. Dep't. of Justice, Office of Justice Programs, National Institute of Justice, *Sexual Assault on Campus: What Colleges and Universities Are Doing About It* (2005).
[588] Commenters cited: Human Rights Watch, *Improving Police Response to Sexual Assault* (2013).
[589] National Resource Center on Domestic Violence, VAWnet, Introduction to Sabrina Garcia & Margaret Henderson, *Blind Reporting of Sexual Violence*, 68 FBI LAW ENFORCEMENT BULLETIN 6 (June 1999), https://vawnet.org/material/blind-reporting-sexual-violence.

has actual knowledge of alleged sexual harassment in the recipient's education program or activity the final regulations require a recipient to respond in a manner that is not clearly unreasonable in light of the known circumstances. A recipient has actual knowledge whenever notice of sexual harassment is given to the Title IX Coordinator, an official with authority to institute corrective measures, or any elementary and secondary school employee.[590] The final regulations do not restrict the form that "notice" might take, so notice conveyed by an anonymous report may convey actual knowledge to the recipient and trigger a recipient's response obligations. A recipient's non-deliberately indifferent response must include offering supportive measures to a complainant (i.e., person alleged to be the victim of sexual harassment).[591] A recipient's ability to offer supportive measures to a complainant, or to consider whether to initiate a grievance process against a respondent, will be affected by whether the report disclosed the identity of the complainant or respondent. In order for a recipient to provide supportive measures to a complainant, it is not possible for the complainant to remain anonymous because at least one school official (e.g., the Title IX Coordinator) will need to know the complainant's identity in order to offer and implement any supportive measures. Section 106.30 defining "supportive measures" directs the recipient to maintain as confidential any supportive measures provided to either a complainant or a respondent, to the extent that maintaining confidentiality does not impair the recipient's ability to provide the supportive measures. A complainant (or third party) who desires to report sexual harassment without disclosing the complainant's identity to anyone may do so, but the recipient will be unable to

[590] Section 106.30 (defining "actual knowledge").
[591] Section 106.44(a).

provide supportive measures in response to that report without knowing the complainant's identity. If a complainant desires supportive measures, the recipient can, and should, keep the complainant's identity confidential (including from the respondent), unless disclosing the complainant's identity is necessary to provide supportive measures for the complainant (e.g., where a no-contact order is appropriate and the respondent would need to know the identity of the complainant in order to comply with the no-contact order, or campus security is informed about the no-contact order in order to help enforce its terms).

Separate and apart from whether a grievance process is initiated, the final regulations require recipients to respond non-deliberately indifferently even where sexual harassment allegations were conveyed to the recipient via an anonymous report (made by the complainant themselves, or by a third party), including offering the complainant supportive measures if the anonymous report identified a complainant (i.e., person alleged to be a victim of sexual harassment). Nothing in the final regulations precludes a recipient from implementing reporting systems that facilitate or encourage an anonymous or blind reporting option. Thus, recipients who are obligated under State laws to offer anonymous reporting options may not face any conflict with obligations under the final regulations. The final regulations do not preclude recipients from offering electronic reporting systems, so recipients obligated to do so under State laws may not face any conflict with obligations under the final regulations. To ensure that complainants (and third parties, because any person may report sexual harassment) have clear, accessible reporting options, we have revised § 106.8(a) to expressly state that any person may report sexual harassment using the Title IX Coordinator's listed contact information, and such a report may be made at any time (including during non-business hours) by using the listed

telephone number or e-mail address (or by mail to the listed office address) for the Title IX Coordinator. Recipients may additionally offer other types of electronic reporting systems.

A formal complaint initiates a grievance process (i.e., an investigation and adjudication of allegations of sexual harassment). A complainant (i.e., a person alleged to be the victim of sexual harassment) cannot file a formal complaint anonymously because § 106.30 defines a formal complaint to mean a document or electronic submission (such as an e-mail or using an online portal provided for this purpose by the recipient) that contains the complainant's physical or digital signature or otherwise indicates that the complainant is the person filing the formal complaint. The final regulations require a recipient to send written notice of the allegations to both parties upon receiving a formal complaint. The written notice of allegations under § 106.45(b)(2) must include certain details about the allegations, including the identity of the parties, if known.

Where a complainant desires to initiate a grievance process, the complainant cannot remain anonymous or prevent the complainant's identity from being disclosed to the respondent (via the written notice of allegations). Fundamental fairness and due process principles require that a respondent knows the details of the allegations made against the respondent, to the extent the details are known, to provide adequate opportunity for the respondent to respond. The Department does not believe this results in unfairness to a complainant. Bringing claims, charges, or complaints in civil or criminal proceedings generally requires disclosure of a person's identity for purposes of the proceeding. Even where court rules permit a plaintiff or victim to remain anonymous or pseudonymous, the anonymity relates to identification of the plaintiff or victim in court records that may be disclosed *to the public*, not to keeping the identity of the

plaintiff or victim unknown *to the defendant*.[592] The final regulations ensure that a complainant may obtain supportive measures while keeping the complainant's identity confidential from the respondent (to the extent possible while implementing the supportive measure), but in order for a grievance process to accurately resolve allegations that a respondent has perpetrated sexual harassment against a complainant, the complainant's identity must be disclosed to the respondent, if the complainant's identity is known. However, the identities of complainants (and respondents, and witnesses) should be kept confidential from anyone not involved in the grievance process, except as permitted by FERPA, required by law, or as necessary to conduct the grievance process, and the final regulations add § 106.71 to impose that expectation on recipients.[593]

When a formal complaint is signed by a Title IX Coordinator rather than filed by a complainant, the written notice of allegations in § 106.45(b)(2) requires the recipient to send both parties details about the allegations, including the identity of the parties *if known*, and thus, if the complainant's identity is known it must be disclosed in the written notice of allegations. However, if the complainant's identity is unknown (for example, where a third party has reported that a complainant was victimized by sexual harassment but does not reveal the complainant's

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[592] *See, e.g.*, Jayne S. Ressler, *#WorstPlaintiffEver: Popular Public Shaming and Pseudonymous Plaintiffs*, 84 TENN. L. REV. 779, 828 (2017) (arguing that Federal and State courts should adopt broader rules allowing plaintiffs to file civil lawsuits anonymously or pseudonymously, and emphasizing that this anonymity relates to whether a plaintiff is named in court records that may be viewed by the public, but does not affect the *defendant's* knowledge of the identity of the plaintiff) ("The plaintiff's anonymity would extend only to court filings and any other documents that would be released to the public. In other words, the defendant would have the same information about the plaintiff had the plaintiff filed the case under her own name.").

[593] Section 106.71(a) (prohibiting retaliation and providing in relevant part that the recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness except as may be permitted by FERPA, or required by law, or to the extent necessary to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder).

identity, or a complainant has reported anonymously), then the grievance process may proceed if the Title IX Coordinator determines it is necessary to sign a formal complaint, even though the written notice of allegations does not include the complainant's identity.[594]

The Department agrees with commenters that concerns about confidentiality often affect a victim's willingness to report sexual assault. The final regulations aim to give complainants as much control as possible over: whether and how to report that the complainant has been victimized by sexual harassment; whether, or what kinds, of supportive measures may help the complainant maintain equal access to education; and whether to initiate a grievance process against the respondent. Each of the foregoing decisions can be made by a complainant with awareness of the implications for the complainant's anonymity or confidentiality. The final regulations ensure that complainants have any or all of the following options: the ability to report anonymously (though a recipient will be unable to provide supportive measures without knowing the complainant's identity); the ability to report and receive supportive measures while keeping the complainant's identity confidential from the respondent (unless the respondent must know the complainant's identity in order for the recipient to implement a supportive measure); and the right to file a formal complaint against the respondent, realizing that doing so means the

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[594] If the complainant's identity is discovered during the investigation, the recipient would need to send supplemental notice of allegations to the parties and treat the complainant as a party throughout the grievance process. *See* § 106.45(b)(2)(ii). Without a complainant (i.e., a person alleged to be the victim of sexual harassment) at some point being identified during an investigation, a recipient may find itself unable to meet the recipient's burden to gather evidence sufficient to reach a determination regarding responsibility. For example, without knowing a complainant's identity a recipient may not be able to gather evidence necessary to establish elements of conduct defined as "sexual harassment" under § 106.30, such as whether alleged conduct was unwelcome, or without the consent of the victim. In such a situation, the final regulations provide for discretionary dismissal of the formal complaint, or allegations therein. § 106.45(b)(3)(ii). A recipient's decision (made via the Title IX Coordinator) to initiate a grievance process over the wishes of a complainant, or where the complainant does not wish to participate, or where the complainant's identity is unknown, is evaluated under the deliberate indifference standard set forth in § 106.44(a).

respondent will know the complainant's identity, yet as to people outside the grievance process the complainant's identity must be kept confidential except as permitted by FERPA, required by law, or as necessary to conduct the grievance process.

Changes: We have added § 106.71(a) requiring recipients to keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as permitted by FERPA, required by law, or as necessary to carry out the purposes of 34 CFR part 106 to conduct any investigation, hearing, or judicial proceeding arising thereunder, which includes a grievance process.

Officials Other Than the Title IX Coordinator Filing a Formal Complaint

Comments: Commenters asked for clarification as to whether "officials with authority to institute corrective measures on behalf of the recipient" are authorized to file a formal complaint, or whether the Title IX Coordinator is the sole employee authorized to file a formal complaint. Commenters requested that § 106.30 be modified so that the complainant, the Title IX Coordinator, or "any institutional administrator" can file a formal complaint; commenters argued that there are many administrators who have a significant interest in ensuring that the recipient investigates potential violations of school policy. Commenters requested clarification as to whether by filing a formal complaint, the Title IX Coordinator becomes a party in the investigation, and if this means that the Title IX Coordinator must be given the rights that the grievance procedures give to complainants, or if not, then commenters wondered who would be treated as the complainant in cases where the victim did not sign the formal complaint. Commenters argued that a Title IX Coordinator who signs a formal complaint initiating

grievance procedures against a respondent is no longer neutral or impartial, is biased, and/or has a conflict of interest, especially where the Title IX Coordinator will also be the investigator.

Discussion: We appreciate the opportunity to clarify that the final regulations do not permit a formal complaint to be filed or signed by any person other than the complainant (i.e., the person alleged to be the victim of sexual harassment or the alleged victim's parent or guardian on the alleged victim's behalf, as appropriate) or the Title IX Coordinator. While it is true that school administrators other than the Title IX Coordinator may have significant interests in ensuring that the recipient investigate potential violations of school policy, for reasons explained above, the decision to initiate a grievance process in situations where the complainant does not want an investigation or where the complainant intends not to participate should be made thoughtfully and intentionally, taking into account the circumstances of the situation including the reasons why the complainant wants or does not want the recipient to investigate. The Title IX Coordinator is trained with special responsibilities that involve interacting with complainants, making the Title IX Coordinator the appropriate person to decide to initiate a grievance process on behalf of the recipient. Other school administrators may report sexual harassment incidents to the Title IX Coordinator, and may express to the Title IX Coordinator reasons why the administrator believes that an investigation is warranted, but the decision to initiate a grievance process is one that the Title IX Coordinator must make.[595]

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[595] This does not preclude recipient employees or administrators other than the Title IX Coordinator from implementing supportive measures for the complainant (or for a respondent). The final regulations, § 106.30 defining "supportive measures," require that the Title IX Coordinator is *responsible* for the effective implementation of supportive measures; however, this does not preclude other recipient employees or administrators from implementing supportive measures for a complainant (or a respondent) and in fact, effective implementation of most

The Department does not view a Title IX's Coordinator decision to sign a formal complaint as being adverse to the respondent. A Title IX Coordinator's decision to sign a formal complaint is made on behalf of the recipient (for instance, as part of the recipient's obligation not to be deliberately indifferent to known allegations of sexual harassment), not in support of the complainant or in opposition to the respondent or as an indication of whether the allegations are credible, have merit, or whether there is evidence sufficient to determine responsibility. To clarify this, we have removed the phrase "or on whose behalf the Title IX Coordinator has filed a formal complaint" from the proposed rules' definition of "complainant" in § 106.30. We have also revised the § 106.30 definition of "formal complaint" to state that when the Title IX Coordinator signs a formal complaint, the Title IX Coordinator does not become a complainant, or otherwise a party, to a grievance process, and must still serve free from bias or conflict of interest for or against any party.

In order to ensure that a recipient has discretion to investigate and adjudicate allegations of sexual harassment even without the participation of a complainant, in situations where a grievance process is warranted, the final regulations leave that decision in the discretion of the recipient's Title IX Coordinator. However, deciding that allegations warrant an investigation does not necessarily show bias or prejudgment of the facts for or against the complainant or respondent. The definition of conduct that could constitute sexual harassment, and the conditions necessitating a recipient's response to sexual harassment allegations, are sufficiently clear that a

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supportive measures requires the Title IX Coordinator to coordinate with administrators, employees, and offices outside the Title IX office (for example, notifying campus security of the terms of a no-contact order, or working with the school registrar to appropriately reflect a complainant's withdrawal from a class, or communicating with a professor that a complainant needs to re-take an exam).

Title IX Coordinator may determine that a fair, impartial investigation is objectively warranted as part of a recipient's non-deliberately indifferent response, without prejudging whether alleged facts are true or not. Even where the Title IX Coordinator is also the investigator,[596] the Title IX Coordinator must be trained to serve impartially,[597] and the Title IX Coordinator does not lose impartiality solely due to signing a formal complaint on the recipient's behalf.

Changes: We have revised the § 106.30 definition of "formal complaint" to mean a document "filed by a complainant or signed by the Title IX Coordinator" and clarified that when a Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party during the grievance process, and the Title IX Coordinator must comply with these final regulations including the obligation in § 106.45(b)(1)(iii) to be free from bias or conflict of interest. We have also revised the definition of "complainant" in § 106.30 to remove the phrase "or on whose behalf the Title IX Coordinator has filed a formal complaint."

Complexity of a Document Labeled "Formal Complaint"

Comments: Commenters argued that the document initiating a grievance process should be labeled something other than a "formal complaint" because calling it a formal complaint makes it sound as though the survivor is complaining, or whining, about having been assaulted.

Commenters argued that requiring signed complaints is one aspect of the proposed rules that would make the Title IX campus system too much like the legal system, and survivors already feel deterred from pursuing justice through criminal and legal systems. Commenters

[596] Section 106.45(b)(7) specifies that the decision-maker must be a different person from the Title IX Coordinator or investigator, but the final regulations do not preclude a Title IX Coordinator from also serving as the investigator.
[597] Section 106.45(b)(1)(iii).

argued that the § 106.30 definition of formal complaint was so legalistic that lawyers would have to get involved in every Title IX matter.

Commenters argued that students may think they have triggered a grievance procedure by reporting to the Title IX Coordinator only to find out that no investigation has begun because the student did not file a document meeting the requirements of a "formal complaint." Commenters argued that requiring a complainant to sign a written document with specific language about "requesting initiation of a grievance procedure" would result in some complainants believing they had filed a formal complaint when the exact paperwork was not filled out or signed correctly. Commenters asked whether a recipient would be deliberately indifferent if the recipient failed to tell a complainant who intended to file a formal complaint that the document filed failed to meet the requirements in § 106.30 and thus no grievance procedures had begun. Commenters requested clarification as to how a Title IX Coordinator should treat an "informal complaint" that did not meet the precise definition of a formal complaint. Commenters argued that the definition of "formal complaint" means that a recipient could dismiss a meritorious complaint, or refuse to investigate, solely for immaterial technical reasons, such as the document not being signed or failing to include specific language "requesting initiation" of the grievance procedures. Commenters argued that the definition of "formal complaint" would provide an arbitrary bureaucratic loophole that would excuse recipients for their willful indifference when paperwork is not completed perfectly.

Commenters argued that the § 106.30 definition of "formal complaint" would make it difficult or impossible for some students to file a formal complaint. Commenters stated, for example, that young children may not have learned how to write. Commenters stated that, for example, individuals with certain disabilities may have difficulty communicating in writing.

Commenters suggested that the definition be modified so that a formal complaint is "signed (or affirmed via another effective communication modality)" because otherwise, a student with a disability – especially with a communication disability or disorder – may be unable to file. Commenters suggested the definition be expanded to accommodate the needs of individuals with disabilities by accepting different communication modalities including oral, manual, AAC (augmentative and alternative communication) techniques, and assistive technologies.

Discussion: The final regulations continue to use the phrase "formal complaint" to describe the document that initiates a grievance process resolving sexual harassment allegations. The word "complaint" is commonly used in proceedings designed to resolve disputed allegations, and the word is used neutrally to describe that the person has brought allegations or charges of some kind, not pejoratively to imply that a person is unjustifiably "complaining" or "whining."[598]

"Formal complaint" is a specific term used in these final regulations to describe a document that initiates a grievance process against a respondent alleging Title IX sexual harassment. A grievance process that is consistent, transparent, and fair is necessarily a formal process, and parties should be apprised that initiating a grievance process is a serious matter. This does not necessitate involvement of lawyers or convert a recipient's Title IX grievance process into a court proceeding. However, we agree with commenters that the way that a formal complaint was described in proposed § 106.30[599] was more restrictive than necessary and did not take into account the common use of electronic or digital transmissions. We have revised and

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[598] For example, OCR refers to a "complainant" as a person who files a "complaint" with OCR alleging a civil rights law violation. *E.g.*, U.S. Dep't. of Education, Office for Civil Rights, *How the Office for Civil Rights Handles Complaints* (Nov. 2018), https://www2.ed.gov/about/offices/list/ocr/complaints-how.html.

[599] Proposed § 106.30 defined "formal complaint" as "a document signed by a complainant or by the Title IX Coordinator alleging sexual harassment against a respondent and requesting initiation of the recipient's grievance procedures consistent with § 106.45."

simplified the definition of a "formal complaint" to mean "a document filed by the complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment."

The § 106.30 definition of a formal complaint describes the purpose of the document, not requirements for specific language that can be used as a bureaucratic loophole for a recipient to avoid initiating a grievance process. The purpose of the formal complaint is to clarify that the complainant (or Title IX Coordinator) believes that the recipient should investigate allegations of sexual harassment against a respondent. The Department does not assume that recipients will treat complainants attempting to file a formal complaint differently from students who attempt to file similar school paperwork; for example, when a form is missing a signature, recipients generally inquire with the student to correct the paperwork. Recipients are under an obligation under § 106.44(a) to respond promptly in a way that is not clearly unreasonable in light of the known circumstances and this obligation extends to the circumstances under which a recipient processes a formal complaint (or a document or communication that purports to be a formal complaint). Under the final regulations, recipients also must document the basis for the recipient's conclusion that the recipient's response was not deliberately indifferent;[600] this provides an additional safeguard against a recipient intentionally treating imperfect paperwork as grounds for refusing to take action upon receipt of a document that purports to be a formal complaint.

We appreciate commenters' concerns that some students may be incapable of signing a document (for example, young students who have not learned how to write, or students with

[600] Section 106.45(b)(10)(ii).

certain disabilities). To address these concerns, we have revised the § 106.30 definition of "formal complaint" to describe a "document signed by a complainant" as "a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint." We have also added § 106.6(g) recognizing the legal rights of parents and guardians to act on behalf of complainants, including with respect to filing a formal complaint of sexual harassment.

Changes: We have revised the § 106.30 definition of "formal complaint" to describe a document, filed by a complainant or signed by a Title IX Coordinator, alleging sexual harassment, against a respondent, and requesting that the recipient investigate the allegation of sexual harassment. We have also revised the § 106.30 definition of "formal complaint" to explain that the phrase "document filed by a complainant" refers to a document or electronic submission (such as an e-mail or through an online portal provided for this purpose by the recipient) that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.

Parents' and Guardians' Rights to File a Formal Complaint

Comments: Commenters asserted that the proposed rules did not acknowledge that parents can file formal complaints on behalf of minor students and that the proposed rules therefore expect, for example, a third grade student to write down and sign a complaint document before getting help after experiencing sexual harassment. Commenters asserted that the formal complaint definition would leave minor students who may be incapable of writing and signing a document unprotected unless the Title IX Coordinator chooses to file a formal complaint on the student's behalf. Commenters argued that it is inappropriate to require a minor to sign any document

because minors lack the legal capacity to bind themselves by signature. Commenters wondered what schools must do if a parent later disagrees with their child's decision to file a formal complaint or if the minor's parent is not consulted prior to filing. Other commenters wondered how a school must handle a situation where the parent, but not the child, wishes to file a formal complaint. Commenters wondered if the proposed rules would allow a Title IX Coordinator to help a complainant fill out the contents of a formal complaint.

Discussion: To address commenters' concerns that the proposed rules did not contemplate the circumstances under which a parent might have the right to file a formal complaint on their child's behalf, we have added § 106.6(g), which acknowledges the legal rights of parents and guardians to act on behalf of a complainant, respondent, or other individual with respect to exercise of rights under Title IX, including but not limited to the filing of a formal complaint. Thus, if a parent has the legal right to act on behalf of their child, the parent may act on the student's behalf by, for example, signing a formal complaint alleging that their child was sexually harassed and asking the recipient to investigate. The parent does not, in that circumstance, become the complainant (because "complainant" is defined as an individual *who is alleged to be the victim* of sexual harassment)[601] but the final regulations clarify that a parent's (or guardian's) legal right to act on behalf of the complainant (or respondent) is not altered by these final regulations. The extent to which a recipient must abide by the wishes of a parent, especially in circumstances where the student is expressing a different wish from what the

[601] Section 106.30 (defining "complainant" to mean an individual "an individual *who is alleged to be the victim* of conduct that could constitute sexual harassment") (emphasis added).

student's parent wants, depends on the scope of the parent's legal right to act on the student's behalf.

Nothing in these final regulations precludes a Title IX Coordinator from assisting a complainant (or parent) from filling out a document intended to serve as a formal complaint; however, a Title IX Coordinator must take care not to offer such assistance to pressure the complainant (or parent) to file a formal complaint as opposed to simply assisting the complainant (or parent) administratively to carry out the complainant's (or parent's) desired intent to file a formal complaint. No person may intimidate, threaten, or coerce any person for the purpose of interfering with a person's rights under Title IX, which includes the right *not* to participate in a grievance process.[602]

Changes: We have added § 106.6(g) to the final regulations, acknowledging the legal rights of parents or guardians to act on behalf of a complainant, respondent, or other individual. We have added § 106.71 prohibiting retaliation and specifically protecting any individual's right to participate, or not participate, in a grievance process.

Methods of Reporting and Methods of Filing a Formal Complaint

Comments: Some commenters believed that the proposed rules would require students to report in person to a Title IX Coordinator (which, commenters asserted, is challenging for many students including those in schools that have satellite campuses and a single Title IX Coordinator located on a different campus). Commenters argued that a student who goes through the inconvenience of locating the Title IX Coordinator to make an in-person report, and then later

[602] Section 106.71 (prohibiting retaliation and specifically protecting any individual's right to participate or to choose not to participate in a grievance process).

decides to pursue a formal process, would need to once again go meet the Title IX Coordinator in-person to file a formal complaint. These commenters argued that the narrow, formal definition of "formal complaint" proposed in § 106.30 would impose unnecessary barriers for complainants and result in fewer formal complaints being filed. Commenters argued that requiring complainants to file formal complaints only with the Title IX Coordinator – who may be a school official with whom the complainant has no relationship – will make survivors less comfortable with the reporting process, when already only about ten percent of campus sexual assaults are reported.[603]

Commenters argued that a formal complaint should be allowed to be filed by telephone, e-mail, or in-person, at the complainant's discretion. Commenters wondered whether Title IX Coordinators have the discretion to help a complainant fill out a formal complaint; whether a Title IX Coordinator could write out a complainant's verbal report and have the complainant sign the document; and whether the complainant's signature could be an electronic signature. Commenters argued that without clarifying that the complainant may sign electronically, the proposed rules would make it impossible for complainants who are not physically present on campus (for example, due to studying abroad, or being enrolled in an online course) to file formal complaints. Other commenters expressed concern that electronic reporting systems would not be allowed under the proposed regulations. Commenters stated that many recipients (both elementary and secondary schools, and postsecondary institutions) use exclusively online, electronic submission systems; commenters suggested that § 106.30 should specify that a formal

[603] Commenters cited: U.S. Dep't. of Justice, Office of Justice Programs, National Institute of Justice, *Research Report: The Sexual Victimization of College Women* (2000).

complaint may be "submitted" or "filed" (but not "signed") to clarify that electronic submission systems can be used for the Title IX Coordinator to receive a formal complaint.

Discussion: Neither the proposed rules, nor the final regulations, required students to report in person to a Title IX Coordinator. However, to address commenters' concerns in this regard and to clarify that reporting to a Title IX Coordinator, and filing a formal complaint with the Title IX Coordinator, should be as accessible as possible for complainants, we have revised the § 106.30 definition of "formal complaint" to explain that a formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail by using the contact information required to be listed for the Title IX Coordinator under § 106.8(a), and by any additional method designated by the recipient. A formal complaint cannot be filed by telephone, because a formal complaint consists of a written document (or electronic submission, such as an e-mail or use of an online portal provided by the recipient for the purpose of accepting formal complaints); however, "any additional method designated by the recipient" may include an online submission system, and the final regulations now expressly reference the option for recipients to offer online portals for submission of formal complaints. The Department has also revised § 106.8(b) to specify that the contact information required to be listed for the Title IX Coordinator under § 106.8(a) must be prominently displayed on the recipient's website (if the recipient has a website) and in any of the recipient's handbooks or catalogs. As discussed above, neither the proposed rules, nor the final regulations, restrict the form in which notice (e.g., a report of alleged sexual harassment) is given to the Title IX Coordinator, an official with authority to institute corrective measures, or an elementary or secondary school employee. Such notice may be given to the Title IX Coordinator via the same contact information listed for the Title IX Coordinator in § 106.8(a) (including in person or by mail at the Title IX Coordinator's office address, by telephone, or by

e-mail), or by other means of communicating with the Title IX Coordinator.[604] The final regulations thus ensure that complainants have multiple clear, accessible methods for reporting (e.g., in person, telephone, mail, electronic mail) and multiple methods for filing formal complaints (e.g., in person, mail, electronic mail, any online portal provided by the recipient to allow electronic submissions of formal complaints), to reduce the inconvenience of "locating" the Title IX Coordinator in order to report or to file a formal complaint.[605]

We understand commenters' concerns that a student may not have a preexisting relationship with a Title IX Coordinator; however, we reiterate that filing a formal complaint is not necessary in order to report and receive supportive measures. The revisions to § 106.30 defining "formal complaint" give complainants the options of filing a formal complaint in person, by mail, by e-mail, and "any additional method designated by the recipient" so that the recipient has discretion to designate other methods for a formal complaint to be filed; further, a "document filed by a complainant" is stated to mean a mean a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant's physical or digital signature or otherwise indicates

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[604] Section 106.8(a) (expressly stating that any person may report sexual harassment by using any of the listed contact information for the Title IX Coordinator or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report, and such a report may be made "at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator.").

[605] We also reiterate that *any person* may report sexual harassment triggering the recipient's response obligations, although only a complainant (or Title IX Coordinator) may initiate a grievance process by filing or signing a formal complaint. We have revised § 106.8(a) to emphasize the fact that any person may report sexual harassment, whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sexual harassment, and we have also revised § 106.30, defining "actual knowledge," to state that "notice" constituting actual knowledge includes, but is not limited to, a report to the Title IX Coordinator as described in § 106.8(a). We have further revised § 106.8 to require recipients to notify all students, employees, parents and guardians of elementary and secondary school students, and others of the Title IX Coordinator's contact information, including prominently displaying that contact information on the recipient's website. These provisions ensure that all persons (not only complainants themselves) have a clear, accessible method of reporting sexual harassment.

that the complainant is the person filing the formal complaint. The final regulations therefore authorize a recipient to utilize electronic submission systems, both for reporting and for filing formal complaints. The final regulations do not preclude a Title IX Coordinator from helping a complainant fill out a formal complaint, so long as what the complainant files is a document or electronic submission that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.

Changes: We have revised the § 106.30 definition of "formal complaint" to specify that a formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under § 106.8(a), and by any additional method designated by the recipient. We have further revised this provision to state that "document filed by a complainant" means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant's digital or physical signature, or otherwise indicates that the complainant is the person filing the formal complaint.

Miscellaneous Concerns About the Formal Complaint Definition

Comments: Commenters wondered whether a complainant can file a formal complaint after having graduated. Commenters wondered whether a formal complaint could be filed against an unknown or unidentified respondent; commenters opined that the formal grievance procedures in § 106.45 seemed "elaborate" for circumstances where the perpetrator was not identified and thus there would be no possibility of punishment through a grievance proceeding. Commenters suggested that complainants should be allowed to make a formal complaint about systemic culture of harassment on a campus, not only against an individual respondent.

Discussion: The Department appreciates commenters' questions regarding whether a complainant may file a formal complaint after the complainant has graduated. The definition of "complainant" is any individual alleged to be the victim of conduct that could constitute sexual harassment; there is no requirement that the complainant must be a student, employee, or other designated relationship with the recipient in order to be treated as a "complainant" entitled to a prompt, non-deliberately indifferent response from the recipient. To clarify the circumstances under which a complainant may file a formal complaint (thereby requiring the recipient to investigate sexual harassment allegations) we have revised the § 106.30 definition of "formal complaint" to state that a complainant must be participating in, or attempting to participate in, the recipient's education program or activity at the time of filing a formal complaint. A complainant who has graduated may still be "attempting to participate" in the recipient's education program or activity; for example, where the complainant has graduated from one program but intends to apply to a different program, or where the graduated complainant intends to remain involved with a recipient's alumni programs and activities. Similarly, a complainant who is on a leave of absence may be "participating or attempting to participate" in the recipient's education program or activity; for example, such a complainant may still be enrolled as a student even while on leave of absence, or may intend to re-apply after a leave of absence and thus is still "attempting to participate" even while on a leave of absence. By way of further example, a complainant who has left school because of sexual harassment, but expresses a desire to re-enroll if the recipient appropriately responds to the sexual harassment, is "attempting to participate" in the recipient's education program or activity. Because a complainant is entitled under these final regulations to a prompt response that must include offering supportive measures, the Department's intention is that recipients will promptly implement individualized services

designed to restore or preserve the complainant's equal access to education,[606] regardless of whether a complainant files a formal complaint, so that if a complainant later decides to file a formal complaint, the complainant has already been receiving supportive measures that help a complainant maintain educational access.

The § 106.30 definition of "formal complaint" states that a formal complaint is a document that alleges sexual harassment "against a respondent," but the final regulations do not require a complainant to identify the respondent in a formal complaint. However, § 106.44(a) prohibits a recipient from imposing disciplinary sanctions on a respondent without first following a grievance process that complies with § 106.45.[607] Section 106.45(b)(2) requires the recipient to send the parties written notice of allegations including the identities of the parties, if known, "upon receipt of a formal complaint." Thus, a recipient in receipt of a complainant's formal complaint, where the complainant has refused to identify the respondent, will be unable to comply with the § 106.45 grievance process and will not be permitted to impose disciplinary sanctions against a respondent. In such a circumstance, the recipient still must promptly respond by offering supportive measures to the complainant, pursuant to §§ 106.44(a) and 106.44(b)(1).

Nothing in the final regulations precludes a recipient from responding to a complainant's request to investigate sexual harassment that allegedly has created a hostile environment on campus; however, a recipient cannot impose disciplinary sanctions against a respondent accused of sexual harassment unless the recipient first follows a grievance process that complies with § 106.45. A complaint filed by a complainant would not constitute a formal complaint triggering a

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[606] Section 106.44(a); § 106.30 (defining "supportive measures").
[607] *See also* § 106.45(b)(1)(i).

recipient's obligation to investigate unless it is a document alleging sexual harassment against a respondent, and the recipient would not be able to impose disciplinary sanctions against a respondent unless the respondent's identity is known so that the recipient follows a grievance process that complies with § 106.45. A recipient must investigate a complainant's formal complaint even if the complainant does not know the respondent's identity, because an investigation might reveal the respondent's identity, at which time the recipient would be obligated to send both parties written notice of the allegations under § 106.45(b)(2) and fulfill all other requirements of the § 106.45 grievance process.

Changes: We have revised § 106.30 defining "formal complaint" to provide that at the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.

Postsecondary Institution

Comments: Some commenters assumed that the Department's use of the term "institution of higher education" in the NPRM means an institution as defined in the Department's regulations implementing Title IV of the Higher Education Act of 1965, as amended, ("HEA") and thus concluded that the Department must undergo negotiated rulemaking in order to promulgate these final regulations.

Discussion: The Department's use of the term "institution of higher education" in the NPRM did not refer to "institution of higher education" as defined in the Department's regulations implementing Title IV of the HEA. As explained in more detail elsewhere in this preamble including the "Executive Orders and Other Requirements" subsection of the "Miscellaneous" section of this preamble, the Department is promulgating these regulations under Title IX and

not under the HEA. Accordingly, the Department is not subject to the requirement of negotiated rulemaking under Title IV of the HEA.

To make it exceedingly clear that these final regulations do not refer to "institutions of higher education" in the context of the HEA, the Department revised the final regulations to refer to "postsecondary institutions" instead of "institutions of higher education." The Department derives its definition of "postsecondary institution" from the existing definitions in Part 106 of Title 34 of the Code of Federal Regulations. The definition of "educational institution" in § 106.2(k) is a definition that applies to Part 106 of Title 34 of the Code of Federal Regulations. Section 106.2(k) defines an educational institution in relevant part as an applicant or recipient of the type defined by paragraph (l), (m), (n), or (o) of § 106.2. Paragraphs (l), (m), (n), and (o) of § 106.2 define an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, respectively. Accordingly, the Department defines a postsecondary institution as an institution of higher education as defined in § 106.2(l), an institution of undergraduate higher education as defined in § 106.2(m), an institution of professional education as defined in § 106.2(n), and an institution of vocational education as defined in § 106.2(o). In this manner, the Department defines the subset of educational institutions as defined in § 106.2(k) that constitute postsecondary institutions as defined in § 106.30. The remainder of the entities described as educational institutions in § 106.2(k) constitute elementary and secondary schools as explained in the section above on the definition of "elementary and secondary school." The definition of "postsecondary institution" applies only to §§ 106.44 and 106.45 of these final regulations.

Changes: The Department revises § 106.30 to define a "postsecondary institution" as used in §§ 106.44 and 106.45 to mean an institution of higher education as defined in § 106.2(l), an

institution of undergraduate higher education as defined in § 106.2(m), an institution of professional education as defined in § 106.2(n), and an institution of vocational education as defined in § 106.2(o), and replaces "institutions of higher education" with "postsecondary institutions" throughout the final regulations.

Respondent

Comments: At least one commenter appreciated that the Department clarified in its proposed definition that only a person in their individual capacity could be subjected to a Title IX investigation rather than an entire organization. Several commenters suggested that the Department alter the language from "respondent" to "responding party." Other commenters recommended adding the word "accused" instead of the word "reported" in an effort to eliminate bias from the proceedings. One commenter asserted that the word "reported" implies that only a mere accusation exists and the commenter argued that a mere accusation should not make a person a respondent. One commenter requested that the Department clarify that a respondent need not be a student, but may be a faculty or staff member. Another commenter asked for clarification regarding what constitutes a person "reported to be a perpetrator" since schools' obligations to the parties are only triggered when someone actually becomes a respondent or complainant.

Discussion: We acknowledge commenters' concerns with the language in the § 106.30 definition of "respondent." However, the Department declines to alter the term "respondent" to "responding party" because the two terms do not vary in a significant way and the term "respondent" is just as neutral as the proposed modification, without introducing potential confusion from use of "responding party" when throughout the final regulations the word "party" is used to refer to either a complainant or a respondent. The Department also disagrees with the

specific concern that using the language "reported" as opposed to "accused" to define the respondent, has the potential to bias the proceedings. The Department believes that the term "reported" carries a less negative connotation than the term "accused" without disadvantaging the complainant. We also acknowledge the suggestion that the final regulations clarify that a respondent can be a student, a faculty member, or other employee of the recipient, and the suggestion that the Department clarify whether a formal complaint is required for a party to become a "respondent." The Department believes that § 106.30 contains sufficiently clear, broad language indicating that any "individual" can be a respondent, whether such individual is a student, faculty member, another employee of the recipient, or other person with or without any affiliation with the recipient. The Department intentionally does not limit a "respondent" to include only individuals against whom a formal complaint has been filed, because even where a grievance process is not initiated, the recipient still has general response obligations under § 106.44(a) that may affect the person alleged to have committed sexual harassment (i.e., the respondent). While the terms "complainant" and "respondent" are commonly used when a formal proceeding is pending, in an effort to eliminate confusion and to promote consistency throughout the final regulations, the Department uses the terms "complainant" and "respondent" to identify the parties in situations where a formal complaint has not been filed as well as where a grievance process is pending.

Changes: None.

Sexual Harassment

Overall Support and Opposition for the § 106.30 Sexual Harassment Definition

Comments: Many commenters expressed support for the § 106.30 definition of sexual harassment. One commenter commended the Department's § 106.30 definition because it makes

clear that Title IX governs misconduct by colleges, not students, and addresses the real problem of sexual harassment while acknowledging that not all forms of unwanted sexual behavior – inappropriate and problematic as they may be – rise to the level of a Title IX violation on the part of colleges and universities. One commenter expressed strong support for shifting Title IX regulations to provide a clear, rational, understandable definition of what, precisely, constitutes sexual harassment and assault as opposed to current vague guidelines. One commenter stated that although some misinformed commenters and advocates have claimed the proposed rules would not require a school to respond to allegations of rape, the third prong of the § 106.30 definition clearly prohibits criminal sexual conduct itemized in incorporated regulation 34 CFR 668.46(a) including a single instance of rape. This commenter further expressed support for the second prong of the definition, which is limited to unwelcome conduct that is "severe, pervasive, and objectively offensive," which, the commenter stated, has proven to be the most controversial prong yet has three advantages: (1) it provides greater clarity and consistency for colleges and universities; (2) it minimizes the risk that federal definitions of sexual harassment will violate academic freedom and the free speech rights of members of the campus community; and (3) it recognizes that the Department's job is not to write new law. This commenter argued that if stakeholders desire a more expansive definition of sexual harassment, they should direct their concerns to Congress, and stated that the proposed rules clearly leave schools with the discretion to use their own, broader definitions of misconduct that do not fall within the school's Title IX obligations.

Several commenters supported the § 106.30 definition because they asserted that it would protect free speech and academic freedom while still requiring recipients to respond to sexual harassment that constitutes sex discrimination. One commenter argued that Title IX grants the

Department authority to impose procedural requirements on schools to effectuate the purpose of Title IX but not to redefine what discrimination is, and when it comes to peer harassment particularly, application of broad definitions modeled on Title VII (which, the commenter asserted, does not require denial of equal access or severity), rather than Title IX's narrower definition, has led to numerous infringements on student and faculty speech and expression. This commenter stated that based on the Department's experience observing how a broader definition has been applied, the Department reasonably may wish to adopt a narrower, clearer definition of harassment to avoid free speech problems, citing a Supreme Court case for the proposition that courts will not allow agencies to adopt regulations broadly interpreting a statute in a manner that raises potential constitutional problems.[608] This commenter argued that the Department cannot ban all unwelcome verbal conduct (i.e., speech), or even seriously offensive speech, and that correcting an overly broad definition of harassment is an appropriate exercise of an agency's authority. The commenter argued that a broad definition may result in an agency finding liability that a court later reverses or subjecting a recipient to a lengthy, speech-chilling investigation that courts later view as a free speech violation;[609] thus, an agency needs to define harassment narrowly to avoid free speech problems *ex ante* rather than try to rely on ad-hoc First Amendment exceptions to a broad definition.

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[608] Commenters cited: *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. and Const. Trades Council*, 485 U.S. 568, 574-575 (1988) (rejecting agency's broad interpretation of law because it would raise possible free speech problems); *NAACP v. Button*, 371 U.S. 415, 438 (1963) (stating broad prophylactic rules in the area of free expression are forbidden because the First Amendment demands precision of regulation).

[609] Commenters cited: *Rodriguez v. Maricopa Cmty. Coll. Dist.*, 605 F.3d 703 (9th Cir 2010); *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000); *Lyle v. Warner Bros.*, 132 P.3d 211, 300 (Cal. 2006) (Chin, J., concurring); *Meltebeke v. Bureau of Labor & Indus.*, 903 P.2d 351 (Or. 1995).

Several commenters supported the § 106.30 definition, arguing that the proposed rules correctly defined the harassment a college must respond to as severe, pervasive conduct that denies equal access to an education – not conduct or speech that is merely "unwelcome," as other commenters would like. One commenter argued that students and faculty must be able to discuss sexual issues, even if that offends some people who hear it, and the fact that speech is deeply offensive to a listener is not a sufficient reason to suppress it.[610] One commenter asserted that, contrary to the suggestion of other commenters who have argued that individual instances of unwelcome speech should be suppressed to prevent any possibility of a hostile environment later developing, such a prophylactic rule to prevent harassment would be a sweeping rule, grossly overbroad in violation of the First Amendment.[611] The commenter further argued that this First Amendment rule fully applies to colleges because the Supreme Court rejected the idea that "First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, 'the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'"[612] Thus, the commenter asserted, even vulgar or indecent college speech is protected.[613] This commenter argued that because the First Amendment does not permit broad prophylactic rules against harassing speech, for a college to punish speech that is not severe and pervasive is a violation of the First Amendment.[614] The commenter further argued that even if speech is severe *or* pervasive, and thus could otherwise violate Federal employment laws like Title VII, faculty speech that offends co-workers may be

[610] Commenters cited: *Snyder v. Phelps*, 562 U.S. 443 (2011).
[611] Commenters cited: *NAACP v. Button*, 371 U.S. 415, 438 (1963).
[612] Commenters cited: *Healy v. James*, 408 U.S. 169, 180 (1972).
[613] Commenters cited: *Papish v. Bd. of Curators*, 410 U.S. 667 (1973).
[614] Commenters cited: *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008).

protected under academic freedom when it does not target a specific employee based on race or gender[615] and the Supreme Court intentionally has adopted a narrower definition of harassment under Title IX than under Title VII, requiring that conduct be both severe and pervasive enough to deny equal educational access, as opposed to merely fostering a hostile environment through severe or pervasive conduct.[616] By contrast to the second prong of the § 106.30 definition, the commenter argued that the Department does have authority to require schools to process claims of groping-based assaults, even if the groping did not by itself deny educational access, as a prophylactic rule to prevent such conduct from recurring and spreading, and potentially causing more harm to the victim that culminates in denial of educational access; according to this commenter, the difference is that because ignoring even a misdemeanor sexual assault creates a high risk that such conduct will persist or spread to the point of denying access and prophylactic rules are constitutionally acceptable when applied to conduct (such as sexual assault), not speech.

One commenter asserted that we live in a hypersensitive age in which disagreeable views are considered an assault on students' emotional safety or health, even though such disagreement is protected by the First Amendment.[617] This commenter agreed with the proposed rules' requirement that speech must interfere with educational "access" and not merely create a hostile environment because from a First Amendment perspective, under schools' hostile learning environment harassment codes, students and campus newspapers have been charged with racial

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[615] Commenters cited: *Rodriguez v. Maricopa Cmty. Coll. Dist.*, 605 F.3d 703 (9th Cir. 2010).
[616] Commenters cited: *Davis v. Monroe Dep't. of Educ.*, 526 U.S. 629, 633, 650, 651, 652, 654 (1999) (noting that the Court repeated the severe "and" pervasive formulation five times).
[617] Commenters cited: Jonathan Haidt & Greg Lukianoff, *The Coddling of the American Mind* (Penguin Press 2018).

or sexual harassment for expressing commonplace views about racial or sexual subjects, such as criticizing feminism, affirmative action, sexual harassment regulations, homosexuality, gay marriage, or transgender rights, or discussing the alleged racism of the criminal justice system.[618] The commenter argued that to prevent speech on campus about racial or sexual subjects from being unnecessarily chilled or suppressed, a more limited definition of sexual harassment is necessary than the expansive hostile environment concept.[619] Another commenter stated that courts have struck down campus racial and gender harassment codes that banned speech that created a hostile environment, but did not cause more tangible harm to students.[620] This commenter argued that if a regulation or campus code bans hostile environments created from verbal conduct, without requiring more tangible harm, people can and will file complaints, and bring lawsuits, over constitutionally protected speech that offended them and that including a vague First Amendment exception in such codes or regulations is not enough to protect free speech because when liability or punishment is imposed, the decision-maker doing so will just claim that the penalty is not based on the content of the speech and that any First Amendment exception does not apply. The commenter argued that to protect free speech, the very definition of harassment must include a requirement that verbal conduct deny access to an education.

The commenter argued that the § 106.30 definition of harassment properly requires that verbal conduct be severe, not just pervasive or persistent as prior Department guidance

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[618] Commenters cited: Jerome Woehrle, *Free Speech Shrinks Due to Bans on Hostile or Offensive Speech*, LIBERTY UNYIELDING (Nov. 23, 2017), https://libertyunyielding.com/2017/11/23/free-speech-shrinks-due-bans-hostile-offensive-speech/ (citing various sources including books and articles).
[619] Commenters cited: *Rodriguez v. Maricopa Cmty. Coll. Dist.*, 605 F.3d 703 (9th Cir. 2010) (dismissing racial harassment lawsuit over instructor's racially insensitive e-mails about immigration based on the First Amendment, even though the e-mails were offensive to Hispanic employees).
[620] Commenters cited: *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995); *UWM Post v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991).

suggested. The commenter asserted that just because offensive ideas are pervasive or persistent on a college campus does not strip the ideas of First Amendment protection and thus, only severe verbal conduct, such as fighting words, threats, and intentional infliction of severe emotional distress, should be prohibited. One commenter similarly argued that the same result is appropriate in the elementary and secondary school context, arguing that the Supreme Court's *Davis* decision expressly required that conduct be severe and pervasive for Title IX liability, unlike workplace conduct under Title VII, and that the Court did so precisely because of the inevitability that elementary and secondary school students frequently behave in ways that would be unacceptable among adult workers.[621] The commenter surmised that the *Davis* Court also likely did so to address free speech concerns raised by amici, who discussed serious problems with using the broader workplace severe or pervasive standard for college students' speech. According to this commenter, college students have broader free speech rights than employees do, and the harassment definition as to their verbal conduct thus needs to be narrower under Title IX than under Title VII. Similarly, another commenter asserted that colleges are not like workplaces where it may be natural to ban offensive speech to maximize efficiency or prevent a hostile or offensive environment; rather, colleges exist for the purpose of exchanging ideas and pursuing the truth even if words and ideas offend listeners.[622] Thus, the commenter asserted, schools should not be required to punish speakers unless their speech interferes with access to an education; according to this commenter, discussion of unpleasant sexual realities and unpopular viewpoints should not be silenced.

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[621] Commenters cited: *Davis*, 526 U.S. 629, 652 (1999).
[622] Commenters cited: *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) (holding hostile environment harassment code was unconstitutionally vague and overbroad and was not a valid prohibition of fighting words).

One commenter asserted that the *Davis* standard, incorporated into the second prong of the § 106.30 definition, allows schools to prohibit sexual violence, to discipline those who commit it, and to remedy its effects and also allows schools to punish students when they determine that a student has engaged in expression (without accompanying physical or other conduct) that is discriminatory based on sex and that interferes with a student's access to education because of its severity, pervasiveness, and objective offensiveness.[623] This commenter stated it is precisely because expression, and not just physical conduct, may be restricted or punished as harassment that the Supreme Court carefully crafted the *Davis* standard for Title IX, reiterating it multiple times in its majority opinion and distinguishing it from the employment standard applied under Title VII.

One commenter asserted that, to the extent the proposed regulations appear to be a departure from a legally sound approach, as some critics have alleged, that is only because the Departments of Education and Justice have, in recent years, insisted upon an unconstitutionally broad definition of sexual harassment unsupported by statutes, regulations, or case law while the new proposed definition is in fact a welcome return to consistency with the law itself. This commenter further noted that while *Davis* sets forth constitutional guidelines for what may and

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[623] Commenters further argued that there is no doubt that First Amendment interests are implicated when expression on public college campuses is regulated; as the Supreme Court has established, "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). The Supreme Court has also rejected the idea that "because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, 'the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" *Healy v. James*, 408 U.S. 169, 180 (1972) (internal citations omitted). Further, these protections apply even to highly offensive speech on campus: "[T]he mere dissemination of ideas – no matter how offensive to good taste – on a state university campus may not be shut off in the name alone of 'conventions of decency.'" *Papish v. Bd. of Curators*, 410 U.S. 667, 670 (1973) (internal citations omitted).

may not be punished under Title IX, it does not preclude recipients from addressing conduct that does not meet that standard, in non-punitive ways including for example providing the complainant with supportive measures, responding to the conduct in question with institutional speech, or offering programming designed to foster a welcoming campus climate more generally.

One commenter supported the § 106.30 definition based on belief that the Federal government should not make a solution to problems of interpersonal relations (and sometimes intimate relations) a precondition to the receipt of Federal funds because schools do not hold a "magic bullet" to prevent all student relationships from going bad, and university resources should not be diverted to respond to civil rights investigations or litigation based on just a student's post-hoc, subjective feelings of being harassed or disrespected. Another commenter believed the new definition would stop schools from acting as the "sex police." This commenter argued that schools have interpreted the current, extremely broad, definition to include asking too many times for sex; nine second stares; fist bumps; and wake up kisses, effectively requiring schools to police the sex lives of students. One commenter supported the § 106.30 definition asserting that harassment definitions should not assume weaknesses or vulnerabilities that the genders have spent decades trying to erase. Other commenters supported the definition believing it would benefit those truly sexually harassed or assaulted and put a stop to false accusations after regretful hookups. One commenter asserted that a clear definition of sexual harassment actionable under Title IX is crucial to ensure that no woman feels ignored or mistreated by a particular investigator or administrator and thus making the definition consistent with Supreme Court precedent is an important advancement for women.

Discussion: The Department appreciates commenters' support for the § 106.30 definition of sexual harassment. The Department agrees that the final regulations utilize a sexual harassment

definition appropriate for furthering Title IX's non-discrimination mandate while acknowledging the unique importance of First Amendment freedoms in the educational context. As described in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, the NPRM proposed a three-pronged definition of sexual harassment recognizing *quid pro quo* harassment by any recipient employee (first prong), unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to education (second prong), and sexual assault (third prong).

Overall, as revised in these final regulations, this three-part definition in § 106.30 adopts the Supreme Court's formulation of actionable sexual harassment, yet adapts the formulation for administrative enforcement in furtherance of Title IX's broad non-discrimination mandate by adding other categories (*quid pro quo*; sexual assault and three other Clery Act/VAWA offenses[624]) that, unlike the *Davis* formulation, do not require elements of severity, pervasiveness, or objective offensiveness. The Department assumes that a victim of *quid pro quo* sexual harassment or the sex offenses included in the Clery Act, as amended by VAWA, has been effectively denied equal access to education. The § 106.30 definition captures categories of misconduct likely to impede educational access while avoiding a chill on free speech and academic freedom. The Department agrees with commenters noting that the Department has a responsibility to enforce Title IX while not interfering with principles of free speech and academic freedom, which apply in elementary and secondary schools as well as postsecondary

[624] These final regulations expressly include four Clery Act/VAWA offenses as sexual harassment as defined in § 106.30: sexual assault, dating violence, domestic violence, and stalking.

institutions in a manner that differs from the workplace context where Title VII prohibits sex discrimination.

The Department agrees that the Supreme Court carefully and deliberately crafted the *Davis* standard for when a recipient must respond to sexual harassment in recognition that school environments are unlike workplace environments. Precisely because expressive speech, and not just physical conduct, may be restricted or punished as harassment, it is important to define actionable sexual harassment under Title IX in a manner consistent with respect for First Amendment rights, and principles of free speech and academic freedom, in education programs and activities. Likewise, the Department agrees with the commenter who noted the distinction between a standard for when speech is actionable versus a standard for when physical conduct is actionable; the former requires a narrowly tailored formulation that refrains from effectively applying, or encouraging recipients to apply, prior restraints on speech and expression, while the latter raises no constitutional concerns with respect to application of broader prohibitions. Thus, *quid pro quo* harassment[625] and the four Clery Act/VAWA offenses constitute *per se* actionable sexual harassment, while the "catch-all" *Davis* formulation that covers purely verbal harassment also requires a level of severity, pervasiveness, and objective offensiveness. The "catch-all"

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[625] While *quid pro quo* harassment by a recipient's employee involves speech, the speech is, by definition, designed to compel conduct; thus, the Department believes that a broad prohibition against an employee conditioning an educational benefit on participation in unwelcome sexual conduct does not present constitutional concerns with respect to protection of speech and expression. *See, e.g.*, *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 207 (3d Cir. 2001) ("government may constitutionally prohibit speech whose *non-expressive* qualities promote discrimination. For example, a supervisor's statement 'sleep with me or you're fired' may be proscribed not on the ground of any expressive idea that the statement communicates, but rather because it facilitates the threat of discriminatory conduct. Despite the purely verbal quality of such a threat, it surely is no more 'speech' for First Amendment purposes than the robber's demand 'your money or your life.'") (emphasis in original).

Davis formulation is a narrowly tailored standard to ensure that speech and expression are prohibited only when their seriousness and impact avoid First Amendment concerns.

The Department does not intend, through these final regulations, to encourage or discourage recipients from governing the sex and dating lives of students, or to opine on whether or not recipients have become the "sex police;" whether such a trend is positive or negative is outside the purview of these final regulations. The Department's definition of sexual harassment is designed to hold recipients accountable for meaningful, fair responses to sexual harassment that violates a person's civil right to be free from sex discrimination, not to dictate a recipient's role in the sex or dating lives of its students. The Department emphasizes that any person can be a victim, and any person can be a perpetrator, of sexual harassment, and like the Title IX statute itself, these final regulations are drafted to be neutral toward the sex of each party.[626]

Changes: We have revised the § 106.30 definition of sexual harassment in four ways: First, by moving the clause "on the basis of sex" from the second prong to the introductory sentence of the entire definition to align with Title IX's focus on discrimination "on the basis of sex" for all conduct that constitutes sexual harassment; second, by specifying that the *Davis* elements in the second prong (severe, pervasive, objectively offensive, denial of equal access) are determined under a reasonable person standard; third, by adding the other three Clery Act/VAWA sex offenses (dating violence, domestic violence, and stalking) to the sexual assault reference in the third prong; and fourth, by referencing the Clery Act and VAWA statutes rather than the Clery Act regulations.

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[626] *Compare* 20 U.S.C. 1681(a) ("*No person* in the United States shall, on the basis of sex, be excluded …") (emphasis added) *with* § 106.30 (defining "complainant" to mean "*an individual* who is alleged to be the victim…") (emphasis added).

Comments: Many commenters opposed the § 106.30 definition of sexual harassment, with some commenters arguing that the definition is unfair, would make schools unsafe and vulnerable and retraumatize survivors, is misogynistic, and promotes a hostile environment. Commenters also stated that it would negatively impact all students, especially LGBTQ students including transgender and non-binary people who are already more reluctant to report for fear of facing bias. Many commenters directed the Department to information and data about prevalence, impact, and other dynamics of sexual harassment that is addressed in the "General Support and Opposition" section of this preamble, arguing that the "narrowed" or "stringent" definition of sexual harassment in the NPRM would increase the prevalence, impact, and costs of sexual harassment on all victims and decrease or chill reporting of sexual harassment including disproportionately negative consequences for particular demographic populations. Many commenters asserted that the proposed definition fails to encompass the wide range of types of sexual harassment that students frequently face. Many commenters argued that requiring schools to only investigate the most serious cases gives a green light to all kinds of inappropriate behavior that should also be investigated. A few commenters contended that screening out harassment claims that do not meet certain thresholds contributes to a society-wide problem where from a young age girls are told in subtle and less subtle ways to be good, nice, and quiet, that girls don't matter as much as boys, and that speaking up to say something against a boy will not be taken seriously.

One commenter asserted that *Alexander v. Yale* established that sexual harassment and assault in schools is not only a crime, but also impedes equitable access to education.[627] Several

[627] Commenters cited: *Alexander v. Yale Univ.*, 459 F. Supp. 1 (D. Conn. 1977).

commenters asserted that any act of rape or assault denies the victim the ability to successfully participate in college and that a person who is raped or assaulted is traumatized, which affects all aspects of college participation and academic performance. Many commenters contended that if enacted, the proposed rules would raise a question for a victim: was my rape/assault bad enough or severe enough to warrant someone listening to me?

Several commenters asserted that by narrowing the definition of sexual harassment, the proposed rules would invalidate the adverse experiences to which victims have been subjected. One commenter argued that while there is no silver bullet to fixing the problem of sexual assault and harassment, narrowing what actions are deemed assault in the realm of Title IX will muddy the waters even further; the commenter argued that what people perceive as vague is necessary to ensure victims are being treated fairly. Several commenters asserted that as all victims of harassment are unique, so are forms of harassment unique and should remain widely defined.

Several commenters argued that the definitions of sexual harassment need to be developed further to include cultural differences in sexual harassment and discrimination. Other commenters asserted that the § 106.30 definition of sexual harassment is very limiting compared to what students on campus really feel and experience; further, students may understand an experience differently based on race, sex, and cultural factors leading to misunderstanding as to what sexual assault or sexual harassment is or is not. A few commenters argued that sexual violence or sexual violation would be a better term to use than sexual harassment. At least one commenter asserted that accused students sometimes do not recognize their behavior as violent and wondered how that reality plays into Title IX reform. At least one commenter characterized the use of qualifiers like severe and pervasive in the sexual harassment definition as creating a

fact-bound focus on the behavior of the victim, an unfair result given that much of the conduct complained about may also be criminal.

Discussion: The Department disagrees that the three-pronged definition of sexual harassment in § 106.30 is unfair, misogynistic, will make schools unsafe, leave students vulnerable, retraumatize survivors, promote a hostile environment, or disadvantage LGBTQ students. As described above, the definition is rooted in Supreme Court Title IX precedent and principles of free speech and academic freedom, applies equally to all persons regardless of sexual orientation or gender identity, provides clear expectations for when schools legally must respond to sexual harassment, and leaves schools discretion to address misconduct that does not meet the Title IX definition. The Department appreciates the data and information commenters referred to regarding the prevalence and impact of sexual harassment on students (and employees) of all ages and characteristics. Precisely because sexual harassment affects so many students in such detrimental ways, the Department has chosen, for the first time, to exercise its authority under Title IX to codify regulations that mandate school responses to assist survivors in the aftermath of sexual harassment.

The Department does not disagree with commenters' characterizations of the *Davis* standard as "narrow" or even "stringent," but we contend that as a whole, the range of conduct prohibited under Title IX is adequate to ensure that abuse of authority (i.e., *quid pro quo*), physical violence, and sexual touching without consent (i.e., the four Clery Act/VAWA offenses) trigger a school's obligation to respond without scrutiny into the severity or impact of the conduct, while verbal and expressive conduct crosses into Title IX sex discrimination (in the form of sexual harassment) when such conduct is so serious that it effectively denies a person equal access to education. As a whole, the definition of sexual harassment in § 106.30 is

significantly broader than the *Davis* standard alone,[628] and in certain ways broader than the judicial standards applied to workplace sexual harassment under Title VII.[629] The final regulations provide students, employees, and recipients clear direction that when incidents of *quid pro quo* harassment or Clery Act/VAWA offenses are reported to the recipient, the recipient must respond without inquiring into the severity or pervasiveness of such conduct. The Department understands commenters' concerns that the *Davis* standard's elements (severity, pervasiveness, and objective offensiveness) will exclude from Title IX incidents of verbal harassment that do not meet those elements. However, the Department does not agree that this standard for verbal harassment (and physical conduct that does not constitute a Clery Act/VAWA offense included in these final regulations) will discourage students or employees from reporting harassment, fail to require recipient responses to a wide range of sexual harassment frequently faced by students, or send the message that girls do not matter as much as boys. The Department believes that State and local educators desire a safe, learning-conducive environment for students and employees, and that recipients will evaluate incidents under the *Davis* standard from the perspective of a reasonable person in the shoes of the complainant, such that the ages, abilities, and relative positions of authority of the individuals involved in an incident will be taken into account. To reinforce this, the final regulations revise the second

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[628] This is because the *Davis* standard, alone, evaluates even physical assaults and violence through the lens of whether an incident is severe, pervasive, and objectively offensive so as to deny a person equal access; however, under these final regulations these elements do not apply to sex-based incidents of *quid pro quo* harassment, sexual assault, dating violence, domestic violence, or stalking.

[629] Under Title VII, sexual harassment (including *quid pro quo*, hostile environment, and even sexual assault) must be shown to alter the conditions of employment. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986). Under these final regulations, *quid pro quo* harassment, sexual assault, dating violence, domestic violence, and stalking do not require a showing of alteration of the educational environment. As previously stated, the Department assumes that a victim of *quid pro quo* sexual harassment or the criminal sex offenses included in the Clery Act, as amended by VAWA, has been effectively denied equal access to education.

prong of the sexual harassment definition to specify that the *Davis* elements are "determined by a reasonable person" to be so severe, pervasive, and objectively offensive that a person is effectively denied equal access to education. The Department does not dispute commenters' characterization that only serious situations will be actionable under this definition, but following the Supreme Court's reasoning in *Davis*, that stricture is appropriate in educational environments where younger students are still learning social skills and older students benefit from robust exchange of ideas, opinions, and beliefs.

Contrary to commenters' assertions, neither the *Davis* standard nor the sexual harassment definition holistically gives a green light to inappropriate behavior. Rather, the three-pronged definition of sexual harassment in § 106.30 provides clear requirements for recipients to respond to sexual harassment that constitutes sex discrimination prohibited under Title IX, while leaving recipients flexibility to address other forms of misconduct to the degree, and in the manner, best suited to each recipient's unique educational environment.

The Department agrees with commenters that for decades, sexual harassment has been a recognized form of sex discrimination that impedes equal access to education, and that rape and assault traumatize victims in ways that negatively affect participation in educational programs and activities. For this reason, contrary to the misunderstanding of many commenters, the Department intentionally included sexual assault as a *per se* type of sexual harassment rather than leaving sexual assault to be evaluated for severity or pervasiveness under the *Davis* standard. No student or employee traumatized by sexual assault needs to wonder whether a rape or sexual assault was "bad enough" or severe enough to report and expect a meaningful response from the survivor's school, college, or university. Far from narrowing what constitutes sexual assault, the Department incorporates the offense of sexual assault used in the Clery Act, which

broadly defines sexual assault to include all the sex offenses listed by the FBI's Uniform Crime Reporting system. The Department agrees that all victims of harassment are unique, and that harassment can take a myriad of unique forms. For this reason, the Department defines sexual harassment to include the four Clery Act/VAWA offenses, leaves the concept of *quid pro quo* harassment broad and applicable to any recipient employee, and does not limit the endless variety of verbal or other conduct that could meet the *Davis* standard. While understanding that sexual harassment causes unique harm to victims distinct from the harm caused by other misconduct, the final regulations define sexual harassment similar to the way in which fraud is understood in the legal system, where "Fraud is a generic term, which embraces all the multifarious means which human ingenuity can devise and which are resorted to by one individual to gain an advantage over another by false suggestions or by the suppression of the truth."[630] Similarly, sexual harassment under § 106.30 is a broad term that encompasses the "multifarious means which human ingenuity can devise" to foist unwelcome sex-based conduct on a victim jeopardizing educational pursuits. Thus, the Department agrees with commenters that some level of open-endedness is necessary to ensure that relevant misconduct is captured. The Department believes that the § 106.30 definition provides standards that are clear enough so that victims, perpetrators, and recipients understand the type of conduct that will be treated as sex discrimination under Title IX, and open-ended enough to not artificially foreclose behaviors that may constitute actionable sexual harassment.

The Department understands commenters' concerns that cultural differences can impact the way that sexual harassment is experienced. Cultural and other personal factors can affect

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[630] *Stapleton v. Holt*, 250 P.2d 451, 453-54 (Okla. 1952).

sexual harassment and sexual violence dynamics, and the Department believes the definition of sexual harassment must remain applicable to all persons, regardless of cultural or other identity characteristics. To the extent that cultural or other personal factors affect a person's understanding about what constitutes sexual harassment, the Department notes that with one exception,[631] no type of sexual harassment depends on the intent or purpose of the perpetrator or victim. Thus, if a perpetrator commits misconduct that meets one or more of the three prongs, any misunderstanding due to cultural or other differences does not negate the commission of a sexual harassment violation. Similarly, a respondent's lack of comprehension that conduct constituting sexual harassment violates the bodily or emotional autonomy and dignity of a victim does not excuse the misconduct, though genuine lack of understanding may (in a recipient's discretion) factor into the sanction decision affecting a particular respondent, or a recipient's willingness to facilitate informal resolution of a formal complaint of sexual harassment.

While the Department appreciates commenters' suggestions that "sexual violence" or "sexual violations" would be preferred terms in place of "sexual harassment," for clarity and ease of common understanding, the Department uses "sexual harassment" as the Supreme Court used that term when acknowledging that sexual harassment can constitute a form of sex discrimination covered by Title IX.

The Department disagrees that the *Davis* standard inappropriately or unfairly creates a fact-bound focus on the *victim's* behavior; rather, elements of severity, pervasiveness, and

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[631] The one exception is the offense of "fondling," included in the Clery Act under the term "sexual assault." Under the Clery Act (referring to the FBI's Uniform Crime Reporting system), fondling is a sex offense that means the "touching of the private body parts of another person *for the purpose of sexual gratification*, without the consent of the victim[.]" *E.g.,* U.S. Dep't. of Education, Office of Postsecondary Education, *The Handbook for Campus Safety and Security Reporting* 3-6 (2016), https://www2.ed.gov/admins/lead/safety/handbook.pdf. (emphasis added).

objective offensiveness focus factually on the nature of the misconduct itself – not on the victim's response to the misconduct. To reinforce and clarify that position, we have revised § 106.30 defining "sexual harassment" to expressly state that the *Davis* elements of severity, pervasiveness, objective offensiveness, and effective denial of equal access, are evaluated from the perspective of a "reasonable person," so that the complainant's individualized reaction to sexual harassment is not the focus when a recipient is identifying and responding to Title IX sexual harassment incidents or allegations.

Changes: We have revised the § 106.30 definition of sexual harassment by specifying that the elements in the *Davis* standard (severe, pervasive, objectively offensive, and denial of equal access) are determined under a reasonable person standard.

Comments: Several commenters asserted that the § 106.30 definition ignores a multitude of objectionable actions thereby excusing large swaths of harassing activity from scrutiny under Title IX. Other commenters objected to the § 106.30 definition on the ground that there are a wide variety of circumstances in which unwelcome conduct on the basis of sex would violate Title IX, but which would fall outside the proposed definition of sexual harassment; several such commenters argued that the net effect of the proposed definition would be to exempt from enforcement by the Department several distinct categories of Title IX violations, and under Title IX the Department has no authority to create such exemptions.

A few commenters asserted that some sexual predators engage in grooming behaviors intended to sexualize an abuser's relationships with children gradually while building a sense of

trust with intended victims.[632] Commenters asserted that grooming behaviors can include behaviors such as making inappropriate jokes, sharing pornographic photos or videos, inappropriately entering locker rooms when students are undressing, singling out children for gifts, trips or special tasks, and finding times and places to be alone with children. Commenters argued that under the proposed rules, these behaviors might not meet the definition of sexual harassment, yet responding to such behaviors is essential to preventing child sexual abuse.

Some commenters expressed concern that the § 106.30 definition discounts certain types of sex-based harassment that, although ostensibly "less severe," nonetheless adversely affect survivors' participation in educational programs. A few such commenters categorized types of sex-based harassment[633] as: (i) "Sexual assault" defined as involving any unwelcome sexual contact, which the commenters stated is covered by the proposed rules' definition of harassment; (ii) "sex-based harassment" as an umbrella term to mean behavior that derogates, demeans, or humiliates an individual based on that individual's sex but does not involve physical contact, and which comes in three forms: "sexual coercion" or *quid pro quo* involving bribes or threats that make an important outcome contingent on the victim's sexual cooperation; "unwanted sexual attention" involving expressions of romantic or sexual interest that are unwelcome, unreciprocated, and offensive to the recipient; and "gender harassment" encompassing verbal

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[632] Commenters cited: Helen C. Whittle *et al.*, *A Comparison of Victim and Offender Perspectives of Grooming and Sexual Abuse*, 36 DEVIANT BEHAVIOR 7 (2015).

[633] Commenters cited: Louise Fitzgerald *et al.*, *Measuring sexual harassment: Theoretical and psychometric advances*, 17 BASIC & APPLIED SOCIAL PSYCHOL. 4 (1995); Jennifer L. Berdahl, *Harassment based on sex: Protecting social status in the context of gender hierarchy*, 32 ACAD. OF MGMT. REV. 641 (2007); Emily Leskinen *et al.*, *Gender harassment: Broadening our understanding of sex-based harassment at work*, 35 LAW & HUM. BEHAVIOR 1 (2011); National Academies of Science, Engineering, and Medicine, *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine* (Frasier F. Benya *et al.* eds., 2018).

and nonverbal behaviors not aimed at sexual cooperation but that convey insulting, hostile, and degrading attitudes about one sex (though devoid of sexual content). These commenters asserted that while sexual coercion remains covered under the §106.30 definition (under the first prong regarding *quid pro quo* harassment), unwanted sexual attention is covered only if it is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to education, and gender harassment is not covered at all by the regulatory definition even though it is the most common type of sex-based harassment in academia as well as the workplace. These commenters also asserted that research shows that gender harassment that is either severe or occurs frequently over a period of time can result in the same level of negative professional, academic, and psychological outcomes as isolated incidents of sexual coercion.[634] These commenters concluded that the only way to truly combat sexual harassment is to enact policies that address and prevent the most common form of sexual harassment (i.e., gender harassment).

Several commenters expressed concern that the proposed rules do not expressly address how technology has changed in the decades since Title IX was enacted (e.g., e-mail, the internet) and asserted that the final regulations must squarely address cyber-harassment on the basis of sex, which commenters stated is a severe and growing trend for students.[635] In addition to asking

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[634] Commenters cited: National Academies of Science, Engineering, and Medicine, *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine* 69 (Frasier F. Benya *et al.* eds., 2018). Commenters further noted that sexual minorities experience gender harassment at more than double the rates of heterosexuals. *Id.* at 46.

[635] Commenters cited: American Association of University Women, *Crossing the Line: Sexual Harassment at School* (2011), for the proposition that: in the 2010-2011 school year, 36 percent of girls, 24 percent of boys, and 30 percent of all students who took the survey in grades seven through 12 experienced sexual harassment online; 18 percent of these students did not want to go to school, 13 percent found it hard to study, 17 percent had trouble sleeping, and eight percent wanted to stay home from school. Commenters also asserted that college students, too, face online sexual harassment, and in support of this assertion, some commenters cited to: David Goldman, *Campus Uproar Over Yik Yak App After Sex, Harassment, Murder*, CNN.COM (May 7, 2015), https://money.cnn.com/2015/05/07/technology/yik-yak-university-of-mary-washington/index html.

that online or cyber-harassment be explicitly referenced, several of these commenters also asserted that the appropriate standard for judging whether cyber-harassment must be responded to is whether such harassment meets the description of harassment set forth in the Department's 2001 Guidance.

Several commenters asserted that school boards in elementary and secondary schools will encounter confusion among the proposed Title IX sexual harassment regulatory definition, State laws governing bullying, abuse, or crimes that mandate reports to law enforcement or child welfare agencies, and school discipline violations, each of which has its own procedures that must be followed. Similarly, several commenters asserted that postsecondary institutions will encounter confusion due to differences between the § 106.30 definition of sexual harassment and various State laws that define sexual harassment or sexual misconduct more broadly; these commenters referenced laws in states such as California, New York, New Jersey, Illinois, and others.

At least one commenter asserted that the requirement that any of the conduct defined as sexual harassment under § 106.30 must be "on the basis of sex" lacks guidance as to how that element must be applied; one commenter wondered if this element means that a complainant must try to prove the respondent's state of mind when most respondents would simply deny acting on the basis of the victim's sex and insist that the action was based on romance, anger, emotion, etc., or whether a complainant would need to provide statistics to show a disparate impact on people of the victim's sex in order to show that the respondent's conduct was "on the basis of sex."

At least one commenter urged the Department to seek input from stakeholders, including education leaders, on what types of technical assistance would be most helpful to school districts seeking to implement the regulatory definition.

Discussion: The Department acknowledges that not every instance of subjectively unwelcome conduct is captured under the three-pronged definition of sexual harassment in § 106.30. However, the Department believes that the conduct captured as actionable under Title IX constitutes precisely the sex-based conduct that the Supreme Court has indicated amounts to sex discrimination under Title IX, as well as physical conduct that might not meet the *Davis* definition (e.g., a single instance of rape, or a single instance of *quid pro quo* harassment). The Department disagrees that it is exempting categories of Title IX violations from coverage under Title IX; to the contrary, the § 106.30 definition ensures that sex discrimination in the form of sexual harassment clearly falls under recipients' Title IX obligations to operate education programs and activities free from sex discrimination.

The Department appreciates commenters' concerns regarding grooming behaviors, which can facilitate sexual abuse. While the sexual harassment definition does not identify "grooming behaviors" as a distinct category of misconduct, some of the conduct identified by commenters and experts as constituting grooming behaviors may constitute § 106.30 sexual harassment, and behaviors that do not constitute sexual harassment may still be recognized as suspect or inappropriate and addressed by recipients outside Title IX obligations.

Similarly, the Department understands commenters' and experts' assertions that unwelcome conduct that is not "severe" can still adversely impact students and employees. The 2018 comprehensive report on "Sexual Harassment of Women" by the National Academies of

Sciences, Engineering, and Medicine (NASEM)[636] helpfully synthesizes decades of sexual harassment research and analysis to classify sex-based harassment as either sexual assault, or any of three types of sex-based harassment (sexual coercion, unwanted sexual attention, or gender harassment). The Department agrees with commenters' assertions that sexual assault and sexual coercion[637] are covered under the regulatory definition, and agrees that unwanted sexual attention is covered if such conduct meets the second prong (the *Davis* standard), but the Department disagrees with commenters' assertion that what NASEM and others label as "gender harassment" is not covered under § 106.30. What the Department understands NASEM and commenters to mean by gender harassment is verbal and nonverbal behaviors, devoid of sexual content, that convey insulting, hostile, degrading attitudes about a particular sex. The language of the second prong of the § 106.30 definition describes conduct on the basis of sex that is unwelcome, determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to education. That description encompasses what commenters label as "gender harassment" (as well as what commenters label "unwanted sexual attention") where the verbal or other conduct meets the *Davis* elements. Thus, the § 106.30 definition appropriately covers what NASEM and commenters describe as the most common type of sex-based harassment in academia and the workplace, as well as other types of sexual harassment identified by such commenters and experts. The Department appreciates the efforts made by NASEM and others to analyze the prevalence of sexual harassment within

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[636] Commenters cited: National Academies of Science, Engineering, and Medicine, *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine* (Frasier F. Benya *et al.* eds., 2018).

[637] Commenters referred to "sexual coercion" as *quid pro quo* harassment.

academia and to recommend approaches to reduce that prevalence, and believes that these final regulations appropriately regulate sexual harassment as a form of Title IX sex discrimination, while respecting the Department's legal obligations to enforce the civil rights statute as passed by Congress, and apply statutory interpretations consistent with First Amendment and other constitutional protections. The Department understands that research demonstrates that the negative impact of persistent (though not severe) harassment may be similar to the impact of a single instance of severe harassment. However, guided by the Supreme Court's *Davis* opinion, the Department believes that unwelcome conduct (that does not constitute *quid pro quo* harassment or a Clery Act/VAWA offense included in § 106.30) rises to a civil rights violation where the seriousness (determined by a reasonable person to be so severe, pervasive, objectively offensive, that it negatively impacts equal access) jeopardizes educational opportunities. While non-severe instances of unwelcome harassment may negatively impact a person, and recipients retain authority to address such instances, Title IX is focused on sex discrimination that jeopardizes educational access.

The Department understands that technology has evolved in the decades since Title IX was enacted, and that the means for perpetrating sexual harassment in modern society may include use of electronic, digital, and similar methods. The § 106.30 sexual harassment definition does not make sexual harassment dependent on the method by which the harassment is carried out; use of e-mail, the internet, or other technologies may constitute sexual harassment as much as use of in-person, postal mail, handwritten, or other communications. For reasons described throughout this section of the preamble, and in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, the Department

believes that the § 106.30 definition is superior to the definition of sexual harassment in the 2001 Guidance.

The Department acknowledges that a myriad of State and Federal laws overlap in addressing misconduct, some of which may be criminal, violative of State civil rights laws, or safety-related (such as anti-bullying legislation), and that elementary and secondary schools, as well as postsecondary institutions, face challenges in meeting obligations under various laws, as well as recipients' own policies. The Department notes that a recipient's agreement to accept Federal financial assistance obligates the recipient to comply with Title IX with respect to education programs or activities, and that compliance with Title IX does not obviate the need for a recipient also to comply with other laws. The Department does not view a difference between how "sexual harassment" is defined under these final regulations and a different or broader definition of sexual harassment under various State laws as creating undue confusion for recipients or a conflict as to how recipients must comply with Title IX and other laws. While Federal Title IX regulations require a recipient to respond to sexual harassment as defined in § 106.30, a recipient may also need to respond to misconduct that does not meet that definition, pursuant to a State law. The Department more thoroughly discusses the interaction between these final regulations and State laws in the "Section 106.6(h) Preemptive Effect" subsection of the "Clarifying Amendments to Existing Regulations" section.

The Department appreciates commenters' concerns about how to apply the prerequisite element that sexual harassment is conduct "on the basis of sex." The Department notes that the Title IX statute prohibits exclusion, denial of benefits, and subjection to discrimination "on the basis of sex," and the Department cannot remove that qualifier in describing conduct prohibited under Title IX because Congress intended for Title IX to provide individuals with effective

protections against discriminatory practices[638] "on the basis of sex."[639] Discriminatory practices on other bases or protected characteristics are not part of Title IX's non-discrimination mandate. To clarify that all the conduct defined as sexual harassment must be "on the basis of sex," the final regulations revise § 106.30 by removing that phrase from the second prong, and inserting it into the introductory sentence that now begins "Sexual harassment means conduct on the basis of sex that satisfies one or more of the following" and then goes on to list the three prongs of the definition.

The Department appreciates the opportunity to clarify that whether conduct is "on the basis of sex" does not require probing the subjective motive of the respondent (e.g., whether a respondent subjectively targeted a complainant because of the complainant's or the respondent's actual or perceived sex, as opposed to because of anger or romantic feelings). Where conduct is sexual in nature, or where conduct references one sex or another, that suffices to constitute conduct "on the basis of sex." In *Gebser* and again in *Davis*, the Supreme Court accepted sexual harassment as a form of sex discrimination without inquiring into the subjective motive of the perpetrator (a teacher in *Gebser* and a student in *Davis*).[640] The Department follows the Supreme

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[638] *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979).
[639] 20 U.S.C. 1681(a).
[640] *See, e.g.*, *Davis*, 526 U.S. at 643 (assuming without analysis that sexual harassment constitutes sex discrimination, in stating that *Gebser* recognized that "whether viewed as discrimination or subjecting students to discrimination, Title IX unquestionably . . . placed on [the Board] the duty not to permit teacher-student harassment in its schools") (internal quotation marks and citation omitted); *id.* at 650 ("having previously determined that 'sexual harassment' is 'discrimination' in the school context under Title IX, we are constrained to conclude that student-on-student sexual harassment, if sufficiently severe, can likewise rise to the level of discrimination actionable under the statute."); *id.* at 650-51 (equating physical threats directed at female students, not of a sexual nature, with sexual harassment and thereby sex discrimination by stating: "The most obvious example of student-on-student sexual harassment . . . would thus involve the overt, physical deprivation of access to school resources. Consider, for example, a case in which male students physically threaten their female peers every day, successfully preventing the female students from using a particular school resource – an athletic field or a computer lab, for instance.").

Court's approach in interpreting conduct "on the basis of sex" to include conduct of a sexual nature, or conduct referencing or aimed at a particular sex.[641]

The Department appreciates a commenter's recommendation to seek input from stakeholders on what types of technical assistance would be most helpful to school districts in implementing the final regulations, and the Department will act on that recommendation by seeking such input from school districts and other recipients with respect to robust technical assistance to help recipients implement the § 106.30 definition and other provisions of the final regulations.

Changes: We have revised § 106.30 defining "sexual harassment" by moving the phrase "on the basis of sex" from the second prong to the introductory sentence applying to all three prongs of the definition of sexual harassment, such that any of the conduct defined as "sexual harassment" must be "on the basis of sex."

Prong (1) *Quid pro quo*

Comments: At least two commenters questioned whether the *quid pro quo* prong of the § 106.30 definition would apply only if the employee's conditioning of an educational benefit was express (as opposed to implied, or reasonably perceived by the victim as a threat to withhold a benefit),

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[641] This approach finds analytic support in works such as Kathleen M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 771-72 (1997), noting that "to date, the Supreme Court has been disinclined to do more than summarily conclude that sexual harassment is a form of sex discrimination" under Title VII and supporting an approach to "because of sex" that focuses on the conduct, not the perpetrator's motive, but arguing that a theoretical justification for why sexual harassment constitutes sex discrimination that justifies such "evidentiary short cuts" should rely on recognition that sexual harassment is a "tool or instrument of gender regulation," undertaken "in the service of hetero-patriarchal norms" that are "punitive in nature [and] produce gendered subjects: feminine women as sex objects and masculine men as sex subjects" making sexual harassment a form of sex discrimination "precisely because its use and effect police hetero-patriarchal gender norms[.]" With a theoretical understanding of why sexual harassment might constitute sex discrimination as a backdrop, sex discrimination can be inferred in individual cases from the existence of sexual harassment, justifiably obviating a need to require "proof" that a particular plaintiff experienced sexual harassment on the basis of, or because of, the plaintiff's and/or defendant's sex, instead keeping the focus of each case on the misconduct itself. *Id*.

and if this prong required a subjective intent on the part of the recipient's employee to deny the aid or benefit even if such intent was not communicated when the harassment occurred. One such commenter asserted that it is important for potential harassers and potential victims to understand what conduct is prohibited and thus the final regulations need to specify whether the *quid pro quo* nature of the harassment must be expressly communicated, or may be implied by the circumstances; this commenter stated that even courts do not require that a harasser explicitly articulate all the terms and conditions of the "bargain of exchange" being proposed in a *quid pro quo* harassment situation.

At least one commenter asserted that the final regulations need to clarify that "consenting" to unwelcome sexual conduct, or avoiding potential adverse consequences without providing the requested sexual favors, does not mean that *quid pro quo* harassment did not occur.

One commenter believed that *quid pro quo* harassment needs to also be severe, pervasive, and objectively offensive.

A few commenters asserted that the *quid pro quo* prong of the sexual harassment definition should be expanded to include more persons than just "employees" of the recipient, because students may also hold positions of authority over other students (for example, team captains, club presidents, graduate assistants, resident advisors) and non-employees often have regular, recipient-approved contact with students and function as agents of the recipient (for example, people supervising internships or clinical experiences, employees of vendors or contracted service providers, volunteers who regularly participate in programs or activities, or board of trustees members who serve as unpaid volunteers). One such commenter argued that the *quid pro quo* prong is too narrow because all people (not just employees) providing any services

as part of a recipient's business should not condition services on sexual favors but also should not perpetrate any unwelcome sexual conduct or create a hostile environment.

One commenter urged the Department to clarify that in the elementary and secondary school context, even a consensual, welcome sexual relationship between a student and teacher counts as sexual harassment because such a relationship is an abuse of the teacher's power over the student; the commenter asserted that the teacher-student relationship in *Gebser* may have been consensual but was still sexual harassment.

Discussion: The Department appreciates the opportunity to clarify that the first prong of the § 106.30 definition, describing *quid pro quo* harassment, applies whether the "bargain" proposed by the recipient's employee is communicated expressly or impliedly. Making educational benefits or opportunities contingent on a person's participation in unwelcome conduct on the basis of sex strikes at the heart of Title IX's mandate that education programs and activities remain free from sex discrimination; thus, the Department interprets the *quid pro quo* harassment description broadly to encompass situations where the *quid pro quo* nature of the incident is implied from the circumstances.[642] For the same reason, the Department declines to require that *quid pro quo* harassment be severe and pervasive; abuse of authority in the form of even a single instance of *quid pro quo* harassment (where the conduct is not "pervasive") is inherently

[642] As the *Davis* Court recognized, the relationship between a teacher and student makes it even more likely than with peer harassment that sexual harassment threatens the equal educational access guaranteed by Title IX. *See Davis*, 526 U.S. at 653 ("The fact that it was a teacher who engaged in harassment in *Franklin* and *Gebser* is relevant. The relationship between the harasser and the victim necessarily affects the extent to which the misconduct can be said to breach Title IX's guarantee of equal access to educational benefits and to have a systemic effect on a program or activity. Peer harassment, in particular, is less likely to satisfy these requirements than is teacher-student harassment.").

offensive and serious enough to jeopardize equal educational access,[643] and although such harassment may involve verbal conduct there is no risk of chilling protected speech or academic freedom by broadly prohibiting *quid pro quo* harassment because such verbal conduct by definition is aimed at compelling a person to submit to unwelcome conduct as a condition of maintaining educational benefits.[644] The Department notes that when a complainant acquiesces to unwelcome conduct in a *quid pro quo* context to avoid potential negative consequences, such

[643] Similarly, where *quid pro quo* harassment may not be "severe" (for example, where the unwelcome sexual conduct consists of rubbing student's back or other conduct that may not meet the "severity" element and would not constitute sexual assault but does consist of unwelcome conduct of a sexual nature), *quid pro quo* harassment is inherently serious enough to jeopardize equal educational access. Thus, *quid pro quo* harassment constitutes sexual harassment under § 106.30, without being evaluated for severity, pervasiveness, and objective offensiveness. Determining whether unwelcome sexual conduct is proposed, suggested, or directed at a complainant, by a recipient's employee, as part of the employee "conditioning" an educational benefit on participation in the unwelcome conduct, does not require the employee to expressly tell the complainant that such a bargain is being proposed, and the age and position of the complainant is relevant to this determination. For example, elementary and secondary school students are generally expected to submit to the instructions and directions of teachers, such that if a teacher makes a student feel uncomfortable through sex-based or other sexual conduct (e.g., back rubs or touching students' shoulders or thighs), it is likely that elementary and secondary school students will interpret that conduct as implying that the student must submit to the conduct in order to maintain educational benefits (e.g., not getting in trouble, or continuing to please the teacher and earn good grades). This approach to sexual harassment by a recipient's employees is in line with the *Gebser/Davis* framework, where the Supreme Court noted that any sexual harassment by a teacher or school employee likely deprives a student of equal educational opportunities. *See Davis*, 526 U.S. at 653. In situations where an employee did not intend to commit *quid pro quo* harassment (for instance, where the teacher did not realize that what the teacher believed were friendly back rubs had sexual overtones and made students feel uncomfortable), the recipient may take the specific factual circumstances into account in deciding what remedies are appropriate for the complainants and what disciplinary sanctions are appropriate for the respondent.

[644] *Quid pro quo* harassment should be interpreted broadly in part because although a teacher, coach, or other employee perpetrating a *quid pro quo* conditioning of benefits may use speech in proposing or inflicting such a Hobson's choice on a student, that speech is incidental to the conduct (sex discriminatory abuse of authority) and a broad rule prohibiting such conduct raises no constitutional concerns. *See, e.g.*, *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 207 (3d Cir. 2001) ("government may constitutionally prohibit speech whose *non-expressive* qualities promote discrimination. For example, a supervisor's statement 'sleep with me or you're fired' may be proscribed not on the ground of any expressive idea that the statement communicates, but rather because it facilitates the threat of discriminatory conduct. Despite the purely verbal quality of such a threat, it surely is no more 'speech' for First Amendment purposes than the robber's demand 'your money or your life.'") (emphasis in original).

"consent" does not necessarily mean that the sexual conduct was not "unwelcome" or that prohibited *quid pro quo* harassment did not occur.[645]

The Department believes that the *quid pro quo* harassment description is appropriately and sufficiently broad because it applies to all of a recipient's employees, so that it includes situations where, for instance, a teacher, faculty member, or coach holds authority and control over a student's success or failure in a class or extracurricular activity, and the Department declines to expand the description to include non-employee students, volunteers, or others not deemed to be a recipient's employee. The Department understands commenters' concerns that non-employees are sometimes in positions sanctioned by the recipient to exercise control over students (or employees) or to distribute benefits on behalf of the recipient. However, the Department is persuaded by the Supreme Court's rationale in *Gebser* that Title IX and Title VII differ with respect to statutory reliance on agency principles.[646] The Department believes that the § 106.30 *quid pro quo* harassment prong reasonably holds recipients responsible for the conduct of the recipient's employees without expanding that liability to all agents of a recipient. However, the unwelcome conduct of a non-employee individual may constitute sexual harassment under the second or third prongs of the § 106.30 definition.

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[645] The approach in these final regulations to *quid pro quo* harassment is consistent with the 2001 Guidance at 5 (stating that *quid pro quo* harassment does not depend on whether "the student resists and suffers the threatened harm or submits and avoids the threatened harm" and that a prohibited *quid pro quo* bargain may occur "explicitly or implicitly").

[646] *Gebser*, 524 U.S. at 283 ("Moreover, *Meritor*'s rationale for concluding that agency principles guide the liability inquiry under Title VII rests on an aspect of that statute not found in Title IX: Title VII, in which the prohibition against employment discrimination runs against 'an employer,' *42 U.S.C. 2000e-2(a)*, explicitly defines 'employer' to include 'any agent,' *§ 2000e(b)*. . . . Title IX contains no comparable reference to an educational institution's 'agents,' and so does not expressly call for application of agency principles.").

In response to a commenter's request that the final regulations state that sexual conduct between a teacher and student counts as sexual harassment even where the conduct is consensual and welcome from the student's viewpoint, the third prong of the § 106.30 definition refers to "sexual assault" as described in the Clery Act, which in turn references sex offenses under the FBI's Uniform Crime Reporting system, including statutory rape (that is, sex with a person who is under the statutory age of consent).[647] With respect to students who are underage in their jurisdiction, a sexual relationship like that in *Gebser* between a teacher and student[648] would therefore count as sexual harassment under § 106.30, regardless of whether the victim nominally consented or welcomed the sexual activity. Furthermore, the Department interprets "unwelcome" as used in the first and second prongs of the § 106.30 definition of sexual harassment as a subjective element; thus, even if a complainant in a *quid pro quo* situation pretended to welcome the conduct (for instance, due to fear of negative consequences for objecting to the employee's suggestions or advances in the moment), the complainant's subjective statement that the complainant found the conduct to be unwelcome suffices to meet the "unwelcome" element.

Changes: None.

Prong (2) *Davis* standard

Davis standard generally

Comments: Several commenters supported the second prong of the § 106.30 definition of sexual harassment, which is derived from the Supreme Court's *Davis* opinion. One commenter stated that previous Department guidance changed the "and" to "or" in the "severe, pervasive, and

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[647] 20 U.S.C. 1092(f)(6)(A)(v).

[648] *Gebser*, 524 U.S. at 278 (describing the relationship between the teacher and student in that case as involving sexual intercourse).

objectively offensive" formulation and asserted that this resulted in over-enforcement and sparked criticism from experts and law professors, including the Association of Title IX Administrators (ATIXA).[649] This commenter argued that while victim advocates have argued that the *Davis* standard should apply only to private lawsuits against schools, it seems illogical to subject schools to two separate standards of responsibility concerning the same conduct, and the *Davis* standard does not let schools "off the hook."

On the contrary, many commenters opposed the second prong of the § 106.30 definition because it uses a standard designed to award money damages in private litigation, not administrative enforcement designed to promote equal educational opportunity. Some commenters argued that *Gebser* does not actually define sexual harassment and that *Davis* cited to the Supreme Court's *Meritor* opinion indicating intent to utilize the same definition for sexual harassment under Title IX as the Court has used under Title VII. One commenter argued that the *Davis* Court inaccurately paraphrased the *Meritor* decision when stating "and" instead of "or" (in "severe, pervasive, and objectively offensive"), and asserted there is nothing in the *Davis* opinion that indicates that the Court intended to apply a higher standard for hostile environment harassment under Title IX than under Title VII.

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[649] Commenters cited: Eugene Volokh, *Open Letter from 16 Penn Law Professors about Title IX and Sexual Assault Complaints*, VOLOKH CONSPIRACY (Feb. 19, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/02/19/open-letter-from-16-penn-law-school-professors-about-title-ix-and-sexual-assault-complaints/; *Law Professors' Open Letter Regarding Campus Free Speech and Sexual Assault* (May 16, 2016), https://www.lankford.senate.gov/imo/media/doc/Law-Professor-Open-Letter-May-16-2016.pdf; Jacob E. Gerson & Jeannie Suk Gersen, *The Sex Bureaucracy*, 104 CAL. L. REV. 881 (2016); National Center for Higher Education Risk Management (NCHERM), *The 2017 NCHERM Group Whitepaper: Due Process and the Sex Police* 2, 15 (2017) ("Some pockets in higher education have twisted the 2011 Office for Civil Rights (OCR) Dear Colleague Letter (DCL) and Title IX into a license to subvert due process and to become the sex police. . . . [T]his Whitepaper [and another ATIXA publication] push back strongly against both of those trends in terms of best practices.").

At least one commenter asserted that if students cannot receive different recourse from the Department than they can in Federal courts, then students will find civil litigation to be a better avenue which will lead to costly redirection of school resources toward defending Title IX litigation, a result exacerbated by the fact that the final regulations expressly prohibit awards of money damages in Department enforcement actions while money damages are available in private lawsuits.

At least one commenter argued that with regard to student-on-student harassment, the Supreme Court in *Davis* did not modify *Gebser* by *defining* "sexual harassment" in some limited way; rather, *Davis* addressed the amount and type of sexual harassment (as that phrase is commonly understood) which, if engaged in by a student harasser, would constitute "discrimination" and thus violate Title IX. At least one commenter argued that the NPRM failed to recognize the difference between the anti-discrimination clause and the anti-exclusion clause of the Title IX statute[650] by incorrectly assigning the purpose of the anti-discrimination clause to the anti-exclusion clause. One such commenter argued that the purpose of the anti-discrimination clause is to forbid gender-based adverse action under a covered program or activity, regardless of whether that action has any impact on the victim's access to that program or activity while the purpose of the anti-exclusion clause is to protect access to a program or activity, regardless of whether the misconduct potentially affecting access occurs under, or outside, that program or activity.

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

One commenter argued that the NPRM's definition of hostile environment sexual harassment does not allow for the central method of analysis that both courts and existing Department guidance have instructed schools to use in evaluating sexual harassment complaints: balancing relevant factors in recognition of the totality of the circumstances. The commenter asserted that this holistic approach is crucial for recipients to fulfill their Title IX responsibilities to prevent the discriminatory conduct's occurrence and end it when it does occur. At least one commenter similarly argued that the "severe and pervasive" prong of the definition creates ambiguity from lack of guidance on how to apply the standard and without such guidance schools will screen out situations that should be addressed.

A few commenters noted that the second prong of the § 106.30 definition appropriately requires actionable harassment to be severe, pervasive, and objectively offensive yet leaves recipients flexibility to address misconduct that does not meet that standard through codes of conduct outside the Title IX context.

Discussion: The Department appreciates commenters' support for the *Davis* definition of actionable sexual harassment embodied in the second prong of the § 106.30 definition. The Department agrees that adopting the *Davis* standard for harassment that does not constitute *quid pro quo* harassment or a Clery Act/VAWA offense, included in § 106.30, appropriately holds recipients responsible for addressing serious, unwelcome sex-based conduct that deprives a person of equal access to education, while avoiding constitutional concerns raised by subjecting speech and expression to the chilling effect of prior restraints. The Department agrees that aligning the Title IX sexual harassment definition in administrative enforcement and private litigation contexts provides clear, consistent expectations for recipients without letting recipients "off the hook." The Department chooses to adopt in these final regulations the *Davis* standard

defining actionable sexual harassment, as one of three parts of a sexual harassment definition. This approach provides consistency with the Title IX rubric for judicial and administrative enforcement and gives a recipient flexibility and discretion to address sexual harassment while ensuring that complainants can rely on their school, college, or university to meaningfully respond to a sexual harassment incident.

The Department understands the argument of many commenters that adoption of the *Gebser/Davis* framework is not legally required and therefore the Department should adopt a broader approach to administrative enforcement than that applied by the Supreme Court in private Title IX lawsuits. The Supreme Court did not restrict its *Gebser/Davis* approach to private lawsuits for money damages, and the Department believes that the Supreme Court's framework provides the appropriate starting point for administrative enforcement of Title IX, with adaptions of that framework to hold recipients responsible for more than what the *Gebser/Davis* framework alone would require.[651]

The Department disagrees with a commenter who asserted that the *Davis* Court mistakenly or inaccurately "paraphrased" the *Meritor* description of actionable workplace harassment; rather, the Department believes that the *Davis* Court intentionally and accurately acknowledged the "severe or pervasive" formulation in *Meritor* yet determined that the "severe and pervasive" standard was more appropriate in the educational context. The Department notes that the *Davis* Court repeated the "severe and pervasive" formulation five times[652] showing that

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[651] For further discussion, see the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble.
[652] *Davis*, 526 U.S. at 633, 650, 651, 652, 654.

the Court noted differences between an educational and workplace environment that warranted a different standard under Title IX than under Title VII.[653]

The Department disagrees with the commenter who asserted that the Department's adoption of *Davis* standards will lead to increased litigation against recipients because students will see no difference between recourse from the Department and recourse available in private litigation. While one of the three prongs of the § 106.30 sexual harassment definition is adopted from *Davis*, the other two prongs differ from the *Davis* standard; moreover, the other parts of the *Gebser/Davis* framework adopted by the Department in the final regulations adapt that framework in a way that broadens the scope of a complainant's rights vis-à-vis a recipient (for example, the actual knowledge condition in the final regulations is defined broadly to include notice to any Title IX Coordinator and any elementary or secondary school employee, in addition to officials with authority to take corrective action; the deliberate indifference standard expressly requires a recipient to offer supportive measures to a complainant and for a Title IX Coordinator to discuss supportive measures with a complainant, with or without the filing of a formal complaint and to explain to a complainant the process for filing a formal complaint). Therefore, while rooted in the Supreme Court's framework, the final regulations appropriately impose requirements on recipients that benefit complainants, which Federal courts applying the *Davis* framework do not impose.[654] We have also revised § 106.3(a) to remove reference to whether the

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[653] *Id.* at 651 ("Courts, moreover, must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults. . . . Indeed, at least early on, students are still learning how to interact appropriately with their peers.").

[654] Consistent with constitutional due process and fundamental fairness, these final regulations also ensure that a recipient's supportive response to a complainant treats respondents equitably by refraining from punishing or

Department will or will not seek money damages as part of remedial action required of a recipient for Title IX violations; for further discussion, see the "Section 106.3(a) Remedial Action" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble.

The Department agrees with a commenter's characterization of *Davis* as not so much redefining sexual harassment as describing the amount and type of sexual harassment that constitutes sex discrimination under Title IX. Likewise, while the Department refers to a "definition" of sexual harassment in § 106.30, the Department notes that the provision describes what amount and type of sexual harassment is actionable under Title IX; that is, what conditions activate a recipient's legal obligation to respond.

The Department disagrees with commenters who argued that the *Davis* standard in the second prong of § 106.30 fails to recognize the difference between the anti-discrimination clause and the anti-exclusion clause of Title IX. In *Davis*, the Supreme Court acknowledged that Title IX contains three separate clauses (anti-exclusion, denial of benefits, anti-discrimination), yet with respect to actionable sexual harassment under Title IX the *Davis* Court repeatedly used the formulation of sexual harassment that is "severe, pervasive, and objectively offensive," at one point seeming to equate it with the denial of benefits clause and at others seeming to equate it with the "subjected to discrimination" clause.[655] Regardless of which of the three Title IX

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disciplining a respondent without following a grievance process that complies with § 106.45. § 106.44(a); § 106.45(b)(1)(i); § 106.30 (defining "supportive measures" as non-punitive, non-disciplinary, not unreasonably burdensome to the other party); *see also* the "Role of Due Process in the Grievance Process" section of this preamble.

[655] 526 U.S. at 650 ("The statute's other prohibitions, moreover, help give content to the term 'discrimination' in this

statutory clauses the *Davis* Court attached to its sexual harassment standard, the Court emphasized several times that the harassment must "deprive the victims of access to the educational opportunities or benefits provided by the school"[656] or must have "effectively denied equal access to an institution's resources and opportunities"[657] or "that it denies its victims the equal access to education that Title IX is designed to protect."[658] The Supreme Court's understanding of sexual harassment as prohibited conduct under Title IX requires sexual harassment to meet a seriousness standard involving denial of equal access to education, regardless of whether the sexual harassment is viewed as causing denial of benefits, exclusion from participation, or subjection to discrimination.

The Department disagrees that the § 106.30 definition of sexual harassment precludes or disallows a totality of the circumstances analysis to evaluate whether alleged conduct does or does not meet the definition. The *Davis* Court noted that evaluation of whether conduct rises to actionable sexual harassment depends on a constellation of factors including the ages and numbers of parties involved,[659] and nothing in the final regulations disallows or disapproves of that common sense approach to determinations of severity, pervasiveness, and objective

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context. Students are not only protected from discrimination, but also specifically shielded from being 'excluded from participation in' or 'denied the benefits of' any 'education program or activity receiving Federal financial assistance.' 20 U.S.C. § 1681(a). The statute makes clear that, whatever else it prohibits, students must not be denied access to educational benefits and opportunities on the basis of gender. 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."); *id.* at 644-45 (holding that a recipient is liable where its "deliberate indifference 'subjects' its students to harassment – "That is, the deliberate indifference must, at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it.") (internal citations omitted).

[656] *Id*. at 650.

[657] *Id.* at 651.

[658] *Id.* at 652.

[659] *Id.* at 651.

offensiveness. To reinforce this, the final regulations include language in the second prong of the § 106.30 definition stating that the *Davis* elements are determined under a reasonable person standard. The Department does not believe that recipients will "screen out" situations that should be addressed due to lack of guidance on how to apply the "severe and pervasive" elements; the Department is confident that recipients' desire to provide students with a safe, non-discriminatory learning environment will lead recipients to evaluate sexual harassment incidents using common sense and taking circumstances into consideration, including the ages, disability status, positions of authority of involved parties, and other factors.

The Department appreciates commenters who stated, accurately, that the final regulations leave recipients flexibility to address misconduct that does not meet the § 106.30 definition of sexual harassment, through a recipient's own code of conduct that might impose behavioral expectations on students and faculty distinct from Title IX's non-discrimination mandate, and we have revised § 106.45(b)(3) to clarify that even when a recipient must dismiss a formal complaint because the alleged conduct does not meet the definition of sexual harassment in § 106.30, such dismissal is only for purposes of Title IX and does not preclude the recipient from responding to the allegations under the recipient's own code of conduct.

Changes: We have revised the § 106.30 definition of sexual harassment by specifying that the elements in the *Davis* standard (severe, pervasive, objectively offensive, and denial of equal access) are determined under a reasonable person standard. We have revised § 106.45(b)(3)(i) to clarify that dismissal of a formal complaint because the alleged conduct does not constitute sexual harassment as defined in § 106.30 is a dismissal for purposes of Title IX but does not preclude the recipient from responding to the allegations under the recipient's own code of conduct. We have also revised § 106.3(a) to remove reference to whether the Department will or

will not seek money damages as part of remedial action required of a recipient for Title IX violations.

Comments: Many commenters argued that the definition for Title IX sexual harassment should be aligned with the definition for Title VII, under which employers are liable for harassment that is sufficiently severe *or* pervasive to alter the conditions of employment.[660] Some commenters argued that under the proposed rules, schools would be held to a lower standard under Title IX to protect students (some of whom are minors) than the standard of protection for employees under Title VII. Some such commenters asserted that everyone on campus benefits from a culture in which sexual assault and harassment are deterred as they would be in a work environment and that Title IX, which applies to students, must not be weaker than Title VII.[661] Several commenters argued that the Title VII standard protects against visual and graphic displays, slurs, comments, and an array of other activities that are severe *or* pervasive on the basis of sex, while the NPRM would deny students the same protections by requiring conduct be both severe *and* pervasive.

Other commenters argued that college students must be able to succeed in college without being told that sexual assault and harassment is just something they must endure so they can finally get jobs at companies that do protect them from assault and harassment. Some commenters further argued that colleges and universities do a severe disservice to would-be

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[660] Commenters cited: *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986) (holding under Title VII "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.") (internal quotation marks and citation omitted; brackets in original) (emphasis added); U.S. Equal Emp. Opportunity Comm'n, *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors* (Jun. 18, 1999).

[661] Commenters cited: *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991) for the proposition that if an employer is aware of and allows the continuation of sexual harassment creating a hostile work environment, it is a violation of Title VII.

harassers and assaulters by creating an environment where, unlike their future work environments, harassment and assault are tolerated. A few commenters asserted that because students can simultaneously be both students and employees it is necessary for the prohibited conduct to be the same under both Title VII and Title IX.

Many commenters asserted that the hostile environment standard expressed in the 2001 Guidance or the withdrawn 2011 Dear Colleague Letter should be adopted in the final regulations, such that sexual harassment is "unwelcome conduct of a sexual nature" and such harassment is actionable when the conduct is "sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the school's programs." Some commenters asserted that the "looser" definition from Department guidance provides greater protection for victims compared to the subjectivity and gray areas created by ill-fitting terminology used in the § 106.30 definition. Many commenters argued that "unwelcome conduct of a sexual nature" is a simple definition of harassment that avoids the self-doubt and discouragement victims may feel if victims are required under the proposed rules to wonder if the harassment they experience fits the § 106.30 definition. Some commenters argued that the § 106.30 definition makes it too easy to dismiss cases as not severe enough when any case of unwelcome sexual conduct should be clearly prohibited out of common sense and fairness.

Some commenters asserted that the Department's guidance definition is more in line with the reality of the type of misconduct that occurs most often. Other commenters pointed to the "Factors Used to Evaluate Hostile Environment Sexual Harassment" section of the 2001

Guidance[662] outlining a variety of factors used to determine if a hostile environment has been created and argued that schools should continue to use these factors to evaluate conduct in order to draw common sense conclusions about what conduct is actionable.

Discussion: The Department acknowledges, as has the Supreme Court, that both Title VII and Title IX prohibit sex discrimination. Significant differences in these statutes, however, lead to different standards for actionable harassment in the workplace, and in schools, colleges, and universities. The Department disagrees with commenters who asserted that an identical standard for prohibited conduct in the workplace and in an educational environment is the appropriate outcome. In the elementary and secondary school context, students and recipients benefit from an approach to non-discrimination law that distinguishes between school and workplace settings.[663] In the higher education context, as some commenters noted, students and faculty must be able to discuss sexual issues even if that offends some people who hear the discussion.[664] Similarly, as a commenter stated, the Supreme Court rejected the idea that "First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, 'the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'"[665] Thus, even vulgar or indecent college speech is

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[662] Commenters cited: 2001 Guidance at 5-7 (listing factors including: the degree to which the conduct affected one or more students' education; the type, frequency, and duration of the conduct; the identity of the relationship between the alleged harasser and the subject or subjects of the harassment; the number of individuals involved; the age and sex of the alleged harasser and the subject or subjects of the harassment; the size of the school, location of the incidents, and context in which they occurred; other incidents at the school; and incidents of gender-based, but nonsexual harassment).

[663] *See Davis*, 526 U.S. at 650 ("Courts, moreover, must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults. . . . Indeed, at least early on, students are still learning how to interact appropriately with their peers.").

[664] *See Snyder v. Phelps*, 562 U.S. 443 (2011).

[665] *Healy v. James*, 408 U.S. 169, 180 (1972) (internal citation omitted).

protected.[666] The *Davis* standard ensures that speech and expressive conduct is not peremptorily chilled or restricted, yet may be punishable when the speech becomes serious enough to lose protected status under the First Amendment.[667] The rationale for preventing a hostile workplace environment free from any severe or pervasive sexual harassment that alters conditions of employment does not raise the foregoing concerns (i.e., allowing for the social and developmental growth of young students learning how to interact with peers in the elementary and secondary school context; fostering robust exchange of speech, ideas, and beliefs in a college setting). Thus, the Department does not believe that aligning the definitions of sexual harassment under Title VII and Title IX furthers the purpose of Title IX or benefits students and employees participating in education programs or activities.[668]

The *Davis* standard embodied in the second prong of the § 106.30 definition differs from the third prong prohibiting sexual assault (and in the final regulations, dating violence, domestic violence, and stalking) because the latter conduct is not required to be evaluated for severity, pervasiveness, offensiveness, or causing a denial of equal access; rather, the latter conduct is assumed to deny equal access to education and its prohibition raises no constitutional concerns. In this manner, the final regulations obligate recipients to respond to single instances of sexual

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[666] *Papish v. Bd. of Curators*, 410 U.S. 667 (1973).
[667] The Department notes that requiring severity, pervasiveness, objective offensiveness, and resulting denial of equal access to education for a victim, matches the seriousness of conduct and consequences of other types of speech unprotected by the First Amendment, such as fighting words, threats, and defamation.
[668] *See* Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights*, 35 JOURNAL OF COLL. & UNIV. L. 385, 449 (2009) (arguing that restrictions on workplace speech "ultimately do not take away from the workplace's essential functions – to achieve the desired results, make the client happy, and get the job done" and free expression in the workplace "is typically not necessary for that purpose" such that workplaces are often "highly regulated environments" while "[o]n the other hand, freedom of speech and unfettered discussion are so essential to a college or university that compromising them fundamentally alters the campus environment to the detriment of everyone in the community" such that free speech and academic freedom are necessary preconditions to a university's success.).

assault and sex-related violence more broadly than employers' response obligations under Title VII, where even physical conduct must be severe or pervasive and alter the conditions of employment, to be actionable.[669] The Department therefore disagrees that the final regulations provide students less protection against sexual assault than employees receive in a workplace, or that sexual assault is tolerated to a greater extent under these Title IX regulations than under Title VII.

For reasons discussed above and in the "Adoption and Adaption of the Supreme Court Framework to Address Sexual Harassment" section of this preamble, the Department believes that the *Davis* definition in § 106.30 provides a definition for non-*quid pro quo*, non-Clery Act/VAWA offense sexual harassment better aligned with the purpose of Title IX than the definition of hostile environment harassment in the 2001 Guidance or the withdrawn 2011 Dear Colleague Letter. The *Davis* Court carefully crafted its formulation of actionable sexual harassment under Title IX for private lawsuits under Title IX, and the Department is persuaded by the Supreme Court's reasoning that administrative enforcement of Title IX is similarly best served by requiring a recipient to respond to sexual harassment that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to education. The Department believes that rooting a definition of sexual harassment in the Supreme Court's

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[669] *E.g.*, *Meritor*, 477 U.S. at 67 ("not all workplace conduct that may be described as harassment affects a term, condition, or privilege of employment within the meaning of Title VII") (internal quotation marks and citation omitted); *Brooks v. City of San Mateo*, 229 F.3d 917, 927 (9th Cir. 2000) (where the plaintiff alleged a sexual assault in the form of fondling plaintiff's breast: "The harassment here was an entirely isolated incident. It had no precursors, and it was never repeated. In no sense can it be said that the city imposed upon Brooks the onerous terms of employment for which Title VII offers a remedy."). Under the final regulations, a single instance of sexual assault (which includes fondling) requires a recipient's prompt response, including offering the complainant supportive measures and informing the complainant of the option of filing a formal complaint. § 106.30 (defining "sexual harassment" to include "sexual assault"); § 106.44(a).

interpretation of Title IX provides more clarity without unnecessarily chilling speech and expressive conduct; these advantages are lacking in the looser definitions used in Department guidance. The *Davis* definition in § 106.30 utilizes the phrase unwelcome conduct on the basis of sex, which is broader than the "unwelcome conduct of a sexual nature" phrase used in Department guidance.[670] The other elements in § 106.30 (severe, pervasive, and objectively offensive) provide a standard of evaluation more precise than the "sufficiently serious" description in Department guidance, yet serve a similar purpose – ensuring that conduct addressed as a Title IX civil rights issue represents serious conduct unprotected by the First Amendment or principles of free speech and academic freedom. As discussed further below, the "effectively denies a person equal access" element in § 106.30 has the advantage of being adopted from the Supreme Court's interpretation of Title IX, yet does not act as a more stringent element than the "interferes with or limits a student's ability to participate in or benefit from the school's programs" language found in Department guidance. The Department does not believe that recipients will err on the side of ignoring reports of conduct that might be considered severe and pervasive, and believes that a prohibition on *any* unwelcome sexual conduct would sweep up speech and expression protected by the First Amendment, and require schools to intervene in situations that do not present a threat to equal educational access. Because the § 106.30 definition provides precise standards for evaluating actionable harassment focused on whether sexual harassment has deprived a person of equal educational access, the Department believes it

[670] As noted by some commenters, sex-based harassment includes unwelcome conduct of a sexual nature but also includes unwelcome conduct devoid of sexual content that targets a particular sex. The final regulations use the phrase "sexual harassment" to encompass both unwelcome conduct of a sexual nature, and other forms of unwelcome conduct "on the basis of sex." § 106.30 (defining "sexual harassment").

is unnecessary to list the factors from the 2001 Guidance that purport to evaluate whether a hostile environment has been created.

Changes: None.

Comments: Many commenters believed that the second prong of the § 106.30 definition means that rape and sexual assault incidents will be scrutinized for severity and set a "pain scale" for sexual assault such that only severe sexual assault will be recognized under Title IX, or that a definition that requires a school to intervene only if sexual violence is "severe, pervasive, and objectively offensive" means that someone would need to be repeatedly, violently raped before the school would act to support the survivor.

Many commenters criticized the second prong of the § 106.30 definition by asserting that, under that standard, only the most severe harassment situations will be investigated, which will reduce and chill reporting of sexual harassment when sexual harassment is already underreported. Many such commenters argued that victims will be afraid to report because the school will scrutinize whether the harassment suffered was "bad enough" and that instead the Department needs to err on the side of caution by including more, not less, conduct as reportable harassment. Many commenters similarly argued that many victims are already unsure of whether their experience qualifies as serious enough to report and therefore narrowing the definition will only discourage victims from reporting unwanted sexual conduct. Many commenters argued that a broad definition of sexual harassment is needed because research shows that students are unlikely to report when their experience does not match common beliefs about what rape is, and because even "less severe" forms of harassment may also lead to negative outcomes and increase a victim's risk of further victimization. Similarly, some commenters noted that research shows

that victims already minimize their experiences[671] and knowing that school administrators will be judging their report for whether it is really serious, really pervasive, and really objectively offensive, will result in more victims feeling dissuaded from reporting due to uncertainty about whether their report will meet the definition or not.

Several commenters argued that the Federal government should stand by a zero-tolerance policy against sexual harassment, and that applying a narrow definition means that some forms of harassment are acceptable, contrary to Title IX's bar on sex discrimination. Several commenters argued that the § 106.30 definition will allow abusers to do everything just short of the narrowed standard while keeping their victims in a hostile environment, further silencing victims.

A few commenters stated that if a student believes conduct "makes me feel uncomfortable," that should be sufficient to require the school to respond. At least one commenter suggested that the final regulations provide guidance on what misconduct is actionable by using behavioral measures such as the Sexual Experiences Survey[672] or the Sexual Experiences Questionnaire.[673]

At least one commenter argued that the language of offensiveness and severity clouds the necessary understanding of unequal power relations and negates a culture of consent. Several

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[671] Commenters cited: The Association of American Universities, *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct* iv (Westat 2015) ("More than 50 percent of the victims of even the most serious incidents (e.g., forced penetration) say they do not report the event because they do not consider it 'serious enough.'").
[672] Commenters cited: Mary Koss & Cheryl J. Oros, *Sexual Experiences Survey: A research instrument investigating sexual aggression and victimization*, 50 JOURNAL OF CONSULTING & CLINICAL PSYCHOL. 3 (1982).
[673] Commenters cited: Louise Fitzgerald *et al.*, *Measuring sexual harassment: Theoretical and psychometric advances*, 17 BASIC & APPLIED SOCIAL PSYCHOL. 4 (1995).

commenters asserted that a definition of sexual harassment that holds up only the dramatic and extreme as worthy of investigation would do little to change rape culture. Many commenters argued that while individual acts are rarely pervasive, individual acts across a society can result in pervasiveness throughout society so that what seem like one-off or minor incidents, or "normal" sexual gestures and conventions, actually do create a pervasive rape culture because they are rooted in patriarchy (for example, a culture that accepts statements like "these women come to parties to get laid"), misunderstanding or ignorance of consent (for example, "she didn't say no" despite several cues of discomfort and unwillingness), and lack of support from authority figures (for example, reactions from school personnel like "boys will be boys," or "this is just college campus culture"). Some commenters argued that to achieve a drop in cases of sexual misconduct, even seemingly minor incidents that make women feel threatened need to be taken seriously.

Similarly, a few commenters argued that the threat of potential violence against women permeates American society and interferes with educational equity. At least one commenter argued that young women already are affected in many ways by the constant presence of potential violence, such that women feel that they cannot be alone with another student for study group purposes, with a teaching assistant to get extra help, or with a professor during office hours. This commenter further stated that young women already do not feel safe attending an academic function if it means walking to her car in the dark, or collaborating online for fear of enduring cyber harassment. A few commenters argued that a narrow definition of harassment ignores the scope of gender-based violence in our society and does nothing to address patterns of harassment as opposed to just an individual case that moves through a formal process.

A few commenters asserted by adding the "and" between "severe, pervasive and objectively offensive" survivors will be forced to quantify their suffering to fit into an imaginary scale determined according to a pass or fail rubric and artificially create categories of legitimate and illegitimate misconduct, when misconduct that is either severe or pervasive or objectively offensive should be more than enough to warrant stopping the misconduct. Many commenters opined that the § 106.30 definition sets an arbitrary and unnecessarily high threshold for when conduct would even constitute harassment. Many commenters viewed the § 106.30 definition as raising the burden of proof on victims to an unnecessary degree, making their reporting process more strenuous and exhausting, and requiring survivors to prove their abuse is worthy of attention. Other commenters noted that the burden is on recipients to show the severity of the reported conduct yet asserted that survivors will still feel pressured to present their complaint in a certain way in order to be perceived as credible enough. A few commenters asserted that this raises concerns especially for people with disabilities, who may react to and communicate about trauma differently. At least one commenter stated that to the extent that the § 106.30 definition is in response to the perception that students and Title IX Coordinators have been pursuing a lot of formal complaints over low-level harassment, such a perception is inaccurate.

Many commenters argued that what is severe, pervasive, and objectively offensive leaves too much room for interpretation and will be subject to the biases of Title IX Coordinators and other school administrators. Another commenter expressed concern that schools would have too much discretion to decide whether conduct was severe, pervasive, and offensive and this will lead to arbitrary decisions to turn away reporting parties. Several commenters asserted that permitting administrators to judge the severity, pervasiveness, and offensiveness of reported conduct will foster a culture of institutional betrayal because some institutions will choose to

investigate misconduct while others will not. A few commenters asserted that courts have found some unwanted sexual behavior (for example, a supervisor forcibly kissing an employee) is not severe *and* pervasive even though such behavior may constitute criminal assault or battery under State laws and that a definition of sexual harassment must at least cover misconduct that would be considered criminal.

Several commenters argued that a narrow definition would contribute to the overall effect of the proposed rules to eliminate most sexual harassment from coverage under Title IX, to the point of absurdity. Several commenters asserted that research shows that narrow definitions of sexual assault indicate that reports will decrease while underlying violence does not decrease.[674] At least one commenter argued that the proposed rules seek to use a single definition of sexual harassment in all settings, from prekindergarten all the way up to graduate school, and this lack of a nuanced approach fails to take into account the vast developmental differences between children, young adults, and college and graduate students. One commenter stated that especially for community college students, whose connections to a physical campus and its resources can be limited, a narrower definition of sexual harassment with "severe and pervasive" rather than "severe or pervasive" could make it harder for reporting parties to prove their victimization.

One commenter asserted that conduct that may not be considered severe in an isolated instance can qualify as severe when that conduct is pervasive, because "severe" and "pervasive" should not always entail two separate inquiries. One commenter suggested that the second prong of § 106.30 be changed to mirror the Title IX statute, by using the phrase "causes a person to be

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[674] Commenters cited: Mary P. Koss, *The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students*, 55 JOURNAL OF CONSULTING & CLINICAL PSYCHOL. 2 (1987).

excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity."

Discussion: The Department appreciates the opportunity to clarify that sexual assault (which includes rape) is referenced in the third prong of the § 106.30 definition of "sexual harassment," while the *Davis* standard (with the elements of severe, pervasive, and objectively offensive) is the second prong. This means that any report of sexual assault (including rape) is not subject to the *Davis* elements of whether the incident was "severe, pervasive, and objectively offensive." Thus, contrary to commenters' concerns, the final regulations do not require rape or sexual assault incidents to be "scrutinized for severity," rated on a pain scale, or leave students to be repeatedly or violently raped before a recipient must intervene. The Department intentionally did not want to leave students (or employees) wondering if a single act of sexual assault might not meet the *Davis* standard, and therefore included sexual assault (and, in the final regulations, dating violence, domestic violence, and stalking) as a stand-alone type of sexual harassment that does not need to demonstrate severity, pervasiveness, objective offensiveness, or denial of equal access to education, because denial of equal access is assumed. Complainants can feel confident turning to their school, college, or university to report and receive supportive measures in the wake of a sexual assault, without wondering whether sexual assault is "bad enough" to report. The Department understands that research shows that rape victims often do not report due to misconceptions about what rape is (e.g., a misconception that rape must involve violence inflicted by a stranger), and that rape victims may minimize their own experience and not report

sexual assault, for a number of reasons.[675] The definition of sexual assault referenced in § 106.30 broadly defines sexual assault to include all forcible and nonforcible sex offenses described in the FBI's Uniform Crime Reporting system. Those offenses do not require an element of physical force or violence, but rather turn on lack of consent of the victim. The Department believes that these definitions form a sufficiently broad definition of sexual assault that reflects the range of sexually violative experiences that traumatize victims and deny equal access to education. The Department believes that by utilizing a broad definition of sexual assault, these final regulations will contribute to greater understanding on the part of victims and perpetrators as to the type of conduct that constitutes sexual assault. The FBI's Uniform Crime Reporting system similarly does not exclude from sexual assault perpetration by a person known to the victim (whether as an acquaintance, romantic date, or intimate partner relationship), and the final regulations' express inclusion of dating violence and domestic violence reinforces the reality that sex-based violence is often perpetrated by persons known to the victim rather than by strangers.

As to unwelcome conduct that is not *quid pro quo* harassment, and is not a Clery Act/VAWA offense included in § 106.30, the *Davis* standard embodied in the second prong of the § 106.30 definition applies. The Department understands commenters' concerns that this means that only "the most severe" harassment situations will be investigated and that complainants will feel deterred from reporting non-sexual assault harassment due to wondering if the harassment is "bad enough" to be covered under Title IX. The Department understands that research shows that even "less severe" forms of sexual harassment may cause negative outcomes

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[675] The Association of American Universities, *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct* iv (Westat 2015) ("More than 50 percent of the victims of even the most serious incidents (e.g., forced penetration) say they do not report the event because they do not consider it "serious enough.").

for those who experience it. The Department believes, however, that severity and pervasiveness are needed elements to ensure that Title IX's non-discrimination mandate does not punish verbal conduct in a manner that chills and restricts speech and academic freedom, and that recipients are not held responsible for controlling every stray, offensive remark that passes between members of the recipient's community. The Department does not believe that evaluating verbal harassment situations for severity, pervasiveness, and objective offensiveness will chill reporting of unwelcome conduct, because recipients retain discretion to respond to reported situations not covered under Title IX. Thus, recipients may encourage students (and employees) to report any unwanted conduct and determine whether a recipient must respond under Title IX, or chooses to respond under a non-Title IX policy.

The Department believes that the Supreme Court's *Gebser* and *Davis* opinions provide the appropriate principles to guide the Department with respect to appropriate interpretation and enforcement of Title IX as a non-sex discrimination statute. Title IX is not an anti-sexual harassment statute; Title IX prohibits sex discrimination in education programs or activities. The Supreme Court has held that sexual harassment may constitute sex discrimination under Title IX, but only when the sexual harassment is so severe, pervasive, and objectively offensive that it effectively denies a person's equal access to education. Title IX does not represent a "zero tolerance" policy banning sexual harassment as such, but does exist to provide effective protections to individuals against discriminatory practices, within the parameters set forth under the Title IX statute (20 U.S.C. 1681 *et seq*.) and Supreme Court case law. While the Supreme Court interpreted the level of harassment differently under Title VII than under Title IX, neither Federal non-sex discrimination civil rights law represents a "zero-tolerance" policy banning all

sexual harassment.[676] Rather, interpretations of both Title VII and Title IX focus on sexual harassment that constitutes sex discrimination interfering with equal participation in a workplace or educational environment, respectively. Contrary to the concerns of commenters, the fact that not every instance of sexual harassment violates Title VII or Title IX does not mean that sexual harassment not covered under one of those laws is "acceptable" or encourages perpetration of sexual harassment.[677] The Department does not believe that parameters around what constitutes actionable sexual harassment under a Federal civil rights statute creates an environment where abusers "do everything just short of the narrowed standard" to torment and silence victims. A course of unwelcome conduct directed at a victim to keep the victim fearful or silenced likely crosses over into "severe, pervasive, and objectively offensive" conduct actionable under Title IX. Whether or not misconduct is actionable under Title IX, it may be actionable under another part of a recipient's code of conduct (e.g., anti-bullying). These final regulations only prescribe a recipient's mandatory response to conduct that does meet the § 106.30 definition of sexual

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[676] *E.g.*, *Chesier v. On Q Financial Inc.*, 382 F. Supp. 3d 918, 925-26 (D. Ariz. 2019) (reviewing Title VII cases involving single instances of sexual harassment determined not to be sufficiently severe enough to affect a term of employment under Title VII) ("not all workplace conduct that may be described as 'harassment' affects a term, condition, or privilege of employment within the meaning of Title VII. . . . 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.") (citing to *Meritor*, 477 U.S. at 67) (emphasis and brackets in original); Julie Davies, *Assessing Institutional Responsibility for Sexual Harassment in Education*, 77 TULANE L. REV. 387, 398, 407 (2002) ("Although the Court adopted different standards for institutional liability under Titles VII and IX, several themes serve as leitmotifs, running through the cases regardless of the technical differences. Neither Title VII nor Title IX is construed as a federal civility statute; the Court does not want entities to be obliged to litigate cases where plaintiffs have been subjected to 'minor' annoyances and insults.") (internal citation omitted).

[677] *See, e.g.*, *Brooks v. City of San Mateo*, 229 F.3d 917, 927 (9th Cir. 2000) ("Our holding in no way condones [the supervisor's] actions. Quite the opposite: The conduct of which [the plaintiff] complains was highly reprehensible. But, while [the supervisor] clearly harassed [the plaintiff] as she tried to do her job, not all workplace conduct that may be described as harassment affects a term, condition, or privilege of employment within the meaning of Title VII. The harassment here was an entirely isolated incident. It had no precursors, and it was never repeated. In no sense can it be said that the city imposed upon [the plaintiff] the onerous terms of employment for which Title VII offers a remedy.") (internal quotation marks and citation omitted).

harassment; these final regulations do not preclude a recipient from addressing other types of misconduct.

For the same reasons that Title IX does not stand as a zero-tolerance ban on all sexual harassment, Title IX does not stand as a Federal civil rights law to prevent all conduct that "makes me feel uncomfortable." The Supreme Court noted in *Davis* that school children regularly engage in "insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it" yet a school is liable under Title IX for responding to such behavior only when the conduct is "so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect."[678] Though not specifically in the Title IX context, the Supreme Court has noted that speech and expression do not lose First Amendment protections on college campuses, and in fact, colleges and universities represent environments where it is especially important to encourage free exchange of ideas, viewpoints, opinions, and beliefs.[679] The Department believes that the *Davis*

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[678] *Davis*, 526 U.S. at 650-51*; see also* Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights*, 35 JOURNAL OF COLL. & UNIV. L. 385, 399 (2009) ("misapplication of harassment law . . . has contributed to a sense among students that there is a general 'right' not to be offended' – a false notion that ill serves students as they transition from the relatively insulated college or university setting to the larger society. Colleges and universities too often address the problems of sexual and racial harassment by targeting any expression which may be perceived by another as offensive or undesirable.") (citing Alan Charles Kors & Harvey A. Silverglate, *The Shadow University: The Betrayal of Liberty on America's Campuses* (Free Press 1998) ("At almost every college and university, students deemed members of 'historically oppressed groups' . . . are informed during orientations that their campuses are teeming with illegal or intolerable violations of their 'right' not to be offended.")).

[679] *Healy v. James*, 408 U.S. 169, 180-81 (1972) ("At the outset we note that state colleges and universities are not enclaves immune from the sweep of the First Amendment. 'It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.' *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Of course, as Mr. Justice Fortas made clear in *Tinker*, First Amendment rights must always be applied 'in light of the special characteristics of the . . . environment in the particular case.' *Ibid*. And, where state-operated educational institutions are involved, this Court has long recognized 'the need for affirming the comprehensive authority of the States and of school officials, consistent with

formulation, applied to unwelcome conduct that is not *quid pro quo* harassment and not a Clery Act/VAWA offense included in § 106.30, appropriately safeguards free speech and academic freedom,[680] while requiring recipients to respond even to verbal conduct so serious that it loses First Amendment protection and denies equal access to the recipient's educational benefits.

While the Department appreciates a commenter's suggestion to describe prohibited conduct by references to terms used in the Sexual Experiences Survey or the Sexual Experiences

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fundamental constitutional safeguards, to prescribe and control conduct in the schools.' *Id.*, at 507. Yet, the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, '(t)he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.") (internal citations omitted).

[680] As noted in the "Role of Due Process in the Grievance Process" section of this preamble, the Department is aware that Title IX applies to all recipients operating education programs or activities regardless of a recipient's status as a public institution with obligations to students and employees under the U.S. Constitution or as a private institution not subject to the U.S. Constitution. However, the principles of free speech, and of academic freedom, are crucial in the context of both public and private institutions. *E.g.*, Kelly Sarabynal, 39 JOURNAL OF L. & EDUC. 145, 145, 181-82 (2010) (noting that "The vast majority of [public and private] universities in the United States promote themselves as institutions of free speech and thought, construing censorship as antipathetic to their search for knowledge") and observing that where public universities restrict speech (for example, through anti-harassment or anti-hate speech codes) the First Amendment "solves the conflict between a university's policies promising free speech and its speech-restrictive policies by rendering the speech-restrictive policies unconstitutional" and arguing that as to private universities, First Amendment principles embodied in a private university's policies should be enforced contractually against the university so that private liberal arts and research universities are held "to their official promises of free speech" which leaves private institutions control over changing their official promises of free speech if they so choose, for instance if the private institution expects students to "abide by the dictates of the university's ideology"). The Department is obligated to interpret and enforce Federal laws consistent with the U.S. Constitution. *E.g.*, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 574-575 (1988) (refusing to give deference to an agency's interpretation of a statute where the interpretation raised First Amendment concerns); 2001 Guidance at 22. While the Department has recognized the importance of responding to sexual harassment under Title IX while protecting free speech and academic freedom since 2001, as explained in the "Adoption and Adaption of the Supreme Court Framework to Address Sexual Harassment" section of this preamble, protection of free speech and academic freedom was weakened by the Department's use of wording that differed from the *Davis* definition of what constitutes actionable sexual harassment under Title IX and for reasons discussed in this section of the preamble, these final regulations return to the *Davis* definition verbatim, while also protecting against even single instances of *quid pro quo* harassment and Clery/VAWA offenses, which are not entitled to First Amendment protection.

Questionnaire,[681] for the above reasons the Department believes that the better formulation of prohibited conduct under Title IX is captured in § 106.30, prohibiting conduct on the basis of sex that is either *quid pro quo* harassment, unwelcome conduct so severe, pervasive, and objectively offensive that it effectively denies a person equal access to education, or sexual assault, dating violence, domestic violence, or stalking under the Clery Act and VAWA.

The Department understands commenters' concerns that the § 106.30 definition of sexual harassment, and the *Davis* standard in the second prong particularly, does not sufficiently acknowledge unequal power relations and societal factors that contribute to perpetuation of violence against women, and commenters' arguments that in order to reduce the prevalence of sexual misconduct across society even minor-seeming incidents should be taken seriously. The Department believes that the Supreme Court's recognition of sexual harassment as a form of sex discrimination[682] represents an important acknowledgement that sexual harassment often is not a matter of private, individualized misbehavior but is representative of sex-based notions and attitudes that contribute to systemic sex discrimination. However, the Department heeds the Supreme Court's interpretation of sexual harassment as sex discrimination under Title IX, premised on conditions that hold recipients liable for how to respond to sexual harassment. The § 106.30 definition of sexual harassment adopts the Supreme Court's *Davis* definition, adapted

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[681] Mary Koss & Cheryl J. Oros, *Sexual Experiences Survey: A research instrument investigating sexual aggression and victimization*, 50 JOURNAL OF CONSULTING & CLINICAL PSYCHOL. 3 (1982) (discussing survey questions designed to assess experiences with sexual harassment consisting of a series of questions about whether a respondent has encountered specific examples of sexual behavior); Louise Fitzgerald *et al.*, *Measuring sexual harassment: Theoretical and psychometric advances*, 17 BASIC & APPLIED SOCIAL PSYCHOL. 4 (1995).

[682] *E.g.*, *Meritor*, 477 U.S. at 64 ("Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."); *Gebser*, 524 U.S. at 283 (reference in *Franklin* to *Meritor* "was made with regard to the general proposition that sexual harassment can constitute discrimination on the basis of sex under Title IX, . . . an issue not in dispute here.") (internal citations omitted).

under the Department's administrative enforcement authority to provide broader protections for students (i.e., by ensuring that *quid pro quo* harassment and Clery Act/VAWA offenses included in § 106.30 count as sexual harassment without meeting the *Davis* standard). Similarly, the Department believes that by clearly defining sexual harassment to include sexual assault, dating violence, domestic violence, and stalking, affected parties will understand that no instance of sexual violence is tolerated under Title IX and may reduce the fear commenters described being felt by some young women participating in educational activities that involve proximity with fellow students or professors.

The Department does not believe that the § 106.30 definition creates categories of "legitimate" sexual misconduct or makes victims prove that their abuse is worthy of attention. The three-pronged definition of sexual harassment in § 106.30 captures physical and verbal conduct serious enough to warrant the label "abuse," and thereby assures complainants that sex-based abuse is worthy of attention and intervention by a complainant's school, college, or university. The Department appreciates the opportunity to clarify that the burden of describing or proving elements of the § 106.30 definition does not fall on complainants; there is no magic language needed to "present" a report or formal complaint in a particular way to trigger a recipient's response obligations. Rather, the burden is on recipients to evaluate reports of sexual harassment in a common sense manner with respect to whether the facts of an incident constitute one (or more) of the three types of misconduct described in § 106.30. This includes taking into account a complainant's age, disability status, and other factors that may affect how an individual complainant describes or communicates about a situation involving unwelcome sex-based conduct.

The Department disagrees with commenters' contention that § 106.30 gives school officials too much discretion to decide whether conduct was severe, pervasive, and objectively offensive or that these elements will lead to arbitrary decisions to turn away reporting parties based on biases of school administrators, fostering a culture of institutional betrayal, or that the § 106.30 definition eliminates "most" sexual harassment from coverage under Title IX, or that this definition is problematic because not all unwanted sexual behavior is severe and pervasive. Elements of severity, pervasiveness, and objective offensiveness must be evaluated in light of the known circumstances and depend on the facts of each situation, but must be determined from the perspective of a reasonable person standing in the shoes of the complainant. The final regulations revise the second prong of the § 106.30 definition to state that the *Davis* elements must be determined under a reasonable person standard. Title IX Coordinators are specifically required under the final regulations to serve impartially, without bias for or against complainants or respondents generally or for or against an individual complainant or respondent.[683] A recipient that responds to a report of sexual harassment in a manner that is clearly unreasonable in light of the known circumstances violates the final regulations,[684] incentivizing Title IX Coordinators and other recipient officials to carefully, thoughtfully, and reasonably evaluate each complainant's report or formal complaint.

The Department appreciates commenters' contention that recipients' Title IX offices have not been processing great quantities of "low-level" harassment cases; however, if that is accurate, then the § 106.30 definition simply will continue to ensure that sexual harassment is

[683] Section 106.45(b)(1)(iii).
[684] Section 106.44(a).

adequately addressed under Title IX, for the benefit of victims of sexual harassment. Far from excluding "most" sexual harassment from Title IX coverage, the definition of sexual harassment in § 106.30 requires recipients to respond to three separate broadly-defined categories of sexual harassment. While not all unwanted sexual conduct is both severe and pervasive, as explained above, the Supreme Court has long acknowledged that not all misconduct amounts to sex discrimination prohibited by Federal civil rights laws like Title VII and Title IX, even where the misconduct amounts to a criminal violation under State law.[685] Where a Federal civil rights law does not find sexual harassment to also constitute prohibited sex discrimination, this does not mean the conduct is acceptable or does not constitute a different violation, such as assault or battery, under non-sex discrimination laws. The Department does not believe that the § 106.30 definition of sexual assault is a "narrow" definition, as it includes all forcible and nonforcible sex offenses described in the FBI's Uniform Crime Reporting system and thus this definition will not discourage reporting of sexual assault.

The Department disagrees that it is inappropriate to use a uniform definition of sexual harassment in elementary and secondary school and postsecondary institution contexts. No person, of any age or educational level, should endure *quid pro quo* harassment, severe, pervasive, objectively offensive unwelcome conduct, or a Clery Act/VAWA offense included in § 106.30, without recourse from their school, college, or university. The § 106.30 definition

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[685] *See, e.g.*, *Brooks v. City of San Mateo*, 229 F.3d 917, 924, 927 (9th Cir. 2000) (Plaintiff alleged a workplace sexual assault in the form of a supervisor fondling plaintiff's breast, which is "egregious" and the perpetrator "spent time in jail" for the assault, yet the Court held that "[t]he harassment here was an entirely isolated incident. It had no precursors, and it was never repeated. In no sense can it be said that the city imposed upon [the plaintiff] the onerous terms of employment for which Title VII offers a remedy."); *see also Davis*, 526 U.S. at 634 (noting that the peer harasser in that case was charged with, and pled guilty to, sexual battery, yet still evaluating the harassment by whether it amounted to severe, pervasive, objectively offensive conduct).

applies equally in every educational setting, yet the definition may be applied in a common sense manner that takes into account the ages and developmental abilities of the involved parties.

The Department disagrees with a commenter's contention that community college students will find it more difficult to report sexual harassment because such students have less of a connection to a physical campus. Under § 106.8 of the final regulations, contact information for the Title IX Coordinator, including an office address, telephone number, and e-mail address, must be posted on the recipient's website, and that provision expressly states that any person may report sexual harassment by using the Title IX Coordinator's contact information. We believe this will simplify the process for community college students, as well as other complainants, to make a report to the recipient's Title IX Coordinator.

The Department disagrees with a commenter's assertion that pervasiveness necessarily transforms harassment into also being severe, because these elements are separate inquiries; however, the Department reiterates that a course of conduct reported as sexual harassment must be evaluated in the context of the particular factual circumstances, under a reasonable person standard, when determining whether the conduct is both severe and pervasive. The Department appreciates a commenter's suggestion to revise the second prong of the § 106.30 definition by stating that severe, pervasive, objectively offensive conduct counts when it "causes a person to be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity" instead of "effectively denies a person equal access to the recipient's education program or activity" to more closely mirror the language in the Title IX statute. However, as discussed above, the Department notes that when considering sexual harassment as a form of sex discrimination under Title IX, the Supreme Court in *Davis* repeatedly used the "denial of equal access" phrase to describe when sexual harassment is

actionable, implying that this is the equivalent of a violation of Title IX's prohibition on exclusion from participation, denial of benefits, and/or subjection to discrimination.[686] We believe this element as articulated by the *Davis* Court thus represents the full scope and intent of the Title IX statute.

Changes: We have revised the § 106.30 definition of sexual harassment by specifying that the elements in the *Davis* definition of sexual harassment (severe, pervasive, objectively offensive, and denial of equal access) are determined under a reasonable person standard.

Comments: Several commenters described State laws under which a recipient is required to respond to a broader range of misconduct than what meets the *Davis* standard, and stated that the NPRM places recipients in a "Catch-22" by requiring recipients to dismiss cases that do not meet the narrower § 106.30 definition; one such commenter urged the Department to either broaden the definition of sexual harassment or remove the mandatory dismissal provision in § 106.45(b)(3). A few commenters requested clarification on whether a school may choose to include a wider range of misconduct than conduct that meets this definition. Many commenters urged the Department not to prevent recipients from addressing misconduct that does not meet

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[686] *Davis*, 526 U.S. at 650 ("The statute's other prohibitions, moreover, help give content to the term 'discrimination' in this context. Students are not only protected from discrimination, but also specifically shielded from being 'excluded from participation in' or 'denied the benefits of' any 'education program or activity receiving Federal financial assistance.' 20 U.S.C. § 1681(a). The statute makes clear that, whatever else it prohibits, students must not be denied access to educational benefits and opportunities on the basis of gender. 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."); *id.* at 644-45 (holding that a recipient is liable where its "deliberate indifference 'subjects' its students to harassment – "[t]hat is, the deliberate indifference must, at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it."); *id.* at 650-652 (expressing the denial of access element in different ways as "depriv[ing] the victims of access to the educational opportunities or benefits provided by the school," "effectively den[ying] equal access to an institution's resources and opportunities," and "den[ying] its victims the equal access to education that Title IX is designed to protect.").

the § 106.30 definition because State laws and institutional policies often require recipients to respond. A few commenters asserted that even if the final regulations allow recipients to choose to address misconduct that does not meet the § 106.30 definition, this creates two different processes and standards (one for "Title IX sexual harassment" and one for other sexual misconduct) which will lead to confusion and inefficiency. At least one commenter stated that the Title IX equitable process should be used for all sexual misconduct violations such that the final regulations should allow recipients to use that process for Title IX, VAWA, Clery Act, and State law sex and gender offenses under a single campus policy and process. At least one commenter recommended that the Department clarify that the final regulations establish minimum Federal standards for responses to sex discrimination and that recipients retain discretion to exceed those minimum standards.

Discussion: The Department is aware that various State laws define actionable sexual harassment differently than the § 106.30 definition, and that the NPRM's mandatory dismissal provision created confusion among commenters as to whether the NPRM purported to forbid a recipient from addressing conduct that does not constitute sexual harassment under § 106.30. In response to commenters' concerns, the final regulations revise § 106.45(b)(3)(i)[687] to clearly state that dismissal for Title IX purposes does not preclude action under another provision of the recipient's code of conduct. Thus, if a recipient is required under State law or the recipient's own policies to investigate sexual or other misconduct that does not meet the § 106.30 definition, the

[687] Section 106.45(b)(3)(i) ("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, did not occur in the recipient's education program or activity, or did not occur against a person in the United States, then the recipient must dismiss the formal complaint with regard to that conduct *for purposes of sexual harassment under title IX or this part; such a dismissal does not preclude action under another provision of the recipient's code of conduct.*") (emphasis added).

final regulations clarify that a recipient may do so. Similarly, if a recipient wishes to use a grievance process that complies with § 106.45 to resolve allegations of misconduct that do not constitute sexual harassment under § 106.30, nothing in the final regulations precludes a recipient from doing so. Alternatively, a recipient may respond to non-Title IX misconduct under disciplinary procedures that do not comply with § 106.45. The final regulations leave recipients flexibility in this regard, and prescribe a particular grievance process only where allegations concern sexual harassment covered by Title IX. The Department does not agree that this results in inefficiency or confusion, because so long as a recipient complies with these final regulations for Title IX purposes, a recipient retains discretion as to how to address non-Title IX misconduct. Because the final regulations extend the § 106.30 definition to include all four Clery Act/VAWA offenses (sexual assault, dating violence, domestic violence, stalking), the Title IX grievance process will apply to formal complaints alleging the Clery Act/VAWA offenses included in § 106.30, and recipients may choose to use the same process for State-law offenses, too.

The Department appreciates a commenter's suggestion to clarify (and does so here) that the final regulations establish Federal standards for responding to sex discrimination in the form of sexual harassment, and recipients retain discretion to respond to more conduct than what these final regulations require.

Changes: The final regulations revise § 106.45(b)(3)(i) to clearly state that dismissal for Title IX purposes does not preclude action under another provision of the recipient's code of conduct.

Comments: Many commenters opposed the second prong of the § 106.30 sexual harassment definition by giving examples of harassing conduct that might not be covered. One such commenter stated that the "severe and pervasive" standard will conflict with elementary and secondary school anti-bullying policies, asserting that, for example, a classmate repeatedly

taunting a girl about her breasts may not be considered both severe and pervasive enough to fall under the proposed rules, whereas a similarly-described scenario was clearly covered under the 2001 Guidance (at p. 6).

A few commenters raised examples such as snapping a girl's bra, casual jokes and comments of a sexual nature, or unwelcome e-mails with sexual content, which commenters asserted can be ignored under § 106.30 because the unwanted behavior might be considered not severe even though it is pervasive, leaving victims in a state of anxiety and negatively impacting victims' ability to access education.

One commenter asserted that under § 106.30, a professor whispering sexual comments to a female student would be "severe" but since it happened once it would not be "pervasive" so even if the female student felt alarmed and uncomfortable and dropped that class, the recipient would not be obligated to respond. The same commenter asserted that the following example would not be sexual harassment under § 106.30 because the conduct would be pervasive but not severe: a graduate assistant e-mails an undergraduate student multiple times per week for two months, commenting each time in detail about what the student wears and how she looks, making the student feel uncomfortable about the unwanted attention to the point where she drops the class.

One commenter described attending a holiday party for graduate students where a fellow student wore a shirt with the words "I'm just here for the gang bang" and while the offensive shirt did not prevent the commenter from continuing an education it made the commenter feel unsafe and showed how deep-seated toxic rape culture is on college campuses; the commenter contended that narrowing the definition of harassment will only perpetuate this culture.

One commenter recounted the experience of a friend who was drugged at a dorm party; the commenter contended that because the boys who drugged the girl did not also rape her, the situation would not even be investigated under the new Title IX rules even though an incident of boys drugging a girl creates a dangerous, ongoing threat on campus.

One commenter urged the Department to authorize recipients to create lists of situations that constitute *per se* harassment, for example where a recipient receives multiple reports of students having their towels tugged away while walking to the dorm bathrooms, or reports of students lifting the skirts or dresses of other students. The commenter asserted that creating lists of such *per se* violations will create more consistent application of the harassment definition within recipient communities and address problematic situations that occur frequently at some institutions.

Discussion: In response to commenters who presented examples of misconduct that they believe may not be covered under the *Davis* standard in the second prong of the § 106.30 definition, the Department reiterates that whether or not an incident of unwanted sex-based conduct meets the *Davis* elements is a fact-based inquiry, dependent on the circumstances of the particular incident. However, the Department does not agree with some commenters who speculated that certain examples would *not* meet the *Davis* standard, and encourages recipients to use common sense in evaluating conduct under a reasonable person standard, by taking into account the ages and abilities of the individuals involved in an incident or course of conduct.

Furthermore, the Department reiterates that the *Davis* standard is only one of three categories of conduct on the basis of sex prohibited under § 106.30, and incidents that do not meet the *Davis* standard may therefore still constitute sexual harassment under § 106.30 (for example, as fondling, stalking, or *quid pro quo* harassment). The Department also reiterates that

inappropriate or illegal behavior may be addressed by a recipient even if the conduct clearly does not meet the *Davis* standard or otherwise constitute sexual harassment under § 106.30, either under a recipient's own code of conduct or under criminal laws in a recipient's jurisdiction (e.g., with respect to a commenter's example of drugging at a dorm party).

The Department understands commenters' concerns that anything less than the broadest possible definition of actionable harassment may result in some situations that make a person feel unsafe or uncomfortable without legal recourse under Title IX; however, for the reasons described above, the Department chooses to adopt the Supreme Court's approach to interpreting Title IX, which requires schools to respond to sexual harassment that jeopardizes the equal access to education promised by Title IX. Whether or not a college student wearing a t-shirt with an offensive slogan constitutes sexual harassment under Title IX, other students negatively impacted by the t-shirt are free to opine that such expression is inappropriate, and recipients remain free to utilize institutional speech to promote their values about respectful expressive activity.

The Department notes that nothing in the final regulations prevents a recipient from publishing a list of situations that a recipient has found to meet the § 106.30 definition of sexual harassment, to advise potential victims and potential perpetrators that particular conduct has been found to violate Title IX, or to create a similar list of situations that a recipient finds to be in violation of the recipient's own code of conduct even if the conduct does not violate Title IX.

Changes: None.

Comments: At least one commenter urged the Department to expressly include verbal sexual coercion in the § 106.30 definition of sexual harassment, noting that studies indicate that college women are likely to experience verbal sexual coercion as a tactic of sexual assault on a

continuum ranging from non-forceful verbal tactics to incapacitation to physical force, and that studies indicate that verbal sexual coercion is the most common sexual assault tactic.[688]

One commenter insisted that the second prong of the § 106.30 definition of sexual harassment is too broad and contended that the Department should adopt the minority view in the *Davis* case, or alternatively change the second prong to "unwelcome physical conduct on the basis of sex that is so severe, and objectively offensive" (eliminating the word pervasive because a single act of a physical nature could trigger the statute while excluding purely verbal conduct from the definition).

At least one commenter suggested that the second prong should be subject to a general requirement of objective reasonableness; the commenter asserted that objective offensiveness is no substitute for requiring all the elements of the hostile environment claim be not only subjectively valid but also objectively reasonable. The commenter asserted that the stakes are high: many complaints come to Title IX offices from students who sincerely believe that they have experienced sexual harassment, meeting any subjective test, but which cannot survive reasonableness scrutiny and thus objective reasonableness under all the circumstances is a necessary guard against arbitrary enforcement.

At least one commenter stated that subjective factors must be taken into consideration to decide if conduct is severe and pervasive because how severe the experience is to a particular victim depends on factors such as the status of the offender, the power the offender holds over

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[688] Commenters cited: Brandie Pugh & Patricia Becker, *Exploring Definitions and Prevalence of Verbal Sexual Coercion and its Relationship to Consent to Unwanted Sex: Implications for Affirmative Consent Standards on College Campuses*, 8 BEHAVIORAL SCI. 8 (2018).

the victim's life, the victim's prior history of trauma, or whether the victim has a support system for dealing with the trauma.

Discussion: The Department appreciates commenters' concerns that verbal sexual coercion is the most common sexual assault tactic, but declines to list verbal coercion as an element of sexual harassment or sexual assault. As explained in the "Consent" subsection of the "Section 106.30 Definitions" section of this preamble, the Department leaves flexibility to recipients to define consent as well as terms commonly used to describe the absence or negation of consent (e.g., incapacity, coercion, threat of force), in recognition that many recipients are under State laws requiring particular definitions of consent, and that other recipients desire flexibility to use definitions of consent and related terms that reflect the unique values of a recipient's educational community.

The Department disagrees with commenters who argued that the *Davis* standard is too broad and that the Department should adopt the dissenting viewpoint from the *Davis* decision. For reasons explained in the "Adoption and Adaption of the Supreme Court Framework to Address Sexual Harassment" section of this preamble, the Department believes that the Supreme Court appropriately described the conditions under which sexual harassment constitutes sex discrimination under Title IX, and the Department's goal through these final regulations is to impose requirements for recipients to provide meaningful, supportive responses fair to all parties when allegations of sexual harassment are brought to a recipient's attention. Similarly, the Department declines a commenter's recommendation to restrict the *Davis* standard solely to "physical" conduct because the Supreme Court has acknowledged that not all speech is protected by the First Amendment, and that verbal harassment can constitute sex discrimination requiring a

response when it is so severe, pervasive, and objectively offensive that it denies a person equal access to education.

The Department is persuaded by commenters' recommendation that the second prong of the § 106.30 definition must be applied under a general reasonableness standard. We have revised § 106.30 to state that sexual harassment includes "unwelcome conduct" on the basis of sex "determined by a reasonable person" to be so severe, pervasive, and objectively offensive that it effectively denies a person equal educational access. We interpret the *Davis* standard formulated in § 106.30 as subjective with respect to the unwelcomeness of the conduct (i.e., whether the complainant viewed the conduct as unwelcome), but as to elements of severity, pervasiveness, objective offensiveness, and denial of equal access, determinations are made by a reasonable person in the shoes of the complainant.[689] The Department believes this approach appropriately safeguards against arbitrary application, while taking into account the unique circumstances of each sexual harassment allegation.

Changes: We have revised the § 106.30 definition of sexual harassment by specifying that the elements in the *Davis* standard (severe, pervasive, objectively offensive, and denial of equal access) are determined under a reasonable person standard.

Comments: Many commenters opposed the § 106.30 definition on the ground that a narrow definition fails to stop harassing behavior before it escalates into more serious violations. Some

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[689] *See Davis*, 526 U.S. at 653-54 (applying the severe, pervasive, objectively offensive, denial of access standard to the facts at issue under an objective) ("Petitioner alleges that her daughter was the victim of repeated acts of sexual harassment by G. F. over a 5-month period, and there are allegations in support of the conclusion that G. F.'s misconduct was severe, pervasive, and objectively offensive. The harassment was not only verbal; it included numerous acts of objectively offensive touching, and, indeed, G. F. ultimately pleaded guilty to criminal sexual misconduct. . . . Further, petitioner contends that the harassment had a concrete, negative effect on her daughter's ability to receive an education.").

commenters urged the Department to consider statistics regarding violent offenders who could be identified by examining their history of harassment that escalated over time into violence. Other commenters emphasized that sexual harassment is often a first stop on a continuum of violence and schools have a unique opportunity and duty to intervene early. At least one commenter asserted that the definition should be more in line with academic definitions of sexual harassment.[690] At least one commenter analogized to laws against drunk driving, asserting that such laws do not distinguish between instances where a driver is marginally above the legal intoxication limit from those where a driver is significantly above the limit; the commenter argued that just as all driving while intoxicated situations are dangerous, all harassment regardless of severity is dangerous. Another commenter likened the § 106.30 approach to choosing not to address a rodent infestation until the problem escalates and becomes costlier to redress.

A few commenters argued that waiting until sexually predatory behavior becomes extremely serious risks women's lives, pointing to instances where women reporting domestic violence have been turned away by police due to individual incidents seeming "non-severe" and then been killed by their violent partners.[691]

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[690] Commenters cited: *Handbook for Achieving Gender Equity Through Education* 215-229 (Susan G. Klein *et al.* eds., 2d ed. 2007).

[691] Commenter cited: Elizabeth Bruenig, *What Do We Owe Her Now?*, THE WASHINGTON POST (Sept. 21, 2018); Lindsay Gibbs, *College track star warned police about her ex-boyfriend 6 times in the 10 days before he killed her*, THINKPROGRESS (Dec. 18, 2018), https://thinkprogress.org/mccluskey-university-of-utah-warned-police-about-ex-boyfriend-6-times-bc08aed0fad5/; Sirin Kale, *Teen Killed By Abusive Ex Even After Reporting Him to Police Five Times*, VICE (Jan. 15, 2019), https://broadly.vice.com/en_us/article/59vnbx/teen-killed-by-abusive-ex-even-after-reporting-him-to-police-five-times.

Many commenters stated that a victim turned away while trying to report a less severe instance of harassment will be unlikely to try and report a second time when the harassing conduct has escalated into a more severe situation.

Discussion: The Department understands commenters' concerns that sometimes harassing behavior escalates into more serious harassment, up to and even including violence and homicide, and that commenters therefore advocate using a very broad definition of sexual harassment that captures even seemingly "low level" harassment. The Department is persuaded that every instance of dating violence, domestic violence, and stalking should be considered sexual harassment under Title IX and has therefore revised § 106.30 to include these offenses in addition to sexual assault. However, for the reasons described above, the Department chooses to follow the Supreme Court's framework recognizing that Title IX is a non-sex discrimination statute and not a prohibition on all harassing conduct, and declines to define actionable sexual harassment as broadly as some academic researchers define harassment. The Department further believes that § 106.30 appropriately recognizes certain forms of harassment as *per se* sex discrimination (i.e., *quid pro quo* and Clery Act/VAWA offenses included in § 106.30), while adopting the *Davis* definition for other types of harassment such that free speech and academic

freedom[692] are not chilled or curtailed by an overly broad definition of sexual harassment.[693] The Department believes that as a whole, the § 106.30 definition appropriately requires recipient intervention into situations that form a course of escalating conduct, without requiring recipients to intervene in situations that might – but have not yet – risen to a serious level. By adding dating violence, domestic violence, and stalking to the third prong of the § 106.30 definition, it is even more likely that conduct with potential to escalate into violence or even homicide will be reported and addressed before such escalation occurs.

The Department contends that, similar to laws setting a legal limit over which a person's blood alcohol level constitutes illegal driving while intoxicated,[694] the § 106.30 definition as a whole sets a threshold over which a person's unwelcome conduct constitutes sexual harassment. While some harassment does not meet the threshold, serious incidents that jeopardize equal educational access exceed the threshold and are actionable. In addition, the § 106.30 definition

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[692] The Supreme Court has recognized academic freedom as protected under the First Amendment. *See, e.g.*, *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. . . . The classroom is peculiarly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, (rather) than through any kind of authoritative selection.") (internal quotation marks and citations omitted).

[693] Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 RUTGERS L. REV. 563 (1995) ("[T]he vagueness of harassment law means the law actually deters much more speech than might ultimately prove actionable."); Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L. J. 481, 483 (1991) ("A broad definition of sexual and racial harassment necessarily delegates broad powers to courts to determine matters of taste and humor, and the vagueness of the definition of 'harassment' leaves those subject to regulation without clear notice of what is permitted and what is forbidden. The inescapable result is a substantial chilling effect on expression.").

[694] While several States have zero-tolerance laws for driving while intoxicated that set illegal blood alcohol content levels at anything over 0.00, those zero-tolerance laws only apply to persons under the legal drinking age; for persons age 21 and older, all States have laws that set an illegal blood alcohol content level at 0.08 – in other words, not all levels of intoxication are prohibited, but rather only blood alcohol content levels above a certain amount. *See* Michael Wechsler, *DUI, DWI, and Zero Tolerance Laws by State*, THELAW.COM, https://www.thelaw.com/law/dui-dwi-and-zero-tolerance-laws-by-state.178/.

includes single instances of *quid pro quo* harassment and Clery Act/VAWA offenses, requiring recipients to address serious problems before such problems have repeated or multiplied and become more difficult to address. Similarly, the Department disagrees that § 106.30 makes complainants wait until sexually predatory behavior becomes extremely serious, because the definition as a whole captures serious conduct (not just "extremely" serious conduct) that Title IX prohibits.

The Department understands commenters' concerns that if a complainant reports a sexual harassment incident that does not meet the § 106.30 definition, that complainant may feel discouraged from reporting a second time if the sexual harassment escalates to meet the § 106.30 definition. However, complainants and recipients have long been familiar with the concept that sexual harassment must meet a certain threshold to be considered actionable under Federal non-discrimination laws.[695] The final regulations follow the same approach, and the Department does not believe that having a threshold for when harassment is actionable will chill reporting. The Department also reiterates that recipients retain discretion to respond to misconduct not covered by Title IX.

Changes: None.

Comments: Several commenters argued that adopting a narrower definition of sexual harassment makes it easier for sexist, misogynistic, and homophobic microaggressions, including sexist

[695] In the workplace under Title VII, and in educational environments under Title IX as interpreted in the Department's 2001 Guidance, not all sexual harassment is actionable. Title VII requires severe or pervasive conduct that alters a condition of employment. *E.g.*, *Meritor*, 477 U.S. at 67 ("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.") (internal quotation marks and citation omitted). The 2001 Guidance requires conduct "sufficiently serious" to deny or limit the complainant's ability to participate in education to be actionable under Title IX. 2001 Guidance at 5.

hostility and crude behavior, to continue unchecked. Commenters argued that making the definition of sexual harassment less inclusive tacitly condones microaggressions, making campuses less safe and decreasing diversity because more students from underrepresented groups will perform worse in school or leave school entirely.

A few commenters recommended that the definition include microaggressions. Some commenters asserted that microaggressions can cause the same negative impact on victims as more severe harassment does.[696] Other commenters asserted that using a "severe, pervasive, and objectively offensive" standard fails to consider personal, cultural, and religious differences in determining what constitutes sexual harassment, ignoring the fact that especially for individuals in marginalized identity groups, microaggressions may not seem pervasive or severe to an outsider but accumulate to make marginalized students feel unwelcome and unable to continue their education. One commenter suggested that rather than narrow the definition of harassment, it should be expanded to include what one professor has called "creepiness."[697] A few commenters asserted that cat-calling and other microaggressions may constitute more subtle forms of sexual harassment yet cause very real harms to victims[698] and the final regulations should protect more students from harmful violations of bodily and mental autonomy and dignity. At least one commenter argued that research indicates that gendered microaggressions, while not extreme,

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[696] Commenter cited: Lucas Torres & Joelle T. Taknint, *Ethnic microaggressions, traumatic stress symptoms, and Latino depression: A moderated mediational model*, 62 JOURNAL OF COUNSELING PSYCHOL. 3 (2015).
[697] Commenters cited: Bonnie Mann, *Creepers, Flirts, Heroes, and Allies: Four Theses on Men and Sexual Harassment*, 11 AM. PHIL. ASS'N NEWSLETTER ON FEMINISM & PHILOSOPHY 24 (2012).
[698] Commenter cited: Emma McClure, *Theorizing a Spectrum of Aggression: Microaggressions, Creepiness, and Sexual Assault*, 14 THE PLURALIST 1 (2019) (noting an accepted definition of "microaggressions" as "the brief and commonplace daily verbal, behavioral, and environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative racial, gender, sexual-orientation, and religious slights and insults to the target person or group" and stating that "although each individual microaggression may seem negligible, when repeated over time, microaggressions can seriously damage the target's mental and physical health").

increase the likelihood of high-severity sexual violence[699] and that unaddressed subtly aggressive behavior leads to more extreme sexual harassment.[700]

One commenter suggested that recipients will save money by investigating all survivor complaints, including of microaggressions, rather than waiting until harassment is severe and pervasive, because trauma from sexual harassment is analogous to chronic traumatic encephalopathy (CTE) in contact sports – it is not necessarily one big trauma that causes CTE but many repeated and seemingly asymptomatic injuries that accumulate over time causing CTE. Commenters argued that schools should be required, or at least allowed, to intervene in cases less severe than the § 106.30 definition.

Discussion: The Department appreciates commenters' concerns about the harm that can result from microaggressions, cat-calling, and hostile, crude, or "creepy" behaviors that can make students feel unwelcome, unsafe, disrespected, insulted, and discouraged from participating in a community or in programs or activities. However, the Supreme Court has cautioned that while Title VII and Title IX both prohibit sex discrimination, neither of these Federal civil rights laws is designed to become a general civility code.[701] The Supreme Court interpreted Title IX's non-

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[699] Commenters cited: Rachel E. Gartner & Paul R. Sterzing, *Gender Microaggressions as a Gateway to Sexual Harassment and Sexual Assault: Expanding the Conceptualization of Youth Sexual Violence*, 31 AFFILIA: J. OF WOMEN & SOCIAL WORK 4 (2016).

[700] Commenters cited: Dorothy Espelage *et al.*, *Longitudinal Associations Among Bullying, Homophobic Teasing, and Sexual Violence Perpetration Among Middle School Students*, 30 JOURNAL OF INTERPERSONAL VIOLENCE 14 (2015).

[701] *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) ("These standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a 'general civility code.' . . . Properly applied, they will filter out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.") (internal quotation marks and citations omitted); *Davis*, 526 U.S. at 684 (Kennedy, J., dissenting) ("the majority seeks, in effect, to put an end to student misbehavior by transforming Title IX into a Federal Student Civility Code."); *id.* at 652 (refuting dissenting justices' arguments that the majority

discrimination mandate to prohibit sexual harassment that rises to a level of severity, pervasiveness, and objective offensiveness such that it denies equal access to education.[702] The *Davis* Court acknowledged that while misbehavior that does not meet that standard may be "upsetting to the students subjected to it,"[703] Title IX liability attaches only to sexual harassment that does meet the *Davis* standard. The Department declines to prohibit microaggressions as such, but notes that what commenters and researchers consider microaggressions[704] could form part of a course of conduct reaching severity, pervasiveness, and objective offensiveness under § 106.30, though a fact-specific evaluation of specific conduct is required. As to a commenter's likening of microaggressions to "asymptomatic" injuries that in the aggregate cause CTE from playing contact sports, actionable sexual harassment under Title IX involves conduct that is unwelcome and so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity. Where harm results from behavior that does not meet the § 106.30 definition of sexual harassment, nothing in these final regulations precludes recipients from addressing such behavior under a recipient's own student or employee conduct code.

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opinion permits too much liability under Title IX or turns Title IX into a general civility code, by emphasizing that it is not enough to show that a student has been teased, called offensive names, or taunted, because liability attaches only to sexual harassment that is severe and pervasive); Julie Davies, *Assessing Institutional Responsibility for Sexual Harassment in Education*, 77 TULANE L. REV. 387, 398, 407 (2002) ("Although the Court adopted different standards for institutional liability under Titles VII and IX, several themes serve as leitmotifs, running through the cases regardless of the technical differences. Neither Title VII nor Title IX is construed as a federal civility statute; the Court does not want entities to be obliged to litigate cases where plaintiffs have been subjected to 'minor' annoyances and insults.") (internal citation omitted).

[702] *Davis*, 526 U.S. at 652.

[703] *Id.* at 651-52.

[704] *See, e.g.*, Emma McClure, *Theorizing a Spectrum of Aggression: Microaggressions, Creepiness, and Sexual Assault*, 14 THE PLURALIST 1 (2019) (noting an accepted definition of "microaggressions" as "the brief and commonplace daily verbal, behavioral, and environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative racial, gender, sexual-orientation, and religious slights and insults to the target person or group").

As noted above, the fact that not every harassing or offensive remark is prohibited under Title IX in no way condones or encourages crude, insulting, demeaning behavior, which recipients may address through a variety of actions; as a commenter pointed out, a recipient's response could include providing a complainant with supportive measures, responding to the conduct in question with institutional speech, or offering programming designed to foster a more welcoming campus climate generally, including with respect to marginalized identity groups. We have revised § 106.45(b)(3) in the final regulations to clarify that mandatory dismissal of a formal complaint due to the allegations not meeting the § 106.30 definition of sexual harassment does not preclude a recipient from acting on the allegations through non-Title IX codes of conduct. The final regulations also permit a recipient to provide supportive measures to a complainant even where the conduct alleged does not meet the § 106.30 definition of sexual harassment.

Changes: We have revised § 106.45(b)(3) to clarify that mandatory dismissal of a formal complaint because the allegations do not constitute sexual harassment as defined in § 106.30 does not preclude a recipient from addressing the allegations through the recipient's code of conduct.

Comments: Several commenters argued that concern for protecting free speech and academic freedom does not require or justify using the *Davis* definition of sexual harassment in the second prong of the § 106.30 definition because harassment is not protected speech if it creates a hostile

environment.[705] Commenters asserted that schools have the authority to regulate harassing speech,[706] that there is no conflict between the First Amendment and Title IX's protection against sexually harassing speech, and that the Department has no evidence that a broader definition of harassment over the last 20 years has infringed on constitutionally protected speech or academic freedom. On the other hand, at least one commenter argued that verbal conduct creating a hostile environment may still be constitutionally protected speech.[707]

Discussion: The Supreme Court has not squarely addressed the intersection between First Amendment protection of speech and academic freedom, and non-sex discrimination Federal civil rights laws that include sexual harassment as a form of sex discrimination (i.e., Title VII and Title IX).[708] With respect to sex discriminatory conduct in the form of admissions or hiring and firing decisions, for example, prohibiting such conduct does not implicate constitutional concerns even when the conduct is accompanied by speech,[709] and similarly, when sex

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[705] Commenters cited: Joanna L. Grossman & Deborah L. Brake, *A Sharp Backward Turn: Department of Education Proposes to Protect Schools, Not Students, in Cases of Sexual Violence*, VERDICT (Nov. 29, 2018) ("There is no legitimate First Amendment or academic freedom protection afforded to unwelcome sexual conduct that creates a hostile educational environment.").

[706] Commenters cited: *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513-14 (1969) (holding school officials can regulate student speech if they reasonably forecast "substantial disruption of or material interference with school activities" or if the speech involves "invasion of the rights of others").

[707] Commenters cited: *White v. Lee*, 227 F.3d 1214, 1236-37 (9th Cir. 2000) (refusing to extend labor law precedents allowing restrictions on workplace speech to non-workplace contexts such as discriminatory speech about housing projects); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991) (holding student speech that created a hostile environment was protected even though workplace speech creating a hostile environment is banned by Title VII).

[708] *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 204, 207 (3d Cir. 2001) ("There is no categorical 'harassment exception' to the First Amendment's free speech clause.") ("Although the Supreme Court has written extensively on the scope of workplace harassment, it has never squarely addressed whether harassment, when it takes the form of pure speech, is exempt from First Amendment protection") ("Loosely worded anti-harassment laws may pose some of the same problems as the St. Paul hate speech ordinance [struck down by the Supreme Court as unconstitutional in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992)]: they may regulate deeply offensive and potentially disruptive categories of speech based, at least in part, on subject matter and viewpoint.").

[709] *E.g.*, John F. Wirenius, *Actions as Words, Words as Actions: Sexual Harassment Law, the First Amendment and Verbal Acts*, 28 WHITTIER L. REV. 905 (2007) (identifying a First Amendment issue only with respect to hostile environment sexual harassment, as opposed to discriminatory conduct in the form of discrete employment decisions and *quid pro quo* sexual harassment).

discrimination occurs in the form of non-verbal sexually harassing conduct, or speech used to harass in a *quid pro quo* manner, stalk, or threaten violence against a victim, no First Amendment problem exists.[710] However, with respect to speech and expression, tension exists between First Amendment protections and the government's interest in ensuring workplace and educational environments free from sex discrimination when the speech is unwelcome on the basis of sex.[711]

In striking down a city ordinance banning bias-motivated disorderly conduct, the Supreme Court in *R.A.V. v. City of St. Paul* emphasized that the First Amendment generally prevents the government from proscribing speech or expressive conduct "because of disapproval

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[710] *Id.*; *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993) (citing Supreme Court cases in support of the view that a variety of conduct can be prohibited even where the person engaging in the conduct uses speech or expresses an idea, such that the First Amendment provides no protection for physical assault, violence, threat of violence, or other special harms distinct from communicative impact); *United States v. Osinger*, 753 F.3d 939, 953 (9th Cir. 2014) ("Because the sole immediate object of [the defendant's] speech was to facilitate his commission of the interstate stalking offense, that speech isn't entitled to constitutional protection.") (internal quotation marks and citation omitted).

[711] Andrea Meryl Kirshenbaum, *Hostile Environment Sexual Harassment Law and the First Amendment: Can the Two Peacefully Coexist?*, 12 TEX. J. OF WOMEN & THE L. 67, 68-70 (2002) ("Although the Supreme Court has never directly addressed this issue, the tension between the First Amendment and hostile environment sexual harassment law is evidenced by an increase in litigation involving these issues in courts throughout the nation." . . . "the clash between the First Amendment and the hostile environment sexual harassment doctrine is acute."); Peter Caldwell, *Hostile Environment Sexual Harassment & First Amendment Content-Neutrality: Putting the Supreme Court on the Right Path*, 23 HOFSTRA LAB. & EMP. L. J. 373 (2006) ("Where pure expression is involved, Title VII steers into the territory of the First Amendment. It is no use to deny or minimize this problem because, when Title VII is applied to sexual harassment claims founded solely on verbal insults, pictorial or literary matter, the statute imposes content-based, viewpoint-discriminatory restrictions on speech."); John F. Wirenius, *Actions as Words, Words as Actions: Sexual Harassment Law, the First Amendment and Verbal Acts*, 28 WHITTIER L. REV. 905 (2007) ("For nearly two decades, a debate has smoldered over the perceived tension between the law of sexual harassment and the First Amendment's guarantee of freedom of speech. As the protection against sexual harassment in the workplace spread beyond overt discrimination in discrete employment decisions and *quid pro quo* sexual harassment to include the less readily quantified 'hostile work environment,' free speech advocates became less sanguine about the compatibility between the protections against workplace discrimination and the First Amendment, especially its proscription of viewpoint discrimination."). The same tension exists with respect to the First Amendment, and verbal and expressive unwelcome conduct on the basis of sex under Title IX, and the Department aims to ensure through a carefully crafted definition of actionable sexual harassment that "discrete" sex offenses "and *quid pro quo* sexual harassment" are *per se* sexual harassment under Title IX because no First Amendment issues are raised, while verbal and expressive conduct is evaluated under the *Davis* standard so that prohibiting sexual harassment under Title IX is consistent with the First Amendment.

of the ideas expressed. Content-based regulations are presumptively invalid."[712] The Supreme Court explained that even categories of speech that can be regulated consistent with the First Amendment (for example, obscenity and defamation) cannot do so in a content-discriminatory manner (for instance, by prohibiting only defamation that criticizes the government).[713] The Supreme Court further explained that while "fighting words" can permissibly be proscribed under First Amendment doctrine, such a conclusion is based on the nature of fighting words to provoke injury and violence,[714] not merely the impact on the listener to be insulted or offended, and government still cannot regulate "based on hostility—or favoritism—towards the underlying message expressed."[715] Side-stepping the direct question of how the First Amendment prohibition against content-based regulations applies to hostile environment sexual harassment claims based on speech rather than acts, the *R.A.V.* Court stated that "sexually-based 'fighting words'" could "produce a violation of Title VII's general prohibition against sexual discrimination in employment *practices*" because "[w]here the government does not target *conduct* on the basis of its expressive conduct, *acts* are not shielded from regulation merely because they express a discriminatory idea or philosophy."[716] The *R.A.V.* Court struck down the city ordinance at issue, even though it was intended to protect persons in historically marginalized groups from victimization, in part because the "secondary effect" of whether a particular listener or audience is offended by speech does not justify restricting the speech.[717] In

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[712] *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).
[713] *See id.* at 383-84.
[714] *Id.* at 380-81 (*citing Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) for proposition that "fighting words" represent "conduct that itself inflicts injury or tends to incite immediate violence").
[715] *Id.* at 386.
[716] *Id.* at 389-90 (internal citation omitted) (emphasis added).
[717] *Id.* at 394.

striking down the ordinance, the Supreme Court noted that city officials retained the ability to communicate their hostility for certain biases – but not "through the means of imposing unique limitations upon speakers who (however benightedly) disagree."[718]

Seven years after deciding *R.A.V.* under the First Amendment, the Supreme Court decided *Davis* under Title IX. While the *Davis* Court did not raise the issue of First Amendment intersection with anti-sexual harassment regulation,[719] it focused on the sexually harassing *conduct* of the peer-perpetrator in that case,[720] indicating that the Supreme Court recognizes that proscribing conduct, as opposed to speech, raises no constitutional concerns, and that even when anti-harassment rules are applied to verbal harassment, requiring the harassment to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to education avoids putting recipients in the untenable position of protecting a recipient from legal liability

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[718] *Id.* at 395-96.

[719] The majority opinion did not address First Amendment concerns, although the dissent raised the issue. *Davis*, 526 U.S. at 667-68 (Kennedy, J., dissenting) ("A university's power to discipline its students for speech that may constitute sexual harassment is also circumscribed by the First Amendment. A number of federal courts have already confronted difficult problems raised by university speech codes designed to deal with peer sexual and racial harassment. *See*, *e.g.*, *Dambrot v. Cent. Michigan Univ.*, 55 F.3d 1177 (6th Cir. 1995) (striking down university discriminatory harassment policy because it was overbroad, vague, and not a valid prohibition on fighting words); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wisconsin Sys.*, 774 F.Supp. 1163 (E.D. Wis. 1991) (striking down university speech code that prohibited, *inter alia*, 'discriminatory comments' directed at an individual that 'intentionally . . . demean' the 'sex . . . of the individual' and 'create an intimidating, hostile or demeaning environment for education, university related work, or other university-authorized activity'); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (similar); *Iota XI Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386 (4th Cir. 1993) (overturning on First Amendment grounds university's sanctions on a fraternity for conducting an 'ugly woman contest' with 'racist and sexist' overtones) The difficulties associated with speech codes simply underscore the limited nature of a university's control over student behavior that may be viewed as sexual harassment."). Presumably, the majority believed that ensuring that even verbal harassment that meets the severe, pervasive, and objectively offensive standard avoids this constitutional problem; the majority expressed a similar rationale in response to the dissent's contention that the majority opinion permitted too much liability against recipients. *Davis*, 526 U.S. at 651-53.

[720] *Davis*, 526 U.S. at 653 ("Petitioner alleges that her daughter was the victim of repeated acts of sexual harassment by G. F. over a 5-month period, and there are allegations in support of the conclusion that G. F.'s misconduct was severe, pervasive, and objectively offensive. *The harassment was not only verbal; it included numerous acts of objectively offensive touching*, and, indeed, G. F. ultimately pleaded guilty to criminal sexual misconduct.") (emphasis added).

arising from how the recipient responds to sexual harassment only by unconstitutionally restricting its students' (or employees') rights to freedom of speech and expression.

The legal commentary and Supreme Court precedent often cited by commenters[721] arguing that the *Davis* definition of sexual harassment is not necessary for protection of First Amendment freedoms because harassment is unprotected if it creates a hostile environment, and because schools have authority to regulate harassing speech, do not support a conclusion that a categorical "harassment exception" exists under First Amendment law and do not justify applying a standard lower than the *Davis* standard for speech-based harassment in the educational context. For example, the statement in a legal commentary frequently cited by commenters that "[t]here is no legitimate First Amendment or academic freedom protection afforded to unwelcome sexual conduct that creates a hostile educational environment" contains no citations to legal authority.[722] Likewise, commenters citing *Tinker v. Des Moines Indep. Comm. Sch. Dist.* for the proposition that school officials can regulate student speech if they reasonably forecast "substantial disruption of or material interference with school activities" or if the speech involves "invasion of the rights of others" fail to acknowledge: (i) in *Tinker* the Supreme Court struck down the school decision in that case forbidding students from wearing armbands expressing opposition to war because that expressive conduct was akin to pure speech

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[721] *E.g.*, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513-14 (1969); Joanna L. Grossman & Deborah L. Brake, *A Sharp Backward Turn: Department of Education Proposes to Protect Schools, Not Students, in Cases of Sexual Violence*, VERDICT (Nov. 29, 2018).

[722] Joanna L. Grossman & Deborah L. Brake, *A Sharp Backward Turn: Department of Education Proposes to Protect Schools, Not Students, in Cases of Sexual Violence*, VERDICT (Nov. 29, 2018) (stating, without citation to legal authority, the proposition that "There is no legitimate First Amendment or academic freedom protection afforded to unwelcome sexual conduct that creates a hostile environment").

warranting First Amendment protection;[723] (ii) the *Tinker* Court insisted that the "substantial disruption" or "interference with school activities" exceptions only apply where school officials have more than unspecified fear of disruption or interference;[724] and (iii) the precise scope of *Tinker's* "interference with the rights of others" language is unclear, but is comparable to the *Davis* standard.[725] By requiring threshold levels of serious interference with work or education environments before sexual harassment is actionable, the Supreme Court standards under *Meritor*[726] (for the workplace) and *Davis*[727] (for schools, colleges, and universities) prevent these non-discrimination laws from infringing on speech and academic freedom,[728] precisely because

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[723] *Tinker*, 393 U.S. at 505-06 ("the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment.").
[724] *Id.* at 508 ("undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression").
[725] *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293 (3d Cir. 2013) ("As we have repeatedly noted, the precise scope of *Tinker's* 'interference with the rights of others' language is unclear.") (internal quotation marks and citation omitted); *cf.* Brett A. Sokolow *et al.*, *The Intersection of Free Speech and Harassment Rules*, 38 HUM. RIGHTS 19 (2011) ("The *Tinker* standard is comparable to the *Davis* standard, which places the threshold for harassment at the point where conduct 'bars the victim's access to an educational opportunity,' in that speech can be restricted only when the educational process is substantially impeded. In other words, when reviewing school policies, and the implementation thereof, it is critical to ensure students are being disciplined as a result of the objective impact of their speech, and not solely based on its content and/or the feelings of those to whom that speech is targeted.").
[726] *Meritor*, 477 U.S. at 67; *see also* John F. Wirenius, *Actions as Words, Words as Actions: Sexual Harassment Law, the First Amendment and Verbal Acts*, 28 WHITTIER L. REV. 905, 908 (2007) (arguing that the hostile work environment doctrine, properly understood with its critical threshold requirement that harassing speech be severe or pervasive enough to create an objectively hostile or abusive work environment, converts harassing speech into "verbal conduct" that may be regulated under Title VII consistent with the First Amendment). Similarly, when harassing speech is severe, pervasive, and objectively offensive enough to create deprivation of equal educational access it may be regulated under Title IX consistent with the First Amendment.
[727] *Davis*, 526 U.S. at 651 ("Rather, a plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."); Brett A. Sokolow, *et al.*, *The Intersection of Free Speech and Harassment Rules*, 38 HUM. RIGHTS 19 (2011) (cautioning that institutional anti-harassment policies must not prevent students from exercising rights of speech and expression, a result that the *Davis* standard makes clear).
[728] *E.g.*, Brett A. Sokolow *et al.*, *The Intersection of Free Speech and Harassment Rules*, 38 HUM. RIGHTS 19, 20 (2011) ("[S]chool regulations and actions that impact speech must be content and viewpoint neutral and must be

non-discrimination laws are not "categorically immune from First Amendment challenge when they are applied to prohibit speech solely on the basis of its expressive content."[729]

The First Amendment plays a crucial role in ensuring that the American government remains responsive to the will of the people and effects peaceful change by fostering free, robust exchange of ideas,[730] including those relating to sex-based equality and dignity.[731] There is no doubt that words can wound, and speech can feel like an "assault, seriously harm[ing] a private

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narrowly tailored to fit the circumstances. These regulations must be clear enough for a person of ordinary intelligence to understand, or courts will find them unconstitutionally void for vagueness. They cannot overreach by covering both protected and unprotected speech or courts will find them unconstitutionally overbroad. The regulation cannot act to preemptively prevent students from exercising their right to freely express themselves because the courts will find the prior restraint of speech presumptively unconstitutional.") ("In some ways, activist courts, agencies, and educational messages about civility and tolerance may have given a false impression that any sexist, ageist, racist, and so forth, remark is tantamount to harassment. As a society, we now use the term 'harassment' to mean being bothered, generically. We must distinguish generic harassment from discriminatory harassment. The standard laid out in *Davis* . . . makes this clear: To be considered discriminatory harassment, the conduct in question must be 'so severe, pervasive, *and* objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.'") (emphasis in original).

[729] *Saxe*, 240 F.3d at 209.

[730] *See Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) ("The vitality of civil and political institutions in our society depends on free discussion. . . . [I]t is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes. Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.") (internal citations omitted).

[731] Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights*, 35 JOURNAL OF COLL. & UNIV. L. 385, 397 (2009) ("In drafting and applying their harassment policies, colleges and universities frequently target protected speech merely because the expression in question is alleged to be sexist, prejudicial, or demeaning. . . . This approach ignores the fact that even explicitly sexist or racist speech is entitled to protection, and all the more so where it espouses views on important issues of social policy. Few people would disagree, for example, that the subjects of relations between the sexes, women's rights, and the pursuit of economic and social equality are all important matters of public concern and debate. Therefore, speech relating to such topics, regardless of whether it takes a favorable or negative view of women, is highly germane to the debate of public matters and social policy. In the marketplace of ideas, these expressions should not be suppressed merely to avoid offense or discomfort.") (citing *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985) (holding invalid under the First Amendment a statute that prohibited pornography depicting the subordination of women because the statute was a content-based restriction – that is, it applied not to all sexual depictions but to depictions of women in a disfavored manner).

individual" with effects that often linger.[732] Nonetheless, serious risks attach to soliciting the coercive power of government to enforce even laudable social norms such as respect and civility.[733] Even low-value speech warrants constitutional protection, in part because government should not be the arbiter of valuable versus worthless expression.[734] This principle holds true for elementary and secondary schools as well as postsecondary institutions.[735] Schools, colleges, and

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[732] *Snyder v. Phelps*, 562 U.S. 443, 461 (2011) (Breyer, J., concurring); s*ee also Davis*, 526 U.S. at 651-52 (acknowledging that gender-based banter, insults, and teasing can be upsetting to those on the receiving end).

[733] Catherine J. Ross, *Assaultive Words and Constitutional Norms*, 66 JOURNAL OF LEGAL EDUC. 739, 744 (2017) ("Recently, students have been in the vanguard, demanding that offensive speech be silenced. Students ask to be protected from hurtful words, sentiments, even gestures, and inadvertent facial clues or rolling eyes that communicate dismissal. They seek the coercive power of authority to enforce laudable social norms – respect, dignity, and equality regardless of race, ethnicity, gender, gender identity, and so forth. Meritorious as these proclaimed goals are, the rules and penalties some students lobby for would suppress the expressive rights of others including students, faculty, and invited guests, a particularly disturbing prospect at an institution devoted to the academic enterprise.").

[734] *Id*. at 749-50 (2017) ("Many people question whether rude epithets, crude jokes, and disparaging statements are the kind of expression that merits First Amendment protection. The Supreme Court has long held the Constitution protects the right to speak 'foolishly and without moderation.' You might maintain that racist, misogynist and other vile speech makes no contribution at all to the exchange of ideas – but the Speech Clause protects even so-called low-worth expression, in large part because no public authority can be trusted to distinguish valuable from worthless expression. The government cannot ban hateful expression, no matter how hurtful.") (citing *Cohen v. California*, 403 U.S. 15, 25-26 (1971)). Furthermore, permitting censorship of speech in an effort to be on the right side of history with respect to racial or sexual equality ignores the role that commitment to the First Amendment has played in achieving milestones for racial and sexual equality. *See, e.g.*, Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L. J. 484, 536-37 (1990) ("History demonstrates that if the freedom of speech is weakened for one person, group, or message, then it is no longer there for others. The free speech victories that civil libertarians have won in the context of defending the right to express racist and other anti-civil libertarian messages have been used to protect speech proclaiming anti-racist and pro-civil libertarian messages. For example, in 1949, the ACLU defended the right of Father Terminiello, a suspended Catholic priest, to give a racist speech in Chicago. The Supreme Court agreed with that position in a decision that became a landmark in free speech history. Time and again during the 1960s and 1970s, the ACLU and other civil rights groups were able to defend free speech rights for civil rights demonstrators by relying on the *Terminiello* decision [*Terminiello v. City of Chicago*, 337 U.S. 1 (1949)].") (internal citations omitted); *see also* Anthony D. Romero, *Equality, Justice and the First Amendment*, AMERICAN CIVIL LIBERTIES UNION (ACLU) (Aug. 15, 2017), https://www.aclu.org/blog/free-speech/equality-justice-and-first-amendment (explaining that the ACLU's nearly century-long history defending freedom of speech "including speech we abhor" is due to belief that "our democracy will be better and stronger for engaging and hearing divergent views. Racism and bigotry will not be eradicated if we merely force them underground. Equality and justice will only be achieved if society looks such bigotry squarely in the eyes and renounces it. . . . There is another reason that we have defended the free speech rights of Nazis and the Ku Klux Klan. . . . We simply never want government to be in a position to favor or disfavor particular viewpoints.").

[735] *See* Catherine J. Ross, *Assaultive Words and Constitutional Norms*, 66 JOURNAL OF LEGAL EDUC. 739, 754-55 (2017) ("Constitutional doctrine asks our youngest students to use the traditional constitutional responses to vile

universities, and their students and employees, who find speech offensive, have numerous avenues to confront offensive speech without "the means of imposing unique limitations upon speakers who (however benightedly) disagree."[736]

The Department believes that the tension between student and faculty freedom of speech, and regulation of speech to prohibit sexual harassment, is best addressed through rules that prohibit harassing and assaultive physical conduct, while ensuring that harassment in the form of speech and expression is evaluated for severity, pervasiveness, objective offensiveness, and denial of equal access to education. This is the approach taken in the § 106.30 definition of sexual harassment, under which *quid pro quo* harassment and Clery Act/VAWA offenses receive *per se* treatment as actionable sexual harassment, while other forms of harassment must meet the *Davis* standard. This approach balances the "often competing demands of the First Amendment's express guarantee of free speech and the Fourteenth Amendment's implicit promise of dignity and equality."[737]

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speech: Walk away, don't listen, or respond with 'more and better speech.' These general First Amendment principles apply with at least as much vigor to college campuses, where most students are adults, not schoolchildren, the guiding ethos of higher education supplements constitutional mandates, and students are not compelled to attend. Looking at what the Constitution requires in grades K-12 reveals a lot about what we should expect the adults enrolled in college to have the capacity to withstand. Since our constitutional framework expects this degree of coping from children beginning in elementary school, it is not asking too much of college students to handle offensive sentiments by using the standard First Amendment tools: Walk away, throw the pamphlet in the trash, get off the screen or, even better, tackle objectionable speech with more and better speech.") (discussing and citing *Nuxoll v. Indian Prairie Sch. Dist. # 204*, 523 F.3d 668, 672 (7th Cir. 2008); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 202 (3d Cir. 2001); *Nixon v. N. Local Sch. Dist. Bd. of Educ.*, 383 F. Supp. 2d 965, 967 (S.D. Ohio 2005)).

[736] *R.A.V.*, 505 U.S. at 395-96. As a commenter observed, recipients retain the ability and discretion to respond to offensive speech by a student (or employee) by providing the complainant with supportive measures, responding to the offensive speech with institutional speech, or offering programming designed to foster a welcoming campus climate more generally.

[737] Catherine J. Ross, *Assaultive Words and Constitutional Norms*, 66 JOURNAL OF LEGAL EDUC. 739, 739 (2017) ("Campuses are rocked by racially and sexually offensive speech and counter speech. Offensive speech and counter speech, including demonstrations and calls for policies that shield the vulnerable and repercussions for offenders, are

Contrary to commenters' assertions, evidence that broadly and loosely worded anti-harassment policies have infringed on constitutionally protected speech and academic freedom is widely available.[738] The fact that broadly-worded anti-harassment policies have been applied to protected speech "leads many potential speakers to conclude that it is better to stay silent and not risk the consequences of being charged with harassment. . . . This halts much campus discussion and debate, taking away from the campus's function as a true marketplace of ideas."[739] Where

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both protected by the Constitution. Yet some college administrations regulate this protected speech. Expression on both sides of a cultural and political divide brings to the fore a conflict that has been simmering in legal commentary for about two decades: the tension between the often competing demands of the First Amendment's express guarantee of free speech and the Fourteenth Amendment's implicit promise of dignity and equality. This clash between two fundamental principles seems to have been exacerbated recently by a renewed focus on identity politics both on campus and in national and international affairs.").

[738] *E.g.*, Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights*, 35 JOURNAL OF COLL. & UNIV. L. 385, 391-92 (2009) (discussing examples of universities punishing protected speech including: a student-employee charged with racial harassment merely for reading a book entitled *Notre Dame vs. The Klan*; finding a professor guilty of racial harassment for explaining in a Latin American Politics class that the term "wetbacks" is commonly used as a derogatory reference to Mexican immigrants; investigating a criminal law professor for a sexually hostile environment where the professor's exam presented a hypothetical case in which a woman seeking an abortion felt thankful after she was attacked because the physical attack resulted in the death of her fetus; finding a student guilty of sexual harassment for posting flyers joking that freshman women could lose weight by using the stairs); *see also* Nadine Strossen, Law Professor and former ACLU President, 2015 Richard S. Salant Lecture on Freedom of the Press at Harvard University (Nov. 5, 2015), https://shorensteincenter.org/nadine-strossen-free-expression-an-endangered-species-on-campus-transcript/ (identifying the free speech and academic freedom problems with "the overbroad, unjustified concept of illegal sexual harassment as extending to speech with any sexual content that anyone finds offensive," opining that the current college climate exalts a misplaced concept of "safety" by insisting that "safety seeks protection from exposure to ideas that make one uncomfortable . . . . [W]hen it comes to safety, our students are being doubly disserved. Too often, denied safety from physical violence, which is critical for their education, but too often granted safety from ideas, which is antithetical to their education," and detailing numerous examples "of campus censorship in the guise of punishing sexual harassment" including: subjecting a professor to investigation for writing an essay critical of current sexual harassment policies; punishing a professor who, during a lecture, paraphrased Machiavelli's comments about raping the goddess Fortuna; finding a professor guilty of sexual harassment for teaching about sexual topics in a graduate-level course called "Drugs and Sin in American Life;" suspending a professor for showing a documentary that examined the adult film industry; punishing a professor for having students play roles in a scripted skit about prostitution in a course on deviance; punishing a professor for requiring a class to write essays defining pornography; firing an early childhood education professor who had received multiple teaching awards, for occasionally using vulgar language and humor about sex in her lectures about human sexuality).

[739] Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights*, 35 JOURNAL OF COLL. & UNIV. L. 385, 397 (2009) ("Of course, sexual and racial

speech and expression are not given sufficient "breathing room," the "safety valve" function of speech is diminished.[740] Furthermore, even seemingly low-value speech can have a "downstream effect of leading to constructive discussion and debate which would not have taken place otherwise."[741] For these reasons, the § 106.30 definition of sexual harassment is designed to capture non-speech conduct broadly (based on an assumption of the education-denying effects of such conduct), while applying the *Davis* standard to verbal conduct so that the critical purposes of both Title IX and the First Amendment can be met.

Changes: None.

So Severe

Comments: Some commenters asserted that the "so severe" element of the second prong of the § 106.30 definition means that recipients must ignore many harassment incidents that result in academic, economic, and psychological harm and suffering including depression and post-traumatic stress disorder, whereas the better approach is to treat any level of harassment as

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harassment policies, regardless of the terms in which they are drafted, are oftentimes applied against protected speech, which again leads many potential speakers to conclude that it is better to stay silent and not risk the consequences of being charged with harassment. . . . The unfortunate result, then, is that students have a strong incentive to refrain from saying anything provocative, inflammatory, or bold and to instead cautiously stick to that which is mundane or conventional. This halts much campus discussion and debate, taking away from the campus's function as a true marketplace of ideas."); *id.* at 432-34 (discussing several Federal court cases striking down university anti-harassment codes as applied to constitutionally protected speech, including *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968 (9th Cir. 1996); *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386 (4th Cir. 1993); *Silva v. Univ. of N.H.*, 888 F. Supp. 293 (D. N.H. 1994)).

[740] Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights*, 35 JOURNAL OF COLL. & UNIV. L. 385, 398-99 (2009) ("Furthermore, one of the benefits of providing breathing room for such expression is that it allows the speaker to espouse his or her views through constructive dialogue rather than act out of frustration by committing acts of violence or hate crimes. This outlet has been labeled the 'safety valve' function of speech.").

[741] *Id.* ("By exposing the real ugliness of prejudice, ignorance and hate, such speech can reach and convince people in ways that polite conversation never could. Moreover, ignorant or misguided speech, though seemingly possessing little value or merit on its own, often has the 'downstream' effect of leading to constructive discussion and debate which would not have taken place otherwise. Consequently, the initial expression greatly benefits the marketplace of ideas and enriches students' understanding of important issues by increasing the potential for real and meaningful debate on campus.").

seriously as the most severe level. Some commenters asserted that schools should never try to tell a survivor what was or was not severe because the survivor is the only person who can determine what was severe. Other commenters wondered what threshold determines an incident as "severe," whether severity refers to the mental impact on the victim or the physical nature of the unwelcome conduct (or both), and how a victim is expected to prove severity.

Discussion: For reasons discussed above, the Department believes that severity is a necessary element to balance protection from sexual harassment with protection of freedom of speech and expression. The Department interprets the *Davis* standard formulated in § 106.30 as subjective with respect to the unwelcomeness of the conduct (i.e., whether the complainant viewed the conduct as unwelcome), and the final regulations clarify that the elements of severity, pervasiveness, objective offensiveness, and resulting denial of equal access are determined under a reasonable person standard.[742] In this way, evaluation of whether harassment is "severe" appropriately takes into account the circumstances facing a particular complainant, such as the complainant's age, disability status, sex, and other characteristics. This evaluation does not burden a complainant to "prove severity," because a complainant need only describe what occurred and the recipient must then consider whether the described occurrence was severe from the perspective of a reasonable person in the complainant's position.

Changes: None.

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[742] *See Davis*, 526 U.S. at 653-54 (applying the severe, pervasive, objectively offensive, denial of access standard to the facts at issue under an objective approach) ("Petitioner alleges that her daughter was the victim of repeated acts of sexual harassment by G. F. over a 5-month period, and there are allegations in support of the conclusion that G. F.'s misconduct was severe, pervasive, and objectively offensive. The harassment was not only verbal; it included numerous acts of objectively offensive touching, and, indeed, G. F. ultimately pleaded guilty to criminal sexual misconduct. . . . Further, petitioner contends that the harassment had a concrete, negative effect on her daughter's ability to receive an education.").

And Pervasive

Comments: Many commenters believed that the "pervasive" element of the second prong of the § 106.30 definition means that students would be forced to endure repeated, escalating levels of harassment before seeking help from schools, and that by the time schools must intervene it might be too late because victims will already have suffered emotional harm and derailed educational futures (e.g., ineligibility for an advanced placement course or rejection from admission to a dream college after grades dropped due to harassment that was not deemed pervasive). Several commenters asserted that every instance of discrimination deserves investigation, or else patterns of harassment will not be discovered because each single instance will be dismissed as not "pervasive." Some such commenters argued that without an investigation, a school will not know whether a single instance of an inappropriate remark or joke is truly an isolated incident or part of a pattern. A few commenters argued that especially in elementary and secondary schools, students whose reports are turned away for not being "pervasive" will be very unlikely to report again when the conduct repeats and does become pervasive.

Several commenters described scenarios that they asserted would not be covered as sexual harassment under § 106.30 because they fail to meet the pervasive element even though such scenarios present severe, objectively offensive, threatening, humiliating, harm-inducing consequences on victims, including: a professor blocking a teaching assistant's exit from a small office while badgering the assistant with sexual insults; a teacher inappropriately touching a student while making sexually explicit comments during an after-school meeting; students posting videos of "revenge porn" on social media.

Discussion: The Department reiterates that *quid pro quo* harassment and Clery Act/VAWA offenses (sexual assault, dating violence, domestic violence, and stalking) constitute sexual harassment under § 106.30 without any evaluation for pervasiveness. Thus, students do not have to endure repeated incidents of such abuse without recourse from a recipient. The Department further reiterates that recipients retain discretion to provide supportive measures to any complainant even where the harassment is not pervasive. The Department disagrees that an investigation into every offensive comment or joke is necessary in order to discern whether the isolated comment is part of a pervasive pattern of harassment. For reasons discussed above, chilling speech and expression by investigating each instance of unwelcome speech is not a constitutionally permissible way of ensuring that unlawful harassment is not occurring. The Department appreciates commenters' concerns that if a complainant receives no support after reporting one incident (that does not rise to the level of actionable harassment under Title IX) the complainant may feel deterred from reporting again if the harassment escalates and meets the *Davis* standard. This is one reason why the Department emphasizes that recipients remain free to provide supportive measures even where alleged conduct does not meet the § 106.30 definition of sexual harassment, and to utilize institutional speech and provide general programming to foster a respectful educational environment, none of which requires punishing or chilling protected speech.

With respect to the scenarios presented by commenters as examples of harassment that may not meet the *Davis* standard because of lack of pervasiveness, the Department declines to make definitive statements about examples, due to the necessarily fact-specific nature of the analysis. However, we note that sexual harassment by a teacher or professor toward a student or subordinate may constitute *quid pro quo* harassment, which does not need to meet a

pervasiveness element. The *Davis* standard as applied in § 106.30 is broad, encompassing any unwelcome conduct on the basis of sex that a reasonable person would find so severe, pervasive, and objectively offensive that a person is effectively denied equal educational access. Disseminating "revenge porn," or conspiring to sexually harass people (such as fraternity members telling new pledges to "score"), or other unwelcome conduct that harms and humiliates a person on the basis of sex may meet the elements of the *Davis* standard including pervasiveness, particularly where the unwelcome sex-based conduct involves widespread dissemination of offensive material or multiple people agreeing to potentially victimize others and taking steps in furtherance of the agreement. Finally, a single instance of unwelcome physical conduct may meet definitions of assault or battery prohibited by other laws, even if the incident does not meet one of the three prongs of the § 106.30 definition of sexual harassment.

Changes: None.

Objectively Offensive

Comments: Several commenters argued that the "objectively offensive" element of the second prong of the § 106.30 definition will mean different things to different school officials, and result in similar incidents being investigated by some schools and not by others. Several commenters asserted that "objectively offensive" creates an unnecessary and inappropriate scrutiny of victims and their experiences, creating barriers to reporting and making campuses less safe, contributing to victim-blaming, perpetuating myths and misconceptions about sexual violence, and minimizing the harm caused by sexual harassment.

Several commenters asserted that nothing is "objectively" offensive because what is offensive is based on how conduct subjectively makes a person feel yet "objective" means not influenced by personal feelings; these commenters argued that therefore the term "objectively

offensive" is an oxymoron. At least one commenter argued that research shows that individuals experience sex-based misconduct differently, depending on prior life experiences, previous victimization, and other factors.[743]

Commenters similarly opined that offensiveness depends on the impact of the conduct, not the intent of the perpetrator. One commenter opined that cat-calling may not sound objectively threatening, yet knowing that cat-calling and similar objectification of women may contribute to physical violence against women[744] might cause a woman targeted by cat-calling to feel unsafe.

At least one commenter argued that what is "objectively offensive" tends to be interpreted as what white, privileged men would find to be offensive, lending itself to a "boys will be boys" attitude that excuses a lot of behavior that offends women and marginalized individuals. One commenter recommended that the Department issue guidance for what factors to consider so that unconscious bias does not impact evaluation of what conduct is "offensive." One commenter claimed that the § 106.30 definition fails to account for the intersectional dynamics (race, gender, sexual orientation, culture, etc.) that may impact the severity and objective offensiveness of an act. This commenter argued that since the purpose of having an investigation is to decide whether conduct was in fact severe, pervasive, and objectively offensive it makes little sense to require schools to dismiss claims at the outset when the rape culture pyramid explains how small microaggressions and supposedly "less severe" offenses fuel

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[743] Commenters cited: Emma M. Millon *et al.*, *Stressful Life Memories Relate to Ruminative Thoughts in Women with Sexual Violence History, Irrespective of PTSD*, FRONTIERS IN PSYCHIATRY 9 (2018).
[744] Commenters cited: Eduardo A. Vasquez *et al.*, *The sexual objectification of girls and aggression towards them in gang and non-gang affiliated youth*, 23 PSYCHOL., CRIME & L. 5 (2017).

a culture for severe behaviors to become normalized. This commenter recommended that "objectively offensive" should be defined and understood with a high bar for sensitive, respectful language and conduct towards all in the community.

At least one commenter argued that because violence against women is often normalized,[745] and perpetrators of even heinous sexual crimes rationalize their behaviors through victim blaming,[746] these social realities make it very difficult for any act of sexual violence or harassment to be deemed "objectively offensive" even when the acts are disruptive or traumatic to the victim. At least one commenter asserted that the § 106.30 definition eliminates the possibility of recipients focusing on unique or personally harmful situations; for example, when private or "inside" jokes do not seem offensive to outsiders but have a harmful connotation for the victim.

Several commenters noted that under case law, what is objectively offensive is analyzed from the perspective of a reasonable person standing in the shoes of the complainant, using an approach that rejects disaggregation of allegations and instead looks at the aggregate or cumulative impact of conduct.[747] One commenter urged the Department to clarify that whether conduct is "severe, pervasive, and objectively offensive" depends on evaluation by a reasonable person and the hypothetical "reasonable person" must consider both male and female views of what is "offensive."

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[745] Commenters cited: Heather R. Hlavka, *Normalizing Sexual Violence: Young Women Account for Harassment and Abuse*, 28 GENDER & SOC'Y 3 (2014).
[746] Commenters cited: Diana Scully, & Joseph Marolla, *Convicted rapists' vocabulary of motive: Excuses and justifications*, 31 SOCIAL PROBLEMS 5 (1984).
[747] Commenters cited: *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993).

At least one commenter argued that the "objectively offensive" element undermines a longstanding analytic requirement that recipients evaluate conduct from both objective and subjective viewpoints (e.g., 2001 Guidance at p. 5).

Discussion: The Department agrees with commenters who note that whether harassing conduct is "objectively offensive" must be evaluated under a reasonable person standard, as a reasonable person in the complainant's position,[748] though the Department declines to require a commenter's suggestion that the "reasonable person" standard must consider offensiveness from both male and female perspectives because the latter suggestion would invite application of sex stereotypes. The final regulations revise the second prong of the § 106.30 definition to expressly state that the *Davis* elements are determined under a reasonable person standard.

The Department disagrees that "objectively offensive" is oxymoronic; the objective nature of the inquiry simply means that evaluation is made by a reasonable person considering whether, standing in the shoes of the complainant, the conduct would be offensive. The reasonable person standard appropriately takes into account whether a reasonable person, in the position of the particular complainant, would find the conduct offensive, thus the standard should not result in victims being blamed or excluded from receiving support regardless of whether the school officials evaluating the conduct share the same race, sex, age, or other characteristics as the complainant. It would be inappropriate for a Title IX Coordinator to evaluate conduct for

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[748] *See Davis*, 526 U.S. at 653-54 (applying the severe, pervasive, objectively offensive, denial of access standard to the facts at issue under an objective approach) ("there are allegations in support of the conclusion that G. F.'s misconduct was severe, pervasive, and objectively offensive. The harassment was not only verbal; it included numerous acts of objectively offensive touching"); s*ee also Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 81 (1998) ("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.") (internal quotation marks and citations omitted.).

objective offensiveness by shrugging off unwelcome conduct as simply "boys being boys" or make similar assumptions based on bias or prejudice. To take that approach would risk evidencing sex-based bias in contravention of § 106.45(a) or bias for or against a complainant or respondent in violation of § 106.45(b)(1)(iii), in addition to indicating improper evaluation of the *Davis* elements under a reasonable person standard. For reasons discussed under § 106.45(b)(1)(iii), the Department leaves recipients flexibility to decide the content of the training required for Title IX personnel under that provision, and nothing in the final regulations precludes a recipient from addressing implicit or unconscious bias as part of such training.

The Department disagrees that this standard inappropriately results in different schools making different decisions about what is objectively offensive. The Department believes that a benefit of the *Davis* standard as formulated in the second prong of § 106.30 is that whether harassment is actionable turns on both subjectivity (i.e., whether the conduct is unwelcome, according to the complainant) and objectivity (i.e., "objectively offensive") with the *Davis* elements determined under a reasonable person standard, thereby retaining a similar "both subjective and objective" analytic approach that commenters point out is used in the 2001 Guidance.[749] The fact-specific nature of evaluating sexual harassment does mean that different people may reach different conclusions about similar conduct, but this is not unreasonable because the specific facts and circumstances of each incident and the parties involved may require different conclusions. The *Davis* standard does not require an "intent" element;

[749] 2001 Guidance at 5 (conduct should be evaluated from both a subjective and objective perspective); *id*. at fn. 39 (citing case law for the proposition that whether conduct is severe, or objectively offensive, must be judged from the perspective of a reasonable person in the complainant's position, such as *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 20-22 (1993) (requiring subjective and objective creation of a hostile work environment)).

unwelcome conduct so severe, pervasive, and objectively offensive that it denies a person equal educational opportunity is actionable sexual harassment regardless of the respondent's intent to cause harm.

The Department disagrees that the objectively offensive element results in unnecessary scrutiny of victims' experiences that will create reporting barriers, make campuses less safe, lead to victim-blaming, or perpetuate sexual violence myths and misconceptions. The *Davis* standard ensures that all students, employees, and recipients understand that unwelcome conduct on the basis of sex is actionable under Title IX when a reasonable person in the complainant's position would find the conduct severe, pervasive, and objectively offensive such that it effectively denies equal access to the recipient's education program or activity.

For reasons explained above, the Department appreciates commenters' concerns that even conduct characterized by commenters as low-level harassment (such as cat-calling and microaggressions) can be harmful, and that some situations have escalated from minor incidents into violence and even homicide against women. This is why, in response to commenters, we have revised final § 106.30 to include as *per se* sexual harassment every incident of the Clery Act/VAWA offenses of dating violence, domestic violence, and stalking (in addition to sexual assault, which was referenced in the NPRM and remains part of the final regulations). In this way, the § 106.30 definition stands firmly against sex-based physical conduct, including violence and threats of violence, while ensuring that verbal and expressive conduct is punishable as Title IX sex discrimination only when the conduct crosses a line from protected speech into sexual harassment that denies a person equal access to education. For the same reasons, the § 106.30 definition pushes back against an historical, societal problem of normalizing violence against women. By not imposing an "intent" element into the sexual harassment definition, § 106.30

makes clear that sexual harassment under any part of the § 106.30 definition cannot be excused by trying to blame the victim or rationalize the perpetrator's behavior, tactics pointed to by commenters (and supported by research) as common reasons why victims (particularly women) have often faced dismissiveness, shame, or ridicule when reporting sex-based violence to authorities.

Changes: We have revised the second prong of the § 106.30 definition to expressly state that the *Davis* elements are determined under a reasonable person standard.

Effectively Denies Equal Access

Comments: Many commenters objected to the element in the second prong of the § 106.30 definition that conduct "effectively denies a person equal access" as a confusing, stringent, unduly restrictive standard that will harm survivors, benefit perpetrators, and send the message to assailants that non-physical sexual harassment is acceptable. At least one commenter stated that requiring conduct to rise to the level of denying a person equal access to the recipient's education program or activity is inconsistent with the language of Title IX because it is a higher bar than the statute's provision (20 U.S.C. 1681) 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 educational program or activity receiving federal financial assistance." Several commenters asserted that waiting until a complainant's access to education has been denied means that students must wait for help until harassing or violent behaviors cause victims to reach a breaking point, making a mockery of institutional responsibility and the values of an educational community.

Many commenters believed that the "effectively denies equal access" element supports a culture that conveys acceptance of sexual harassment of women as long as the victims continue

showing up to school, leaving girls and women in situations that are difficult and discouraging without recourse until they have lost access altogether. Many commenters believed that in order to file a Title IX complaint meeting this element, a victim would need to drop out of school entirely, fail a class, have a panic attack, be unable to function, or otherwise provide evidence of denial of access. Commenters argued that this standard makes no sense because help should be given to complainants before access has been denied, and will lead to more victims dropping out of school. One commenter relayed a personal story of sexual assault and stated that the commenter felt deterred from reporting the incident because the commenter was unsure whether, under the NPRM, the university would consider the incident significant enough to respond, despite the fact that the commenter knew of witnesses who could attest to the incident, and the commenter had to switch out of a class to avoid crossing paths with the perpetrator.

Many commenters believed that this element has a perverse effect of leaving students who demonstrate resilience by managing to attend classes and participate in educational activities despite being subjected to harassment and abuse without protection from the harassment they suffer. A few commenters opposed this element because it places the focus on a survivor's response to trauma instead of on the unwelcome conduct itself, when everyone responds differently to trauma. One commenter recounted an experience of reporting sexual violence to the police and being told that they did not appear "traumatized enough" to be

credible; the commenter argued that this element of the § 106.30 definition leaves too much subjectivity with school officials to interpret a victim's reaction to trauma.[750]

One commenter supported the proposed rules because for the first time the Department is regulating sexual harassment as a form of sex discrimination under Title IX, and sexual assault as a form of sexual harassment, but expressed concern that many commenters interpret the "effectively denies equal access" element as requiring students to drop out of school before action can be taken, amounting to a "constructive expulsion" requirement that is much more strict than what Title IX requires. Many commenters expressed the belief that this element means harassment is not actionable unless a complainant has been effectively driven off campus, and most of these commenters urged the Department to use "denies or limits" or simply "limits" instead of "effectively denies" to clarify that unwelcome conduct is actionable when it limits (not only when it has already denied) equal access to education. Many such commenters noted that the 2001 Guidance used "deny or limit" to recognize that students should not be denied a remedy for sexual harassment because they continue to come to class or participate in athletic practice no matter at what personal or emotional cost. At least one commenter stated that the 2001 Guidance only prohibits conduct that is sufficiently serious to deny or limit a student's educational benefits or opportunities from both a subjective and objective perspective, so if the purpose of the proposed definition is to minimize its misapplication to low-level situations that remain protected by the First Amendment (for public institutions) and principles of academic freedom (for private

[750] Commenters cited: Rebecca Campbell, *Survivors' Help-Seeking Experiences With the Legal and Medical Systems*, 20 VIOLENCE & VICTIMS 1 (2005), for the proposition that trauma cannot be identified or understood by looking at someone and everyone responds to trauma in a different manner.

institutions), that could be accomplished simply through clarification of the 2001 Guidance rather than adopting the *Davis* definition.

Several commenters wondered how a victim is supposed to prove effective denial, and stated that such a hurdle only perpetuates the harmful concept of "the perfect victim" that already causes too many victims to question whether their experience has been "bad enough" to be considered valid and worthy of intervention. One commenter asserted that knowledge about high functioning depression is growing more common, but a victim who is attending classes and does not appear significantly affected might believe they cannot even report sexual harassment and must continue suffering in silence. One commenter wondered if this element would mean that a third grade student sexually harassed by a sixth grade student who still attends school but expresses anxiety to their parent every day, begins bed-wetting, or cries themselves to sleep at night, has experienced "effective denial" or not. The same commenter further wondered if a ninth grader joining the wrestling team who gets sexually hazed by teammates has been "effectively denied" access if he quits the team but still carries on with other school activities. Another commenter stated that "deny access" would seem to allow for a professor to make inappropriate gender related jokes, making students of that gender feel uncomfortable in the class and potentially perform poorer, although they still attend class, so thus they are not "denied," but rather just "negatively impacted."

One commenter argued that this element mirrors the statutory language of "excluded from participation," but neglects the other two clauses (denial of benefits and subjected to discrimination) in the Title IX statute. This commenter stated that while this higher standard might be appropriate under the Supreme Court's rubric for Title IX private lawsuits, the Department should not reduce its own administrative authority because sexual harassment can,

and does, deny people educational benefits and opportunities even without excluding them entirely from access to education. This commenter argued that if Congress intended for the denial of benefits clause to be as narrow as the exclusion from participation clause, Congress would not have bothered using the two phrases separately; rules of statutory construction mean that Congress does not use words accidentally or without meaning. The commenter argued that a plain interpretation of the Title IX statute means that a lower level of denial of benefits could violate Title IX as much as a higher level of exclusion from participation. The commenter asserted that this does not mean that a very minor limitation of access would meet the standard, but some limitations (short of "denial") should meet the standard and must be covered by Title IX.

One commenter expressed concern over the varied interpretations of "access" to educational activities among Federal courts, noting that some interpret it narrowly (i.e., the ability of a student to enter in or begin an educational activity) while others interpret it more broadly (i.e., the ability to enter into an educational activity free from discriminatory experiences). Another commenter requested clarification that the Department interprets the "effective denial of equal access" element as not just physical inability to attend classes but also where a complainant experiences negative impacts on learning opportunities. Some commenters expressed concern that recipients will be confused about whether they are obligated to intervene if a student skips class to avoid a harasser, has difficulty focusing in class because of harassment, or suffers a decline in their grade point average (GPA) due to harassment, since these consequences have not yet cut off the student's "access" to education.

A few commenters expressed concern that this element could have detrimental effects on international students because they rely on student visas that require them to meet a certain

academic performance, so waiting until academic performance has suffered may be too late to help the international student because the student may already have lost their student visa. At least one commenter argued that this element is inappropriate in the elementary and secondary school context because the time-limited nature of education during the developmental years means that requiring inaction until a student has already lost educational access impedes basic civil rights.

One commenter wondered if a recipient exercising disciplinary power over student misconduct that does not affect the complainant's access to its program or activity, but declining to do so for sexual harassment, would be making a gender-based exception that constitutes sex discrimination in violation of Title IX.

Several commenters urged the Department to adopt an alternative approach adapted from workplace sexual harassment law, under which unwelcome conduct is actionable where it creates an environment reasonably perceived (and actually perceived) as hostile and abusive, altering work conditions, without requiring any showing of a tangible adverse action or psychological harm.[751] One such commenter urged the Department to adopt this "tried and tested formula" because the harm done to a survivor's educational access and performance should be just one factor in determining whether harassing conduct creates an environment which would be reasonably perceived as hostile, and no single factor should be dispositive but rather based on the totality of all the circumstances.[752] One commenter suggested replacing "effectively denies a

[751] Commenters cited: *Harris*, 510 U.S. at 22.
[752] Commenters cited: *Harris*, 510 U.S. at 22-23 ("This is not, and by its nature cannot be, a mathematically precise test . . . But we can say that whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances . . . no single factor is required.").

person's equal access" with "effectively bars a person's access to an educational opportunity or benefit" because the former sets too high a standard while the "effectively bars" phrase is used in *Davis*.[753]

A few commenters argued that eliminating hostile environment in its entirety from analyses of sexual harassment leaves victims without recourse and reflects the Department's ignorance of the realities of sexual violence because conduct considered benign when examined in isolation can be oppressive and limiting when considered in the context of sexual trauma. One such commenter argued that the decision to eliminate the concept of "hostile environment" without anything in its place is a callous decision that fundamentally contradicts the purpose of Title IX. This commenter contended that harassment in the form of cat-calling, for instance, creates a hostile environment even without interfering with access to education, and should not be tolerated.

One commenter stated that the NPRM is inconsistent because at some points, the Department writes that schools must intervene in harassment that "effectively denies a person *equal* access to the recipient's education program or activity," but at other points, the Department omits the critical word "equal" before "access."

Discussion: The Department understands commenters' concerns that the "effectively denies a person equal access" element sets too high a bar for a sexual harassment complainant to seek assistance from their school, college, or university. The Department reiterates that this element does not apply to the first or third prongs of the § 106.30 definition (*quid pro quo* harassment

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[753] Commenters cited: *Davis*, 526 U.S. at 640 ("that such an action will lie only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit").

and Clery Act/VAWA offenses, none of which need a demonstrated denial of equal access in any particular situation because the Department agrees with commenters that such acts inherently jeopardize equal educational access).

The Department appreciates the opportunity to clarify that, contrary to many commenters' fears and concerns, this element does *not* require that a complainant has already suffered loss of education before being able to report sexual harassment. This element of the *Davis* standard formulated in § 106.30 requires that a person's "equal" access to education has been denied, not that a person's total or entire educational access has been denied. This element identifies severe, pervasive, objectively offensive unwelcome conduct that deprives the complainant of *equal* access, measured against the access of a person who has not been subjected to the sexual harassment. Therefore, we do not intend for this element to mean that more victims will withdraw from classes or drop out of school, or that only victims who do so will have recourse from their schools.

This element is adopted from the Supreme Court's approach in *Davis*, where the Supreme Court specifically held that Title IX's prohibition against exclusion from participation, denial of benefits, and subjection to discrimination applies to situations ranging from complete, physical exclusion from a classroom to denial of *equal* access.[754] In line with this approach, the § 106.30 definition does not apply only when a complainant has been entirely, physically excluded from educational opportunities but to any situation where the sexual harassment "so undermines and

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[754] *See Davis*, 526 U.S. at 651 ("*It is not necessary, however, to show physical exclusion* to demonstrate that students have been deprived by the actions of another student or students of an educational opportunity on the basis of sex. Rather, a plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied *equal access* to an institution's resources and opportunities.") (emphasis added).

detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."[755] Neither the Supreme Court, nor the final regulations in § 106.30, requires showing that a complainant dropped out of school, failed a class, had a panic attack, or otherwise reached a "breaking point" in order to report and receive a recipient's supportive response to sexual harassment. The Department acknowledges that individuals react to sexual harassment in a wide variety of ways, and does not interpret the *Davis* standard to require certain manifestations of trauma or a "constructive expulsion." Evaluating whether a reasonable person in the complainant's position would deem the alleged harassment to deny a person "equal access" to education protects complainants against school officials inappropriately judging how a complainant has reacted to the sexual harassment. The § 106.30 definition neither requires nor permits school officials to impose notions of what a "perfect victim" does or says, nor may a recipient refuse to respond to sexual harassment because a complainant is "high-functioning" or not showing particular symptoms following a sexual harassment incident.

School officials turning away a complainant by deciding the complainant was "not traumatized enough" would be impermissible under the final regulations because § 106.30 does not require evidence of concrete manifestations of the harassment. Instead, this provision assumes the negative educational impact of *quid pro quo* harassment and Clery Act/VAWA offenses included in § 106.30 and evaluates other sexual harassment based on whether a

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[755] *See id.* at 650-652 (describing the denial of access element variously as: "depriv[ing] the victims of access to the educational opportunities or benefits provided by the school," "effectively den[ying] *equal access* to an institution's resources and opportunities" and "den[ying] its victims the *equal access* to education that Title IX is designed to protect.") (emphasis added).

reasonable person in the complainant's position would be effectively denied *equal* access to education compared to a similarly situated person who is not suffering the alleged sexual harassment. Thus, contrary to commenters' concerns, victims do not need to suffer in silence, and do not need to worry about what types of symptoms of trauma will be "bad enough" to ensure that a recipient responds to their report. Commenters' examples of a third grader who starts bed-wetting or crying at night due to sexual harassment, or a high school wrestler who quits the team but carries on with other school activities following sexual harassment, likely constitute examples of denial to those complainants of "equal" access to educational opportunities even without constituting a total exclusion or denial of an education, and the Department reiterates that no specific type of reaction to the alleged sexual harassment is necessary to conclude that severe, pervasive, objectively offensive sexual harassment has denied a complainant "equal access."

For reasons described above, the Department believes that adoption and adaption of the *Davis* standard better serves both the purposes of Title IX's non-discrimination mandate and constitutional protections of free speech and academic freedom, and thus the final regulations retain the *Davis* formulation of effective denial of equal access rather than the language used in Department guidance documents. While commenters correctly assert that the Department is not required to use the *Davis* standard, for the reasons explained in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, the Department is persuaded that the Supreme Court's Title IX cases provide the appropriate backdrop for Title IX enforcement, and the Department has intentionally adapted that framework for administrative enforcement to provide additional protections to complainants (and respondents) not required in private Title IX litigation. With respect to the denial of equal access

element, neither the *Davis* Court nor the Department's final regulations require complete exclusion from an education, but rather denial of "equal" access. Signs of enduring *unequal* educational access due to severe, pervasive, and objectively offensive sexual harassment may include, as commenters suggest, skipping class to avoid a harasser, a decline in a student's grade point average, or having difficulty concentrating in class; however, no concrete injury is required to conclude that serious harassment would deprive a reasonable person in the complainant's position of the ability to access the recipient's education program or activity on an equal basis with persons who are not suffering such harassment. This clarification addresses the concerns of some commenters that a rule requiring total denial of access would harm international students whose student visas may be in jeopardy if their academic performance suffers, and the similar concerns from commenters that waiting to help until an elementary school student has dropped out of school would irreparably damage the student's educational pathways. For the same reasons, § 106.30 does not raise the issue identified by a commenter as to whether a school would be violating Title IX by requiring a student to suffer total exclusion before responding to sexual harassment as compared to other types of misconduct.

For reasons described above, the Department is persuaded by Supreme Court reasoning that different standards for actionable harassment are appropriate under Title IX (for educational environments) and Title VII (for the workplace). However, neither law requires "tangible adverse action or psychological harm" before the sexual harassment may be actionable, as a commenter feared would be required under these final regulations.

The Department agrees that the Supreme Court used a variety of phrasing through the majority opinion to describe the "denial of equal access" element. However, the Department does not agree with the commenter who suggested that using "effectively bars access to an

educational opportunity or benefit " instead of "effectively denies equal access to an education program or activity" yields a broader or better formulation, and in fact, the Department believes that under the *Davis* Court's reasoning, denial of "equal access" to a recipient's education program or activity reflects a broad standard that appropriately captures situations of unequal access due to sex discrimination, in conformity with Title IX's non-discrimination mandate, and § 106.30 reflects this standard by using the phrase "effectively denies a person equal access."

The Department disputes that § 106.30 eliminates the concept of hostile environment "without anything in its place." While the concept of a hostile environment originated under Title VII to describe sexual harassment creating a hostile or abusive workplace environment altering the conditions of a complainant's job, when interpreting Title IX the Supreme Court carefully applied a standard tailored to address the particular discriminatory ill addressed by Title IX: denying a person "the equal access to education that Title IX is designed to protect."[756] Contrary to the contention of some commenters that all unwelcome conduct must be covered by Title IX even if it does not interfere with education, Title IX is concerned with sex discrimination in an education program or activity, but as discussed above, does not stand as a Federal civility code that requires schools, colleges, and universities to prohibit every instance of unwelcome or undesirable behavior. The Department acknowledges that the 2001 Guidance and 2017 Q&A use the phrase "hostile environment" to describe sexual harassment that is not *quid*

[756] *Id.* at 652 (holding schools liable where the sexual harassment "denies its victims the equal access to education that Title IX is designed to protect.").

pro quo harassment[757] and that these final regulations depart from those guidance documents by describing sexual harassment as actionable when it effectively denies a person equal access to education rather than when the sexual harassment creates a hostile environment. While the two concepts may overlap, for reasons discussed above, the denial of equal access to education element is more precisely tailored to serve the purpose of Title IX (which bars discrimination in education programs or activities) than the hostile environment concept, which originated to describe the kind of hostile or abusive *workplace* environment sexual harassment may create under Title VII.[758] Under these final regulations, where sexual harassment effectively denies a person "equal access" to education, recipients must offer the complainant supportive measures (designed to restore or preserve the complainant's equal educational access)[759] and, where a fair grievance process finds the respondent to be responsible for sexually harassing the complainant,

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[757] 2001 Guidance at 5 ("By contrast, sexual harassment can occur that does not explicitly or implicitly condition a decision or benefit on submission to sexual conduct. Harassment of this type is generally referred to as hostile environment harassment."); 2017 Q&A at 1. The withdrawn 2011 Dear Colleague Letter and withdrawn 2014 Q&A similarly relied on a hostile environment theory of sexual harassment. 2011 Dear Colleague Letter at 15; 2014 Q&A at 1.

[758] To the extent that the Supreme Court in *Davis* cited to Title VII cases as authority for its formulation of the "effectively denied equal access" element for actionable sexual harassment under Title IX, we believe that such citations indicate that the Title IX focus on "effectively denied equal access" element is the educational equivalent of the workplace doctrine of "hostile environment." *E.g.*, *Davis*, 526 U.S. at 651 ("Rather, a plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities. *Cf. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. at 67*."); *id.* ("Whether gender-oriented conduct rises to the level of actionable 'harassment' thus 'depends on a constellation of surrounding circumstances, expectations, and relationships,' *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 82, 140 L. Ed. 2d 201, 118 S. Ct. 998 (1998)."). Even though these final regulations do not rely on a "hostile environment" theory of sexual harassment, a recipient may choose to deliver special training to a class, disseminate information, or take other steps that are designed to clearly communicate the message that the school does not tolerate harassment and will be responsive to any student who reports sexual harassment, as described in the 2001 Guidance, so that no person is effectively denied equal access to education. 2001 Guidance at 16.

[759] Section 106.44(a) (requiring that with or without a grievance process, the recipient's response to sexual harassment must include promptly offering supportive measures to the complainant); § 106.30 (defining "supportive measures" as individualized services provided without fee or charge to complainants or respondents, designed to restore or preserve equal access to education without unreasonably burdening the other party).

the recipient must effectively implement remedies designed to restore or preserve the complainant's equal educational access.[760]

The Department appreciates commenters' pointing out that the NPRM inconsistently used the phrases "equal access" and "access" and has revised the final regulations to ensure that all provisions referencing denial of access, or preservation or restoration of access, include the important modifier "equal." This will ensure that the appropriate interpretation of this element is better understood by students, employees, and recipients: that Title IX is concerned with "equal access," not just total denial of access.

Changes: We have revised several provisions to ensure the word "equal" appears before "access" (e.g., "effectively denies equal access" or "restore or preserve equal access") to mirror the use of "equal access" in § 106.30 defining "sexual harassment," so that the terminology and interpretation is consistent throughout the final regulations.

Prong (3) Sexual Assault, Dating Violence, Domestic Violence, Stalking

Comments: Some commenters approved of the third prong of the § 106.30 definition's reference to the Clery Act's definition of sexual assault as part of the overall definition of "sexual harassment."

Many commenters supported the reference to "sexual assault" but contended that the third prong of the definition should also reference the other VAWA crimes included in the Clery Act regulations, namely, dating violence, domestic violence, and stalking. A few commenters

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[760] Section 106.45(b)(1)(i) (requiring the recipient to provide remedies to a complainant where a respondent is found responsible following a grievance process that complies with § 106.45 and stating that remedies may consist of individualized services similar to those that meet the definition in § 106.30 of supportive measures except that remedies (unlike supportive measures) may be punitive or disciplinary against the respondent, and need not avoid burdening the respondent)); § 106.45(b)(7)(iv) (stating that the Title IX Coordinator is responsible for the effective implementation of remedies).

requested clarification as to whether dating violence, domestic violence, and stalking would only count as sexual harassment under § 106.30 if such crimes met the second prong (severe, pervasive, and objectively offensive), and expressed concern that a single instance of an offense such as dating violence or domestic violence might fail to be included because it would not be considered "pervasive." A few commenters asserted that the proposed regulations would leave dating violence, domestic violence, and stalking in an educational civil rights gray area. Many commenters urged the Department to bring the third prong of the § 106.30 definition into line with the Clery Act, as amended by VAWA, by expressly including dating violence, domestic violence, and stalking.

Several commenters argued that dating violence, domestic violence, and stalking are just as serious as sexual harassment and sexual assault.[761] A few commenters recounted working with victims where domestic violence or stalking escalated beyond the point of limiting educational access even tragically ending up in homicides. A few commenters noted that dating violence was recently added as a reportable crime under the Clery Act in part because 90 percent of all campus rapes occur via date rapes,[762] and dating violence should be included in the § 106.30 definition.

Some commenters asserted that domestic violence is prevalent among youth, and that the highest rate of dating violence and domestic violence against females occurs between the ages of

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[761] Commenters cited, *e.g.*: National Association of Student Affairs Administrators in Higher Education (NASPA) & Education Commission of the States, *State Legislative Developments on Campus Sexual Violence: Issues in the Context of Safety* 7-8 (2015); Wendy Adele Humphrey, *"Let's Talk About Sex": Legislating and Educating on the Affirmative Consent Standard*, 50 UNIV. OF S.F. L. REV. 35, 49, 58-60, 62-64, 71 (2016); Emily A. Robey-Phillips, *Federalism in Campus Sexual Violence: How States Can Protect Their Students When a Trump Administration Will Not*, 29 YALE J. OF L. & FEMINISM 373, 393-414 (2018).

[762] Commenters cited: Health Research Funding, *39 Date Rape Statistics on College Campuses*, https://healthresearchfunding.org/39-date-rape-statistics-college-campuses/.

16-24,[763] precisely when victims are likely to be in high school and college, needing Title IX protections. Commenters argued that if a school fails to properly respond to a student's domestic violence situation, the student's health and school performance may suffer and even lead to the victim dropping out of school, and that a significant number of female homicide victims of college age were killed by an intimate partner.[764]

Many commenters asserted that stalking presents a unique risk to the health and safety of college students due to the significant connection between stalking and intimate partner violence[765] insofar as stalking often occurs in the context of dating violence and sexual violence. Many commenters asserted that stalking is very common on college campuses and within the college population; persons aged 18-24 (the average age of most college students) experience the highest rates of stalking victimization of any age group;[766] and college-aged women are stalked at higher rates than the general population and that one study showed that over 13 percent of college women had experienced stalking in the academic year prior to the study.[767] One commenter cited a study that showed that in ten percent of stalking situations the victim reported that the stalker committed, or attempted, forced sexual contact.[768] At least one commenter cited research showing that sexual assault perpetrators often employed classic stalking strategies (e.g.,

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[763] Commenters cited: U.S. Dep't. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Factbook: Violence by Intimates* (1998).
[764] Commenter cited: U.S. Dep't. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Factbook: Violence by Intimates* (1998); U.S. Dep't. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Patterns and Trends: Homicide Trends in the United States, 1980-2008* (Nov. 2011); Katie J. M. Baker, *Domestic Violence on Campus is the Next Big College Controversy*, BUZZFEED NEWS (Jun. 9, 2015).
[765] Commenters cited: Judith McFarlane *et al.*, *Stalking and Intimate Partner Femicide*, 3 HOMICIDE STUDIES 300 (1999).
[766] Commenters cited: U.S. Dep't. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Special Report: Stalking Victimization in the United States* (2009).
[767] Commenters cited: U.S. Dep't. of Justice, Office of Justice Programs, National Institute of Justice, *Research Report: The Sexual Victimization of College Women* (2000).
[768] Commenters cited: *Id*.

surveillance and information-gathering) to select victims.[769] A few commenters provided examples of the kind of stalking behaviors that commonly victimize college students, including following a victim to and from classes, repeatedly contacting a student despite requests to cease communication, and threats of self-harm if a student does not pay attention to the stalker. Several commenters expressed concern that without express recognition of stalking as a sexual harassment violation, the discrete incidents involved in a typical stalking pattern might not meet the *Davis* standard and thus would not be reportable under Title IX. One commenter elaborated on an example of typical stalking behavior that would fall through the cracks of effective response under the proposed rules, where the stalking behavior is pervasive but arguably not serious (when each incident is considered separately) and the complainant declines a no-contact order because the locations where the complainant encounters the respondent are places the complainant needs to access to pursue the complainant's own educational activities. This commenter argued that failure to address sex-based stalking may have dire consequences; the commenter stated that several tragic homicides of female students[770] were preceded by this fairly standard stalking-turned-violent pattern.

Discussion: The Department appreciates commenters' support for including "sexual assault" referenced in the Clery Act as an independent category of sexual harassment in § 106.30 and we are persuaded by the many commenters who asserted that the other Clery Act/VAWA sex-based

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[769] Commenters cited: David Lisak & Paul Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 1 (2002).

[770] Commenters described three such homicide situations: the 2010 murder of University of Virginia fourth-year student, Yeardley Love, by her boyfriend who was also a fourth-year student; the 2018 murder of University of Utah student Lauren McCluskey, by her ex-boyfriend; the 2018 murder of 16 year old Texas high schooler Shana Fisher – the first victim of the 17 year old shooter who killed ten students, beginning with Shana who had recently rejected him romantically.

offenses (dating violence, domestic violence, and stalking) also should be included in the same category as sexual assault. Commenters correctly pointed out that without specific inclusion of dating violence, domestic violence, and stalking in the third prong of § 106.30, those offenses would need to meet the *Davis* standard set forth in the second prong of the § 106.30 definition. While the NPRM assumed that many such instances would meet the elements of severity and pervasiveness (as well as objective offensiveness and denial of equal access), commenters reasonably expressed concerns that these offenses may not always meet the *Davis* standard.[771] The Department agrees with commenters who urged that because these offenses concern non-expressive, often violent conduct, even single instances should not be subjected to scrutiny under the *Davis* standard. Dating violence, domestic violence, and stalking are inherently serious sex-based offenses[772] that risk equal educational access, and failing to provide redress for even a single incident does, as commenters assert, present unnecessary risk of allowing sex-based violence to escalate. The Department is persuaded by commenters' arguments and data showing that dating violence, domestic violence, and stalking are prevalent, serious problems affecting students, especially college-age students. The Department believes that a broad rule prohibiting those offenses appropriately falls under Title IX's non-discrimination mandate without raising any First Amendment concerns. The Department therefore revises the final regulations to include dating violence, domestic violence, and stalking as defined in the Clery Act and VAWA.

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[771] As commenters noted, dating violence and domestic violence may fail to meet the *Davis* standard because although a single instance is severe it may not be pervasive, while a course of conduct constituting stalking could fail to meet the *Davis* standard because the behaviors, while pervasive, may not independently seem severe.

[772] Stalking may not always be "on the basis of sex" (for example when a student stalks an athlete due to celebrity worship rather than sex), but when stalking is "on the basis of sex" (for example, when the stalker desires to date the victim) stalking constitutes "sexual harassment" under § 106.30. Stalking that does not constitute sexual harassment because it is not "on the basis of sex" may be prohibited and addressed under a recipient's non-Title IX codes of conduct.

Changes: We have revised the third prong of the final § 106.30 definition of sexual harassment to add, after sexual assault, dating violence, domestic violence, and stalking as defined in VAWA.

Comments: One commenter objected to the reference to "sexual assault" in the third prong of the § 106.30 definition by asserting that the definition seemed to be just for the purpose of having sexual assault in the proposed regulations without any intent to enforce it. A few commenters believed that the third prong's reference to "sexual assault" will not prevent sexual assault even though reported numbers of rapes might decline, because certain situations would no longer be considered rape.

A few commenters objected to the reference to the Clery Act definition of "sexual assault," asserting that the definition of "sexual assault" is too narrow because it fails to capture sex-based acts such as administration of a date rape drug, attempted rape, a respondent forcing a complainant to touch the respondent's genitals, the touching of a complainant's non-private body part (e.g., face) with the respondent's genitals, or an unwanted and unconsented-to kiss on the cheek (even if coupled with forcing apart the complainant's legs).

One commenter believed the definition of sexual assault is too narrow because it does not include a vast number of "ambiguous" sexual assaults; the commenter argued that coercive sexual violence often includes a layer of guilt-inducing ambiguity that may arise from explicit or implied threats used by the perpetrator as a means of compelling nominal (but not genuine) consent. One commenter stated that from December of 2017 to December of 2018, 2,887 people in the United States Googled the question "was I raped?" and according to the same data from Google Trends, in the same time span, 2,311 people Googled "rape definition" and over the last five years, 10,781 and 12,129 people have searched for the question and definition respectively.

This commenter argued that these numbers reflect a lack of certainty surrounding what constitutes rape and demonstrate the need for clarity and better education rather than a vague reference to "sexual assault." Another commenter stated that sexual assault cases often fit within a certain "gray area" often centered on consent issues, and that most sexual violence situations are not black and white; the commenter opined that Title IX should be available to help complainants whose experience is "a little grayer" because otherwise people will continue to pressure and coerce partners into having sex that is not truly consensual, creating more and more trauma.

At least one commenter asserted that historically, courts have considered conduct that meets any reasonable definition of criminal sexual assault, including rape, as sex-based harm under Title IX,[773] and thus a separate reference to "sexual assault" in the § 106.30 definition is unnecessary and only serves to blur the distinction between school-based administrative processes and criminal justice standards. Several other commenters, by contrast, pointed to at least one Federal court opinion holding that a rape failed to meet the "severe and pervasive" standard in private litigation under Title IX.[774]

At least one commenter expressed concern that using the Clery Act's definition of sexual assault (which includes "fondling" under the term "sexual assault") would encompass "butt slaps" (as "fondling") yet this misbehavior occurs with such frequency especially in elementary and secondary schools that school districts will be overwhelmed with needing to investigate

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[773] Commenters cited: *Soper v. Hoben*, 195 F.3d 845, 855 (6th Cir. 1999) (assertion that victim was raped, sexually abused, and harassed obviously qualifies as severe, pervasive, and objectively offensive sexual harassment).
[774] Commenters cited: *Ross v. Corp. of Mercer Univ.*, 506 F. Supp. 2d 1325, 1358 (M.D. Ga. 2007) (finding that a single instance of rape was not pervasive under the *Davis* standard).

those incidents under the strictures of the Title IX grievance process. Another commenter expressed concern that including sexual assault (particularly fondling) in the third prong of the § 106.30 definition is too broad, and wondered whether this definition could encompass innocent play by small children, such as "playing doctor." This commenter argued that where the conduct at issue does not bother the participants it cannot create a subjectively hostile environment or interfere with equal access to an education, regardless of lack of consent based on being under the age of majority.[775]

One commenter argued that because the Clery Act definition of "sexual assault" includes incest and statutory rape, such a definition will encompass incidents that are consensual when Title IX should be focused on discriminatory conduct, which should be restricted to nonconsensual or unwanted conduct; the commenter asserted that where a half-brother and half-sister, or a 13 year old and an 18 year old, engage in consensual sexual activity the Title IX process should not be used to intervene, even if such conduct may constitute criminal offenses that can be addressed through a criminal justice system. Another commenter argued that the inclusion of statutory rape sweeps up sexual conduct by underage students no matter how consensual, welcome, and reciprocated the conduct might be, and asserted that this over-inclusion threatens to turn Title IX into enforcement of high school and first-year college

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[775] Commenters cited: *Newman v. Federal Express*, 266 F.3d 401 (6th Cir. 2001) (racial harassment claim fails when victim is not seriously offended); *Jadon v. French*, 911 P.2d 20, 30-31 (Alaska 1996) (conduct that does not seriously offend the victim does not create a subjectively hostile environment and thus is not sexually harassing). Conduct must be not just "unwelcome," *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67-68 (1986), but also subjectively hostile and annoying to constitute sexual harassment. This commenter argued that "sexual assault" must include both subjective unwelcomeness and objective interference with access to education to be actionable and also cited: *Gordon v. England*, 612 F. App'x 330 (6th Cir. 2015) ("extreme groping" did not create an objectively hostile environment, by itself, and thus did not violate Title VII); *Brooks v. City of San Mateo*, 229 F.3d 917 (9th Cir. 2000) (holding misdemeanor sexual assault involving touching of breast did not create objectively hostile environment, by itself, and thus did not violate Title VII).

students through repressive administrative monitoring of youth sexuality in instances that are not severe, not pervasive, and do not impede educational access.

One commenter described a particular institution of higher education's sexual misconduct policy as defining sexual assault broadly to include "any other intentional unwanted bodily contact of a sexual nature," a standard the commenter argued is ambiguous and overbroad; the commenter argued that the final regulations should clarify that schools cannot apply a definition of "sexual assault" that equates all unwanted touching (such as a kiss on the cheek) with groping or penetration because it is unfair to treat kissing without verbal consent the same as a sex crime and, in the long run, makes it less likely that women will be taken seriously when sex crimes occur. This commenter also asserted that vague, overbroad definitions of sexual assault disproportionately harm students of color.[776]

Some commenters believed that the final regulations should include sexual assault in the definition but should use a definition of sexual assault different from the proposed rules' reference to "sexual assault" under the Clery Act regulations. One commenter believed that laypersons reading the regulation should not have to refer to yet another Federal regulation in

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[776] Commenters cited: Ben Trachtenberg, *How University Title IX Enforcement and Other Discipline Processes (Probably) Discriminate Against Minority Students*, 18 NEV. L. J. 107 (2017); Emily Yoffe, *The Question of Race in Campus Sexual-Assault Cases: Is the system biased against men of color?*, THE ATLANTIC (September 2017) (noting that male students of color are "vastly overrepresented" in the cases Yoffe has tracked and arguing that as "the definition of sexual assault used by colleges has become broader and blurrier, it certainly seems possible that unconscious biases might tip some women toward viewing a regretted encounter with a man of a different race as an assault. And as the standards for proving assault have been lowered, it seems likely that those same biases, coupled with the lack of resources common among minority students on campus, might systematically disadvantage men of color in adjudication, whether or not the encounter was interracial."); Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. FORUM 103, 106-08 (2015) ("American racial history is laced with vendetta-like scandals in which black men are accused of sexually assaulting white women" followed by revelations "that the accused men were not wrongdoers after all . . . . morning-after remorse can make sex that seemed like a good idea at the time look really alarming in retrospect; and the general social disadvantage that black men continue to carry in our culture can make it easier for everyone in the adjudicative process to put the blame on them . . . . Case after Harvard case that has come to my attention . . . has involved black male respondents.").

order to know the definition of "sexual assault." Another commenter stated that by including a cross-reference to the Clery Act regulation, this Title IX regulation could have its definition of sexual assault changed due to regulatory changes under the Clery Act, and that sexual assault should be explicitly defined rather than relying on a cross-reference to a different regulation. One commenter, supportive of the three-prong definition of sexual harassment in § 106.30, suggested that the provision should include a full definition of sexual assault to better clarify prohibited conduct rather than a cross-reference to the Clery Act.

A few other commenters asserted that the Clery Act definition of sexual assault poses problems; they argued that reference to the Clery Act regulations should be replaced by inserting a definition of sexual assault directly into § 106.30. One such commenter argued that the Clery Act definition of sexual assault is biased against men because under the definitions of rape and fondling, a male who performs oral sex on a female victim likely commits "rape" while a female who performs oral sex on a male victim at most commits "fondling," but not the more serious-sounding offense of rape.

One commenter proposed an alternate definition of sexual assault that would define sexual assault by reference to crimes under each State law as classified under the FBI Uniform Crime Reporting Program's ("FBI UCR") National Incident-Based Reporting System (NIBRS). This commenter asserted that this alternative definition of sexual assault would better serve the Department's purpose because it does not require the Department to issue new definitions for Title IX purposes of the degree of family connectedness for incest, the statutory age of consent for statutory rape, consent and incapacity for consent for rape, and other elements in the listed sex offenses. This commenter further asserted that the commenter's alternative definition would not use the definition of rape in the FBI UCR's Summary Reporting System (SRS), because the

FBI has announced that it is retiring the SRS on January 1, 2021 and will collect crime data only through NIBRS thereafter.

Another commenter asserted that the reference in § 106.30 to 34 CFR 668.46(a) for a definition of sexual assault fails to provide meaningful guidance on what conduct recipients must include under Title IX, because the Clery Act regulation relies on the FBI UCR, which is a reporting system designed to aggregate crime data across the Nation, not intended to provide guidance about what conduct is acceptable or unacceptable for enforcement purposes. Under the Clery Act regulation, this commenter points out that "rape" and "fondling" do not define what consent (or lack of consent) means, and "fondling" does not identify which body parts are considered "private." This commenter argued that the need for clarity about what constitutes sexual assault is too important to leave recipients to muddle through vague definitions, and proposed that the third prong of § 106.30 use the following alternative definition of sexual assault: 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, the person 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; sexual assault must effectively deny a person equal access to the recipient's education program or activity.

Discussion: The Department emphasizes that including sexual assault as a form of sexual harassment is not an empty reference; the Department will enforce each part of the § 106.30 definition, including requiring recipients to respond to sexual assault, vigorously for the benefit of all persons in a recipient's education program or activity. The Department believes that the Clery Act's reference to sexual assault is appropriately broad and thus does not agree with the

commenter's contention that the sexual assault reference excludes acts that should be considered rape or sexual assault.

The Department acknowledges commenters' concerns that not every act related to or potentially involved in a sexual assault would meet the Clery Act definition of sexual assault. With respect to violative acts such as commenters' examples of administration of a date rape drug, touching a non-private body part with the perpetrator's private body part, and so forth, such acts constitute criminal acts and/or torts under State laws and likely constitute separate offenses under recipients' own codes of conduct. Therefore, such egregious acts can be addressed even if they do not constitute sexual harassment under Title IX. With respect to an attempted rape, we define "sexual assault" in § 106.30 by reference to the Clery Act,[777] which in turn defines sexual assault by reference to the FBI UCR,[778] and the FBI has stated that the offense of rape includes attempts to commit rape.[779]

The Department disputes a commenter's contention that the sexual assault definition in § 106.30 lacks sufficient precision to capture sexual assault that occurs under what the commenter called "guilt-inducing ambiguity" or "gray areas" often centered around whether the complainant genuinely consented or only consented due to coercion. For reasons explained in the "Consent" subsection of the "Section 106.30 Definitions" section of this preamble, the Department intentionally leaves recipients flexibility and discretion to craft their own definitions of consent (and related terms often used to describe the absence or negation of consent, such as coercion).

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[777] Section 106.30 (defining "sexual harassment" to include "Sexual assault" as "defined in 20 U.S.C. 1092(f)(6)(A)(v)").
[778] 20 U.S.C. 1092(f)(6)(A)(v) ("The term 'sexual assault' means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.").
[779] U.S. Dep't. of Justice, Federal Bureau of Investigation, *UCR Offense Definitions* (with respect to rape, "Attempts or assaults to commit rape are also included"), https://ucrdatatool.gov/offenses.cfm.

The Department believes that a recipient should select a definition of sexual consent that best serves the unique needs, values, and environment of the recipient's own educational community. So long as a recipient is required to respond to sexual assault (including offenses such as rape, statutory rape, and fondling, which depend on lack of the victim's consent), the Department believes that recipients should retain flexibility in this regard. The Department has revised the final regulations to state that it will not require recipients to adopt a particular definition of consent.[780] With respect to the commenter's point regarding a lack of certainty about what constitutes rape, the Department believes that including sexual assault in these Title IX regulations will contribute to greater societal understanding of what sexual assault is and why every person should be protected against it.

Because Federal courts applying the *Davis* standard have reached different conclusions about whether a single rape has constituted "severe and pervasive" sexual harassment sufficient to be covered under Title IX, we are including single instances of sexual assault as actionable under the § 106.30 definition. We believe that sexual assault inherently creates the kind of serious, sex-based impediment to equal access to education that Title IX is designed to prohibit, and decline to require "denial of equal access" as a separate element of sexual assault.

The Department understands the concerns of some commenters that including "fondling" under the term sexual assault poses a perceived challenge for recipients, particularly elementary and secondary schools, where, for instance, "butt slaps" may be a common occurrence. The Department appreciates the opportunity to clarify that under the Clery Act, fondling is a sex offense defined (by way of reference to the FBI UCR) as the touching of a person's private body

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[780] Section 106.30 (entry for "consent").

parts without the consent of the victim *for purposes of sexual gratification*. This "purpose" requirement separates the sex offense of fondling from the touching described by commenters as "children playing doctor" or inadvertent contact with a person's buttocks due to jostling in a crowded elevator, and so forth. Where the touching of a person's private body part occurs *for the purpose of sexual gratification*, that offense warrants inclusion as a sexual assault, and if the "butt slaps" described by one commenter as occurring frequently in elementary and secondary schools do constitute fondling, then those elementary and secondary schools must respond to knowledge of those sex offenses for the protection of students. The definition of fondling, properly understood, appropriately guides schools, colleges, and universities to consider fondling as a sex offense under Title IX, while distinguishing touching that does not involve the requisite "purpose of sexual gratification" element, which still may be addressed by a recipient outside a Title IX process. The Department notes that recipients may find useful guidance in State law criminal court decisions that often recognize the principle that, with respect to juveniles, a sexualized purpose should not be ascribed to a respondent without examining the circumstances of the incident (such as the age and maturity of the parties).[781] The Department declines to create an exception for fondling that occurs where both parties engage in the conduct willingly even though they are underage, because of an underage party's inability to give legal consent to sexual activity, and as discussed above the "for the purposes of sexual gratification" element of fondling

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[781] *See, e.g.*, *In re* K.C., 226 N.C. App. 452, 457 (N.C. App. 2013) ("On the question of sexual purpose, however, this Court has previously held – in the context of a charge of indecent liberties between children – that such a purpose does not exist without some evidence of the child's maturity, intent, experience, or other factor indicating his purpose in acting[.] . . . Otherwise, sexual ambitions must not be assigned to a child's actions. . . . The element of purpose may not be inferred solely from the act itself. . . . Rather, factors like age disparity, control by the juvenile, the location and secretive nature of the juvenile's actions, and the attitude of the juvenile should be taken into account. . . . The mere act of touching is not enough to show purpose.") (internal quotation marks and citations omitted).

protects against treating innocuous, non-sexualized touching between children as sexual harassment under Title IX.

For similar reasons, the Department declines to exclude incest and statutory rape from the definition of sexual assault. The Department understands commenters' concerns, but will not override the established circumstances under which consent cannot legally be given (e.g., where a party is under the age of majority) or under which sexual activity is prohibited based on familial connectedness (e.g., incest). The Department notes that where sexual activity is not unwelcome, but still meets a definition of sexual assault in § 106.30, the final regulations provide flexibility for how such situations may be handled under Title IX. For instance, not every such situation will result in a formal complaint requiring the recipient to investigate and adjudicate the incident;[782] the recipient has the discretion to facilitate an informal resolution after a formal complaint is filed;[783] the final regulations remove the NPRM's previous mandate that a Title IX Coordinator must file a formal complaint upon receipt of multiple reports against the same respondent;[784] the final regulations allow a recipient to dismiss a formal complaint where the complainant informs the Title IX Coordinator in writing that the complainant wishes to withdraw the formal complaint;[785] and the final regulations do not require or prescribe disciplinary

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[782] Section 106.30 (defining "formal complaint" to mean a document "filed by a complainant or signed by a Title IX Coordinator" and defining "complainant" to mean "an individual who is alleged to be the victim of conduct that could constitute sexual harassment"). Situations where an individual does not view themselves as a "victim" likely will not result in the filing of a formal complaint triggering a § 106.45 grievance process.
[783] Section 106.45(b)(9) (permitting a recipient to facilitate informal resolution, with the voluntary written consent of both parties, of any formal complaint except those alleging that an employee sexually harassed a student).
[784] *See* the "Proposed § 106.44(b)(2) Reports by Multiple Complainants of Conduct by Same Respondent [removed in final regulations]" subsection of the "Recipient's Response in Specific Circumstances" section of this preamble.
[785] Section 106.45(b)(3)(ii).

sanctions.[786] Thus, the final regulations provide numerous avenues to avoid situations where a recipient is placed in a position of feeling compelled to drag parties through a grievance process where no party found the underlying incident unwelcome, offensive, or impeding access to education, and recipients should not feel incentivized by the final regulations to become repressive monitors of youth sexuality.[787]

The Department understands a commenter's concern that some recipients have defined sexual misconduct very broadly, including labeling a wide range of physical contact made without verbal consent as "sexual assault." For reasons described above and in the "Consent" subsection of the "Section 106.30 Definitions" section of this preamble, the Department declines to require recipients to adopt particular definitions of consent, and declines to prohibit recipients from addressing conduct that does not meet the § 106.30 definition of sexual harassment under non-Title IX codes of conduct. The Department believes that recipients should retain flexibility to set standards of conduct for their own educational communities that go beyond conduct prohibited under Title IX (or, in the case of defining consent, setting standards for that element of sexual assault). The Department notes that many commenters submitted information and data showing that conduct "less serious" than that constituting § 106.30 sexual harassment can still

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[786] *See* the "Deliberate Indifference" subsection of the "Adoption and Adaptation of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, noting that the final regulations intentionally refrain from second guessing recipients' decisions with respect to imposition of disciplinary sanctions following an accurate, reliable determination reached by following a § 106.45 grievance process. This leaves recipients flexibility to decide appropriate sanctions in situations where behavior constituted sexual harassment under § 106.30 yet did not subjectively offend or distress the complainant.

[787] *See* the "Formal Complaint" subsection of the "Section 106.3 Definitions" section of this preamble, discussing the reasons why these final regulations permit a formal complaint (which triggers a recipient's grievance process) to be filed only by a complainant (i.e., the alleged victim) or by the Title IX Coordinator, and explaining that a Title IX Coordinator's decision to override a complainant's wishes by initiating a grievance process when the complainant does not desire that action will be evaluated by whether the Title IX Coordinator's decision was clearly unreasonable in light of the known circumstances (that is, under the general deliberate indifference standard described in § 106.44(a)).

have negative impacts on victims, and can escalate into actionable harassment or assault when left unaddressed[788] and therefore recipients should retain discretion to decide how to address student and employee misconduct that is not actionable under Title IX. The Department shares commenters' concerns that vague, ambiguously-worded sexual misconduct policies have resulted in some respondents being punished unfairly. The Department is equally concerned that complainants, too, have often been denied opportunity to understand and participate in Title IX grievance processes to vindicate instances of sexual violation. These concerns underlie the § 106.45 grievance process prescribed in the final regulations, for the benefit of each complainant and each respondent, regardless of race or other demographic characteristics. Thus, even if a recipient chooses a definition of "consent" that results in a broad range of conduct prohibited as sexual assault, the recipient's students and employees will be aware of the breadth of conduct encompassed and benefit from robust procedural protections to further each party's respective views and positions with respect to particular allegations.

The Department appreciates commenters' concerns about including sexual assault by reference to the Clery Act regulations at 34 CFR 668.46(a). Postsecondary institutions are already familiar with the Clery Act[789] and the Department's implementing regulations, and although the Clery Act does not apply to elementary and secondary schools, requiring schools,

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[788] *E.g.*, Rachel E. Gartner & Paul R. Sterzing, *Gender Microaggressions as a Gateway to Sexual Harassment and Sexual Assault: Expanding the Conceptualization of Youth Sexual Violence*, 31 AFFILIA: J. OF WOMEN & SOCIAL WORK 491 (2016); Dorothy Espelage *et al*., *Longitudinal Associations Among Bullying, Homophobic Teasing, and Sexual Violence Perpetration Among Middle School Students*, 30 JOURNAL OF INTERPERSONAL VIOLENCE 14 (2014); Eduardo A. Vasquez *et al.*, *The sexual objectification of girls and aggression towards them in gang and non-gang affiliated youth*, 23 PSYCHOL., CRIME & LAW 5 (2016); National Academies of Science, Engineering, and Medicine, *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine* (Frasier F. Benya *et al.* eds., 2018).

[789] The Clery Act applies to institutions of higher education that receive Federal student financial aid under Title IV of the Higher Education Act of 1965, as amended; *see* discussion under the "Clery Act" subsection of the "Miscellaneous" section of this preamble.

colleges, and universities to reference the same range of sex offenses under both the Clery Act and Title IX will harmonize compliance obligations under both statutes (for postsecondary institutions) while providing elementary and secondary school recipients with a preexisting Federal reference to sex offenses rather than a new definition created by the Department solely for Title IX purposes. In response to commenters' concerns that reference to the Clery Act regulations leaves these final regulations subject to changes to the Clery Act regulations, the final regulations now reference sexual assault by citing to the Clery Act statute (and as to dating violence, domestic violence, and stalking, the VAWA statute[790]), rather than to the Clery Act regulations. The Clery Act statute references sex offenses as defined in the FBI UCR,[791] a national crime reporting program designed to standardize crime statistics across jurisdictions. At the same time, this modification preserves the benefit of harmonizing Clery Act and Title IX obligations that arise from a recipient's awareness of sex offenses.

The Department disagrees that the Clery Act's definition of sexual assault is biased or discriminatory against men. Although under the FBI UCR definitions it is possible that, for example, oral sex performed on an unconscious woman may be designated as a different offense

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[790] VAWA at 34 U.S.C. 12291(a)(10), (a)(8), and (a)(30), defines dating violence, domestic violence, and stalking, respectively.

[791] The Clery Act, 20 U.S.C. 1092(f)(6)(A)(v) defines "sexual assault" to mean an "offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation." The FBI UCR, in turn, consists of two crime reporting systems: The Summary Reporting System (SRS) and the National Incident-Based Reporting System (NIBRS). U.S. Dep't. of Justice, Criminal Justice Information Services, *SRS to NIBRS: The Path to Better UCR Data* (Mar. 28, 2017). The current Clery Act regulations, 34 CFR 668.46(a), direct recipients to look to the SRS for a definition of rape and to NIBRS for a definition of fondling, statutory rape, and incest as the offenses falling under "sexual assault." The FBI has announced it will retire the SRS and transition to using only the NIBRS in January 2021. Federal Bureau of Investigation, Criminal Justice Information Services, Uniform Crime Reporting (UCR) Program, *National Incident-Based Reporting System* (NIBRS), https://www.fbi.gov/services/cjis/ucr/nibrs. NIBRS' forcible and nonforcible sex offenses consist of: rape, sodomy, and sexual assault with an object (as well as fondling, statutory rape, and incest, as noted above). Thus, reference to the Clery Act will continue to cover the same range of sex offenses under the FBI UCR regardless of whether or when the FBI phases out the SRS.

than oral sex performed on an unconscious man, the difference is not discriminatory or unfairly biased against men, because any such difference results from differentiation between a penetrative versus non-penetrative act, yet under the FBI UCR both offenses fall under the term sexual assault, and further, penetrative acts against both men and women (and touching the genitalia of men, and of women) all fall under FBI UCR sex offenses. While conduct might be classified differently based on whether the victim was male or female, such offenses would fall under the term sexual assault. All the sex offenses designated under the Clery Act as sexual assault represent serious violations of a person's bodily and emotional autonomy, regardless of whether a particular sexual assault is categorized as rape, fondling, or other forcible or non-forcible sex offense under the FBI UCR.

For similar reasons, the Department declines to adopt the alternative definitions of sexual assault proposed by commenters. The Department believes that, with the final regulations' modification to reference the Clery Act and VAWA statutes rather than solely the Clery Act regulations, "sexual assault" under § 106.30 is appropriately broad, capturing all conduct falling under forcible and non-forcible sex offenses determined by reference to the FBI UCR, while facilitating postsecondary institution recipients' understanding of their obligations under both the Clery Act and Title IX and providing an appropriate reference for elementary and secondary schools to protect students from sex offenses under Title IX.

The Department disagrees that the definitions of rape and fondling in the FBI UCR are too narrow. The violative sex acts covered by offenses described in the FBI UCR were designed to cover a broad range of sexual misconduct regardless of how different jurisdictions have

defined such offenses under State criminal laws,[792] an approach that lends itself to the purpose of these final regulations, which is to ensure that recipients across all jurisdictions include a variety of sex offenses as discrimination under Title IX.

The Department disagrees that including statutory rape and incest makes the sexual assault category too broad, and declines to adopt the specific alternative definitions of sexual assault proposed by commenters. The Department believes that, in response to commenters' concerns, the final regulations appropriately capture a broad range of sex offenses referenced in the Clery Act and VAWA (which refer to the FBI UCR without specifying whether to look to the SRS or NIBRS, foreclosing any problem resulting from the FBI's transition from the SRS to the NIBRS system) while leaving recipients the discretion to select particular definitions of consent (and what constitutes a lack of consent) that best reflect each recipient's values and community standards and adopt a broader or narrower definition of, e.g., fondling by specifying which body parts are considered "private" or whether the touching must occur underneath or over a victim's clothing. Regardless of how narrowly or broadly a recipient defines "consent" with respect to the FBI UCR's categories of forcible and nonforcible sex offenses, the Department believes that any such offenses would constitute conduct jeopardizing equal access to education in violation of Title IX without raising constitutional concerns, and that the § 106.45 grievance process gives complainants and respondents opportunity to fairly resolve factual allegations of such conduct.

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[792] In explaining one of the two systems used in the FBI UCR, the FBI has stated: "the definitions used in the NIBRS [National Incident-Based Reporting System] must be generic in order not to exclude varying state statutes relating to the same type of crime. Accordingly, the offense definitions in the NIBRS are based on common-law definitions found in *Black's Law Dictionary*, as well as those used in the *Uniform Crime Reporting Handbook* and the NCIC Uniform Offense Classifications. Since most state statutes are also based on common-law definitions, even though they may vary as to the specifics, most should fit into the corresponding NIBRS offense classifications." U.S. Dep't. of Justice, Uniform Crime Reporting System, *National Incident-Based Reporting System* (2011), https://ucr.fbi.gov/nibrs/2011/resources/nibrs-offense-definitions.

Changes: The third prong of the § 106.30 definition of sexual harassment now references "sexual assault" per the Clery Act at 20 U.S.C. 1092(f)(6)(A)(v) (instead of referencing the Clery Act regulations at 34 CFR 668.46); and adds reference to VAWA to include "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), and "stalking" as defined in 34 U.S.C. 12291(a)(30).

Gender-based harassment

Comments: A number of commenters discussed issues related to gender-based harassment, sexual orientation, and gender identity.

Some commenters expressed the general view that LGBTQ individuals need to be protected and were concerned that the proposed rules would make campuses even more unsafe for LGBTQ students and have a negative impact on addressing issues of gender-based discrimination and harassment.

Several commenters stated the LGBTQ community experiences sexual violence at much higher rates.

Some commenters expressed specific concerns about the impact of the proposed rules, including the definition of sexual harassment, on transgender individuals.

A few commenters also stated that transgender students should be treated consistent with their gender identity. Some commenters specifically asked the Department to maintain protections presumably found in the withdrawn Letter from James A. Ferg-Cadima, Acting Deputy Assistant Secretary for Policy, Office for Civil Rights at the Department of Education regarding transgender students' access to facilities such as restrooms dated January 7, 2015, and "Dear Colleague Letter on Transgender Students" jointly issued by the Civil Rights Division of

the Department of Justice and the Office for Civil Rights of the Department of Education, dated May 13, 2016.[793]

Some commenters expressed concern that the proposed rules promote heterosexuality as the normal or preferred sexual orientation and therefore fail to recognize and capture the identities and experiences of the LGBTQ community and recommended that the Department explicitly state that Title IX protections apply to members of the LGBTQ community.

One commenter believed that all public school districts should adopt and enforce policies stating that harassment for any reason, including on the basis of gender identity, will not be tolerated and that appropriate disciplinary measures will be taken and urged the Department to add language to the proposed rules making clear that such harassment is within the meaning of Title IX.

Some commenters urged the Department to include specific language referring to sexual harassment based on gender identity, including transgender and gender-nonconforming identities or expressions and expressed concern about the lack of such language in the proposed rules. Some of these commenters noted that some courts have interpreted Title IX, Title VII, and similar statutes to prohibit discrimination on the basis of gender identity and sexual orientation because discrimination on either of these bases of discrimination is discrimination on the basis of sex. One commenter acknowledged that contrary case law exists, but asserted Title IX clearly

[793] *See* U.S. Department of Education & U.S. Department of Justice, Dear Colleague Letter (Feb. 22, 2017) (withdrawing letters), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf.

prohibits discrimination on the basis of sex stereotyping which underlies discrimination, harassment, and assaults against LGBTQ people.[794]

On the other hand, one commenter stated that Title IX is about sex and not gender identity and urged the Department to make clear that biology, not gender identity, determines the definition of men and women.

Another commenter asserted that the Department's use of the phrase "on the basis of sex" in defining sexual harassment is limiting. This commenter asserted that the phrase "on the basis of sex" minimizes and confines experiences of gender discrimination and gender-based violence to a binary understanding by aligning it with sex assigned at birth.

Another commenter urged the Department to keep transgender males out of female sports categories as it is unfair to women and girls in competitions.

One commenter stated that OCR has long understood that gender-based discrimination, even where discrimination is not sexual in nature, might also fall under Title IX by creating a hostile environment for students. The commenter expressed concern that the term gender only appears once in a footnote in the proposed rules and asked how students' gender presentation, gender identity, and sexual orientation can be considered under the proposed rules and whether the Department made a conscious decision not to include gender and sexual orientation.

Another commenter asked the Department to clarify whether gender-based harassment is still covered under Title IX and whether incidents of sexual exploitation are to be included in these grievance procedures.

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[794] Commenters cited, *e.g.*: *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Comm'n*, 884 F.3d 560 (6th Cir.), appeal docketed, No. 18-107 (U.S. August 16, 2019); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir.), appeal docketed, No. 17-1623 (U.S. June 1, 2018).

Other commenters were generally concerned that the proposed rules would discourage participation of women and gender nonconforming students in academia. One commenter asserted that the single greatest danger to women's health is men. The commenter reminded the Department that Title IX helps protect women (as well as those who have been harassed or assaulted) and asked the Department not to endanger women.

Another commenter recommended that the Department add language stating that sexual harassment is bi-directional (male-to-female and female-to-male).

Discussion: The Department appreciates the concerns of the commenters. Prior to this rulemaking, the Department's regulations did not expressly address sexual harassment. We believe that sexual harassment is an important issue, meriting regulations with the force and effect of law rather than mere guidance documents, which cannot create legally binding obligations.[795]

Title IX, 20 U.S.C. 1681(a), expressly prohibits discrimination "on the basis of sex," which is why the Department incorporates the phrase "on the basis of sex" in the definition of sexual harassment in § 106.30. The word "sex" is undefined in the Title IX statute. The Department did not propose a definition of "sex" in the NPRM and declines to do so in these final regulations.

The focus of these regulations remains prohibited conduct. For example, the first prong of the Department's definition of sexual harassment concerns an employee of the recipient conditioning the provision of an educational aid, benefit, or service on an individual's participation in unwelcome sexual conduct, which is commonly referred to as *quid pro quo*

[795] *Perez v. Mortgage Bankers Ass'n*, 525 U.S. 92, 96-97 (2015).

sexual harassment. Any individual may experience *quid pro quo* sexual harassment. The second prong of the § 106.30 definition of sexual harassment involves unwelcome conduct on the basis of sex determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; any individual may experience this form of harassment, as well. The third prong of the sexual harassment definition in these final regulations is sexual assault, dating violence, domestic violence, or stalking on the basis of sex as defined in the Clery Act and VAWA, respectively, and again, any individual may be sexually assaulted or experience dating violence, domestic violence, or stalking on the basis of sex. Thus, any individual – irrespective of sexual orientation or gender identity – may be victimized by the type of conduct defined as sexual harassment to which a recipient must respond under these final regulations.

Title IX and its implementing regulations include provisions that presuppose sex as a binary classification, and provisions in the Department's current regulations, which the Department did not propose to revise in this rulemaking, reflect this presupposition. For example, 20 U.S.C. 1681(a)(2), which concerns educational institutions commencing planned changes in admissions, refers to "an institution which admits only students of one sex to being an institution which admits students of both sexes." Similarly, 20 U.S.C. 1681(a)(6)(B) refers to "men's" and "women's" associations as well as organizations for "boys" and "girls" in the context of organizations "the membership of which has traditionally been limited to persons of one sex." Likewise, 20 U.S.C. 1681(a)(7)(A) refers to "boys'" and "girls'" conferences. Title IX does not prohibit an educational institution "from maintaining separate living facilities for the different sexes" pursuant to 20 U.S.C. 1686. Additionally, the Department's current Title IX regulations expressly permit sex-specific housing in 34 CFR 106.32 ("[h]ousing provided by a

recipient to students of one sex, when compared to that provided to students of the other sex"), separate intimate facilities on the basis of sex in 34 CFR 106.33 ("separate toilet, locker room, and shower facilities on the basis of sex" with references to "one sex" and "the other sex"), separate physical education classes on the basis of sex in 34 CFR 106.34 ("[t]his section does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact"), separate human sexuality classes on the basis of sex in 34 CFR 106.34 ("[c]lasses or portions of classes in elementary and secondary schools that deal primarily with human sexuality may be conducted in separate sessions for boys and girls"), and separate teams on the basis of sex for contact sports in 34 CFR 106.41 ("a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport"). In promulgating regulations to implement Title IX, the Department expressly acknowledged physiological differences between the male and female sexes. For example, the Department's justification for not allowing schools to use "a single standard of measuring skill or progress in physical education classes . . . [if doing so] has an adverse effect on members of one sex"[796] was that "if progress is measured by determining whether an individual can perform twenty-five push-ups, the standard may be virtually out-of-reach for many more women than men because of the difference in strength between average persons of each sex."[797]

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[796] 34 CFR 106.43.

[797] U.S. Dep't. of Health, Education, and Welfare, General Administration, Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 40 FR 24128, 24132 (June 4, 1975). Through that rulemaking, the Department promulgated § 86.34(d), which is substantially similar to the Department's current regulation 34 CFR 106.43.

The Department declines to take commenters' suggestions to include a definition of the word "sex" in these final regulations because defining sex is not necessary to effectuate these final regulations and has consequences that extend outside the scope of this rulemaking. These final regulations primarily address a form of sex discrimination – sexual harassment – that does not depend on whether the definition of "sex" involves solely the person's biological characteristics (as at least one commenter urged) or whether a person's "sex" is defined to include a person's gender identity (as other commenters urged). Anyone may experience sexual harassment, irrespective of gender identity or sexual orientation. As explained above, the Department acknowledged physiological differences based on biological sex in promulgating regulations to implement Title IX with respect to physical education. Defining "sex" will have an effect on Title IX regulations that are outside the scope of this rulemaking, such as regulations regarding discrimination (e.g., different treatment) on the basis of sex in athletics. The scope of matters addressed by the final regulations is defined by the subjects presented in the NPRM, and the NPRM did not propose to define sex. The Department declines to address that matter in these final regulations. The Department will continue to look to the Title IX statute and the Department's Title IX implementing regulations with respect to the meaning of the word "sex" for Title IX purposes.

To address a commenter's assertion that Title IX prohibits sex stereotyping that underlies discrimination against LGBTQ individuals, the Department notes that some of the cases the commenter cited are cases under Title VII and are on appeal before the Supreme Court of the United States. The most recent position of the United States in these cases is (1) that the ordinary public meaning of "sex" at the time of Title VII's passage was biological sex and thus the appropriate construction of the word "sex" does not extend to a person's sexual orientation or

transgender status, and (2) that discrimination based on transgender status does not constitute sex stereotyping but a transgender plaintiff may use sex stereotyping as evidence to prove a sex discrimination claim if members of one sex (e.g., males) are treated less favorably than members of the other sex (e.g., females).[798] Although the U.S. Attorney General and U.S. Solicitor General interpret the word "sex" solely within the context of Title VII, the current position of the United States may be relevant as to the public meaning of the word "sex" in other contexts as well. As explained above, the Department does not define "sex" in these final regulations. These final regulations focus on prohibited conduct, irrespective of a person's sexual orientation or gender identity. Whether a person has been subjected to the conduct defined in § 106.30 as sexual harassment does not necessarily require reliance on a sex stereotyping theory. Nothing in these final regulations, or the way that sexual harassment is defined in § 106.30, precludes a theory of sex stereotyping from underlying unwelcome conduct on the basis of sex that constitutes sexual harassment as defined in § 106.30.

With respect to sexual harassment as a form of sex discrimination in these final regulations, the Department's position in these final regulations remains similar to its position in the 2001 Guidance, which provides:

> Although Title IX does not prohibit discrimination on the basis of sexual orientation, sexual harassment directed at gay or lesbian students that is sufficiently

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[798] *See* Brief of Respondent Equal Employment Opportunity Commission at 16, 22-27, 50-53, *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Comm'n*, 884 F.3d 560 (6th Cir.), appeal docketed, No. 18-107 (U.S. August 16, 2019), https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf; *accord* Amicus Curiae Brief for the United States in *Bostock* and *Zarda*, https://www.supremecourt.gov/DocketPDF/17/17-1618/113417/20190823143040818_17-1618bsacUnitedStates.pdf, *Bostock v. Clayton County, Ga.*, 723 F. App'x 964 (11th Cir.), appeal docketed, No. 17-1618 (U.S. June 1, 2018); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir.), appeal docketed, No. 17-1623 (U.S. June 1, 2018); *see also* Memorandum from the U.S. Attorney General to the U.S. Attorneys & Heads of Department Components, "*Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964*" (Oct. 4, 2017) https://www.justice.gov/ag/page/file/1006981/download ("Attorney General's Memorandum").

> serious to limit or deny a student's ability to participate in or benefit from the school's program constitutes sexual harassment prohibited by Title IX under the circumstances described in this guidance. For example, if a male student or a group of male students target a gay student for physical sexual advances, serious enough to deny or limit the victim's ability to participate in or benefit from the school's program, the school would need to respond promptly and effectively, as described in this guidance, just as it would if the victim were heterosexual. On the other hand, if students heckle another student with comments based on the student's sexual orientation (e.g., "gay students are not welcome at this table in the cafeteria"), but their actions do not involve conduct of a sexual nature, their actions would not be sexual harassment covered by Title IX.[799]
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> …[G]ender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, but not involving conduct of a sexual nature, is also a form of sex discrimination to which a school must respond[.] For example, the repeated sabotaging of female graduate students' laboratory experiments by male students in the class could be the basis of a violation of Title IX.

These final regulations provide a definition of sexual harassment that differs in some respects from the definition of sexual harassment in the 2001 Guidance, as explained in more detail in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section, the "Sexual Harassment" subsection in the "Section 106.30 Definitions" section, and throughout this preamble. These final regulations include sexual harassment as unwelcome conduct on the basis of sex that a reasonable person would determine is so severe, pervasive, and objectively offensive that it denies a person equal educational access; this includes but is not limited to unwelcome conduct of a sexual nature, and may consist of unwelcome conduct based on sex or sex stereotyping. The Department will not tolerate sexual harassment as defined in § 106.30 against any student, including LGBTQ students.

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[799] 2001 Guidance at 3.

For similar reasons to those discussed above, the Department declines to address discrimination on the basis of gender identity or other issues raised in the Department's 2015 letter regarding transgender students' access to facilities such as restrooms and the 2016 "Dear Colleague Letter on Transgender Students."

These final regulations concern sexual harassment and not the participation of individuals, including transgender individuals, in sports or other competitive activities. We do not believe these final regulations serve to discourage the participation of women in a recipient's education programs and activities, including sports or other competitive activities.

These final regulations address sexual exploitation to the extent that sexual exploitation constitutes sexual harassment as defined in § 106.30, and the grievance process in § 106.45 applies to all formal complaints alleging sexual harassment.

Sexual harassment is not limited to being bi-directional (male-to-female and female-to-male). As explained above, these final regulations focus on prohibited conduct, irrespective of the identity of the complainant and respondent. As explained above, any person may experience sexual harassment as a form of sex discrimination, irrespective of the identity of the complainant or respondent.

Changes: None.

Comments: One commenter urged the Department to require that all policies, information, education, training, reporting options, and adjudication processes be accessible and fair and balanced to all students regardless of race, ethnicity, disability, sexual orientation, or other potentially disenfranchising characteristics. One commenter recommended that the Department remove "sex discrimination issues" from the summary section of the preamble because the scope is too narrow and inconsistent with the spirit of Title IX and discrimination in higher education

extends beyond sex discrimination. This commenter also stated that the proposed rules refer to recipients' responsibilities related to actionable harassment under Title IX, but the commenter suggested that the term discrimination would be more appropriate because sex- and gender-based harassment is only one form of discrimination that Title IX prohibits. One commenter stated that if the scope of the proposed rules must be limited to sexual harassment, this scope should be clearly stated in the preamble to not give the impression that other forms of discrimination included in Title IX do not require due process.

Discussion: Title IX expressly prohibits discrimination on the basis of sex and not race, disability, or other protected characteristics, and the Department does not have the legal authority to promulgate regulations addressing discrimination on the basis of protected characteristics, other than sex, under Title IX. The Department enforces other statutes such as Title VI, which prohibits discrimination on the basis of race, color, and national origin. The Department's other regulations specifically address discrimination based on these and other protected characteristics.

These final regulations require that all policies, information, education, training, reporting options, and adjudication processes be accessible and fair for all students. For example, any complainant will be offered supportive measures, even if that person does not wish to file a formal complaint under § 106.44(a). Any respondent will receive the due process protections in the § 106.45 grievance process before the imposition of any disciplinary sanctions for sexual harassment under § 106.44(a). Additionally, the recipient's non-discrimination statement, designation of a Title IX Coordinator, policy, grievance procedures, and training materials should be readily accessible to all students pursuant to § 106.8 and § 106.45(b)(10)(i)(D).

For the reasons previously explained, the Department does not define sex in these final regulations, as these final regulations focus on prohibited conduct, namely sexual harassment as

a form of sex discrimination. As previously explained, the Department's definition of sexual harassment applies for the protection of any person who experiences sexual harassment, regardless of sexual orientation or gender identity.

Although these final regulations constitute the Department's first promulgation of regulations that address sexual harassment, these final regulations also make revisions to pre-existing regulations and regulations such as regulations in subpart A and subpart B of Part 106 that generally address sex discrimination but do not specifically address sexual harassment. For example, the Department revises § 106.8, which concerns the designation of a Title IX Coordinator who will address all forms of discrimination on the basis of sex and not just sexual harassment. The Department clarifies in § 106.8(c) that 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 Part 106 of Title 34 of the Code of Federal Regulations, and also a grievance process that complies with § 106.45 for formal complaints of sexual harassment as defined in § 106.30. Section 106.8(c) thus clarifies that a recipient does not need to apply or use the grievance process in § 106.45 for complaints alleging sex discrimination that does not constitute sexual harassment.

Changes: None.

Supportive Measures

Overall Support and Opposition

Comments: Many commenters supported the definition of "supportive measures" in § 106.30 because the provision states that supportive measures may be offered to complainants and respondents; commenters asserted that supportive measures should be offered on an equal basis to all parties, except to the extent public safety concerns would require different treatment,

stressing that respondents deal with their own strife as a result of going through the Title IX process. These commenters viewed the § 106.30 definition of supportive measures as appropriately requiring measures that do not disproportionately punish, discipline, or unreasonably burden either party. Many commenters appreciated that the § 106.30 definition of supportive measures included a list illustrating the range of services that could be offered to both parties, and several of these commenters specifically expressed strong support for mutual no-contact orders as opposed to one-way no-contact orders.

Many commenters opposed the § 106.30 definition of supportive measures because, while neither party should be presumed to be at fault before an investigation had been completed commenters argued that this provision will cause an overall decrease in the availability of support services and accommodations to victims. Commenters argued that the requirement that supportive measures be "non-disciplinary, non-punitive," "designed [but not required] to restore access," and not unreasonably burdensome to the non-requesting party, significantly limits the universe of supportive measures schools could offer to victims by prohibiting any measure reasonably construed as negative towards a respondent. These commenters believed the supportive measures definition was too respondent-focused and effectively prioritized the education of respondents over complainants. Several commenters identified the clause "designed to effectively restore or preserve" and questioned how OCR would review and determine whether a supportive measure met this requirement. One commenter asserted that supportive measures designed to restore "access," as opposed to *equal* access, contradicted the proposed definition of "sexual harassment" in § 106.30 as well as the Supreme Court's holding in *Davis* because restoring *some* access is an incomplete remedy for a denial of *equal* access.

Several commenters requested clarification that colleges and universities have flexibility and discretion to approve or disapprove requested supportive measures, including one-way no-contact orders, according to the unique considerations of each situation. Another commenter argued that § 106.30 should be modified to expressly state that schedule and housing adjustments, or removing a respondent from playing on a sports team, do not constitute an unreasonable burden on the respondent when those measures do not separate the respondent from academic pursuits. Commenters argued that § 106.30 should clarify what kind of burdens will be considered "unreasonable." Commenters urged the Department to modify the definition of supportive measures to require that all such measures be proportional to the alleged harm and the least burdensome measures that will protect safety, preserve equal educational access, and deter sexual harassment.

Many commenters suggested that the final regulations should require schools to implement a process through which the parties can seek and administrators can consider appropriate supportive measures, and at least one commenter suggested that a hearing similar to a preliminary injunction hearing under Federal Rule of Civil Procedure 65 should be used, particularly in cases where one party seeks the other party's removal from certain facilities, programs, or activities. At least one commenter asked the Department to specify that any interim measures must be lifted if the respondent is found not responsible.

Many commenters requested clarification as to what types of supportive measures are allowable in the elementary and secondary school context or requested that the Department expand the supportive measures safe harbor and definition to apply in the elementary and secondary school context. Other commenters asserted that there may be a greater need for supportive measures in cases involving international students, women in career preparatory

classes such as construction, manufacturing, and wielding, and lower-income students, for whom dropping out of school could have more drastic and long-lasting consequences.

Many commenters requested that the Department reconsider or clarify the requirement in § 106.30 that the Title IX Coordinator is responsible for effective implementation of supportive measures, arguing that Title IX Coordinators cannot fulfill all the duties assigned to them under the proposed rules (especially if a recipient has only designated one individual as a Title IX Coordinator) and asserting that the responsibility to implement supportive measures could be easily delegated to other offices on campus.

Discussion: The Department appreciates commenters' support for the § 106.30 definition of supportive measures, and we acknowledge commenters' arguments that the language employed in the proposed definition of the term "supportive measures" is too respondent-focused or lessens the availability of measures to assist victims. The Department disagrees that this provision prioritizes the needs of one party over the other. For example, the § 106.30 definition states that the individualized services can be offered "to the complainant or respondent"[800] free of charge, that the services shall not "unreasonably" burden either party, and may include services to protect the safety "of all parties" as well as the recipient's educational environment, or to deter sexual harassment. The Department disagrees that the requirements for supportive measures to be non-disciplinary, non-punitive, and not unreasonably burdensome to the other party indicate a preference for respondents over complainants or prioritize the education of respondents over that

[800] We emphasize that a "complainant" is any individual who has been alleged to be the victim of conduct that could constitute sexual harassment, and a "respondent" is any individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment, so a person may be a complainant or a respondent regardless of whether a formal complaint has been filed or a grievance process is pending (and irrespective of who reported the alleged sexual harassment – the alleged victim themselves, or a third party). *See* § 106.30 defining "complainant" and defining "respondent."

of complainants. These requirements protect complainants and respondents from the other party's request for supportive measures that would unreasonably interfere with either party's educational pursuits. The plain language of the § 106.30 definition does not state that a supportive measure provided to one party cannot impose *any* burden on the other party; rather, this provision specifies that the supportive measures cannot impose an *unreasonable* burden on the other party. Thus, the § 106.30 definition of supportive measures permits a wide range of individualized services intended to meet any of the purposes stated in that provision (restoring or preserving equal access to education, protecting safety, deterring sexual harassment).

We do not believe that it would be appropriate to specify, list, or describe which measures do or might constitute "unreasonable" burdens because that would detract from recipients' flexibility to make those determinations by taking into the account the specific facts and circumstances and unique needs of the parties in individual situations.[801] For similar reasons, we decline to require that supportive measures be "proportional to the harm alleged" and constitute the "least burdensome measures" possible, because we believe that the § 106.30 definition appropriately allows recipients to select and implement supportive measures that meet one or more of the stated purposes (e.g., restoring or preserving equal access; protecting safety; deterring sexual harassment) within the stated parameters (e.g., without being disciplinary or

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[801] The recipient must document the facts or circumstances that render certain supportive measures appropriate or inappropriate. Under § 106.45(b)(10)(ii), a recipient must create and maintain for a period of seven years records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment and must document the basis for its conclusion that its response was not deliberately indifferent. Specifically, that provision states that if a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. Thus, if a recipient determines that a particular supportive measure was not appropriate even though requested by a complainant, the recipient must document why the recipient's response to the complainant was not deliberately indifferent.

punitive, without unreasonably burdening the other party). The "alleged harm" in a situation alleging conduct constituting sexual harassment as defined in § 106.30 is serious harm and the definition of supportive measures already accounts for the seriousness of alleged sexual harassment while effectively ensuring that supportive measures are not unfair to a respondent; even if a supportive measure implemented by a recipient arguably was not the "least burdensome measure" possible, in order to qualify as a supportive measure under § 106.30 the measure cannot punish, discipline, or unreasonably burden the respondent.

To the extent that commenters are advocating for wider latitude for recipients to impose *interim* suspensions or expulsions of respondents, the Department believes that without a fair, reliable process the recipient cannot know whether it has interim-expelled a person who is actually responsible or not. Where a respondent poses an immediate threat to the physical health or safety of the complainant (or anyone else), § 106.44(c) allows emergency removals of respondents prior to the conclusion of a grievance process (or even where no grievance process is pending), thus protecting the safety of a recipient's community where an immediate threat exist. The Department believes that the § 106.30 definition of "supportive measures" in combination with other provisions in the final regulations results in effective options for a recipient to support and protect the safety of a complainant while ensuring that respondents are not prematurely punished.[802]

In response to commenters' concerns that omission of the word "equal" before "access" in the § 106.30 definition of supportive measures creates confusion about whether the purpose of

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[802] Section 106.44(c) (governing the emergency removal of a respondent who poses an immediate threat to any person's physical health or safety); § 106.44(d) (permitting the placement of non-student employees on administrative leave during a pending grievance process).

supportive measures is intended to remediate the same denial of "equal access" referenced in the § 106.30 definition of sexual harassment, we have added the word "equal" before "access" in the definition of supportive measures, and into § 106.45(b)(1)(i) where similar language is used to refer to remedies. The Department appreciates the opportunity to clarify that whether or not a recipient has implemented a supportive measure "designed to effectively restore or preserve" equal access is a fact-specific inquiry that depends on the particular circumstances surrounding a sexual harassment incident. Section 106.44(a) requires a recipient to offer supportive measures to every complainant irrespective of whether a formal complaint is filed, and if a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances under § 106.45(b)(10)(ii).[803]

In order to ensure that the definition of supportive measures in § 106.30 is read broadly we have also revised the wording of this provision to more clearly state that supportive measures must be designed to restore or preserve equal access to education without unreasonably burdening the other party, which may include measures designed to protect the safety of parties or the educational environment, or deter sexual harassment. The Department did not wish for the prior language to be understood restrictively to foreclose, for example, a supportive measure in the form of an extension of an exam deadline which helped preserve a complainant's equal access to education and did not unreasonably burden the respondent but could not necessarily be considered designed to protect safety or deter sexual harassment.

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[803] *See* discussion in the "Section 106.44(a) Deliberate Indifference Standard" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this preamble.

The Department was persuaded by the many commenters who requested that the Department expand provisions that incentivize and encourage supportive measures. As previously noted, we have revised § 106.44(a) to require recipients to offer supportive measures to complainants. As explained in the "Proposed § 106.44(b)(3) Supportive Measures Safe Harbor in Absence of a Formal Complaint [removed in final regulations]" subsection of the "Recipient's Response in Specific Circumstances" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this preamble, we have eliminated the proposed safe harbor regarding supportive measures altogether and, thus, we do not extend this safe harbor to elementary and secondary schools. As all recipients (including elementary and secondary school recipients) are now required to offer complainants supportive measures as part of their non-deliberately indifference response under § 106.44(a), the proposed safe harbor regarding supportive measures is unnecessary. The Department agrees that the need to offer supportive measures in the absence of, or during the pendency of, an investigation is equally as important in elementary and secondary schools as in postsecondary institutions. The final regulations revise the § 106.30 definition of supportive measures to use the word "recipient" instead of "institution" to clarify that this definition applies to all recipients, not only to postsecondary institutions.

To preserve discretion for recipients, the Department declines to impose additional suggested changes that would further restrict or prescribe the supportive measures a recipient may or must offer, including requiring supportive measures that "do" restore or preserve equal access rather than supportive measures "designed" to restore or preserve equal access. Requiring supportive measures to be "designed" for that purpose rather than insisting that such measures actually accomplish that purpose protects recipients against unfair imposition of liability where,

despite a recipient's implementation of measures intended to help a party retain equal access to education, underlying trauma from a sexual harassment incident still results in a party's inability to participate in an education program or activity. To the extent that commenters desire for the final regulations to specify that certain populations (such as international students) may have a greater need for supportive measures, the Department declines to revise this provision in that regard because the determination of appropriate supportive measures in a given situation must be based on the facts and circumstances of that situation. Supportive measures must be offered to every complainant as a part of a recipient's response obligations under § 106.44(a).

The Department declines to include an explicit statement that schedule and housing adjustments, or removals from sports teams or extracurricular activities, do not unreasonably burden the respondent as long as the respondent is not separated from the respondent's academic pursuits, because determinations about whether an action "unreasonably burdens" a party are fact-specific. The unreasonableness of a burden on a party must take into account the nature of the educational programs, activities, opportunities, and benefits in which the party is participating, not solely those educational programs that are "academic" in nature. On the other hand, the Department appreciates the opportunity to clarify that, contrary to some commenters' concerns, schedule and housing adjustments do not necessarily constitute an "unreasonable" burden on a respondent, and thus the § 106.30 definition of supportive measures continues to require that recipients consider each set of unique circumstances to determine what individualized services will meet the purposes, and conditions, set forth in the definition of

supportive measures.[804] Removal from sports teams (and similar exclusions from school-related activities) also require a fact-specific analysis, but whether the burden is "unreasonable" does not depend on whether the respondent still has access to academic programs; whether a supportive measure meets the § 106.30 definition also includes analyzing whether a respondent's access to the array of educational opportunities and benefits offered by the recipient is unreasonably burdened. Changing a class schedule, for example, may more often be deemed an acceptable, reasonable burden than restricting a respondent from participating on a sports team, holding a student government position, participating in an extracurricular activity, and so forth.

The final regulations require a recipient to refrain from imposing disciplinary sanctions or other actions that are not supportive measures, against a respondent, without following the § 106.45 grievance process, and also require the recipient's grievance process to describe the range, or list, the disciplinary sanctions that a recipient might impose following a determination of responsibility, and describe the range of supportive measures available to complainants and respondents.[805] The possible disciplinary sanctions described or listed by the recipient in its own grievance process therefore constitute actions that the recipient itself considers "disciplinary" and thus would not constitute "supportive measures" as defined in § 106.30. If a recipient has listed ineligibility to play on a sports team or hold a student government position, for example, as a possible disciplinary sanction that may be imposed following a determination of responsibility, then the recipient may not take that action against a respondent without first following the §

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[804] The 2001 Guidance at 16 takes a similar approach to the final regulations' approach to supportive measures, by stating that it "may be appropriate for a school to take interim measures during the investigation of a complaint" and for instance, "the school may decide to place the students immediately in separate classes or in different housing arrangements on a campus, pending the results of the school's investigation" or where the alleged harasser is a teacher "allowing the student to transfer to a different class may be appropriate."

[805] Section 106.44(a); § 106.45(b)(1)(i); § 106.45(b)(1)(vi); § 106.45(b)(1)(ix).

106.45 grievance process. If, on the other hand, the recipient's grievance process does not describe or list a specific action as a possible disciplinary sanction that the recipient may impose following a determination of responsibility, then whether such an action (for example, ineligibility to play on a sports team or hold a student government position) may be taken as a supportive measure for a complainant is determined by whether that the action is not disciplinary or punitive and does not unreasonably burden the respondent. Certain actions, such as suspension or expulsion from enrollment, or termination from employment, are inherently disciplinary, punitive, and/or unreasonably burdensome and so will not constitute a "supportive measure" whether or not the recipient has described or listed the action in its grievance process pursuant to § 106.45(b)(1)(vi).

The Department reiterates that a recipient may remove a respondent from all or part of a recipient's education program or activity in an emergency situation pursuant to § 106.44(c) (with or without a grievance process pending) and may place a non-student employee respondent on administrative leave during a grievance process, pursuant to § 106.44(d).[806] Further, a recipient is obligated to conclude a grievance process within a reasonably prompt time frame, thus limiting the duration of time for which supportive measures are serving to maintain a status quo balancing the rights of both parties to equal educational access in an interim period while a grievance process is pending.

With respect to supportive measures in the elementary and secondary school context, many common actions by school personnel designed to quickly intervene and correct behavior

[806] For further discussion see the "Additional Rules Governing Recipients' Responses to Sexual Harassment" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this preamble.

are not punitive or disciplinary and thus would not violate the § 106.30 definition of supportive measures or the provision in § 106.44(a) that prevents a recipient from taking disciplinary actions or other measures that are "not supportive measures" against a respondent without first following a grievance process that complies with § 106.45. For example, educational conversations, sending students to the principal's office, or changing student seating or class assignments do not inherently constitute punitive or disciplinary actions and the final regulations therefore do not preclude teachers or school officials from taking such actions to maintain order, protect student safety, and counsel students about inappropriate behavior. By contrast, as discussed above, expulsions and suspensions would constitute disciplinary sanctions (and/or constitute punitive or unreasonably burdensome actions) that could not be imposed without following a grievance process that complies with § 106.45. The Department emphasizes that these final regulations apply to conduct that constitutes sexual harassment as defined in § 106.30, and not to every instance of student misbehavior.

These final regulations do not expressly require a recipient to continue providing supportive measures upon a finding of non-responsibility, and the Department declines to require recipients to lift, remove, or cease supportive measures for complainants or respondents upon a finding of non-responsibility. Recipients retain discretion as to whether to continue supportive measures after a determination of non-responsibility. A determination of non-responsibility does not necessarily mean that the complainant's allegations were false or unfounded but rather could mean that there was not sufficient evidence to find the respondent responsible. A recipient may choose to continue providing supportive measures to a complainant or a respondent after a determination of non-responsibility. This is not unfair to either party because by definition, "supportive measures" do not punish or unreasonably burden the other party, whether the other

party is the complainant or respondent. There may be circumstances where the parties want supportive measures to remain in place or be altered rather than removed following a determination of non-responsibility, and the final regulations leave recipients flexibility to implement or continue supportive measures for one or both parties in such a situation.

The Department also declines to add an additional requirement that schools implement a process by which supportive measures are requested by the parties and granted by recipients, because we wish to leave recipients flexibility to develop processes consistent with each recipient's administrative structure rather than dictate to every recipient how to process requests for supportive measures. Although we do not dictate a particular process, these final regulations specify in § 106.44(a) that the Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. Complainants will know about the possible supportive measures available to them[807] and will have the opportunity to express what they would like in the form of supportive measures, and the Title IX Coordinator will take into account the complainant's wishes in determining which supportive measures to offer. The final regulations do prescribe that a recipient's Title IX Coordinator must remain responsible for coordinating the effective implementation of supportive measures, so that the burden of arranging and enforcing the supportive measures in a given circumstance remains on the

[807] Section 106.45(b)(1)(ix) requires the recipient's grievance process to describe the range of supportive measures available to complainants and respondents. Additionally, the Title IX Coordinator must contact an individual complainant to discuss the availability of supportive measures, under § 106.44(a).

recipient, not on any party. We acknowledge commenters' concerns that these final regulations place many responsibilities on a Title IX Coordinator, and a recipient has discretion to designate more than one employee as a Title IX Coordinator if needed in order to fulfill the recipient's Title IX obligations.[808]

With respect for a process to remove a respondent from a recipient's education program or activity, these final regulations provide an emergency removal process in § 106.44(c) if there is an immediate threat to the physical health or safety of any students or other individuals arising from the allegations of sexual harassment. A recipient must provide a respondent with notice and an opportunity to challenge the emergency removal decision immediately following the removal. Additionally, the grievance process in § 106.45 provides robust due process protections for both parties, and before imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent, a recipient must follow a grievance process that complies with § 106.45.

We acknowledge commenters' concerns regarding the provision in the § 106.30 definition supportive measures that the Title IX Coordinator must coordinate the effective implementation of supportive measures. However, we believe it is important that students know they can work with the Title IX Coordinator to select and implement supportive measures rather than leave the burden on students to work with various other school administrators or offices. The Department recognizes that many supportive measures involve implementation through various offices or departments within a school. When supportive measures are part of a school's

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[808] *See* discussion in the "Section 106.8(a) Designation of Coordinator" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble.

Title IX obligations, 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 administrative requirements within the recipient's own system does not fall on the student receiving the supportive measures. The Department recognizes that beyond coordinating and serving as the student's point of contact, the Title IX Coordinator will often rely on other campus offices to actually provide the supportive measures sought, and the Department encourages recipients to consider the variety of ways in which the recipient can best serve the affected student(s) through coordination with other offices while ensuring that the burden of effectively implementing supportive measures remains on the Title IX Coordinator and not on students.

Changes: We have revised the definition for supportive measures in § 106.30 to refer to "recipients" instead of "institutions" which clarifies that the definition of supportive measures is applicable in the context of elementary and secondary schools as well as in the context of postsecondary institutions. We have added "equal" before "access" in the description of supportive measures designed to restore or preserve equal access to the recipient's education program or activity. We have revised the second sentence of this provision to clarify that supportive measures must be designed to restore or preserve equal access and must not unreasonably burden the other party, which may include measures also designed to protect safety or the recipient's educational environment, or deter sexual harassment.

No-Contact Orders

Comments: Several commenters focused on the list of possible supportive measures included in the definition of supportive measures in § 106.30 and viewed the express inclusion of mutual no-contact orders as a general prohibition on one-way no-contact orders, and asked the Department

to clarify whether one-way no-contact orders were prohibited. Other commenters assumed one-way no-contact orders were prohibited, and expressed concern that by disallowing one-way no-contact orders, the onus would be placed on the victim to take extreme measures to provide for their own accommodations and prevent victims from getting the support they needed, or would discourage victims from reporting in the first place. Many commenters asserted that a victim would be forced to face or interact with their alleged harasser in class, in dorms, or elsewhere on campus if one-way no-contact orders were prohibited. Other commenters argued that a victim would have to win an administrative proceeding in order to be granted a one-way no-contact order. Many commenters called for the Department to remove the "mutual restrictions on contact" provision from the list entirely because it is not a victim-focused supportive measure. Additionally, some commenters expressed the belief that mutual no-contact orders are not enforceable because it is hard to determine which party has the burden to comply with the no-contact order if both parties are present in the same location. A few commenters believed that mutual no-contact orders would constitute unlawful retaliation against the victim since such an order would necessarily restrict the victim's own participation in programs or activities as well as the participation of the respondent. Some commenters argued that mutual no-contact orders were contrary to the public policies underlying VAWA and various State laws, and that mutual no-contact orders are analogous to reciprocal protective or restraining orders, which have been invalidated by at least one State Supreme Court.[809]

[809] Commenters cited: *Bays v. Bays*, 779 So.2d 754 (La. 2001).

Other commenters asked the Department to expand the list in the § 106.30 definition of supportive measures to include a greater variety of allowable supportive measures. Some commenters argued that the list of possible supportive measures only included prospective measures (that might preserve access going forward) as opposed to remedial measures (that might restore access that had already been lost), and argued that the Department should explicitly mention measures aimed at restoring equal access, such as opportunities to repeat a class or retake an exam or attaching an addendum to a transcript to explain a low grade.

Discussion: We acknowledge commenters' concerns related to the inclusion of mutual no-contact orders on the non-exhaustive list of possible supportive measures in § 106.30, but the Department declines to exclude this example from the list of supportive measures. The list of possible supportive measures included in the § 106.30 definition is illustrative, not exhaustive. The inclusion of "mutual restrictions on contact between the parties" on the illustrative list of possible supportive measures in § 106.30 does not mean that one-way no-contact orders are never appropriate. A fact-specific inquiry is required into whether a carefully crafted no-contact order restricting the actions of only one party would meet the § 106.30 definition of supportive measures. For example, if a recipient issues a one-way no-contact order to help enforce a restraining order, preliminary injunction, or other order of protection issued by a court, or if a one-way no-contact order does not unreasonably burden the other party, then a one-way no-contact order may be appropriate. The Department also reiterates that sexual harassment allegations presenting a risk to the physical health or safety of a person may justify emergency removal of a respondent in accordance with the § 106.44(c) emergency removal provision, which could include a no-trespass or other no-contact order issued against a respondent.

The inclusion of mutual no-contact orders on an illustrative list does not mean the final regulations require complainants to face their respondents on campus, in classrooms, or in dorms. Rather, the express inclusion of mutual no-contact orders suggests that recipients can offer measures – tempered by the requirements that they are not punitive, disciplinary, or unreasonably burdensome to the other party – to limit the interactions, communications, or contact, between the parties. The final regulations do not require recipients to initiate administrative proceedings (i.e., a grievance process) in order to determine and implement appropriate supportive measures. Contrary to the arguments of commenters, the Department believes that mutual no-contact may constitute reasonable restrictions imposed on both parties, because under certain circumstances such a measure serves the purposes of protecting each party's right to pursue educational opportunities, protecting the safety of all parties, and deterring sexual harassment. The Department believes that "mutual restrictions on contact between the parties" may in many circumstances provide benefits to the complainant, for example, where such a mutual no-contact order serves the interest of protecting safety or deterring sexual harassment by forbidding communication between the parties, which might not require either party to change dorm rooms or even re-arrange class schedules. Further restrictions, such as avoiding physical proximity between the parties, will require a fact-specific analysis to determine the scope of a no-contact order that may be appropriate under § 106.30; for example, where both parties are athletes and sometimes practice on the same field, consideration must be given to the scope of a no-contact order that deters sexual harassment, without unreasonably burdening the other party, with the goal of restricting contact between the parties without requiring either party to forgo educational activities. It may be unreasonably burdensome to prevent respondents from attending extra-curricular activities that a recipient offers as a result of

a one-way no contact order prior to being determined responsible; similarly, it may be unreasonably burdensome to restrict a complainant from accessing campus locations in order to prevent contact with the respondent. In some circumstances, for example, a complainant might be offered a supportive measure consisting of a mutual no-contact order restricting either party from *communicating* with the other (which measure likely would not unreasonably burden either party). If, however, the complainant wishes to avoid all physical sightings of a respondent and not only an order prohibiting communications, if appropriate the complainant may receive a supportive measure in the form of an alternate housing assignment (without fee or cost to the complainant). The Department does not view such a supportive measure in such a circumstance as unreasonably burdening the complainant, because alternate supportive measures also would have prevented sexual harassment (by prohibiting all communication between the parties). Under § 106.44(a), a Title IX Coordinator must consider a complainant's wishes with respect to supportive measures, and if a complainant would like a different housing arrangement as part of a supportive measure, then a Title IX Coordinator should consider offering such a supportive measure.

The Department does not believe that "mutual restrictions on contact between the parties" could constitute unlawful retaliation by restricting the complainant's own participation in certain programs or activities of the recipient as well as that of the respondent. Such a supportive measure would simply treat both parties equally, and "restrictions on contact" could be limited in scope to prohibiting communications between the parties, which may not affect the complainant's ability to participate in classes or activities. The Department notes that the § 106.30 definition's requirements that supportive measures be non-disciplinary and non-punitive apply equally to protect complainants against a recipient taking action that punishes or sanctions

a complainant. In response to commenters' concerns about complainants being unfairly punished in the wake of reporting sexual harassment, the Department added § 106.71 prohibiting retaliation. Actions taken by a recipient under the guise of "supportive measures" that actually have the purpose and effect of penalizing the complainant for the purpose of discouraging the complainant from exercising rights under Title IX would constitute unlawful retaliation.

We also acknowledge the various other suggested modifications to the list of supportive measures offered by commenters, but we decline to expand this list. The Department encourages recipients to broadly consider what measures they can reasonably offer to individual students to ensure continued equal access to a recipient's education program and activities for a complainant, irrespective of whether a complainant files a formal complaint, and for a respondent, when a formal complaint is filed. The Department has provided a list to illustrate the range of possible supportive measures, but the list of supportive measures is not intended to be exhaustive. Nothing in § 106.30 precludes recipients from considering and providing supportive measures not listed in the definition, including measures designed to retrospectively "restore" or prospectively "preserve" a complainant's equal educational access. We note that the § 106.30 already includes the example of "course-related adjustments" which could encompass several suggested measures identified by commenters, such as opportunities to retake classes or exams, or adjusting an academic transcript.

Changes: None.

Other Language/Terminology Comments

Comments: One commenter expressed concern that the terms "survivor" and "victim" used in the NPRM to describe a person who merely alleges something has happened to them are prejudicial and anti-male. Other commenters asserted that the Department's proposed regulations

are biased in favor of males partly due to the use of neutral terms such as "complainant" and "respondent" instead of "survivor" or "perpetrator." One commenter suggested that, instead of using the term "complainant," the final regulations should refer to "student survivors" or "those who face harassment." The commenter further recommended that the final regulations use the term "perpetrator" instead of "respondent," saying that the use of the term "respondent" is confusing, and fails to account for perpetrators who are never formally investigated, and therefore are never in a formal respondent role (i.e., because they have not responded to anything).

Discussion: The Department disagrees that the use of the term survivor or victim in the NPRM is biased, anti-male, or pro-male. The term "survivor" was used five times in the preamble to refer generally to individuals who have been victims of sexual harassment. The Department listened to advocates for these individuals, as we listened to other stakeholders. The use of the term survivor or victim in that context takes no position on the veracity of any particular complainant or respondent, or complainants or respondents in general. The final regulations are intended to be objective and do not use the term "survivor" or "victim" in the regulatory text, instead using the more neutral terms "complainant" and "respondent." The final regulations are intended to be fair, unbiased, and impartial toward both complainants and respondents. When a determination of responsibility is reached against a respondent, the Department's interest is in requiring remedies for the complainant, to further the goal of Title IX by providing remedies to victims of sexual harassment aiming to restore their equal educational access. Although the final regulations do not need to use the word "victim," once a reliable outcome has determined that a complainant was victimized by sexual harassment, the final regulations mandate that remedies be provided to that

complainant precisely because after such a determination has been made, that complainant has been fairly, reliably shown to have been the victim of sexual harassment.

Changes: None.

Comments: One commenter expressed concern that the terms used in the NPRM reveal a clear preference in protecting the interests of a school and effectively limiting a school's liability rather than protecting the equal right for all students to have access to higher education free from discrimination.

Discussion: The Department does not have, nor does the terminology in the final regulations reflect, any preference for protecting the interests of a school or effectively limiting a school's liability rather than protecting the equal right of all students to have access to higher education free from discrimination. Although the Department is not required to adopt the deliberate indifference standard articulated by the Supreme Court, we are persuaded by the policy rationales relied on by it and believes it is 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."[810] 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 climate 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

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[810] *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 648-49 (1999).

second guess such decisions. In addition, the final regulations impose obligations on recipients that go beyond the deliberate indifference standard as set forth in *Davis*; for example, by requiring that recipients' non-deliberately indifferent response must include offering supportive measures to a complainant under § 106.44(a). Additionally, as explained in more detail in the "Section 106.44(b) Proposed 'Safe Harbors,' generally" subsection in the "Recipient's Response in Specific Circumstances" section, these final regulations do not include any of the proposed safe harbors in the NPRM for recipients.

Changes: None.

Comments: One commenter opposed the use of criminal terms since many of the terms that relate to the findings have legal definitions in criminal law, for which due process protections already exist, and the use of such language suggests that colleges do not want the overall Title IX process to be an educational experience and not a criminal justice proceeding.

Discussion: The Department disagrees with the commenter's contention. The Department has in no way implied that these proceedings are criminal in nature and the final regulations use terms such as "complainant" and "respondent," "decision-maker" and "determination regarding responsibility" to describe features of the grievance process, language intentionally adopted to avoid reference to terms used in civil courts or criminal proceedings (e.g., plaintiff, defendant, prosecutor, judge, verdict). In this way, the final regulations acknowledge that the resolution of allegations of Title IX sexual harassment in an education program or activity serves a different purpose and occurs in a different context from a civil or criminal court. As explained in the "Role of Due Process in the Grievance Process" section of this preamble, the § 106.45 grievance process is rooted in principles of due process to create a process fair to all parties and likely to result in reliable outcomes, and while the Department believes that the grievance process is

consistent with constitutional due process, the § 106.45 grievance process is independent from constitutional due process because it is designed to effectuate the purposes of Title IX as a civil rights statute. The Department understands the concerns expressed by some commenters that colleges want the overall Title IX process to be an educational experience and that the outcome is administrative and believes the final regulations prescribe a consistent grievance process appropriate for administratively resolving allegations of sexual harassment in an education program or activity.

Changes: None.

Comments: One commenter suggested using the word "discrimination" instead of "harassment" in places where the NPRM describes actionable behavior because harassment does not have to occur for there to be discrimination.

Discussion: The Department declines to adopt the word "discrimination" instead of "harassment" in these final regulations. The Department's Title IX regulations already address sex discrimination, and these final regulations intend to address sexual harassment as a particular form of sex discrimination under Title IX. Complaints of sex discrimination that do not constitute sexual harassment may be made to a recipient for handling under the prompt and equitable grievance procedures that recipients must adopt under § 106.8(c). When the sex discrimination complained of constitutes sexual harassment as defined in § 106.30, these final regulations govern how recipients must respond to that form of sex discrimination.

Changes: None.

Comments: One commenter expressed concern that the NPRM used the term "guilt," which equates school conduct processes to the court system and seems contrary to the NPRM's goals of distinguishing between school conduct processes and the judicial system. The commenter argued

that instead, the final regulations should use the terms "found responsible" and "not responsible," and should only draw comparisons with civil, rather than criminal, case law.

Discussion: The Department disagrees with the concern that the NPRM inappropriately used the term "guilt." The word "guilt" appears only in two instances in the NPRM, and neither of those occurrences is in the text of the proposed regulations. In the first instance, the NPRM notes that "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."[811] Second, the NPRM states that "[a] fundamental notion of a fair proceeding is that a legal system does not prejudge a person's guilt or liability."[812] In both contexts, the NPRM was using the term guilt generally to refer to culpability for an offense. The Department also declines to revise the final regulations to use the terms "found responsible" and "not responsible" because it has already utilized similar language; for example, § 106.45(b)(1)(vi) uses "determination of responsibility" in the context of finding a respondent responsible and § 106.45(b)(7) employs the term "determination regarding responsibility" in the context of a determination that could either find the respondent responsible or non-responsible. The NPRM uses the same or similar terms.[813]

Changes: None.

Comments: Several commenters suggested that the term "equitable" should be used instead of "equal" because the two terms have different meanings, and Title IX focuses on educational

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[811] 83 FR 61464.
[812] 83 FR 61473.
[813] *See, e.g.*, 83 FR 61466, 61470.

equity. Without citing a specific provision, one commenter argued that "equal" would assume that if a translator were provided for one party, a translator must be provided for the other party.

Discussion: The Department understands commenters' concerns that "equal" and "equitable" have different implications, and the final regulations use both terms with such a distinction in mind. Where parties are given "equal" opportunity, for example, both parties must be treated the same. By contrast, where parties must be treated "equitably," the final regulations explain what equitable means for a complainant and for a respondent. The Department disagrees that the use of "equal" in these final regulations is inappropriate. The equal opportunity for both parties to receive a disability accommodation does not mean that both parties *must* receive a disability accommodation or that they must receive the *same* disability accommodation. Similarly, both parties may not need a translator, and a recipient need not provide a translator for a party who does not need one, even if it provides a translator for the party who needs one.

Changes: None.

Comments: One commenter suggested using the term "education program or activity" instead of "schools" to be more consistent with statute and case law. The commenter asserted that use of the word "schools" may limit the ability to investigate issues that arise during sporting activities, afterschool programs, on field trips, etc.

Discussion: Although the Department declines to remove reference to "schools," the Department provides a definition for "elementary and secondary schools" as well as "postsecondary institutions" in § 106.30. The Department believes that it is important to distinguish between these types of recipients as the type of hearing that a recipient must provide under § 106.45(b)(6) may be different if the recipient is an elementary or secondary school as opposed to a postsecondary institution.

To address the commenter's concerns, the Department notes that § 106.2(h) provides a definition of "program or activity" as all of the operations of elementary and secondary schools and postsecondary institutions. Additionally, the Department has revised § 106.44(a) to specify that for purposes of §§ 106.30, 106.44, and 106.45, an education program or activity includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs. This definition aligns with the Supreme Court's opinion in *Davis*[814] and clarifies when sporting activities, afterschool programs, or field trips constitute part of the recipient's education program or activity. The Department also revised § 106.44(a) to state that for purposes of §§ 106.30, 106.44, and 106.45, an "education program or activity" also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. The revisions to § 106.44(a) to help better define "education program or activity" are explained more fully in the "Section 106.44(a) 'education program or activity'" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section.

Changes: The Department has revised § 106.44(a) to specify that an education program or activity includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

Comments: One commenter expressed concern that the NPRM's use of the term "students" is too narrow in light of the language of Title IX and current Title IX regulations, as well as the

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[814] *Davis*, 526 U.S. at 645.

Supreme Court's repeated determinations that Title IX encompasses all individuals participating in education programs and activities. Another commenter suggested that the term "student" in the NPRM should be replaced with "person" consistent with statute and case law and because the term "student" may be restrictive because it does not encompass employees, volunteers, parents, and community members. One commenter expressed concern that the definition of "student" as a person who has gained admission is problematic because institutions of higher education, particularly those who do not have open enrollment, typically consider an applicant a student once they have submitted a deposit, indicating their acceptance of an admission offer and commitment to attend.

Discussion: The Department disagrees with the commenters who opposed the use of the term "students." Title IX provides that a recipient of Federal funding may not discriminate on the basis of sex in the education program or activity that it operates and extends protections to any "person." The final regulations similarly use "person" or "individual" to ensure that the Title IX non-discrimination mandate applies to anyone in a recipient's education program or activity. For example, § 106.30 defines sexual harassment as conduct that deprives "a person" of equal access; § 106.30 defines a "complainant" as an "individual" who is alleged to be the victim of sexual harassment. Where the final regulations use the phrase "students and employees" or "students," such terms are used not to narrow the application of Title IX's non-discrimination mandate but to require particular actions by the recipient reasonably intended to benefit students, employees, or both; for example, § 106.8(a) requires recipients to notify "students and employees" of contact information for the Title IX Coordinator. Where the final regulations intend to include "applicants for admission" in addition to "students" the phrase "applicants for admission" is used; for example, § 106.8(b)(2)(ii) precludes recipients from using publications

that state that the recipient treats applicants for admission (or employment), students, or employees differently on the basis of sex (unless permitted under Title IX). Both Title IX and existing Title IX regulations use the term "student" ubiquitously.[815] The existing Title IX regulations, in 34 CFR 106.2(r), define "student" as "a person who has gained admission." "Admission", as defined in34 CFR 106.2(q), "means selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by a recipient." The Department disagrees with the commenter's concern that the definition of "student" as a person who has gained admission is problematic. The Department does not believe the term "student" should be changed to reflect other persons who are not enrolled in the recipient's education program or activity. The term "student" as defined in 34 CFR 106.2(r) aligns with the definition of "formal complaint" in §106.30 that provides at the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.[816] A student who has applied for admission and has been admitted is attempting to participate in the education program or activity of the recipient.

Changes: None.

Comments: One commenter expressed concern that equating "trauma-informed" and "impartial" is a false equivalency that threatens to undermine the quality and efficacy of the Title IX process. The commenter argued that "trauma-informed" refers to a body of research, practice, and theory that teaches professionals who interact with victims to recognize that all individuals process

[815] *E.g.*, 20 U.S.C. 1681(a)(2); 34 CFR 106.36.
[816] *See* the "Formal Complaint" subsection in the "Section 106.30 Definitions" section of this preamble.

trauma differently, to understand different responses to trauma, and to recognize ways in which we can avoid further traumatization of involved parties through sensitive questioning, mindfulness-based practices, and avoiding potentially triggering situations such as unnecessarily repetitive questioning. Further, equating these two terms is dismissive of decades of research and best practices concerning gender and sexual-based violence and harassment prevention and response.

Discussion: The Department disagrees that the final regulations equate "trauma-informed" and "impartial" in a manner that undermines the quality and efficacy of the Title IX process. It appears that the commenter prefers the Department to adopt a trauma-informed approach as a best practice. The Department understands from personal anecdotes and research studies that sexual violence is a traumatic experience for survivors. The Department is aware that the neurobiology of trauma and the impact of trauma on a survivor's neurobiological functioning is a developing field of study with application to the way in which investigators of sexual violence offenses interact with victims in criminal justice systems and campus sexual misconduct proceedings.[817] The final regulations require impartiality on the part of Title IX personnel (i.e., Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolutions)[818] to reinforce the truth-seeking purpose of a grievance process. The Department wishes to emphasize that treating all parties with dignity, respect, and sensitivity without bias, prejudice, or stereotypes infecting interactions with parties fosters impartiality and truth-seeking.

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[817] *E.g.*, Jeffrey J. Nolan, *Fair, Equitable Trauma-Informed Investigation Training* (Holland & Knight updated July 19, 2019) (white paper summarizing trauma-informed approaches to sexual misconduct investigations, identifying scientific and media support and opposition to such approaches, and cautioning institutions to apply trauma-informed approaches carefully to ensure impartial investigations).

While the final regulations do not use the term "trauma-informed," nothing in the final regulations precludes a recipient from applying trauma-informed techniques, practices, or approaches so long as such practices are consistent with the requirements of § 106.45(b)(1)(iii) and other requirements in § 106.45.

Changes: None.

Comments: One commenter requested clarification of the numerous provisions of the proposed regulations that refer to specific time frames, such as ten "days." The commenter suggested that the Department clarify whether these are "calendar" days or "working" days.

Discussion: The Department appreciates the commenter's request for clarification as to how to calculate "days" with respect to various time frames referenced in the proposed regulations and appreciates the opportunity to clarify that because the Department does not require a specific method for calculating "days," recipients retain the flexibility to adopt the method that works best for the recipient's operations; for example, a recipient could use calendar days, school days, or business days, or a method the recipient already uses in other aspects of its operations.

Changes: None.

Comments: One commenter asserted that it is unclear whether § 106.6(d) intended to cover recipients that are not government actors. The commenter suggested adding "whether or not that recipient is a government actor" after "recipient."

Discussion: As explained in the "Role of Due Process in the Grievance Process" section of this preamble, the Department recognizes that some recipients are State actors with responsibilities to provide due process of law and other rights to students and employees under the U.S. Constitution, while other recipients are private institutions that do not have constitutional obligations to their students and employees. The final regulations apply to all recipients covered

by Title IX because fair, reliable procedures that best promote the purposes of Title IX are as important in public schools, colleges, and universities as in private ones. The grievance process prescribed in the final regulations is important for effective enforcement of Title IX and is thus consistent with, but independent of, constitutional due process. Where enforcement of Title IX's non-discrimination mandate is likely to present potential intersections with a public recipient's obligation to respect the constitutional rights of students and employees, the final regulations caution recipients that nothing in these final regulations requires a recipient to restrict constitutional rights.[819] Similarly, the Department, as an agency of the Federal government, cannot require private recipients to restrict constitutional rights. The Department will not require private recipients to abide by restrictions in the U.S. Constitution that do not apply to them. The Department, as a Federal agency, however, must interpret and enforce Title IX in a manner that does not require or cause any recipient, whether public or private, to restrict or otherwise abridge any person's constitutional rights.

Changes: None.

Comments: One commenter encouraged the Department to explicitly state that Title IX and the Title IX regulations do not apply to schools that do not receive Federal financial assistance to help protect their autonomy and Constitutional rights, which would promote diversity in education by protecting the autonomy and freedom of private and religious schools to thrive according to their stated mission and purpose. The commenter stated that their schools are committed to providing safe and equal learning opportunities for each student that they serve and

[819] *E.g.,* § 106.6(d); § 106.44(a) (stating that the Department may not deem a recipient to have satisfied the recipient's duty to not be deliberately indifferent based on the recipient's restriction of rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment).

noted that such language has been included in reauthorizations of the Elementary and Secondary Education Act (ESEA) and that the Every Student Succeeds Act, the most recent reauthorization passed in 2015, contains Section 8506 which specifically states, "Nothing in this Act shall be construed to affect any private school that does not receive funds or services under this Act" [20 U.S.C. 7886(a)]."

Discussion: The Department does not believe it is necessary to further explain in the final regulations that Title IX applies only to recipients of Federal financial assistance; the text of Title IX, 20 U.S.C. 1681, clearly states that the Title IX non-discrimination mandate applies to education programs or activities that receive Federal financial assistance, and expressly exempts educational institutions controlled by religious organizations from compliance with Title IX to the extent that compliance with Title IX is inconsistent with the religious tenets of the religious organization even if the educational institution does receive Federal financial assistance.[820] Existing Title IX regulations already sufficiently mirror that Title IX statutory language by defining "recipient"[821] and affirming the Title IX exemption for educational institutions controlled by religious organizations.[822]

Changes: None.

Comments: One commenter stated that the proposed regulations were not easy to understand because the "Summary" section of the NPRM contained too little information. The commenter asserted that although the proposed regulations were intended to protect young people, young people would not be able to understand them. Another commenter opposed the NPRM because,

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[820] 20 U.S.C. 1681(a); 20 U.S.C. 1681(a)(3).
[821] 34 CFR 106.2(i) (defining "recipient").
[822] 34 CFR 106.12(a).

the commenter asserted, the details were perplexing, vague, and did not tell in sufficient detail, how the proposed rules would be implemented in terms of the behavior, conditions, and situations involved. Another commenter expressed concern that the "sloppy and biased language" in the NPRM needed to be corrected, pointing specifically to the summary comments at 83 FR 61462 and elsewhere in the NPRM.

Discussion: The Department acknowledges the concern from the commenter that the proposed regulations are not easy enough to understand. However, the purpose of the NPRM is to provide a basic overview of the Department's proposed actions and reasons for the proposals. The Department believes that the NPRM accomplished this purpose by providing not only a summary section but also a background section and specific discussions of each proposed provision.

The Department acknowledges the concern of the commenter that opposed the NPRM because the commenter believed the language was too vague and does not provide sufficient detail as to how the proposed rules would be implemented in specific situations. The Department believes that both the NPRM, and now these final regulations, strike an appropriate balance between containing sufficient details as to a recipient's legal obligations without improperly purporting to specify outcomes for all scenarios and situations many of which will turn on particular facts and circumstances. The Department wishes to emphasize that when determining how to comply with these final regulations, recipients have flexibility to employ age-appropriate methods, exercise common sense and good judgment, and take into account the needs of the parties involved.

The Department disagrees that any of the language in the proposed rules or final regulations is biased, and notes that the Department's choice of language throughout the text of

the final regulations is neutral, impartial, and unbiased with respect to complainants and respondents.

Changes: None.

Comments: One commenter expressed concern that the final regulations should not emphasize the view that schools are in a unique position to make disciplinary decisions based on school climate because all decisions, including disciplinary decisions, should be made congruent with the intent and spirit of the proposed rules. Stating that schools are in a unique position regarding decision making invites many forms of prejudice and renders decisions less reliable.

Discussion: The Department disagrees with the position that the final regulations should not emphasize the view that schools are in a unique position to make disciplinary decisions based on school climate. The Department disagrees with the commenter's conclusory assertion that by acknowledging schools are in a unique position to make such decisions that the Department invites prejudice that renders decisions less reliable. As the Supreme Court reasoned in *Davis*, Title IX must be interpreted in a manner that leaves flexibility in schools' disciplinary decisions and that does not place courts in the position of second guessing the disciplinary decisions made by school administrators.[823] As a matter of policy, the Department believes that these same principles should govern administrative enforcement of Title IX.

Changes: None.

Comments: One commenter suggested including a full list of stakeholders who were interviewed and involved in the process of developing the NPRM to establish credibility (with aliases

[823] *Davis*, 626 U.S. at 648.

provided to protect the privacy of individual participants), as well as the meeting minutes included as an appendix.

Discussion: The Department does not believe it is necessary to publish a full list of stakeholders who were interviewed and involved in the process of developing the NPRM to establish credibility or publish meeting minutes included as an appendix. The Department noted in the NPRM that it 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; scholars and experts in law, psychology, and neuroscience; and numerous individuals who have experienced school-level Title IX proceedings as a complainant or respondent; school and college administrators; child and sex abuse prosecutors.[824] The Department believes this level of detail is sufficient to support the Department's contention that the Department conducted wide outreach in developing the NPRM.

Changes: None.

Comments: One commenter suggested including an index of terms that define legal terminology, including "respondeat superior, "reasonableness standard," "deliberate indifference standard," "constructive notice," and so forth because the use of legal terminology throughout these regulations without accompanying layperson's commentary or clear definition of the terminology applied throughout the proposed revisions confuse and divert attention from the actual meaning of the proposed rules.

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[824] 83 FR 61463-64.

Discussion: The Department does not believe it is necessary to include an index of terms that define legal terminology. The Department has defined key terms as necessary in § 106.30, and § 106.2 also provides relevant definitions. The remainder of the language used in the final regulations should be interpreted both in the context of the final regulations and in accordance with its ordinary public meaning.

The Department agrees that the term "respondeat superior" is a legal term of art that may be confusing in light of the final regulations' frequent use of the word "respondent" which looks very similar to the word "respondeat" as used in the phrase "respondeat superior" in the § 106.30 definition of "actual knowledge." To address this concern, the Department has revised the definition of "actual knowledge" in § 106.30 to use the term "vicarious liability" instead of "respondeat superior." Although "vicarious liability" is a legal term, "vicarious liability" more readily conveys the concept of being liable for the actions or omissions of another, without causing unnecessary confusion with the word "respondent."

Changes: Partly in response to commenters' concerns that the phrase "respondeat superior" was not recognizable as a legal term or was too easily confused with use of the word "respondent" throughout the final regulations, we have revised the definition of "actual knowledge" in § 106.30 by replacing term "respondeat superior" with "vicarious liability."

Comments: One commenter suggested including support and context for the Department's contention in the NPRM that the proposed rules will give sexual harassment complainants greater confidence to report and expect their school to respond in a meaningful way by separating a recipient's obligation to respond to a report of sexual harassment from the recipient's obligation to investigate formal complaints of sexual harassment; the commenter argued that the NPRM thus implies that either complainants do not currently have a clear

understanding of their Title IX rights and a school's obligation to respond or that complainants are under the misconception that all complaints are considered formal complaints under the current Title IX guidance and regulations.

Discussion: The Department's past guidance required recipients to *always* investigate any report of sexual harassment, even when the complainant only wanted supportive measures and did not want an investigation, which necessarily results in some intrusion into the complainant's privacy.[825] This guidance combined a recipient's obligation to respond to a report of sexual harassment with the recipient's obligation to investigate formal complaints of sexual harassment. This guidance also did not distinguish between an investigation which resulted in the imposition of disciplinary sanctions and an inquiry into a report of sexual harassment.[826] The Department's past guidance did not specifically provide both parties the opportunity to know about an investigation and participate in such an investigation, when the investigation may lead to the imposition of disciplinary sanctions against the respondent and the provision of remedies. Through §§ 106.44 and 106.45, these final regulations clarify when a recipient has the affirmative obligation to conduct an investigation that may lead to the imposition of disciplinary sanctions, requires the recipient to notify both parties of such an investigation, and requires the recipient to provide both parties the opportunity to participate in the process. Irrespective of whether a recipient conducts an investigation under § 106.45, a recipient may inquire about a report of sexual harassment and must offer supportive measures in response to such a report under § 106.44(a). If a recipient does not provide a complainant with supportive measures, then

[825] 2001 Guidance at 13, 15, 18; 2011 Dear Colleague Letter at 4.
[826] 2001 Guidance at 13, 15, 18.

the recipient must document the reasons why such a response as not clearly unreasonable in light of the known circumstances under § 106.45(b)(10)(ii).

Under the Department's past guidance, some students did not know that reporting sexual harassment always would lead to an investigation, even when the student did not want the recipient to investigate. A rigid requirement such as an investigation in every circumstance may chill reporting of sexual harassment, which is in part why these final regulations separate the recipient's obligation to respond to a report of sexual harassment from the obligation to investigate a formal complaint of sexual harassment. Under these final regulations, a student may receive supportive measures irrespective of whether the student files a formal complaint, which results in an investigation. In this manner, these final regulations encourage students to report sexual harassment while allowing them to exercise some control over their report. If students would like supportive measures but do not wish to initiate an investigation under § 106.45, they may make a report of sexual harassment. If students would like supportive measures and also would like the recipient to initiate an investigation under § 106.45, they may file a formal complaint.

The Department disagrees with the premise that 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 implies that all complainants suffer misconceptions; rather, the Department believes that distinguishing between a recipient's obligation to respond to a report, on the one hand, and a recipient's obligation to investigate a formal complaint on the other hands, provides clarity that benefits complainants, respondents, and recipients.

Changes: None.

Comments: One commenter suggested adding prevention and community educational programming as a possible option schools can utilize as one of the remedies provided following a formal complaint, as well as adding a requirement of educational outreach and prevention programming elsewhere within the final regulations.

Discussion: The Department declines to list prevention and community educational programming as a possible option schools can utilize as a remedy after the conclusion of a grievance process, or to add a requirement of educational outreach and prevention programming elsewhere within the final regulations. The Department notes that nothing in the final regulations prevents recipients from undertaking such efforts. With respect to remedies, the final regulations require a recipient to provide remedies to a complainant where a respondent has been found responsible, and notes that such remedies may include the type of individualized services non-exhaustively listed in the § 106.30 definition of "supportive measures." Whether or not the commenter's understanding of prevention and community education programming would be part of an appropriate remedy for a complainant, designed to restore or preserve the complainant's equal access to education, is a fact-specific matter to be considered by the recipient. With respect to a general requirement that recipients provide prevention and community education programming, the final regulations are focused on governing a recipient's response to sexual harassment incidents, leaving additional education and prevention efforts within a recipient's discretion.

Changes: None.

Section 106.44 Recipient's Response to Sexual Harassment, Generally

Section 106.44(a) "actual knowledge"

The Recipient's Self-Interest

Comments: Many commenters expressed concerns about the actual knowledge requirement in § 106.44(a), citing examples of instances in which schools sought to avoid addressing sexual harassment and assault, including high-profile sexual abuse scandals at universities where some university employees failed to report abuse that was reported to them. One commenter asserted that schools discourage sexual harassment and assault reports because the number of reported instances of sexual violence at an institution is publicly available (which harms or is perceived to harm the recipient's reputation), and alleged perpetrators are often prominent members of college communities, including star athletes, fraternity members, leading actors, and promising filmmakers. Commenters argued that, by using an actual knowledge requirement that fails to make employees mandatory reporters, schools will continue to ignore cases of sexual violence and will investigate fewer harassment complaints, resulting in less justice and fewer services for victims of sexual harassment.

Discussion: The Department incorporates here its discussion under the "Actual Knowledge" subsection of the "Section 106.30 Definitions" section of this preamble. As discussed in that section, and in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, we believe that the final regulations appropriately hold recipients liable for responding to every allegation of sexual harassment of which the recipient is aware, ensure that elementary and secondary school students may report to any school employee, and respect the autonomy of complainants at postsecondary institutions to choose whether, and when, the complainant desires to report sexual harassment. No recipient

may yield to institutional self-interest by ignoring known allegations of sexual harassment without violating the recipient's obligation to promptly respond as set forth in § 106.44(a).

Changes: None.

Burdening the Complainant

Comments: Numerous commenters argued that § 106.44(a) will have the effect of shifting the burden of each report onto the complainant, who, in addition to dealing with the harm to their mental health from harassment or assault, must also bear the responsibility of locating and reporting to the correct administrator. Several commenters also voiced concern that § 106.44(a) makes it more difficult for victims to know how or to whom to report harassment. Other commenters argued that complainants would be at a loss in instances where the school has not educated students and staff as to who the Title IX Coordinator is, where that person can be found, and what that person's responsibilities are. Several commenters asked what a complainant should do if a complainant has had a negative experience previously with the Title IX Coordinator, because the complainant would have no one else to whom to turn in order to report or file a formal complaint.

Many commenters asserted that § 106.44(a) would chill reports of sexual harassment and assault. Several commenters stated that 59.3 percent of survivors in one study confided in informal support sources while across several studies, fewer than one-third of victims reported to formal sources.[827] One commenter asserted that research has consistently reflected that survivors of campus sexual assault are more likely to disclose to someone with whom they have an

[827] Commenters cited: Charlotte Pierce-Baker, *Surviving the silence: Black women's stories of rape* (W.W. Norton 1998); Patricia A. Washington, *Disclosure Patterns of Black Female Sexual Assault Survivors*, 7 VIOLENCE AGAINST WOMEN 11 (2001).

existing relationship rather than a campus administrator. Commenters argued that fewer reports would reach the Title IX Coordinator, since the Title IX Coordinator lacks a preexisting personal relationship with survivors. Several commenters asserted that most school personnel do not know who the Title IX Coordinator is, and that these employees will therefore be unable to help complainants find the Title IX Coordinator.

Discussion: The Department incorporates here its discussion under the "Actual Knowledge" subsection of the "Section 106.30 Definitions" section of this preamble. As discussed in that section, and in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, we believe that the definition of actual knowledge in these final regulations has been revised to appropriately trigger a recipient's response obligations by notice to any elementary and secondary school employee, to any recipient's Title IX Coordinator, and to any official with authority to institute corrective measures on the recipient's behalf. The Department believes that respecting a complainant's autonomy is an important, desirable goal and that allowing complainants to discuss or disclose a sexual harassment experience with employees of postsecondary institutions without such confidential conversations automatically triggering the involvement of the recipient's Title IX office will give complainants in postsecondary institutions greater control and autonomy over the reporting process. The final regulations place the burden on recipients to ensure that all students and employees (as well as parents of elementary and secondary school students, and others) are notified of contact information for the Title IX Coordinator, so that when a complainant chooses to report, the complainant may easily locate the Title IX Coordinator's office location, telephone number, and e-mail address, and report using any of those methods, or any other means resulting in the Title IX Coordinator receiving the person's verbal or written report. Nothing in the final

regulations precludes a recipient, including a postsecondary institution, from instructing any or all of its employees to report sexual harassment disclosures and reports to the Title IX Coordinator, if the recipient believes that such a universal mandatory reporting system best serves the recipient's student and employee population. However, universal mandatory reporting systems have led to the unintended consequence of reducing options for complainants at postsecondary institutions to discuss sexual harassment experiences confidentially with trusted employees,[828] and the final regulations therefore do not impose a universal mandatory reporting system in the postsecondary institution context.

Changes: None.

Elementary and Secondary Schools

Comments: Many commenters stated that the actual knowledge requirement is inappropriate for elementary and secondary school students because, from a young child's perspective, there is no distinction between a teacher, teacher's aide, bus driver, cafeteria worker, school resource officer, or maintenance staff person; to a young child, they are all grown-ups. Commenters asserted that this is particularly true for adults such as bus drivers and school resource officers, who can take corrective measures (kicking a student off the bus, for example) but not necessarily "on behalf of" the school. Several commenters stated that often a peer seeking help for a friend brings an issue of sexual harassment or assault to the attention of teachers or other school personnel, and commenters asserted that these allegations should be formally addressed by the school. Numerous commenters asserted that all school employees, not just teachers, should be

[828] *E.g.*, Carmel Deamicis, *Which Matters More: Reporting Assault or Respecting a Victim's Wishes?*, THE ATLANTIC (May 20, 2013); Allie Grasgreen, *Mandatory Reporting Perils*, INSIDE HIGHER ED (Aug. 30, 2013).

responsible employees. By ensuring that a student can confide in counselors, aides, and coaches, commenters believed that students would be more likely to speak up and receive benefits to which they are entitled under Title IX. Commenters asserted that the proposed rules would conflict with other mandatory reporting requirements; for example, State laws requiring all school staff to notify law enforcement or child welfare agencies of child abuse. Another commenter stated that, by limiting the definition of complainant to only "the victim," the proposed regulations would not allow for parents to file complaints on behalf of their children, and would not contemplate a witness to sexual harassment making a complaint. One commenter asserted that the actual knowledge requirement may be in tension with the Every Student Succeeds Act (ESSA); the commenter asserted that under ESSA, a school district with probable cause to believe a teacher engaged in sexual misconduct is prohibited from helping that teacher from getting a new job yet, the commenter argued, under the proposed rules the school district would not need to take any action to address the teacher's sexual misconduct absent a formal complaint.

Discussion: The Department incorporates here its discussion under the "Actual Knowledge" subsection of the "Section 106.30 Definitions" section of this preamble. As discussed in that section, and in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, we believe that the final regulations appropriately hold recipients liable for responding to every allegation of sexual harassment of which the recipient is aware, ensure that elementary and secondary school students may report to any school employee, and ensure that every recipient's educational community understands that *any person* may report sexual harassment (whether they are the victim, or a witness, or any other third party), triggering the recipient's obligation to promptly respond. As discussed in the

"Complainant" subsection of the "Section 106.30 Definitions" section of this preamble, we have revised the definition of "complainant" to remove the inference that the alleged victim themselves must be the same person who reports the sexual harassment. Upon notice that any person has allegedly been victimized by conduct that could constitute sexual harassment as defined in § 106.30, a recipient must respond, including by promptly offering supporting measures to the alleged victim (i.e., the complainant).

The final regulations do not contravene or alter any Federal, State, or local requirements regarding other mandatory reporting obligations that school employees have. Those obligations are distinct from the obligations in these final regulations.

The Department acknowledges that the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the Every Student Succeeds Act (ESSA), may require a recipient subject to ESEA to take certain steps with respect to an employee who has been accused of sexual misconduct when a recipient has probable cause to believe the employee engaged in sexual misconduct.[829] We do not believe that the actual knowledge requirement in these final regulations is in tension with ESSA. The final regulations define actual knowledge to include notice of *allegations* of sexual harassment; a recipient cannot wait to respond to sexual harassment allegations until the recipient has *probable cause* that the sexual harassment occurred. Under revised § 106.44(a) the recipient's prompt response to allegations of sexual harassment must include offering the complainant supportive measures irrespective of whether the complainant files, or the Title IX Coordinator signs, a formal complaint. A recipient's obligations under ESSA may factor into a Title IX Coordinator's decision to sign a formal

[829] *E.g.*, https://www2.ed.gov/policy/elsec/leg/essa/section8546dearcolleagueletter.pdf.

complaint initiating a grievance process against an employee-respondent, even when the complainant (i.e., the alleged victim) does not wish to file a formal complaint, if, for example, the recipient wishes to investigate allegations in order to determine whether the recipient has probable cause of employee sexual misconduct that affect the recipient's ESSA obligations.

Changes: None.

Confusion for Employees

Comments: Numerous commenters expressed concern that resident assistants or resident advisors, professors, and coaches may not know how to respond to complainants appropriately if the proposed rules allow postsecondary institution employees to have discretion over whether to report sexual harassment to the Title IX Coordinator. Several commenters asked the Department to specify that all schools should be responsible for educating all employees about a variety of procedures for handling sexual harassment and violence. Another commenter suggested that deans, directors, department heads, or any supervisory employees should be held individually liable for having actual knowledge of a report of sexual misconduct. One commenter asserted that a greater number of employees should be required to inform students of their right to file a formal complaint and to obtain supportive measures. One commenter stated that schools following the proposed rules might be sued for inadequate reporting policies, since a recipient's failure to tell its employees to respond appropriately to disclosures arguably amounts to an intentional decision not to respond to third-party discrimination.

Discussion: The Department incorporates here its discussion under the "Actual Knowledge" subsection of the "Section 106.30 Definitions" section of this preamble. As discussed in that section, and in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, the Department agrees with commenters' concerns

that a wider pool of trusted adults in elementary and secondary schools should trigger a recipient's obligations, and, thus, the final regulations expand the definition of actual knowledge to include notice to *any* employee of an elementary and secondary school. However, for reasons discussed in the aforementioned sections of this preamble, the Department disagrees that the pool of postsecondary institution employees to whom notice charges the recipient with actual knowledge needs to be expanded beyond the Title IX Coordinator and officials with authority to institute corrective measures on the recipient's behalf.

The Department disagrees that these final regulations increase liability for recipients with respect to inadequate reporting policies. These final regulations require recipients to respond to sexual harassment, or allegations of sexual harassment, when the recipient has actual knowledge, defined in part to include notice to an official with authority to institute corrective measures on behalf of the recipient. This requirement, and definition, are also used by Federal courts in applying the *Gebser/Davis* framework in private Title IX lawsuits.[830] These final regulations go beyond the *Gebser/Davis* framework by requiring recipients to have in place clear, accessible reporting options, and requiring recipients to notify its educational community of those reporting options. The recipient's educational community must be notified about how to report sexual harassment in person, by mail, telephone, or e-mail, and the final regulations specify that any person may report sexual harassment (whether the person reporting is the alleged victim themselves or any third party).

Changes: None.

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[830] *E.g.*, *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998).

Intersection Between Actual Knowledge and Deliberate Indifference

Comments: One commenter asked, if a recipient has actual knowledge that a student or employee has been subjected to unwelcome conduct on the basis of sex, but the recipient does not know whether the misconduct effectively denied the victim equal access to the recipient's education program or activity, whether the recipient must respond under §§ 106.44(a) and 106.44(b)(2), to at least seek out the missing information and if not, whether the respondent has an obligation to inform the complainant of the nature of the missing and needed additional information regarding denial of equal access.

Discussion: The Department acknowledges the commenter's question about how much detail is needed in order for the recipient to have actual knowledge triggering the recipient's obligation to provide a non-deliberately indifferent response, and whether a recipient with partial information about a sexual harassment allegation has a responsibility to notify the complainant that additional information is needed to further evaluate or respond to the allegation. In response, the Department notes that the definition of "complainant" under § 106.30 is an individual who is alleged to be the victim of *conduct that could constitute sexual harassment*; thus, the recipient need not have received notice of facts that definitively indicate whether a reasonable person would determine that the complainant's equal access has been effectively denied in order for the recipient to be required to respond promptly in a non-deliberately indifferent manner under § 106.44(a). The definition of "actual knowledge," in § 106.30, also reflects this concept as actual knowledge means notice of sexual harassment or *allegations* of sexual harassment.

These final regulations, and § 106.44(a) in particular, incorporate principles similar to the principles in the Department's 2001 Guidance with respect to a recipient's response to a student's or parent's report of sexual harassment or sexual harassment allegations, or a

recipient's response to direct observation by a responsible employee of conduct that could constitute sexual harassment. The Department's 2001 Guidance states:

> If a student or the parent of an elementary or secondary student provides information or complains about sexual harassment of the student, the school should initially discuss what actions the student or parent is seeking in response to the harassment. The school should explain the avenues for informal and formal action, including a description of the grievance procedure that is available for sexual harassment complaints and an explanation of how the procedure works. If a responsible school employee has directly observed sexual harassment of a student, the school should contact the student who was harassed (or the parent, depending upon the age of the student), explain that the school is responsible for taking steps to correct the harassment, and provide the same information described in the previous sentence.[831]

Like the 2001 Guidance, these final regulations in § 106.6(g) recognize that a parent or guardian may have the legal right to act on behalf of a "complainant," "respondent," "party," or other individual. Section 106.44(a) also requires that the Title IX Coordinator promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain the process for filing a formal complaint. Thus, if a parent or guardian has a legal right to act on behalf of a student, the parent or guardian has the right to act on behalf of a Title IX complainant, including with respect to discussing supportive measures, or deciding to file a formal complaint.

Changes: None.

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[831] 2001 Guidance at 15.

Modeling Reporting on the Military System

Comments: Commenters argued that the reporting system used in the U.S. military to address sexual assault should be modified for use in Title IX reporting systems in order to best serve civil rights purposes. Commenters described the military reporting system as providing sexual assault victims with a two-track reporting system, under which a victim can choose a "restricted" or "unrestricted" report. Commenters described the military system's "restricted" report option as allowing the victim to report confidentially, for the purpose of receiving services, and no investigation is commenced unless the victim chooses an "unrestricted" reporting path whereby the victim's identity is not confidential and charges are initiated against the alleged perpetrator. Commenters asserted that giving victims these options for reporting helps address the well-known and well-researched fact that sexual assault is underreported throughout society, including in military and school environments, and that many survivors of sexual violence exercise the "victim's veto" whereby no investigation takes place, and no services are given to a victim, because the victim chooses not to report their experience in any official manner. Commenters asserted that the withdrawn 2014 Q&A essentially created this two-track model,[832] which best serves the needs of complainants, and argued that it best fits the purpose of civil rights protections, especially as compared to the traditional law enforcement model, under which a victim's only option is to report to police, and then police officers and prosecutors have sole discretion whether to investigate and whether to prosecute, and the victim has little or no control

[832] Commenters cited: 2014 Q&A at 21, 22, 24.

over those decisions, leading many victims to exercise the "victim's veto" and never report at all.[833]

Commenters described the approach of the withdrawn 2014 Q&A as giving survivors two choices of how to report, so survivors essentially would make the decision whether to initiate an investigation. Commenters asserted that the withdrawn 2014 Q&A ensured that if a survivor made an official report to a responsible employee or to the Title IX Coordinator the school must investigate unless the survivor explicitly requested that there be no investigation and the Title IX Coordinator granted that request after weighing multiple factors. On the other hand, commenters asserted, under that guidance a survivor could choose a "confidential path" and access services and accommodations for healing, without initiating an investigation unless or until the survivor changed their mind and officially reported to a responsible employee or to the Title IX Coordinator (which, commenters stated, is the equivalent in the military system as turning a restricted report into an unrestricted report, which is commonplace). Commenters urged the Department to reinstate the withdrawn 2014 Q&A, rather than keep the provisions in the proposed rules, regarding how complainants must report and what happens after a complainant reports.

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[833] Commenters cited, *e.g.*: Tamara F. Lawson, *A Shift Towards Gender Equality in Prosecutions: Realizing Legitimate Enforcement of Crimes Committed Against Women in Municipal and International Criminal Law*, 33 S. ILL. UNIV. L. J. 181, 188-90 (2008) (in instances of sexual violence, police and prosecutors decide to advance very few cases through the criminal system); Kimberly A. Lonsway & Joanne Archambault, *The "Justice Gap" for Sexual Assault Cases: Future Directions for Research and Reform*, 18 VIOLENCE AGAINST WOMEN 145, 147 (2012) (finding that only five to 20 percent of victims will report a sexual assault to law enforcement); Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 306 (1999) (arguing that the "victim's veto" occurs when the victim does not even report the wrongdoing); Kimberly A. Lonsway & Joanne Archambault, *The "Justice Gap" for Sexual Assault Cases: Future Directions for Research and Reform*, 18 VIOLENCE AGAINST WOMEN 145, 159 (2012) (explaining that factors such as "poor evidence gathering by police (especially victim interviews), intimidating defense tactics, incompetent prosecutors, and inappropriate decision making by jurors" result in low sexual assault conviction rates). Commenters asserted this leads to more victims deciding not to report at all.

Discussion: The Department is aware of the two-track reporting system used in the U.S. military,[834] and agrees that giving victims control over whether to report for purposes of receiving supportive services only, or also for the purpose of launching an official investigation into the alleged sexual assault, is beneficial to sexual assault victims. These final regulations share similarities with the military's two-track reporting system; the Department desires to respect the autonomy of each alleged victim to report for the purpose of receiving supportive measures, and to decide whether or not to also request an investigation into the allegations of sexual harassment. As commenters observed, the withdrawn 2014 Q&A's approach to what happens when an alleged victim reports sexual harassment also shares similarities with the two-track reporting system used in the military. These final regulations, too, are similar in some ways to the approach taken in the withdrawn 2014 Q&A. However, the Department believes that the additional precision, and obligatory nature, of these final regulations results in an approach superior to simply reinstating prior guidance.

Under the final regulations, any person may report[835] that any individual has allegedly been victimized by conduct that could constitute sexual harassment,[836] and the recipient must

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[834] *E.g.*, U.S. Dep't. of Defense, Sexual Assault Prevention and Response, "Reporting Options," https://sapr.mil/reporting-options ("Sexual assault is the most underreported crime in our society and in the Military. While the Department of Defense [DoD] prefers that sexual assault incidents are reported to the command to activate both victims' services and law enforcement actions, it recognizes that some victims desire only healthcare and advocacy services and do not want command or law enforcement involvement. The Department believes its first priority is for victims to be treated with dignity and respect and to receive the medical treatment, mental health counseling, and the advocacy services that they deserve. Under DoD's Sexual Assault Prevention and Response (SAPR) Policy, Service members . . . have two reporting options - Restricted Reporting and Unrestricted Reporting. Under Unrestricted Reporting, both the command and law enforcement are notified. With Restricted (Confidential) Reporting, the adult sexual assault victim can access healthcare, advocacy services, and legal services without the notification to command or law enforcement.").

[835] Section 106.8(a) ("any person" may report sexual harassment regardless of whether the person reporting is the alleged victim themselves, or any third party).

[836] Section 106.30 (defining "complainant" to mean an individual who is alleged to be the victim of conduct that could constitute sexual harassment).

respond promptly, including by offering supportive measures to the complainant (i.e., the alleged victim) and telling the complainant about the *option* of also filing a formal complaint that starts an investigation.[837] The only persons who can initiate an investigation are the complainant themselves, or the Title IX Coordinator.[838] Thus, if a complainant wants a report to remain confidential (in the sense of the complainant's identity not being disclosed to the alleged perpetrator, and not launching an investigation), the complainant may receive supportive measures without an investigation being conducted – unless the Title IX Coordinator, after having considered the complainant's wishes, decides that it would be clearly unreasonable for the school *not* to investigate the complainant's allegations. On the other hand, if the complainant chooses to file a formal complaint, the school *must* initiate a grievance process and investigate the complainant's allegations.[839] These final regulations preserve the benefits of allowing third party *reporting* while still giving the complainant as much control as reasonably possible over whether the school investigates, because under the final regulations a third party can report – and trigger the Title IX Coordinator's obligation to reach out to the complainant and offer supportive measures – but the third party cannot trigger an investigation.[840] Further, the final regulations allow a complainant to initially report for the purpose of receiving supportive measures, and to later decide to file a formal complaint.

Changes: None.

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[837] Section 106.44(a).
[838] Section 106.30 (defining "formal complaint" as a document filed by a complainant or signed by a Title IX Coordinator).
[839] Section 106.44(b)(1).
[840] *Cf.* § 106.6(g) (If a parent or guardian has a legal right to act on a complainant's behalf, the parent or guardian may file a formal complaint on behalf of the complainant).

Section 106.44(a) "education program or activity"

General Support and Opposition for "Education Program or Activity" as a Jurisdictional Condition

Comments: Several commenters expressed support for the NPRM's approach to the "education program or activity" condition, stating that it is consistent with the Title IX statute and case law. Commenters asserted that the Department has appropriately recognized that whether misconduct occurs on campus or off campus is not dispositive, and that courts have similarly applied a multi-factor test to deciding whether conduct occurred in an education program or activity. One commenter cited Federal cases suggesting that sexually hostile conduct itself, and not just its consequences, must occur on campus or at a school-sponsored or supervised event for Title IX to apply.[841] One commenter expressed support for the NPRM's approach to education program or activity because it is consistent with the Department's past practice. The commenter cited Departmental determination letters involving institutions of higher education in 2004 and 2008 that stated recipients do not have a Title IX duty to address alleged misconduct that occurs off campus and that does not involve the recipient's programs or activities. A few commenters expressed support for the NPRM's approach to education program or activity, asserting that it imposes reasonable limits on recipient responsibility. One commenter asserted that schools are not the sex police and that expecting schools to have jurisdiction over activity in off-campus

[841] Commenters cited: *Doe v. Brown Univ*., 896 F.3d 127, 132 fn. 6 (1st Cir. 2018); *Yeasin v. Durham*, 719 F. App'x 844 (10th Cir. 2018); *Roe v. St. Louis Univ*., 746 F.3d 874 (8th Cir. 2014); *Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist*., 511 F.3d 1114, 1121 fn.1 (10th Cir. 2008); *Ostrander v. Duggan*, 341 F.3d 745 (8th Cir. 2003); *Farmer v. Kan. State Univ*., No. 16-CV-2256, 2017 WL 980460, at *8 (D. Kan. Mar. 14, 2017), *aff'd by Farmer v. Kan. State Univ*., 918 F.3d 1094 (10th Cir. 2019); Stephanie Ebert, THE BOSTON GLOBE (Dec. 8, 2018) (Harvard student suing Harvard University in Federal court for investigating the student for rape allegation by non-student far from campus).

apartments, at a parent's house, a local bar, or nearby hotel, is unrealistic. One commenter expressed support for the NPRM's approach to including "education program or activity" as a condition triggering a recipient's response obligations, but urged the Department to go further and explicitly exclude from Title IX allegations made by or against someone who has no relationship with the recipient, and allegations involving students but occurring in a time or place totally unrelated to school activities such as during summer vacation hundreds of miles away from campus.

Other commenters asserted that the NPRM's approach to education program or activity was unclear. Commenters stated that the NPRM's preamble mentioned several factors, such as recipient ownership of the premises, endorsement, oversight, supervision, and disciplinary power, but argued that this multi-factor test may be confusing and make it difficult for students and schools to understand their Title IX rights and obligations. One commenter argued that the practical application of the Department's approach to misconduct that has both on-campus and off-campus elements would be challenging; for example, the commenter stated, if a sexual misconduct complaint involved a series of actions occurring on campus and off campus then the recipient may have to sift through evidence to identify and ignore events not "in" a program or activity.

Many commenters expressed concern that the NPRM's approach to the education program or activity condition would increase danger to students and others. Commenters cited studies and scholarly articles suggesting that sexual assault can cause lasting psychological damage to victims, including increasing suicide rates and substantially impacting victims' academic career, retention, graduation, and grade point average, regardless of whether the sexual

assault occurred off campus or on campus.[842] Commenters argued that not addressing off-campus misconduct may chill reporting, make it harder for the community to know the nature of threats facing them, and even discourage young women from attending college. Commenters expressed concern that the NPRM would cause victims to leave school, asserting that over one-third of sexual harassment or assault victims drop out of school.[843] Commenters argued that because a significant number of sexual assaults occur off campus,[844] not requiring schools to respond to those assaults will only lead to more college students dropping out. Several commenters emphasized that the reality is that off-campus life is often an essential part of the educational experience, such as off-campus travel for conferences and networking events, and that off-campus living for students is quite common.[845] Commenters argued that the Department should not give a free pass to perpetrators whose abusive conduct occurs off campus. Commenters expressed concern that repeat offenders could systematically target victims, knowing they will get away with it.

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[842] *See* data cited by commenters in the "Impact Data" subsection of the "General Support and Opposition" section of this preamble.

[843] Commenters cited: Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18 JOURNAL OF COLL. STUDENT RETENTION: RESEARCH, THEORY & PRACTICE 2, 234, 244 (2015).

[844] Commenters cited: EduRisk by United Educators, *Confronting Campus Sexual Assault: An Examination of Higher Education Claims* at 6 (2015) ("In 41 percent of claims, the victim and perpetrator attended the same off-campus party before going back to campus, where the sexual assault occurred. These off-campus parties included institution-recognized sorority and fraternity houses, athletic team houses, and students' off-campus residences."); U.S. Dep't. of Justice, Bureau of Justice Statistics, *Rape and Sexual Assault Victimization Among College-Age Females, 1995-2013* at 6 (2014) (95 percent of sexual assaults of female students ages 18-24 occur outside of school).

[845] Commenters cited: American Association of University Women, *Crossing the Line: Sexual Harassment at School* (2011); Rochelle Sharp, *How Much Does Living Off Campus Cost? Who Knows?*, THE NEW YORK TIMES (Aug. 5, 2016) (87 percent of college students and even more elementary and secondary school students reside off campus).

Commenters raised concerns about off-campus Greek life as hotbeds of sexual misconduct not covered by the NPRM, arguing that students are more likely to experience sexual assault if in a fraternity or sorority, and that men in fraternities are more likely than other male students to be perpetrators of sexual misconduct.[846] Commenters expressed concern that recipients might interpret the NPRM as preventing them from addressing sexual misconduct in fraternities, sororities, and social clubs the recipient does not recognize,[847] or perversely encourage recipients not to recognize Greek letter associations, but that the Department should encourage such relationships because they often entail mandatory insurance, risk management standards, and training requirements to reduce incidents of sexual misconduct.

Commenters asserted that the NPRM especially increases risks to community college and vocational school students because such students generally live off campus, to students of color and other already marginalized students who may not be able to afford to live on campus, to elementary and secondary school students with disabilities who may be separated from their peers and removed to off-site services, and to LGBTQ students because it may be harder for them to find adequate outside support services. One commenter argued that the Department's exclusion of off-campus assaults will hinder Federal background check processes, potentially harming our national security and exposing co-workers to danger. Another commenter stated that the corporate world does not exclude out-of-office misconduct from company codes of conduct,

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[846] Commenters cited: Jacqueline Chevalier Minow & Christopher J. Einolf, *Sorority Participation and Sexual Assault Risk*, 15 VIOLENCE AGAINST WOMEN 7 (2009); Jennifer Fleck, *Sexual assault more prevalent in fraternities and sororities, study finds*, UWIRE.COM (Oct. 16, 2014); Claude A. Mellins *et al.*, *Sexual Assault Incidents Among College Undergraduates: Prevalence and Factors Associated with Risk*, 13 PLOS ONE 1 (2017).

[847] Commenters cited: Jacquelyn D. Weirsma-Mosely *et al., An Empirical Investigation of Campus Demographics and Reported Rapes*, 65 JOURNAL OF AM. COLL. HEALTH 4 (2017); Cortney A. Franklin, *Sorority Affiliation and Sexual Assault Victimization*, 22 VIOLENCE AGAINST WOMEN 8 (2016).

and so the Department should not set young people up to fail by not showing them early in life that misconduct is unacceptable and will lead to consequences.

Commenters argued that Federal courts have been supportive of universities applying student codes of conduct to misconduct occurring off campus and outside the school's programs or activities.[848] Commenters argued that courts have recognized that an assailant's mere presence on campus creates a hostile environment for sexual harassment victims, exposing recipients to Title IX liability under a deliberate indifference standard if the recipient fails to redress the hostile environment even where the underlying sexual harassment or assault occurred off campus and outside the recipient's education program or activity. Commenters asserted that the proposed rules would leave recipients vulnerable to private Title IX lawsuits because recipients would not need to address the continuing effects of sexual assault that occurred outside the recipient's program or activity under the Department's regulations yet a Federal court may hold otherwise.[849] Commenters argued that Federal courts have determined that regardless of where a sexual assault occurred, where both parties are in the same education program or activity a recipient should be held liable under a deliberate indifference standard based on the recipient's response to the alleged incident, even if the incident happened under circumstances outside the

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[848] Commenters cited: *Slaughter v. Brigham Young Univ.*, 514 F.2d 622 (10th Cir. 1975); *Due v. Fla. Agric. & Mech. Univ.* (N.D. Fla. 1963); *Hill v. Bd. of Trustees of Mich. State Univ.*, 182 F. Supp. 2d 621 (W.D. Mich. 2001); *Gomes v. Univ. of Me. Sys.*, 304 F.Supp. 2d 117 (D. Me. 2004).

[849] Commenters cited: *Lapka v. Chertoff*, 517 F.3d 974 (7th Cir. 2008); 477 F.3d 1282, 1298 (11th Cir. 2007); *Doe v. East Haven Bd. of Educ.*, 200 F. App'x 46 (2d Cir. 2006); *Butters v. James Madison Univ.*, 145 F. Supp. 3d 610 (W.D. Va. 2015), *dismissed on summary judgment in Butters v. James Madison Univ.*, 208 F. Supp. 3d 745 (W.D. Va. 2016); *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, *Doe ex rel. Doe v. Derby Bd. of Educ.*, 451 F. Supp. 2d 438 (D. Conn. 2006); *Crandell v. New York Coll. of Osteopathic Med.*, 87 F. Supp. 2d 304, 316 (S.D.N.Y. 2000); *Kinsman v. Fla. State Univ. Bd. of Trustees*, No. 4:15-CV-235, 2015 WL 11110848 (N.D. Fla. Aug. 12, 2015); *McGinnis v. Muncie Cmty. Sch. Corp.*, 1:11-CV-1125, 2013 WL 2456067 (S.D. Ind. June 5, 2013); *C.S. v. S. Columbia Sch. Dist.*, No. 4:1-CV-1013, WL 2371413 (M.D. Pa. May 21, 2013); *Kelly v. Yale Univ.*, No. 3:01-CV-1591, 2003 WL 1563424 (D. Conn. Mar. 26, 2003).

recipient's control.[850] Commenters argued that courts have allowed Title IX private causes of action for sexual misconduct to proceed even where some or all of alleged misconduct occurred in a location outside the recipient's control so long as there was "some nexus between the out-of-school conduct and the school"[851] and that the proposed rules should take the same approach. Commenters argued that the Supreme Court's *Gebser* decision involved sexual activity between a teacher and student where the sexual activity did not take place on school grounds, yet the Supreme Court did not consider that sexual harassment to be outside the purview of Title IX.[852]

Commenters argued that the 2001 Guidance and 2017 Q&A require recipients to address sexual harassment that occurs off campus where the underlying sexual harassment or assault causes the complainant to experience a hostile environment on campus, and urged the Department to ensure that the final regulations impose similar obligations for recipients to address the continuing effects of sexual harassment that occurs off campus.

Another commenter contended that the NPRM conflicts with recent Department actions under the Trump Administration, such as cutting off partial funding to the Chicago Public School system for failing to address two reports of off-campus sexual assault.

Discussion: The Department appreciates the general support for our approach to including the concept of a recipient's "education program or activity" in these final regulations. The "education program or activity" language in the Title IX statute[853] provides context for the scope

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[850] Commenters cited: *Spencer v. Univ. of N.M. Bd. of Regents*, No. 15-CV-141, 2016 WL 10592223 (D. N.M. Jan. 11, 2016).
[851] Commenters cited: *Weckhorst v. Kan. State Univ.*, 241 F. Supp. 3d 1154, 1168-69 (D. Kan. 2017); *Rost ex rel. KC v. Steamboat Springs RE -2 School Dist.*, 511 F.3d 1114, 1121 fn.1 (10th Cir. 2008).
[852] Commenters cited: *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 278 (1998).
[853] 20 U.S.C. 1681(a).

of Title IX's non-discrimination mandate, which ensures that Federal funds are not used to support discriminatory practices in education programs or activities.[854]

In *Davis*, the Supreme Court framed the question in that case as whether a recipient of Federal financial assistance may be liable for damages under Title IX, for failure to respond to peer-on-peer sexual harassment in the recipient's program or activity.[855] The Supreme Court in *Davis* continued to reference the statutory "program or activity" language throughout its decision[856] and refuted dissenting justices' arguments that the majority's approach permitted too much liability against recipients in part by reasoning: "Moreover, because the harassment must occur 'under' 'the operations of' a funding recipient, *see* 20 U.S.C. § 1681(a); § 1687 (defining 'program or activity'), the harassment must take place in a context subject to the school district's control. . . . These factors combine to limit a recipient's damages liability to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs."[857]

The Department's regulatory authority must emanate from Federal law.[858] Congress, in enacting Title IX, has conferred on the Department the authority to regulate under Federal law. The appropriate place to start is the statutory text of Title IX, for "[u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning."[859] Title

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[854] *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979) (the objectives of Title IX are two-fold: first, to "avoid the use of Federal resources to support discriminatory practices" and second, to "provide individual citizens effective protection against those practices").
[855] *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 639 (1999).
[856] *Id.* at 652 ("Moreover, the provision that the discrimination occur 'under any education program or activity' suggests that the behavior be serious enough to have the systemic effect of denying the victim equal access to an educational program or activity").
[857] *Id.* at 645.
[858] *See Stark v. Wickard*, 321 U.S. 288, 309 (1944).
[859] *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006) (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

IX's text, 20 U.S.C. 1681(a) (emphasis added), states: "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[.]" The Department's authority to regulate sexual harassment as a form of sex discrimination pursuant to Title IX is clear; the Supreme Court has held that sexual harassment is a form of sex discrimination, and has confirmed that Congress has directed the Department, as a Federal agency that disburses funding to education programs or activities, to establish requirements to effectuate Title IX's non-discrimination mandate.[860] The Department's authority to regulate sexual harassment depends on whether sexual harassment occurs in "any education program or activity" because the Department's regulatory authority is co-extensive with the scope of the Title IX statute. Title IX does not authorize the Department to regulate sex discrimination occurring *anywhere* but only to regulate sex discrimination in education programs or activities.[861] Congress, in the Title IX statute, provided definitions of "program or activity" that are reflected in the Department's current Title IX regulations.[862]

The Supreme Court has applied the "program or activity" language in the Title IX statute in the context of judicial enforcement of Title IX. The Department does not believe that the Supreme Court's application of "program or activity" in the context of sexual harassment as a form of sex discrimination is an unreasonable interpretation of the Title IX statute, because the Supreme Court applied the language of the statute including the definitions of "program or

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[860] *Gebser v. Lago Vista Ind. Sch. Dist*., 524 U.S. 274, 280-81 (1998) (quoting 20 U.S.C. 1682).
[861] *See* the "Section 106.44(a) 'against a person in the U.S.'" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section this preamble, for discussion of the other jurisdictional limitation on the scope of Title IX – that the statute protects any person "in the United States."
[862] 20 U.S.C. 1687; 34 CFR 106.2(h).

activity" provided in the statute. The Department thus concludes that we should align these final regulations with the Supreme Court's approach to "education program or activity" in the context of Title IX sexual harassment.[863] By contrast, as explained in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment," the three parts of the *Gebser/Davis* framework (i.e., definition of sexual harassment, actual knowledge, deliberate indifference) do *not* appear in the text of the Title IX statute, and the Department believes that it may promulgate regulatory requirements that differ in significant ways from the *Gebser/Davis* framework, to best effectuate the purposes of Title IX's non-discrimination mandate in the context of administrative enforcement, and we have done so in these final regulations.

The Department acknowledges the concerns of many commenters who argued that with respect to sexual harassment, whether the alleged conduct occurred in the recipient's education program or activity might have been understood too narrowly under the NPRM (e.g., to exclude all off-campus conduct) or at least created potential confusion for complainants and recipients. In response to commenters' concerns, the Department believes that providing additional clarification as to the scope of a recipient's education program or activity for purposes of Title IX sexual harassment is necessary, and, therefore, adds to § 106.44(a) in the final regulations language similar to language used by the Court in *Davis*: For purposes of § 106.30, § 106.44, and

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[863] The Supreme Court's analysis of the "program or activity" statutory language was in the context of judicial enforcement, but the Department does not believe a different analysis is necessary or advisable for administrative enforcement, where the Department – like the Supreme Court – is constrained to interpret and apply the text of the statute including the definitions of "program or activity" provided in the statute. Consistent with this position, and as discussed throughout this preamble, we have revised § 106.44(a) to clarify that "education program or activity" for purposes of these sexual harassment regulations includes circumstances wherein the recipient exercises substantial control over both the harasser and the context of the harassment – the same conclusion reached by the *Davis* Court when it applied the "program or activity" statutory language to the context of a school's response to sexual harassment. *Davis*, 526 U.S. at 645.

§ 106.45, the phrase "education program or activity" includes "locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs" and also includes "any building owned or controlled by a student organization that is officially recognized by a postsecondary institution." The Title IX statute[864] and existing Title IX regulations,[865] already contain detailed definitions of "program or activity" that, among other aspects of such definitions, include "all of the operations of" a postsecondary institution or local education agency. The Department will interpret "program or activity" in these final regulations in accordance with the Title IX statutory (20 U.S.C. 1687) and regulatory definitions (34 CFR 106.2(h)), guided by the Supreme Court's language applied specifically for use in sexual harassment situations under Title IX regarding circumstances over which a recipient has control and (for postsecondary institutions) buildings owned or controlled by student organizations if the student organization is officially recognized by the postsecondary institution. [866]

While "all of the operations of" a recipient (per existing statutory and regulatory provisions), and the additional "substantial control" language in these final regulations, clearly include all incidents of sexual harassment occurring on a recipient's campus, the statutory and regulatory definitions of program or activity along with the revised language in § 106.44(a) clarify that a recipient's Title IX obligations extend to sexual harassment incidents that occur off

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[864] 20 U.S.C. 1687.
[865] 34 CFR 106.2(h); 34 CFR 106.2(i) (defining "recipient"); 34 CFR 106.31(a) (referring to "any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance").
[866] Section 106.44(a) (adding "For purposes of this section, § 106.30, and § 106.45, 'education program or activity' includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.").

campus if any of three conditions are met: if the off-campus incident occurs as part of the recipient's "operations" pursuant to 20 U.S.C. 1687 and 34 CFR 106.2(h); if the recipient exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus pursuant to § 106.44(a); or if a sexual harassment incident occurs at an off-campus building owned or controlled by a student organization officially recognized by a postsecondary institution pursuant to §106.44(a).

The NPRM cited to Federal court opinions that have considered whether sexual harassment occurred in a recipient's education program or activity by examining factors such as whether the recipient funded, promoted, or sponsored the event or circumstance where the alleged harassment occurred. While it may be helpful or useful for recipients to consider factors applied by Federal courts to determine the scope of a recipient's program or activity, no single factor is determinative to conclude whether a recipient exercised substantial control over the respondent and the context in which the harassment occurred, or whether an incident occurred as part of "all of the operations of" a school, college, or university.

The revised language in § 106.44(a) also specifically addresses commenters' concerns about recognized student organizations that own and control buildings such as some fraternities and sororities operating from off-campus locations where sexual harassment and assault may occur with frequency. The revised language further addresses commenters' questions regarding whether postsecondary institutions' Title IX obligations are triggered when sexual harassment occurs in an off-campus location not owned by the postsecondary institution but that is in use by a student organization that the institution chooses to officially recognize such as a fraternity or sorority. The revisions to § 106.44(a) clarify that where a postsecondary institution has officially recognized a student organization, the recipient's Title IX obligations apply to sexual harassment

that occurs in buildings owned or controlled by such a student organization, irrespective of whether the building is on campus or off campus, and irrespective of whether the recipient exercised substantial control over the respondent and the context of the harassment outside the fact of officially recognizing the fraternity or sorority that owns or controls the building. The Department makes this revision to promulgate a bright line rule that decisively responds to commenters and provides clarity with respect to recipient-recognized student organizations that own or control off-campus buildings. Official recognition of a student organization, alone, does not conclusively determine whether all the events and actions of the students in the organization become a part of a recipient's education program or activity; however, the Department believes that a reasonable, bright line rule is that official recognition of a student organization brings buildings owned or controlled by the organization under the auspices of the postsecondary institution recipient and thus within the scope of the recipient's Title IX obligations. As part of the process for official recognition, a postsecondary institution may require a student organization that owns or controls a building to agree to abide by the recipient's Title IX policy and procedures under these final regulations, including as to any misconduct that occurs in the building owned or controlled by a student organization. Accordingly, postsecondary institutions may not ignore sexual harassment that occurs in buildings owned or controlled by recognized student organizations. The Department acknowledges that even though postsecondary institutions may not always control what occurs in an off campus building owned or controlled by a recognized student organization, such student organizations and the events in their buildings often become an integral part of campus life. The Department also acknowledges that a postsecondary institution may be limited in its ability to gather evidence during an investigation if the incident occurs off campus on private property that a student organization (but not the

institution) owns or controls. A postsecondary institution, however, may still investigate a formal complaint arising from sexual harassment occurring in a building owned or controlled by a recognized student organization (whether the building is on campus or off campus), for instance by interviewing students who were allegedly involved in the incident and who are a part of the officially recognized student organization. Thus, under the final regulations (e.g., § 106.44(b)(1)) a postsecondary institution must investigate formal complaints alleging sexual harassment that occurred in a fraternity or sorority building (located on campus, or off campus) owned by the fraternity or sorority, if the postsecondary institution has officially recognized that Greek life organization. Further, under § 106.44(a) the recipient must offer supportive measures to a complainant alleged to be the victim of sexual harassment occurring at a building owned or controlled by an officially recognized student organization. Where a postsecondary institution has officially recognized a student organization, and sexual harassment occurs in an off campus location *not* owned or controlled by the student organization yet involving members of the officially recognized student organization, the recipient's Title IX obligations will depend on whether the recipient exercised substantial control over the respondent and the context of the harassment, or whether the circumstances may otherwise be determined to have been part of the "operations of" the recipient.

We note that the revision in § 106.44(a) referencing a "building owned or controlled by a student organization that is officially recognized by a postsecondary institution" is not the same as, and should not be confused with, the Clery Act's use of the term "noncampus building or property," even though that phrase is defined under the Clery Act in part by reference to student

organizations officially recognized by an institution.[867] For example, "education program or activity" in these final regulations includes buildings within the confines of the campus on land owned by the institution that the institution may rent to a recognized student organization.[868] As discussed in the "Clery Act" subsection of the "Miscellaneous" section of this preamble, the Clery Act and Title IX serve distinct purposes, and Clery Act geography is not co-extensive with the scope of a recipient's education program or activity under Title IX.

With respect to commenters who suggested that the final regulations should not apply to sexual misconduct by or against an individual with no relationship to the recipient, the Department believes that the framework adopted in the final regulations appropriately effectuates the broad non-discrimination mandate of Title IX (which protects any "person" from discrimination in an education program or activity) while also ensuring that recipients are responsible for addressing sexual harassment occurring in an educational institution's "operations," or when the recipient has control over the situation, or where a postsecondary institution has recognized a student organization thereby lending the recipient's implicit extension of responsibility over circumstances involving sexual harassment that occurs in buildings owned or controlled by such a student organization. Like the "no person" language in the Title IX statute, the final regulations place no restriction on the identity of a complainant (§

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[867] *See* 20 U.S.C. 1092(f)(6)(iii) (defining "noncampus building or property" in part as "any building or property owned or controlled by a student organization recognized by the institution"). The Clery Act regulations, 34 CFR 668.46(a), include "noncampus building or property" as part of an institution's Clery geography and define "noncampus building or property" as "[a]ny building or property owned or controlled by a student organization that is officially recognized by the institution; or [a]ny building or property owned or controlled by an institution that is used in direct support of, or in relation to, the institution's educational purposes, is frequently used by students, and is not within the same reasonably contiguous geographic area of the institution.").

[868] *But see* U.S. Dep't. of Education, Office of Postsecondary Education, *The Handbook for Campus Safety and Security Reporting*, 2-18 to 2-19 (2016), https://www2.ed.gov/admins/lead/safety/handbook.pdf.

106.30 defines complainant to mean "an individual who is alleged to be the victim of conduct that could constitute sexual harassment"), obligating a recipient to respond to such a complainant regardless of the complainant's relationship to the recipient. Similarly, reflecting that the Title IX statute does not limit commission of prohibited discrimination only to certain individuals affiliated with a recipient, the final regulations define a respondent to mean "an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment" without restricting a respondent to being a person enrolled or employed by the recipient or who has any other affiliation or connection with the recipient.

However, the final regulations do require that in order to file a formal complaint, the complainant must be "participating in or attempting to participate in" the recipient's education program or activity at the time the formal complaint is filed.[869] This prevents recipients from being legally obligated to investigate allegations made by complainants who have no relationship with the recipient, yet still protects those complainants by requiring the recipient to respond promptly in a non-deliberately indifferent manner. For similar reasons, the final regulations provide in § 106.45(b)(3)(ii) that a recipient *may* in its discretion dismiss a formal complaint if the respondent is no longer enrolled or employed by the recipient, recognizing that a recipient's general obligation to provide a complainant with a prompt, non-deliberately indifferent response might not include completing a grievance process in a situation where the recipient lacks any disciplinary authority over the respondent.

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[869] A complainant may be "attempting to participate" in the recipient's education program or activity, for example, where the complainant has applied for admission, or where the complainant has withdrawn but indicates a desire to re-enroll if the recipient appropriately responds to sexual harassment allegations.

In response to commenters' concerns that practical application of the "education program or activity" condition might be challenging in situations that, for example, involve some conduct occurring in the recipient's education program or activity and some conduct occurring outside the recipient's education program or activity, the Department reiterates that "off campus" does not automatically mean that the incident occurred outside the recipient's education program or activity. The Department agrees that recipients are obliged to think through the scope of each recipient's own education program or activity in light of the statutory and regulatory definitions of "program or activity" (20 U.S.C. 1687 and 34 CFR 106.2(h)) and the statement in § 106.44(a) that "education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs as well as buildings owned or controlled by student organizations officially recognized by a postsecondary institution.

To ensure that recipients adequately consider the resulting coverage of Title IX to each recipient's particular circumstances, the final regulations require that every Title IX Coordinator, investigator, decision-maker, and person who facilitates an informal resolution process, must be trained on (among other things) "the scope of the recipient's education program or activity."[870] We have also revised § 106.45(b)(10)(i)(D) so that materials used to train Title IX personnel must be posted on a recipient's website. These revisions ensure that a recipient's students and employees, and the public, understand the scope of the recipient's education program or activity for purposes of Title IX. Under Title IX, recipients must operate education programs or activities free from sex discrimination, and the Department will enforce these final regulations vigorously

[870] Section 106.45(b)(1)(iii).

with respect to a recipient's obligation to respond to sexual harassment that occurs in the recipient's education program or activity.

In situations involving some allegations of conduct that occurred in an education program or activity, and some allegations of conduct that did not, the recipient must investigate the allegations of conduct that occurred in the recipient's education program or activity, and nothing in the final regulations precludes the recipient from choosing to also address allegations of conduct outside the recipient's education program or activity.[871] For example, if a student is sexually assaulted outside of an education program or activity but subsequently suffers Title IX sexual harassment in an education program or activity, then these final regulations apply to the latter act of sexual harassment, and the recipient may choose to address the prior assault through its own code of conduct. Nothing in the final regulations prohibits a recipient from resolving allegations of conduct outside the recipient's education program or activity by applying the same grievance process required under § 106.45 for formal complaints of Title IX sexual harassment, even though such a process would not be required under Title IX or these final regulations. Thus, a recipient is not required by these final regulations to inefficiently extricate conduct occurring outside an education program or activity from conduct occurring in an education program or activity arising from the same facts or circumstances in order to meet the recipient's obligations with respect to the latter.

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[871] Section 106.45(b)(3) (revised in the final regulations to expressly state that although a recipient must dismiss allegations about conduct that did not occur in the recipient's education program or activity, such a mandatory dismissal is "for purposes of sexual harassment under title IX or this part; such a dismissal does not preclude action under another provision of the recipient's code of conduct.").

The Department appreciates the various concerns raised by many commenters regarding the extent to which students reside or spend time off campus and how the application of the "education program or activity" condition may affect students who experience sexual harassment and sexual assault in off-campus situations, including community college students, vocational school students, and students who belong to marginalized demographic groups. The Department reiterates that the final regulations do not impose a geographic test or draw a distinction between on-campus misconduct and off-campus misconduct. As discussed above, whether conduct occurs in a recipient's education program or activity does not necessarily depend on the geographic location of the incident. Instead, "education program or activity" relies on statutory and regulatory definitions of "program or activity,"[872] on the statement adapted from the Supreme Court's language in *Davis* added to § 106.44(a) that education program or activity includes locations, events, or circumstances over which the recipient exercised substantial control over the respondent and over the context in which the sexual harassment occurred, and includes on-campus and off-campus buildings owned or controlled by a student organization officially recognized by a postsecondary institution. If a sexual assault occurs against a student outside of an education program or activity, and the student later experiences Title IX sexual harassment in an education program or activity, then a recipient with actual knowledge of such sexual harassment in the recipient's education program or activity must respond pursuant to § 106.44(a).

The final regulations' approach reduces confusion for recipients and students as to the scope of Title IX's protective coverage and recognizes the Department's administrative role in

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[872] *E.g.*, 20 U.S.C. 1687; 34 CFR 106.2(h).

enforcing this important civil rights law according to the statute's plain terms. Furthermore, as noted previously, nothing in the final regulations prevents recipients from initiating a student conduct proceeding or offering supportive measures to students affected by sexual harassment that occurs outside the recipient's education program or activity. Title IX is not the exclusive remedy for sexual misconduct or traumatic events that affect students. As to misconduct that falls outside the ambit of Title IX, nothing in the final regulations precludes recipients from vigorously addressing misconduct (sexual or otherwise) that occurs outside the scope of Title IX or from offering supportive measures to students and individuals impacted by misconduct or trauma even when Title IX and its implementing regulations do not require such actions.[873] The Department emphasizes that sexual misconduct is unacceptable regardless of the circumstances in which it occurs, and recognizing jurisdictional limitations on the purview of a statute does not equate to condoning any form of sexual misconduct.

The Department believes a commenter's concern regarding the negative effect of the final regulations on the Federal background check process and our national security to be speculative. The final regulations would not categorically exclude off-campus assaults. As discussed previously, the final regulations applies to off-campus sexual harassment that occurs under "the operations of" the recipient, or where the recipient exercised substantial control over the respondent and the context in which the sexual harassment occurred, or in a building owned or

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[873] As discussed in the "Directed Question 5: Individuals with Disabilities" subsection of the "Directed Questions" section of this preamble, nothing in these final regulations affects a recipient's obligations to comply with all applicable disability laws, such as the ADA. Thus, for example, if a recipient's student (or employee) has a disability caused or exacerbated by, or arising from, sexual harassment, a recipient must comply with applicable disability laws (including with respect to providing reasonable accommodations) irrespective of whether the sexual harassment that caused or exacerbated the individual's disability constitutes Title IX sexual harassment to which the recipient must respond under these final regulations.

controlled by a student organization officially recognized by a postsecondary institution. This commenter appears to have made a series of assumptions that may not be true, including that a significant number of off-campus assaults not covered by the final regulations would involve perpetrators subjected to a Federal background check in the future, and that a significant number of background checks would fail to uncover relevant information about sexual misconduct solely because the perpetrator's misconduct was not covered under Title IX. Again, the Department emphasizes that nothing in the final regulations prevents recipients from addressing sexual misconduct that occurs outside their education programs or activities, nor do the final regulations discourage or prevent a victim from reporting sexual misconduct to law enforcement or from filing a civil lawsuit; therefore, numerous avenues exist through which misconduct not covered under Title IX would be revealed during a Federal background check of the perpetrator.

With respect to a commenter's assertion that the final regulations may perversely incentivize recipients to not recognize fraternities and sororities, the Department believes this conclusion would require assuming that recipients will make decisions affecting the quality of life of their students based solely on whether or not recipient recognition of a student organization such as a fraternity or sorority would result in sexual harassment that occurs at locations affiliated with that organization falling under Title IX's scope. The Department does not make such an assumption, believing instead that recipients take many factors into account in deciding whether, and under what conditions, a recipient wishes to officially recognize a student organization. Whether or not these final regulations alter postsecondary institutions' decisions about recognizing Greek life organizations, the Department has determined that the scope of Title IX extends to the entirety of a recipient's education program and activity, and with respect to postsecondary institutions, the Department is persuaded by commenters' contentions that

when a postsecondary institution chooses to officially recognize a student organization, the recipient has implied to its students and employees that locations owned by such a student organization are under the imprimatur of the recipient, whether or not the recipient otherwise exercises substantial control over such a location.

The Department believes there is a fundamental distinction between Title IX, and workplace policies that may exist in the corporate world. Title IX has clear jurisdictional application to education programs or activities, and the Department does not have authority to extend Title IX's application. By contrast, corporations may have more flexibility in crafting their own rules and policies to reflect their values and the needs of their employees and customers. Further, Title VII does not necessarily deem actionable all sexual harassment committed by employees regardless of the location or context of the harassment.[874] These final regulations tether sexual harassment to a recipient's education program or activity in a similar manner to the way courts tether sexual harassment to a workplace under an employer's control.[875] Regardless of any differences between analyses under Title VII and Title IX, we emphasize that recipients retain discretion under the final regulations to address sexual misconduct that falls outside the recipient's education program or activity through their own

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[874] *See, e.g.*, *Lapka v. Chertoff*, 517 F.3d 974, 982-83 (7th Cir. 2008).

[875] The Department adds to § 106.44(a) the statement that "education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs. This helps clarify that even if a situation arises off campus, it may still be part of the recipient's education program or activity if the recipient exercised substantial control over the context and the alleged harasser. While such situations may be fact specific, recipients must consider whether, for example, a sexual harassment incident between two students that occurs in an off-campus apartment (i.e., not a dorm room provided by the recipient) is a situation over which the recipient exercised substantial control; if so, the recipient must respond when it has actual knowledge of sexual harassment or allegations of sexual harassment that occurred there. At the same time, the Title IX statute and existing regulations broadly define a recipient's "program or activity" to include (as to schools) "all of the operations" of the school, such that situations that arise on campus are already part of a school's education program or activity. 20 U.S.C. 1687.

disciplinary system and by offering supportive measures to complainants reporting such misconduct.

The Department acknowledges commenters' citations to Federal court opinions for the proposition that a recipient may be deliberately indifferent to sexual harassment that occurred outside the recipient's control where the complainant has to interact with the respondent in the recipient's education program or activity, or where the effects of the underlying sexual assault create a hostile environment in the complainant's workplace or educational environment. However, with the changes to the final regulations made in response to commenters' concerns, the Department believes that we have clarified that sexual harassment incidents occurring off campus may fall under Title IX. The statutory and regulatory definitions of "program or activity" and the statements regarding "substantial control" and "buildings owned or controlled by" student organizations officially recognized by postsecondary institutions in § 106.44(a) do not state or imply that off-campus incidents necessarily fall outside a recipient's education program or activity. Moreover, complainants can request supportive measures or an investigation into allegations of conduct that do not meet Title IX jurisdictional conditions, under a recipient's own code of conduct.[876]

Some of the situations in Federal cases cited to by commenters may have reached similar outcomes under the final regulations. For example, in *Doe v. East Haven Board of Education*,[877]

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[876] The Department also notes that § 106.45(b)(8) in the final regulations permits complainants and respondents equally to appeal a recipient's determination that allegations were subject to mandatory dismissal under § 106.45(b)(3)(i).

[877] 200 F. App'x 46, 48 (2d Cir. 2006); *Lapka v. Chertoff*, 517 F.3d 974, 982-83 (7th Cir. 2008) (the Seventh Circuit reasoned that the plaintiff sufficiently alleged workplace harassment even though the alleged rape occurred while the

the Second Circuit held that the plaintiff sufficiently alleged sexual harassment to which the school was deliberately indifferent where the harassment consisted of on-campus taunts and name-calling directed at the plaintiff after she had reported being raped off campus by two high-school boys. The final regulations would similarly analyze whether sexual harassment (i.e., unwelcome conduct on the basis of sex so severe, pervasive, and objectively offensive that it effectively deprives a complainant of equal access to education) *in the recipient's program or activity* triggered a recipient's response obligations regardless of whether such sexual harassment stemmed from the complainant's allegations of having suffered sexual assault (e.g., rape) *outside* the recipient's program or activity. Further, whether or not the off-campus rape in that case was in, or outside, the school's education program or activity, would depend on the factual circumstances, because as explained above, not all off-campus sexual harassment is excluded from Title IX coverage.

Contrary to commenters' assertions, the Supreme Court in *Gebser* did not dispense with the program or activity limitation or declare that where the harassment occurred did not matter. The facts at issue in the *Gebser* case involved teacher-on-student harassment that consisted of both in-class sexual comments directed at the plaintiff as well as a sexual relationship that began

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plaintiff and assailant were socializing after hours in a private hotel room, because the bar was part of the training facility where the plaintiff and assailant were required to attend work-related training sessions and thus were on "official duty" while at that facility, including the bar located in the facility, "so the event could be said to have grown out of the workplace environment" and the plaintiff and assailant were trainees expected to eat and drink at the facility and "return to dormitories and hotel rooms provided by" the employer such that "[e]mployees in these situations can be expected to band together for society and socialize as a matter of course" justifying the Court's conclusion that the plaintiff had alleged sexual harassment (rape) that arose in the context of a workplace environment and to which the employer had an obligation to respond). Although *Lapka* was a case under Title VII, the final regulations would similarly analyze whether sexual harassment occurred in the school's program or activity by inquiring whether the school exercised substantial control over the context of the harassment and the alleged harasser.

when the respondent-teacher visited the plaintiff's home ostensibly to give her a book.[878] The Supreme Court in *Gebser* emphasized that a school district needs to be aware of discrimination (in the form of sexual harassment) "in its programs" and emphasized that a *teacher's* sexual abuse of a student "undermines the basic purposes of the educational system"[879] thereby implicitly recognizing that a teacher's sexual harassment of a student is likely to constitute sexual harassment "in the program" of the school even if the harassment occurs off campus. Nothing in the final regulations contradicts this premise or conclusion; § 106.44(a) clarifies that a recipient's education program or activity includes circumstances over which a recipient has substantial control over the context of the harassment and the respondent, and a teacher employed by a recipient who visits a student's home ostensibly to give the student a book but in reality to instigate sexual activity with the student could constitute sexual harassment "in the program" of the recipient such that a recipient with actual knowledge of that harassment would be obligated under the final regulations to respond. Similarly, the Supreme Court in *Davis* viewed the perpetrator's status as a teacher in *Gebser* as relevant to concluding that the sexual

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[878] *Gebser*, 524 U.S. at 277-78.

[879] *Gebser*, 524 U.S. at 286 ("As a general matter, it does not appear that Congress contemplated unlimited recovery in damages against a funding recipient where the recipient is unaware of *discrimination in its programs*.") (emphasis added); *id.* at 289 (reasoning that a school's liability in a private lawsuit should give the school opportunity to know of the violation and correct it voluntarily similarly to the way the Title IX statute directs administrative agencies to give a school that opportunity to voluntarily correct violations, and the Court stated "Presumably, a central purpose of requiring notice of the violation 'to the appropriate person' and an opportunity for voluntary compliance before administrative enforcement proceedings can commence is to avoid diverting education funding from beneficial uses where a recipient was unaware of *discrimination in its programs* and is willing to institute prompt corrective measures.") (emphasis added); *id.* at 290 ("we hold that a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of *discrimination in the recipient's programs* and fails adequately to respond.") (emphasis added); *id.* at 292 ("No one questions that a student suffers extraordinary harm *when subjected to sexual harassment and abuse by a teacher*, and that *the teacher's conduct is reprehensible and undermines the basic purposes of the educational system*.") (emphasis added).

harassment was happening "under" the recipient's education program or activity.[880] We reiterate that the final regulations do not distinguish between sexual harassment occurring "on campus" versus "off campus" but rather state that Title IX covers sexual harassment that occurs in a recipient's education program or activity. The final regulations follow the *Gebser/Davis* approach to Title IX's statutory reference to discrimination in an education program or activity; sexual harassment by a teacher as opposed to harassment by a fellow student may, as indicated in *Gebser* and *Davis*, affect whether the sexual harassment occurred "under any education program or activity."[881] This is a matter that recipients must consider when training Title IX personnel on the "scope of the recipient's education program or activity" pursuant to § 106.45(b)(1)(iii).

Both the 2001 Guidance and 2017 Q&A recognize the statutory language of "education program or activity" as a limitation on sexual harassment to which a recipient must respond. For example, the 2001 Guidance notes that "Title IX applies to all public and private educational institutions that receive Federal funds" and states that the "education program or activity of a school includes all of the school's operations" which means "that Title IX protects students in connection with all of the academic, educational, extra-curricular, athletic, and other programs of the school, whether they take place in the facilities of the school, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere."[882] Similarly, the

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[880] *Davis*, 526 U.S. at 652-53 ("Moreover, the provision that the discrimination occur 'under any education program or activity' suggests that the behavior be serious enough to have the systemic effect of denying the victim equal access to an educational program or activity. . . . The fact that it was a teacher who engaged in harassment in *Franklin* and *Gebser* is relevant. The relationship between the harasser and the victim necessarily affects the extent to which the misconduct can be said to breach Title IX's guarantee of equal access to educational benefits and to have a systemic effect on a program or activity.").
[881] *Id.* at 652.
[882] 2001 Guidance at 2-3 (internal quotation marks omitted) (citing to 20 U.S.C. 1687, codification of the amendment to Title IX regarding scope of jurisdiction, enacted by the Civil Rights Restoration Act of 1987, and to 65 FR 68049 (November 13, 2000), the Department's amendment of the Title IX regulations to incorporate the statutory definition of "program or activity.").

2017 Q&A expressly acknowledges that a recipient's obligation to respond to sexual harassment is confined to harassment that occurs in the recipient's education program or activity, citing statutory and regulatory definitions of "recipient," "operations," and "program or activity."[883] The final regulations similarly rely on preexisting statutory and regulatory definitions of a recipient's "program or activity" and add a statement that "education program or activity" includes circumstances over which the recipient exercised substantial control. The withdrawn 2011 Dear Colleague Letter departed from the Department's longstanding acknowledgement that a recipient's response obligations are conditioned on sexual harassment that occurs in the recipient's education program or activity;[884] these final regulations return to the Department's approach in the 2001 Guidance, which mirrors the Supreme Court's approach to "education program or activity" as a jurisdictional condition that promotes a recipient's obligation under Title IX to provide education programs or activities free from sex discrimination. Like the 2001 Guidance, the final regulations approach the "education program or activity" condition as extending to circumstances over which recipients have substantial control, and not only to incidents that occur "on campus." We reiterate that nothing in the final regulations precludes a recipient from offering supportive measures to a complainant who reports sexual harassment that

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[883] 2017 Q&A at 1, fn. 3.

[884] 2011 Dear Colleague Letter at 4 ("Schools 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. If a student files a complaint with the school, *regardless of where the conduct occurred*, the school must process the complaint in accordance with its established procedures. Because students often experience the continuing effects of off-campus sexual harassment in the educational setting, schools should consider the effects of the off-campus conduct when evaluating whether there is a hostile environment on campus. For example, if a student alleges that he or she was sexually assaulted by another student off school grounds, and that upon returning to school he or she was taunted and harassed by other students who are the alleged perpetrator's friends, the school should take the earlier sexual assault into account in determining whether there is a sexually hostile environment. The school also should take steps to protect a student who was assaulted off campus from further sexual harassment or retaliation from the perpetrator and his or her associates.") (emphasis added); *see also* the withdrawn 2014 Q&A at 29-30.

occurred outside the recipient's education program or activity, and any sexual harassment that does occur in an education program or activity must be responded to even if it relates to, or happens subsequent to, sexual harassment that occurred outside the education program or activity.

Although the 2001 Guidance and 2017 Q&A frame actionable sexual harassment as harassment that creates a "hostile environment,"[885] the final regulations utilize the more precise interpretation of Title IX's scope articulated by the Supreme Court in *Davis*: that a recipient must respond to sexual harassment that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to education.[886] The use of the phrase "hostile environment" in the 2001 Guidance and 2017 Q&A does not mean that those guidance documents ignored the "education program or activity" limitation referenced in the Title IX statute; whether framed as a "hostile environment" (as in Department guidance) or as "effective denial of a person's equal access" to education (as in these final regulations), sexual harassment is a form of sex discrimination actionable under Title IX when it occurs in an education program or activity.

Because the final regulations do not exclude "off campus" sexual harassment from coverage under Title IX and instead take the approach utilized in the 2001 Guidance and applied

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[885] 2001 Guidance at 3; 2017 Q&A at 1. Although footnote 3 of the 2017 Q&A states that "[s]chools are responsible for redressing a hostile environment that occurs on campus even if it relates to off-campus activities," this statement was intended to convey that a recipient may not ignore sexual harassment that occurs *in its program or activity* just because the parties involved may also have experienced an incident of sexual harassment *outside its program or activity*. *See also Doe v. East Haven Bd. of Educ.*, 200 F. App'x 46, 48 (2d Cir. 2006) (holding that plaintiff sufficiently alleged sexual harassment to which the school was deliberately indifferent where the harassment consisted of on-campus, sexualized taunts and name-calling directed at the plaintiff after she had reported being raped by two high-school boys outside the school's program or activity).

[886] *See also* the "Sexual Harassment" subsection of the "Section 106.30 Definitions" section of this preamble for further discussion of the "effective denial of equal access" element in the final regulations' definition of sexual harassment and the relationship between that element and the concept of hostile environment.

by the Supreme Court in *Davis*, under which off campus sexual harassment may be in the scope of a recipient's education program or activity, the Department disagrees that these final regulations conflict with the Department's recent enforcement action with respect to holding Chicago Public Schools accountable for failure to appropriately respond to certain off-campus sexual assaults.

Changes: Section 106.44(a) is revised to state that "education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. Section 106.45(b)(1)(iii) is revised to include training for Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolutions on "the scope of the recipient's education program or activity." Section 106.45(b)(3)(i) is revised to expressly provide that a mandatory dismissal of allegations in a formal complaint about conduct not occurring in the recipient's education program or activity is "for purposes of title IX or [34 CFR part 106]; such a dismissal does not preclude action under another provision of the recipient's code of conduct." Section 106.45(b)(10)(i)(D) is revised to require recipients to post materials used to train Title IX personnel on the recipient's website, or if the recipient does not have a website, to make such materials available for inspection and review by members of the public.

Online Sexual Harassment

Comments: One commenter cited case law for the proposition that Title IX does not cover online or digital conduct.[887] Other commenters cited cases holding that recipients may be liable under Title IX for failing to adequately address online harassment.[888] A few commenters argued that the NPRM's approach to education program or activity is inconsistent with the Department's past practice and guidance documents, such as guidance issued in 2010 which acknowledged that cell phone and internet communications may constitute actionable harassment. Many commenters were concerned the NPRM would exclude online sexual harassment due to the education program or activity condition in § 106.44(a), and cited studies showing the prevalence and effects of online harassment and cyber-bullying on victims.[889] Commenters argued that it was unclear to what extent the NPRM would cover online harassment and suggested that the Department more broadly define "program or activity" to include student interactions that are enabled by recipients, such as online harassment between students using internet access provided by the recipient. Commenters argued that the final regulations should explicitly address cyber-bullying and electronic speech. Some commenters suggested that excluding online misconduct may conflict with State law; for example, commenters stated that New Jersey law includes harassment occurring online.

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[887] Commenters cited, *e.g.*: *Yeasin v. Durham*, 719 F. App'x 844 (10th Cir. 2018); *Gordon v. Traverse City Area Pub. Sch.*, 686 F. App'x 315, 324 (6th Cir. 2017).
[888] Commenters cited: *Feminist Majority Found. v. Hurley*, 911 F.3d 674 (4th Cir. 2018); *S.J.W. v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 777 (8th Cir. 2012); *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 220-221 (3d Cir. 2011); *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565, 573 (4th Cir. 2011); *Sypniewski v. Warren Hill Reg'l Bd. of Educ.*, 307 F.3d 243, 257 (3d Cir. 2002).
[889] Commenters cited, *e.g.*: American Association of University Women, *Crossing the Line: Sexual Harassment at School* (2011).

Discussion: The Department appreciates commenters' concerns about whether Title IX applies to sexual harassment that occurs electronically or online. We emphasize that the education program or activity jurisdictional condition is a fact-specific inquiry applying existing statutory and regulatory definitions of "program or activity" to the situation; however, for recipients who are postsecondary institutions or elementary and secondary schools as those terms are used in the final regulations, the statutory and regulatory definitions of "program or activity" encompass "all of the operations of" such recipients, and such "operations" may certainly include computer and internet networks, digital platforms, and computer hardware or software owned or operated by, or used in the operations of, the recipient.[890] Furthermore, the final regulations revise § 106.44(a) to specify that an education program or activity includes circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurred, such that the factual circumstances of online harassment must be analyzed to determine if it occurred in an education program or activity. For example, a student using a personal device to perpetrate online sexual harassment during class time may constitute a circumstance over which the recipient exercises substantial control.

Contrary to the claims made by some commenters, the approach to "education program or activity" contained in the final regulations, and in particular its potential application to online harassment, would not necessarily conflict with the Department's previous 2010 Dear Colleague Letter addressing bullying and harassment. The Department's 2010 guidance made a passing reference that harassing conduct may include "use of cell phones or the internet," and the

[890] 20 U.S.C. 1687; 34 CFR 106.2(h).

Department's position has not changed in this regard.[891] These final regulations apply to sexual harassment perpetrated through use of cell phones or the internet if sexual harassment occurred in the recipient's education program or activity. As explained in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, these final regulations adopt and adapt the *Gebser/Davis* framework of actual knowledge and deliberate indifference, in contrast to the rubric in the 2010 Dear Colleague Letter on bullying and harassment; however, these final regulations appropriately address electronic, digital, or online sexual harassment by not making sexually harassing conduct contingent on the *method* by which the conduct is perpetrated. Additionally, even if a recipient is not required to address certain misconduct under these final regulations, these final regulations expressly allow a recipient to address such misconduct under its own code of conduct.[892] Accordingly, there may not be any conflict between these final regulations with respect to State laws that explicitly cover online harassment.

Changes: None.

Consistency with Title IX Statutory Text

Comments: Some commenters opposed the NPRM's approach to "education program or activity" by arguing that it conflicts with Title IX's statutory text. Commenters contended that the NPRM is an unambiguously incorrect interpretation of Title IX under the deference doctrine articulated by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council,*

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[891] U.S. Dep't. of Education, Office for Civil Rights, *Dear Colleague Letter: Harassment and Bullying* at 2 (Oct. 26, 2010), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf.
[892] *E.g.*, § 106.45(b)(3)(i).

Inc.,[893] and will thus be given no judicial deference. One such commenter asserted that the Title IX statute has three distinctive protective categories, such that no person on the basis of sex can be: (1) excluded from participation in; (2) denied the benefits of; or (3) subjected to discrimination under any education program or activity. The commenter argued that the first clause includes off-campus conduct, such as male students on a public street blocking female students from accessing campus. This commenter argued that the third clause prohibits discrimination "under," and not "in" or "within," a recipient's education program or activity and is violated whenever women or girls are subjected to more adverse conditions than males. This commenter asserted that the Title IX statutory text does not depend on where the underlying conduct occurs, but rather focuses on the subsequent hostile educational environment that such misconduct can cause.

Another commenter argued that requiring recipients to treat off-campus sexual misconduct differently from on-campus sexual misconduct can itself violate Title IX.

Discussion: The Department acknowledges the analysis offered by at least one commenter that the Title IX statute, by its own text, has three distinct protective categories and the commenter's argument that the "subjected to discrimination" prong is violated whenever females are subjected to more adverse conditions than males. As explained below, the Department elects to adopt the analysis applied by the Supreme Court rather than the analysis provided by the commenter.

In *Davis*, the Supreme Court acknowledged that Title IX protects students from "discrimination" and from being "excluded from participation in" or "denied the benefits of" any

[893] 467 U.S. 837 (1984).

education program or activity receiving Federal financial assistance.[894] The *Davis* Court characterized sexual harassment as a form of sex *discrimination* under Title IX,[895] and reasoned that whether a recipient is liable for sexual harassment thus turns on whether the recipient can be said to have "subjected" students to sex discrimination in the form of sexual harassment.[896] The *Davis* Court further reasoned, "Moreover, because the harassment must occur 'under' 'the operations of' a funding recipient, *see* 20 U.S.C. § 1681(a); § 1687 (defining 'program or activity'), the harassment must take place in a context subject to the school district's control. . . . These factors combine to limit a recipient's damages liability to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs."[897]

Adopting the Supreme Court's analysis of the appropriate application of the Title IX statute's "program or activity" language in the context of sexual harassment, the final regulations treat sexual harassment as a form of sex discrimination under Title IX and hold recipients accountable for responding to sexual harassment that took place in a context under the recipient's control. In interpreting "education program or activity" in the final regulations, the Department will look to the definitions of "program or activity" provided by Title IX[898] and existing Title IX

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[894] *Davis*, 526 U.S. at 650.
[895] *Id.* ("Having previously determined that 'sexual harassment' is 'discrimination' in the school context under Title IX, we are constrained to conclude that student-on-student sexual harassment, if sufficiently severe, can likewise rise to the level of discrimination actionable under the statute.").
[896] *Id.* ("The statute's plain language confirms the scope of prohibited conduct based on the recipient's degree of control over the harasser and the environment in which the harassment occurs. If a funding recipient does not engage in harassment directly, it may not be liable for damages unless its deliberate indifference 'subjects' its students to harassment. That is, the deliberate indifference must, at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it.") (internal citations to dictionary references omitted).
[897] *Id.* at 644-45.
[898] 20 U.S.C. 1687 (defining "program or activity").

regulations,[899] and has revised § 106.44(a) of the final regulations to clarify that "education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs, as well as on-campus and off-campus buildings owned or controlled by student organizations officially recognized by postsecondary institutions. The Department notes that the commenter's hypothetical, concerning male students on a public street blocking female students from accessing campus, would require a fact-specific analysis but could constitute sexual harassment in the recipient's education program or activity if such an incident occurred in a location, event, or circumstance over which the recipient exercised substantial control.

Contrary to the claims made by some commenters, and as discussed above, the final regulations would not necessarily require recipients to treat off-campus misconduct differently from on-campus misconduct. Title IX does not create, nor did Congress intend for it to create, open-ended liability for recipients in addressing sexual harassment. Rather, the statute imposed an important jurisdictional limitation through its reference to education programs or activities. Recipients are responsible under Title IX for addressing sex discrimination, including sexual harassment, in their "education program or activity," but a recipient's education program or activity may extend to locations, events, and circumstances "off campus."

Changes: We have revised § 106.44(a) to state that for purposes of §§ 106.30, 106.44, and 106.45, "education program or activity" includes locations, events, or circumstances over which

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[899] 34 CFR 106.2(h) (defining "program or activity"); 34 CFR 106.2(i) (defining "recipient"); 34 CFR 106.31(a) (referring to "any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance").

the respondent had substantial control over both the respondent and the context in which the sexual harassment occurred, and also includes buildings owned or controlled by student organizations that are officially recognized by a postsecondary institution.

Constitutional Equal Protection

Comments: One commenter contended that the NPRM's approach to "education program or activity" may violate the Fourteenth Amendment because experiencing off-campus or online sexual victimization detrimentally affects student-survivors' education, and the Fourteenth Amendment guarantees these students equal protection, yet, the commenter argued, the NPRM would leave these students outside Title IX's reach and deprived of equal protection.

Discussion: We disagree with the contention that the application in the final regulations of "education program or activity" as a jurisdictional condition may violate the Equal Protection Clause of the Fourteenth Amendment. The Department reiterates that the "education program or activity" limitation in the final regulations does not create or apply a geographic test, does not draw a line between "off campus" and "on campus," and does not create a distinction between sexual harassment occurring in person versus online. Moreover, under these final regulations, any individual alleged to be a victim of conduct that could constitute sexual harassment is a "complainant"[900] to whom the recipient must respond in a prompt, non-deliberately indifferent manner; in that manner, all students are treated equally without distinction under the final regulations based on, for example, where a student resides or spends time. The distinction of which some commenters are critical, then, is not a distinction drawn among groups or types of

[900] Section 106.30 (defining a "complainant" as any individual who is alleged to be the victim of conduct that could constitute sexual harassment).

students, but rather is a distinction drawn (for reasons explained previously) between incidents that are, or are not, under the control of the recipient. The Department further notes that even if commenters correctly characterize the distinction as being made between some students (who suffer harassment in an education program or activity) and other students (who suffer harassment outside an education program or activity), the applicable level of scrutiny under the Equal Protection Clause to any differential treatment under such circumstances would be the rational basis test.[901] A heightened level of scrutiny would apply where a suspect or quasi-suspect classification is involved, such as race or sex.[902] But, as here, where no such suspect or quasi-suspect classification is involved, the final regulations may treat students differently due to the circumstances in which the misconduct occurred, and the rational basis test applies. Under the rational basis test, a law or governmental action is valid under the Equal Protection Clause so long as it is rationally related to a legitimate government interest.[903] With Title IX, Congress made a rational determination that recipients should be held liable for misconduct over which they had some level of control. The statute's reference to "education program or activity" reflects this important limitation. To expose recipients to liability for misconduct wholly unrelated to circumstances over which they have control would contravene congressional intent and lead to potentially unlimited exposure to loss of Federal funds. The Department believes that the use of "education program or activity" in § 106.44(a) appropriately reflects both statutory text and

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[901] *See F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993).
[902] *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (applying strict scrutiny under the Equal Protection Clause to assess classifications based on race); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (applying intermediate scrutiny under the Equal Protection Clause to assess classifications based on sex).
[903] *See Beach Commc'ns, Inc.*, 508 U.S. at 313 (holding that in areas of social and economic policy, statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide rational basis for classification).

congressional intent, and furthers the legitimate government interest of ensuring liability is not open-ended and has reasonable jurisdictional limitations.

Changes: None.

Institutional Autonomy and Litigation Risk

Comments: A number of commenters stated that the Department's approach to "education program or activity" would undermine recipient autonomy and expose recipients to litigation risk. Commenters argued that recipients should have the right to determine the standards of behavior to which their students must adhere, both on campus and off campus, and that the NPRM would infringe on institutional academic prerogatives and independence. Commenters expressed concern that the NPRM would make recipients vulnerable to litigation from students seeking damages for off-campus assaults, including because recipients could be accused of arbitrarily deciding which cases to investigate and which cases to declare outside their jurisdiction.

Discussion: We acknowledge the importance of recipient discretion and flexibility to determine the recipient's own standards of conduct. However, Congress created a clear mandate in Title IX and vested the Department with the authority to administratively enforce Title IX to effectuate the statute's twin purposes: to "avoid the use of Federal resources to support discriminatory practices" and to "provide individual citizens effective protection against those practices."[904] Importantly, nothing in the final regulations prohibits recipients from using their own disciplinary processes to address misconduct occurring outside their education program or

[904] *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979).

activity.[905] Indeed, this flexibility for recipients to address sexual misconduct that falls outside the scope of Title IX, including sexual misconduct that is outside the recipient's education program or activity, permits recipients to reduce the litigation risk perceived by some commenters. As discussed above, and contrary to the claims made by many commenters, the final regulations do not distinguish between on-campus misconduct and off-campus misconduct. Off-campus sexual harassment is not categorically excluded from Title IX coverage. Recipients' decisions to investigate formal complaints regarding allegations of sexual harassment cannot be arbitrary under the final regulations; rather, a recipient *must* investigate a formal complaint where the alleged sexual harassment (meeting the definition in § 106.30) occurred in the recipient's education program or activity, against a person in the United States.

Changes: None.

Requests for Clarification

Comments: Commenters raised questions regarding the Department's approach to the "education program or activity" condition. Commenters requested clarity as to events that begin off campus but have effects on campus, such as interaction among students, faculty, and staff outside formal professional or academic activities. These commenters were concerned that, in such circumstances, it may be challenging for an institution to clearly and consistently identify what conduct has occurred strictly within its education program and which conduct is beyond its educational program. One commenter sought clarification as to what, if any, are the

[905] In response to many commenters' concerns that § 106.45(b)(3) was understood to prevent recipients from addressing misconduct that occurred outside an education program or activity, the Department has revised § 106.45(b)(3)(i) in the final regulations to expressly state that mandatory dismissal due to the alleged conduct occurring outside an education program or activity is only a dismissal for purposes of Title IX and does not preclude the recipient from addressing the conduct through other codes of conduct.

Department's expectations for a recipient's conduct processes that address off-campus sexual misconduct. This commenter asserted that Title IX prohibits discrimination "under" an education program or activity, but that § 106.44(a) and proposed § 106.44(b)(4) referred to sexual harassment "in" an education program or activity, while proposed § 106.45(b)(3) referred to sexual harassment "within" a program or activity. The commenter inquired as to whether "in" differs from "within" in those proposed sections, and whether those terms mean something different than "under" used in the Title IX statute, and if so what are the differences in meaning. The commenter asserted that Title IX prohibits "discrimination" under an education program or activity and that § 106.44(a) and proposed § 106.44(b)(2) refer to "sexual harassment" in an education program or activity, and asked if recipients would be required to respond where sexual harassment occurred outside an education program or activity but resulted in discrimination under the education program or activity. This commenter stated that under Title IX an individual may not be "excluded" from a federally-assisted program or activity on the basis of sex, and asked whether recipients must address sexual harassment that did not occur "in" its education program or activity but nevertheless effectively excluded the victim from equal access to it.

Discussion: The Department appreciates the questions raised by commenters regarding the application of "education program or activity" in § 106.44(a) of the final regulations. The final regulations do not impose requirements on a recipient's code of conduct processes addressing misconduct occurring outside the recipient's education program or activity, and do not govern the recipient's decisions to address or not address such misconduct. The Department's regulatory authority is limited to the scope of Title IX: ensuring that recipients of Federal funding operate education programs or activities free from sex discrimination. For the final regulations to apply, sexual harassment (a form of sex discrimination) must occur in the recipient's education program

or activity. As explained previously, nothing in the final regulations precludes a recipient from offering supportive measures to a complainant who reports sexual harassment that occurred outside the recipient's education program or activity, and any sexual harassment or sex discrimination that does occur in an education program or activity must be responded to even if it relates to, or happens subsequent to, sexual harassment that occurred outside the education program or activity.

Whether sexual harassment occurs in a recipient's education program or activity is a fact-specific inquiry. The key questions are whether the recipient exercised substantial control over the respondent and the context in which the incident occurred. There is no bright-line geographic test, and off-campus sexual misconduct is not categorically excluded from Title IX protection under the final regulations.[906] Recognizing that recipients need to carefully consider this matter, the Department revised § 106.45(b)(1)(iii) to require training for Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolution processes on "the scope of the recipient's education program or activity."

In response to a commenter's question regarding the NPRM's use of the terms "in," "within," and "under" an education program or activity, and whether those terms are intended to have different meanings, the Department has replaced "within" with "in" throughout the final regulations, thus making all provisions consistent with the reference to "in" contained in § 106.44(a). We also wish to clarify that the final regulations' use of the term "in" is meant to be

[906] *See* the "Clery Act" subsection of the "Miscellaneous" section of this preamble for discussion regarding the distinctive purposes of Clery Act geography versus Title IX coverage of education programs or activities; *see also* revised § 106.44(a) including in an "education program or activity" any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

interchangeable with the Title IX statute's use of "under"; the Department gives the same meaning to these prepositions, and notes that the Supreme Court in *Davis* referenced harassment "under" the operations of (i.e., the program or activity of) a recipient and harassment that occurred "in" a context subject to the recipient's control seemingly interchangeably.[907]

Changes: The final regulations consistently use "in" an education program or activity rather than "within."

Section 106.44(a) "against a person in the U.S."

Impact on Study Abroad Participants

Comments: Several commenters asserted that the NPRM would endanger students studying abroad, because the final regulations apply only to sexual harassment that occurs against a person in the United States. Commenters argued that when recipients offer students study abroad opportunities, recipients should still have responsibility to ensure student safety and well-being. Commenters acknowledged that Congress may not have contemplated studying abroad or recipients having satellite campuses across the globe when drafting Title IX in the 1970s. However, commenters argued that international experiences are increasingly common and critical components of education today, particularly in higher education, and that some schools require students in certain academic programs to study abroad. Commenters noted that even the Federal government, on the U.S. State Department website, encourages students to have international exposure to compete in a globalized society. Commenters argued that it would be absurd for the Federal government to encourage international exposure for students and not

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[907] *Davis*, 526 U.S. at 645 ("Moreover, because the harassment must occur *under* the operations of' a funding recipient . . . the harassment must take place *in* a context subject to the school district's control") (internal quotation marks and citations omitted; emphasis added).

protect them in the process because studying abroad is necessary for some majors and to prepare for certain careers. Commenters cited studies suggesting study abroad increases the risk for sexual misconduct against female students and showing how students had to alter their career paths in the aftermath of sexual misconduct experienced abroad.[908] One commenter stated that harassment abroad, such as by institution-employed chaperones, can derail victims' ability to complete their education at their home institution in the United States. This commenter stated that for the Department to interpret Title IX as providing no recourse for such students is impossible to imagine. Commenters asserted that the NPRM tells bad actors they can get away with sexual misconduct in foreign programs. Commenters asserted that study abroad students are already uniquely vulnerable and less likely to report to foreign local authorities because, for example, they may be unfamiliar with the foreign legal system, they share housing with the perpetrators, and there may be language barriers, fear of retaliation or social isolation, and fewer available support services. Commenters further argued that because crime occurring overseas cannot be prosecuted in the U.S, filing a Title IX report with the recipient might be the survivor's only option. Commenters contended that the NPRM may have the effect of discouraging students from studying abroad and learning about foreign cultures and languages which would run contrary to the fundamental purpose of education to foster curiosity and discovery.

Discussion: We acknowledge the concerns raised by many commenters that the final regulations would not extend Title IX protections to incidents of sexual misconduct occurring against persons outside the United States, and the impact that this jurisdictional limitation might have on

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[908] Commenters cited, *e.g.*: Matthew Kimble, *et al.*, *Study Abroad Increases Risk for Sexual Assault in Female Undergraduates: A Preliminary Report*, 5 PSYCHOL. TRAUMA: THEORY, RESEARCH, PRACTICE, & POL'Y 5 (2013).

the safety of students participating in study abroad programs. However, by its plain text, the Title IX statute does not have extraterritorial application. Indeed, Title IX states that "*[n]o 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[.]"[909] The Department believes a plain meaning interpretation of a statute is most consistent with fundamental rule of law principles, ensures predictability, and gives effect to the intent of Congress. Courts have recognized a canon of statutory construction that "Congress ordinarily intends its statutes to have domestic, not extraterritorial, application."[910] This canon rests on presumptions that Congress is mainly concerned with domestic conditions and seeks to avoid unintended conflicts between our laws and the laws of other nations.[911] If Congress intended Title IX to have extraterritorial application, then it could have made that intention explicit in the text when it was passed in 1972, and Congress could amend Title IX to apply to a recipient's education programs or activities located outside the United States if Congress so chooses. The Federal government's encouragement of international experiences, such as study abroad, is not determinative of Title IX's intended scope. The U.S. Supreme Court most recently acknowledged the presumption against extraterritoriality in *Kiobel v. Royal Dutch Petroleum*[912] and *Morrison v. National Australian Bank*.[913] In *Morrison*, the Court reiterated the "longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United

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[909] 20 U.S.C. 1681(a) (emphasis added).
[910] *Small v. United States*, 544 U.S. 385, 388-89 (2005).
[911] *Smith v. United States*, 507 U.S. 197, 204 (1993).
[912] 133 S. Ct. 1659 (2013).
[913] 561 U.S. 247 (2010).

States."[914] The Court concluded that "[w]hen a statute gives no clear indication of extraterritorial application, it has none."[915]

Very few Federal cases have addressed whether Title IX applies extraterritorially to allegations of sex discrimination occurring abroad, and Federal district courts have reached different results in these cases.[916] To date, no Federal circuit has addressed this issue. Commenters noted that the court in *King v. Board of Control of Eastern Michigan University*[917] applied Title IX to a claim of sexual harassment occurring overseas during a study abroad program; the Federal district court reasoned that study abroad programs are educational operations of the recipient that "are explicitly covered by Title IX and which necessarily require students to leave U.S. territory in order to pursue their education." The court emphasized that Title IX's scope extends to "any education program or activity" of a recipient, which presumably would include the recipient's study abroad programs. While the Department agrees that a recipient's study abroad programs may constitute education programs or activities of the recipient, the Department agrees with the rationale applied by a Federal district court in *Phillips v. St. George's University*[918] that regardless of whether a study abroad program is part of a recipient's education program or activity, Title IX does not have extraterritorial application. The court in *Phillips* noted that nothing in the Title IX statute's plain language indicates that Congress intended it to apply outside the U.S. and that the plain meaning of "person in the United States" suggests that Title IX only applies to persons located in the United States, even

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[914] *Id.* at 255.
[915] *Id.*
[916] *See* Robert J. Aalberts *et al.*, *Studying is Dangerous? Possible Federal Remedies for Study Abroad Liability*, 41 JOURNAL OF COLL. & UNIV. L. 189, 210-13 (2015).
[917] 221 F. Supp. 2d 783 (E.D. Mich. 2002).
[918] No. 07-CV-1555, 2007 WL 3407728 (E.D.N.Y. Nov. 15, 2007).

when that person is participating in a recipient's education program or activity outside the United States.

Both *Phillips* and *King* were decided before the Supreme Court's *Morrison* and *Kiobel* opinions, and the Department doubts that the rationale applied by the court in *King* would survive analysis under those Supreme Court decisions, which emphasized the importance of the presumption against extraterritoriality of statutes passed by Congress. We find the *Phillips* Court's reasoning to be well-founded, especially in light of the later-decided Supreme Court cases regarding extraterritoriality, and we believe the jurisdictional limitation on extraterritoriality contained in the final regulations is wholly consistent with the text of the Title IX statute and with the presumption against extraterritoriality recognized numerous times by the Supreme Court. We further note that the Supreme Court acknowledges that where Congress intends for its statutes to apply outside the United States, Congress knows how to codify that intent.[919] When Congress has codified such intent in other Federal civil rights laws, Congress has addressed issues that arise with extraterritorial application such as potential conflicts with foreign laws and procedures.[920] Based on the presumption against extraterritoriality reinforced by Supreme Court decisions and the plain language in the Title IX statute limiting protections to persons "in the United States," the Department believes that the Department does not have authority to declare that the presumption against extraterritoriality has been overcome, absent further congressional or Supreme Court direction on this issue.

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[919] *E.g.*, *Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co.* (*Aramco*), 499 U.S. 244, 258 (1991) ("Congress's awareness of the need to make a clear statement that a statute applies overseas is amply demonstrated by the numerous occasions on which it has expressly legislated the extraterritorial application of a statute.").
[920] *E.g.*, Older Americans Act Amendments of 1984, Pub. L. No. 98-459, § 802, 98 Stat. 1767, 1792 (codified at 29 U.S.C. 623, 630 (amending the Age Discrimination Employment Act of 1967 to apply outside the United States)); 29 U.S.C. 623(f) (addressing potential conflicts of laws issues).

As a practical matter, we also note that schools may face difficulties interviewing witnesses and gathering evidence in foreign locations where sexual misconduct may have occurred. Recipients may not be in the best position to effectively investigate alleged sexual misconduct in other countries. Such practical considerations weigh in favor of the Department looking to Congress to expressly state whether Congress intends for Title IX to apply in foreign locations.

We emphasize that nothing in these final regulations prevents recipients from initiating a student conduct proceeding or offering supportive measures to address sexual misconduct against a person outside the United States. We have revised § 106.45(b)(3) to explicitly state that even if a recipient must dismiss a formal complaint for Title IX purposes because the alleged sexual harassment did not occur against a person in the U.S., such a dismissal is only for purposes of Title IX, and nothing precludes the recipient from addressing the alleged misconduct through the recipient's own code of conduct. Contrary to claims made by some commenters, it is not true that the final regulations leave students studying abroad with no recourse in the event of sexual harassment or sexual assault. Recipients remain free to adopt disciplinary systems to address sexual misconduct committed outside the United States, to protect their students from such harm, and to offer supportive measures such as mental health counseling or academic adjustments for students impacted by misconduct committed abroad. As such, we believe the final regulations will not discourage students from participating in study abroad programs that may enrich their educational experience.

Changes: None.

Consistency with Federal Law and Departmental Practice

Comments: Some commenters asserted that excluding extraterritorial application of Title IX would conflict with other Federal laws and past practice of the Department. One commenter stated that the NPRM is inconsistent with the Department's own interpretation of the VAWA amendments to the Clery Act, and argued that carving out conduct occurring abroad conflicts with Clery Act language regarding geographical jurisdiction. This commenter argued that if a postsecondary institution has a separate campus abroad or owns or controls a building or property abroad that is used for educational purposes and used by students, the postsecondary institution must disclose the Clery Act crimes that occur there. The commenter suggested it would be illogical to require recipients to make such disclosures and yet not address the same underlying misconduct and that this puts recipients in a precarious position. Other commenters argued that the Department should interpret Title IX as protecting persons enrolled in education programs or activities the recipient conducts or sponsors abroad, as this interpretation would be consistent with application of other Federal civil rights laws, such as Title VI, and that the proposed rules' approach conflicts with the Department's past approach of requiring recipients to address sexual misconduct that could limit participation in education programs or activities overseas.

Discussion: We disagree with the commenters who contended that excluding application of Title IX to sexual misconduct committed outside the United States raises untenable conflict with the past practice of the Department and other Federal laws. With respect to past practice of the Department, OCR has never explicitly addressed in any of its guidance whether Title IX has extraterritorial application. For example, though the withdrawn 2014 Q&A stated that "[u]nder Title IX, a school must process all complaints of sexual violence, *regardless of where the*

conduct occurred, to determine whether the conduct occurred in the context of an education program or activity,"[921] it included an illustrative list of covered "[o]ff-campus education programs and activities" such as activities occurring at fraternity or sorority houses and school-sponsored field trips; none of these examples involved an education program or activity outside the United States.[922] However, to the extent that application of the "person in the United States" language in the final regulations departs from past Department guidance or practice, the Department believes that the jurisdictional limitation on extraterritoriality contained in the final regulations is reasonable and wholly consistent with the plain text of the Title IX statute and with the presumption against extraterritoriality recognized numerous times by the U.S. Supreme Court.

With respect to other Federal law, we acknowledge that certain misconduct committed overseas is reportable under the Clery Act where, for example, the misconduct occurs in a foreign location that a U.S. institution owns and controls. However, the two laws (Title IX and the Clery Act) do not have the same scope or purpose,[923] even though the two laws often intersect for postsecondary institution recipients who are also subject to the Clery Act. The Department does not perceive a conflict between a recipient's obligation to comply with reporting obligations under the Clery Act and response obligations under Title IX. As discussed above, both the text of the Title IX statute and case law on the topic of extraterritoriality make it clear that Title IX does not apply to sex discrimination against a person outside the United States.

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[921] *See* 2014 Q&A at 29.
[922] *Id.*
[923] *See* "Background" subsection in "Clery Act" subsection of the "Miscellaneous" section of this preamble.

With respect to Title VI, this statute, like Title IX, expressly limits its application to domestic discrimination with its opening words "No person in the United States . . ." and commenters provided no example of a Federal court or Department application of Title VI to conduct occurring outside the United States. Nonetheless, the final regulations are focused on administrative enforcement of Title IX, and for reasons discussed previously, the Department does not believe that the statutory text or judicial interpretations of Title IX overcome the presumption against extraterritoriality that applies to statutes passed by Congress.

Changes: None.

Constitutional Equal Protection

Comments: One commenter asserted that excluding extraterritorial application of Title IX may raise Constitutional issues under the Fourteenth Amendment Equal Protection Clause. This commenter argued that experiencing sexual victimization in study abroad programs detrimentally affects the student-survivor's education, and the Fourteenth Amendment guarantees these students equal protection, yet the NPRM would leave these students outside the scope of Title IX protection and deprive them of equal protection.

Discussion: We disagree with the contention that excluding extraterritorial application of Title IX may violate the Fourteenth Amendment Equal Protection Clause. As an initial matter, the applicable level of scrutiny under the Equal Protection Clause to any differential treatment of students under the § 106.44(a) "against a person in the United States" limitation would be the rational basis test. A heightened level of scrutiny would apply where a suspect or quasi-suspect classification is involved, such as race or sex. But, as here, where no such suspect or quasi-suspect classification is involved and the final regulations may treat students differently due to the geographic location of misconduct occurring outside the United States, the rational basis test

applies. Under the rational basis test, a law or governmental action is valid under the Equal Protection Clause so long as it is rationally related to a legitimate government interest.[924] With respect to Title IX, Congress made a rational determination that recipients should only be held liable for misconduct that occurs within the United States. The statute's explicit reference to "[n]o person in the United States" in 20 U.S.C. 1681(a) reflects this jurisdictional limitation. To hold recipient responsible for misconduct that took place outside the country could be unrealistically demanding and lead to open-ended liability, and if Congress intended that result, then Congress could have expressly stated its intent for Title IX to apply overseas when enacting Title IX, and can amend Title IX to so state. The Department believes that the reference to "against a person in the United States," in § 106.44(a), appropriately reflects both the plain meaning of the statutory text and congressional intent that Title IX is focused on eradicating sex discrimination in domestic education programs or activities. The Department reiterates that recipients remain free under the final regulations to use their own disciplinary codes to address sexual harassment committed abroad and to extend supportive measures to students affected by sexual misconduct outside the United States.

Changes: None.

Impact on International or Foreign Exchange Students in the U.S.

Comments: A few commenters asserted the proposed rules' limitation with respect to persons "in the United States" may be detrimental to survivors who are international students whose visa

[924] *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) (holding that in areas of social and economic policy, statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide rational basis for classification).

status depends on academic performance. One commenter expressed concern that § 106.44(a) would exclude foreign exchange students in the U.S. from Title IX coverage, arguing that the Department should not treat foreign exchange students as undeserving of the same protection as students born in the United States.

Discussion: The jurisdictional limitation that sexual harassment occurred against "a person in the United States" is not a limitation that protects only U.S. citizens; international students or foreign students studying in the United States are entitled to the same protections under Title IX as any other individuals. Title IX states that "[n]o person in the United States" shall be subject to discrimination based on sex. It is well-settled that the word "person" in this context includes citizens and non-citizens alike. Title IX protects every individual in the U.S. against discrimination on the basis of sex in education programs or activities receiving Federal financial assistance, regardless of citizenship or legal residency.

Changes: None.

Section 106.44(a) Deliberate Indifference Standard

Comments: Many commenters were supportive of the deliberate indifference standard and several argued that it is a sufficient standard to hold institutions accountable for failing to address allegations of sexual misconduct in an appropriate manner. Many commenters favored the deliberate indifference standard because it affords institutions greater discretion to handle Title IX cases in a manner that is most consistent with the institution's educational mission and level of resources.

In contrast, other commenters advocated for the Department to return to the "reasonableness" standard because it affords recipients less discretion in their handling of Title IX complaints. These commenters argued that the reasonableness standard strikes the necessary

balance between forcing schools to make certain policy changes, such as adopting due process protections in their grievance procedures, and granting deference. Other commenters argued that because the deliberate indifference standard is couched in terms of a safe harbor and coupled with "highly prescriptive mechanism[s]" under § 106.44 and § 106.45 it actually provides recipients with very little to no discretion in practice.

Many commenters expressed the general concern that lowering the "reasonableness" standard to the "deliberate indifference" standard allows schools to investigate fewer allegations, punish fewer bad actors, and would shield schools from administrative accountability even in cases where schools mishandle complaints, fail to provide effective support, and wrongly determine against the weight of the evidence that the accused was not responsible for the misconduct. One commenter compared the deliberate indifference standard in the proposed rules to the application of the deliberate indifference standard in the prison context under the Eighth Amendment,[925] arguing that if finalized the deliberate indifference standard would apply more stringently in the Title IX context and provide greater institutional protection to schools because it would be difficult to imagine any scenario where an institution could be found deliberately indifferent.

Some commenters argued that the deliberate indifference standard is only appropriate in actions for private remedies rather than public remedies, and asserted that the 2001 Guidance acknowledged this difference. Some commenters contended that the deliberate indifference standard is wholly inappropriate in the context of administrative enforcement, arguing that because the Department only demands equitable remedies of schools, in the form of policy

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[925] Commenter cited: *Farmer v. Brennan*, 511 U.S. 825 (1994).

changes, schools do not require the additional protection afforded by the deliberate indifference standard that applies in private lawsuits for money damages against schools. Other commenters noted that the deliberate indifference standard has not been adopted in the context of any of the other civil rights statutes OCR is charged with enforcing.

Various commenters indicated that more clarity is needed with respect to what the deliberate indifference standard requires of recipients in the absence of a formal complaint of sexual harassment. Some commenters requested that the Department include a definition for deliberate indifference. Many commenters critiqued the language used to convey the standard, expressing the concern that a school's response could be indifferent or unreasonable and not be in violation of Title IX so long as they were not *deliberately* indifferent or *clearly* unreasonable. Some commenters expressed the concern that the word "deliberate" implies an intentionality element, asserting that intent is difficult to prove. Other commenters believed the standard was too vaguely worded, provided too much deference to the institutions, and would always be interpreted in favor of the schools. Some commenters argued that the deliberate indifference standard would effectively deny the complainant any meaningful process because an institution could dismiss a complaint after determining that the alleged conduct does not fall within its interpretation of the sexual harassment definition.

Some suggested the Department revise the proposed rules to impose a different standard on schools in circumstances where the schools are responding to allegations against someone in a position of authority, pointing to the misconduct of Larry Nassar at Michigan State University.

Discussion: The Department appreciates the commenters' support of the deliberate indifference standard and agrees that the deliberate indifference standard affords recipients an appropriate amount of discretion to address sexual misconduct in our Nation's schools while holding

recipients accountable if their response is clearly unreasonable in light of the known circumstances. The Department, however, also recognizes that too much discretion can result in unintended confusion and uncertainty for both complainants who deserve a meaningful response and careful consideration of their reports, and for respondents who should be punished only after they are determined to be responsible through a fair process. Since the implementing regulations were first issued in 1975, the Department has observed, and many stakeholders, including complainants and respondents, have informed the Department through public comment, that complainants and respondents have experienced various pitfalls and implementation problems from a lack of clarity with respect to recipients' obligations under Title IX. As stated in the proposed regulations, the lack of clear regulatory standards has contributed to processes that have not been fair to the parties involved, have lacked appropriate procedural protections, and have undermined confidence in the reliability of the outcomes of investigations of sexual harassment complaints. For the reasons stated in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, the Department will maintain the deliberate indifference standard in the final regulations, with revisions to § 106.44(a) that specify certain actions a recipient must take in order to not be deliberately indifferent.

In response to commenters' concerns that the deliberate indifference standard leaves recipients too much leeway to decide on an appropriate response, the Department revises § 106.44(a) to include specific actions that a recipient must take as part of its non-deliberately indifferent response. Section 106.44(a) requires that a recipient's response treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the

imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent.[926] As commenters have stated, many complainants would like supportive measures and do not necessarily wish to pursue a formal complaint and grievance process, although they should be informed of the process for filing a formal complaint. The Department wishes to respect the autonomy and wishes of a complainant throughout these final regulations, and recipients should also respect a complainant's wishes to the degree possible. Respondents also should not be punished for allegations of sexual harassment until after a grievance process that complies with § 106.45, as such a grievance process provides notice of the allegations to both complainants and respondents as well as a meaningful opportunity for both complainants and respondents to be heard. Additionally, the Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. A recipient should engage in a meaningful dialogue with the complainant to determine which supportive measures may restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment. A recipient must offer each complainant supportive measures, and a

[926] For discussion of what is intended by refraining from imposing disciplinary sanctions and other actions that are "not supportive measures" against a respondent, see the "Supportive Measures" subsection of the "Section 106.30 Definitions" section of this preamble. We use the same language to describe refraining from punishing a respondent with following the § 106.45 grievance process, in § 106.45(b)(1)(i).

recipient will have sufficiently fulfilled its obligation to offer supportive measures as long as the offer is not clearly unreasonable in light of the known circumstances, and so long as the Title IX Coordinator has contacted the complainant to engage in the interactive process also described in revised § 106.44(a). The Department acknowledges that there may be specific instances in which it is impossible or impractical to provide supportive measures. For example, the recipient may have received an anonymous report or a report from a third party and cannot reasonably determine the identity of the complainant to promptly contact the complainant. Similarly, if a complainant refuses the supportive measures that a recipient offers (and the supportive measures offered are not clearly unreasonable in light of the known circumstances) and instead insists that the recipient take punitive action against the respondent without a formal complaint and grievance process under § 106.45, the Department will not deem the recipient's response to be clearly unreasonable in light of the known circumstances. If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response is not clearly unreasonable in light of the known circumstances, pursuant to revised § 106.45(b)(10)(ii). Offering supportive measures to every complainant and documenting why *not* providing supportive measures is *not* clearly unreasonable in light of the known circumstances are some of the actions required under these final regulations but not expressly required under case law describing the deliberate indifference standard. These actions are required as part of the Department's administrative enforcement of the deliberate indifference standard.

Although we acknowledge the concerns of commenters urging the Department to abandon the deliberate indifference standard and return to the reasonableness standard, the Department disagrees for various reasons. As more fully explained in the "Deliberate Indifference" subsection of the "Adoption and Adaption of the Supreme Court's Framework to

Address Sexual Harassment" section, the Department departs from its prior guidance that set forth a standard more like reasonableness, or even strict liability, instead of deliberate indifference. The Department's past guidance and enforcement practices have taken the position that a recipient's response to sexual harassment should be judged under a standard that expected the recipient's response to effectively stop harassment and prevent its recurrence.[927] This approach did not provide recipients adequate flexibility to make decisions affecting their students. For example, the Department's guidance required recipients to always investigate any report of sexual harassment, even when the complainant only wanted supportive measures and did not want an investigation.[928] Such a rigid requirement to investigate every report of sexual harassment in every circumstance intrudes into complainants' privacy without concern for complainants' autonomy and wishes and, thus, may chill reporting of sexual harassment. Additionally, the Department's past guidance did not distinguish between an investigation that leads to the imposition of discipline and an inquiry to learn more about a report of sexual harassment.[929] Deliberate indifference provides appropriate flexibility for recipients while holding recipients accountable for meaningful responses to sexual harassment that prioritize complainants' wishes.[930]

The Department disagrees that these final regulations are highly or overly prescriptive such that recipients have no discretion. Recipients retain discretion to determine which supportive measures to offer and must document why providing supportive measures is not

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[927] 2001 Guidance at iv, vi.
[928] 2001 Guidance at 13, 15, 18; 2011 Dear Colleague Letter at 4.
[929] 2001 Guidance at 13, 15, 18; 2011 Dear Colleague Letter at 4.
[930] The final regulations specify that a recipient's non-deliberately indifferent response must include investigating and adjudicating sexual harassment allegations, when a formal complaint is filed by a complainant or signed by the recipient's Title IX Coordinator. § 106.44(b)(1); § 106.30 (defining "formal complaint"); § 106.45(b)(3)(i).

clearly unreasonably in light of the known circumstances, if the recipient does not provide any supportive measures. The Department will not second guess the supportive measures that a recipient offers as long as these supportive measures are not clearly unreasonable in light of the known circumstances. Similarly, the Department believes that the grievance process prescribed by § 106.45 creates a standardized framework for resolving formal complaints of sexual harassment under Title IX while leaving recipients discretion to adopt rules and practices not required under § 106.45.[931] The Department notes that these final regulations do not include the safe harbor provisions proposed in the NPRM, and the Department explains its decision for not including these safe harbors in the "Recipient's Response in Specific Circumstances" section of this preamble.

Contrary to some commenters' concerns, the deliberate indifference standard does not relieve recipients of their obligation to respond to every known allegation of sexual harassment. The deliberate indifference standard would also not allow recipients to investigate fewer allegations of sexual harassment or punish fewer respondents after a finding of responsibility. Rather, under these final regulations, recipients are specifically required to investigate allegations in a formal complaint (and must explain to each complainant the option of filing a formal complaint), and must provide a complainant with remedies any time a respondent is

[931] The revised introductory sentence in § 106.45(b) provides that any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in § 106.30, must apply equally to both parties. The final regulations grant flexibility to recipients in other respects; *see* the discussion in the "Other Language/Terminology Comments" subsection of the "Section 106.30 Definitions" section of this preamble (noting that recipients may decide whether to calculate time frames using calendar days, school days, or other method); § 106.45(b)(6)(i) (allowing, but not requiring, live hearings to be held virtually through use of technology); § 106.45(b)(5)(vi) (removing the requirement that evidence gathered in the investigation be provided to the parties using a file-sharing platform); §§ 106.45(b)(1)(vii), 106.45(b)(7)(i) (giving recipients a choice between using the preponderance of the evidence standard or the clear and convincing evidence standard).

found responsible for sexual harassment pursuant to § 106.45(b)(1)(i). Even where a formal investigation is not required (because neither the complainant nor the Title IX Coordinator has filed or signed a formal complaint, or because a complainant is not participating in or attempting to participate in the recipient's education program or activity at the time of filing), the deliberate indifference standard requires that a recipient's response is not clearly unreasonable in light of known circumstances. Contrary to commenters' arguments, this standard requires more than for a recipient to respond in some minimal or ineffective way because minimal and ineffective responses would inevitably qualify as "clearly unreasonable" and because as revised, § 106.44(a) imposes specific, mandatory obligations on a recipient with respect to a recipient's response to each complainant. Given that the deliberate indifference standard involves an analysis of whether a response was clearly unreasonable in light of the known circumstances, there are many different factual circumstances under which a recipient's response may be deemed deliberately indifferent.

Section 106.44(a) requires a recipient to respond promptly where the recipient has actual knowledge of sexual harassment; a recipient may have actual knowledge of sexual harassment even where no person has reported or filed a formal complaint about the sexual harassment. For example, employees in an elementary or secondary school may observe sexualized insults scrawled on school hallways, and even where no student has reported the incident, the school employees' notice of conduct that could constitute sexual harassment as defined in § 106.30 (i.e., unwelcome conduct that a reasonable person would conclude is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to education) charges the recipient with actual knowledge, and the recipient must respond in a manner that is not clearly unreasonable in light of the known circumstances, which could include the recipient removing

the sexually harassing insults and communicating to the student body that sexual harassment is unacceptable. By way of further example, if a Title IX Coordinator were to receive multiple reports of sexual harassment against the same respondent, as part of a non-deliberately indifferent response the Title IX Coordinator may sign a formal complaint to initiate a grievance process against the respondent, even where no person who alleges to be the victim wishes to file a formal complaint. The deliberate indifference standard does not permit recipients to ignore or respond inadequately to sexual harassment of which the recipient has become aware, but the deliberate indifference standard appropriately recognizes that a recipient's prompt response will differ based on the unique factual circumstances presented in each instance of sexual harassment.

In response to comments that the *Gebser/Davis* liability standard (i.e., deliberate indifference) is and should be used only for monetary damages in private litigation, the Department notes that courts have used the *Gebser/Davis* standard in considering and awarding injunctive relief.[932] Additionally, in *Gebser*, the Supreme Court acknowledged that the Department of Education has the authority to "promulgate and enforce requirements that effectuate [Title IX's] non-discrimination mandate."[933] In promulgating these final regulations, the Department is choosing to do just that. The Department is not required to adopt identical

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[932] *Fitzgerald v. Barnstable Sch. Dist.*, 555 U.S. 246, 255 (2009) ("In addition, this Court has recognized an implied private right of action . . . In a suit brought pursuant to this private right, *both injunctive relief and damages are available*.") (internal citations omitted; emphasis added); *Hill v. Cundiff*, 797 F.3d 948, 972-73 (11th Cir. 2015) (reversing summary judgment against plaintiff's claims for injunctive relief because a jury could find that the alleged conduct was "severe, pervasive, and objectively offensive" under *Davis*); *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 322-23 (3d Cir. 2013) (upholding preliminary injunction against school for banning students from wearing bracelets because the school failed to show that the "bracelets would breed an environment of pervasive and severe harassment" under *Davis*); *Haidak v. Univ. of Mass. at Amherst*, 299 F. Supp. 3d 242, 270 (D. Mass. 2018) (denying plaintiff's request for a preliminary injunction because he failed to show that the school was deliberately indifferent to an environment of severe and pervasive discriminatory conduct under *Davis*), *aff'd in part, vacated in part, remanded by Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56 (1st Cir. 2019).
[933] *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998).

standards for all civil rights laws under the Department's enforcement authority, and after carefully considering the rationale relied upon by the Supreme Court in the context of sexual harassment under Title IX, the Department adopts the deliberate indifference standard articulated by the Supreme Court, tailored for administrative enforcement of recipients' responses to sexual harassment. The Department believes it would be beneficial for recipients and students alike if the administrative standards governing recipients' responses to sexual harassment were aligned with the standards developed by the Supreme Court in private actions, while ensuring that through administrative enforcement the Department holds recipients accountable for taking specific actions that the *Gebser/Davis* framework does not require.[934]

The Department also believes that the language used to describe the deliberate indifference standard is sufficiently clear. The Department defines the standard according to the conventional understanding of the standard, that is, to be deliberately indifferent means to have acted in a way that is "clearly unreasonable in light of the known circumstances" consistent with the formulation of the deliberate indifference standard offered by the Supreme Court in *Davis.*[935] The Department appreciates the opportunity to clarify that the term "deliberate" as used in the standard does not require an element of subjective intent to harm, or bad faith, or similar mental state, on the part of a recipient's officials, administrators, or employees. Rather, the final regulations clearly state in § 106.44(a) that a recipient with actual knowledge of sexual harassment against a person in the United States occurring in its education program or activity

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[934] *E.g.*, § 106.44(a) specifically requires that a recipient's mandatory response to each report of sexual harassment must include promptly offering supportive measures to the complainant, and must avoid imposing disciplinary sanctions against a respondent without following the § 106.45 grievance process; § 106.44(b)(1) requires a recipient to investigate sexual harassment allegations made in a formal complaint; § 106.45 prescribes specific procedural protections for complainants, and respondents, when a recipient investigates and adjudicates formal complaints.
[935] *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 648-49 (1999); § 106.44(a).

must respond in a manner that is "not clearly unreasonable," including by taking certain specific steps such as offering supportive measures to a complainant. Accordingly, the Department will hold a recipient responsible for compliance regardless of whether acting in a clearly unreasonable way, in light of the known circumstances, is the result of malice, incompetence, ignorance, or other mental state of the recipient's officials, administrators, or employees. As adapted for administrative enforcement, the deliberate indifference standard sufficiently ensures that a recipient takes steps to address student safety and provides equal access to the recipient's education program or activity while preserving a recipient's discretion to address the unique facts and circumstances presented by any particular situation (for example, a recipient's offer of supportive measures as required in § 106.44(a) will be evaluated based on whether the recipient offered supportive measures to the complainant that, under the facts and circumstances presented in an individual complainant's situation, were in fact designed to restore or preserve the complainant's equal educational access).

The Department is persuaded by commenters' suggestions that the Department should impose stricter, more specific obligations on recipients' responses to sexual harassment or sexual harassment allegations, including allegations against employees in positions of authority. Rather than abandoning the deliberate indifference liability standard, the Department adapts that standard for administrative enforcement in ways that preserve the benefits of aligning judicial and administrative enforcement rubrics, preserve the benefit of the "not clearly unreasonable in light of the known circumstances" standard's deference to unique factual circumstances, yet imposes mandatory obligations on every recipient to respond in specific ways to each complainant alleged to be victimized by sexual harassment. Adopting the Supreme Court's formulation of the deliberate indifference standard, while adapting that standard to specify what

a recipient *must* do every time the recipient knows of sexual harassment (or allegations of sexual harassment), addresses commenters' concerns that the deliberate indifference standard as presented in the NPRM did not impose strict enough requirements on a recipient to ensure the recipient responds supportively and fairly to sexual harassment in its education programs or activities.

In the interest of providing greater clarity, consistency, and transparency as to a recipient's obligations under Title IX and what students can expect, the Department does not want to overcomplicate the regulatory scheme in the final regulations by establishing separate standards for when a recipient is handling complaints involving different classes of respondents (for example, allegations against students, versus allegations against employees). The Department believes that expecting a recipient to respond in a manner that is not clearly unreasonable in light of the known circumstances appropriately requires a recipient to take into account whether the respondent holds a position of authority.

Changes: The Department revised § 106.44(a) to provide that a recipient's response must be prompt, and must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. Section § 106.44(a) is also revised to provide that the Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.

Recipient's Response in Specific Circumstances

Section 106.44(b) Proposed "Safe harbors," generally

Comments: Some commenters praised the safe harbor provisions generally for giving colleges and universities the discretion to respond to sexual harassment complaints outside the formal grievance process. Some commenters also praised the safe harbor provisions for identifying specific circumstances under which a recipient can conform its response to legal requirements and avoid a finding of deliberate indifference.

Some commenters, although supportive of the safe harbors generally, requested that the Department clarify how the safe harbors would work.

Many commenters disagreed with the Department's use of the term "safe harbor" in the NPRM, because the provisions that provided a "safe harbor" also include mandatory requirements. These commenters argued that a safe harbor is conventionally understood as a provision that a regulated party can take advantage of to shield itself from administrative action, as opposed to something a regulated party is required to do. Commenters asserted that "safe harbors" are options rather than obligations and pointed to the mandatory language contained in proposed § 106.44(b)(2) under which the Title IX Coordinator would have been required to file a formal complaint upon receiving multiple reports against a respondent,[936] as fundamentally inconsistent with the idea of a safe harbor.

[936] Proposed § 106.44(b)(2) has been removed in the final regulations; see discussion under the "§ Proposed 106.44(b)(2) Reports by Multiple Complainants of Conduct by Same Respondent [removed in final regulations]" subsection of the "Recipient's Response in Specific Circumstances" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this preamble.

Some commenters criticized the safe harbor provisions as rules intended to immunize recipients from a finding of deliberate indifference but requiring no more than a minimal response to allegations of sexual harassment, contrary to Title IX's express intent. Commenters argued that the safe harbor provisions, combined with the deliberate indifference standard, curtail the Department's ability to independently and comprehensively review a recipient's response to sexual harassment allegations, amounting to an abdication of the Department's role to enforce Title IX.

Discussion: The Department appreciates comments in support of the two proposed safe harbors. Upon further consideration, the Department decided not to include the two proposed safe harbors in these final regulations.

One of the proposed safe harbor provisions provided that if the recipient followed a grievance process (including implementing any appropriate remedy as required) that complies with § 106.45 in response to a formal complaint, the recipient's response to the formal complaint would not be deliberately indifferent and would not otherwise constitute discrimination under Title IX. The proposed provision was meant to provide an assurance that the recipient's response (only as to the formal complaint) would not be deemed deliberately indifferent as long as a recipient complies with § 106.45. This proposed safe harbor left open the possibility that other aspects of the recipient's response may be deliberately indifferent. The Department understands commenters' concerns that this safe harbor provision may have been confusing or misleading by somehow suggesting that compliance with § 106.45 is not required, or by suggesting that compliance with § 106.45 would have excused a recipient from providing a non-deliberately indifferent response with respect to matters other than conducting a grievance process. The Department is not including this proposed safe harbor provision in the final regulations to make

it clear that recipients are always required to comply with § 106.45 in response to a formal complaint, and are always required to comply with all the obligations specified in § 106.44(a), with or without a formal complaint being filed. Indeed, the Department retains the mandate in § 106.45(b)(1) and revises this mandate for clarity to state: "In response to a formal complaint, a recipient must follow a grievance process that complies with § 106.45." The Department did not intend to leave the impression that it was immunizing recipients with respect to their obligations to address sexual harassment. These final regulations require a meaningful response to allegations of sexual harassment of which a recipient has notice, when the sexual harassment occurs in a recipient's education program or activity against a person in the United States.

The second proposed safe harbor provided that a recipient would not be 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, and the recipient also informs the complainant in writing of the right to file a formal complaint. This safe harbor is now unworkable and unnecessary in light of other revisions made to the proposed regulations, specifically a recipient's obligations in § 106.44(a) and § 106.45(b)(10)(ii). Under § 106.44(a), a recipient's response must treat complainants and respondents equitably by offering the complainant supportive measures as defined in § 106.30, and a Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. The Department revised § 106.45(b)(1) to add a mandate that with or without a formal complaint, a recipient must comply with §

106.44(a), emphasizing that recipients must offer supportive measures to a complainant regardless of whether a complainant chooses to file a formal complaint, and recipients must investigate any formal complaint that a complaint does choose to file. Additionally, under § 106.45(b)(10)(ii), if a recipient does not provide a complainant with supportive measures, then the recipient must document why such a response was not clearly unreasonable in light of the known circumstances. As recipients are now required to offer supportive measures to a complainant (not only incentivized to do so by the proposed safe harbor) and to document why not providing a complainant with supportive measures was not clearly unreasonable in light of the known circumstances, the final regulations removes safe harbors and instead, the Department will enforce the mandates and requirements in the final regulations, including those specified in §§ 106.44(a) and 106.44(b).

Despite the absence of these safe harbor provisions, recipients still have discretion with respect to how to respond to sexual harassment allegations in a way that takes into account factual circumstances. The final regulations, like the proposed regulations, require a recipient to begin the § 106.45 grievance process in response to a formal complaint. A recipient retains significant discretion under these final regulations, yet must meet specific, mandatory obligations that ensure a recipient responds supportively and fairly to every allegation of Title IX sexual harassment. For example, a recipient may decide which supportive measures to offer a complainant, whether to offer an informal resolution process under § 106.45(b)(9), whether to allow all parties, witnesses, and other participants to appear at the live hearing virtually under § 106.45(b)(6)(i), and whether to take action under another provision of the recipient's code of conduct even if the recipient must dismiss allegations in a formal complaint under § 106.45(b)(3)(i), among other areas of discretion.

These final regulations also provide sufficient clarity as to how a recipient must respond to sexual harassment, rendering the proposed safe harbors unnecessary. For example, § 106.44(a) specifically addresses how a recipient's response must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures against a respondent. Section § 106.44(b)(1) also clearly mandates that in response to a formal complaint a recipient must follow a grievance process that complies with § 106.45, and with or without a formal complaint, a recipient must comply with § 106.44(a). The Department clearly addresses specific circumstances throughout these final regulations. For example, the Department addresses when a recipient must or may dismiss a formal complaint under §106.45(b)(3) for purposes of sexual harassment under Title IX or this part, when a recipient may consolidate formal complaints as to allegations of sexual harassment under § 106.45(b)(4), and when an informal resolution process may be offered under § 106.45(b)(9), among other matters.

The elimination of the safe harbor provisions proposed in the NPRM alleviates and addresses the concerns of commenters who opposed these safe harbor provisions.

Changes: The Department does not include the two safe harbor provisions from the NPRM, in proposed § 106.44(b)(1) and proposed § 106.44(b)(3).

Section 106.44(b)(1) Mandate to Investigate Formal Complaints and Safe Harbor

Comments: Several commenters supported § 106.44(b)(1), asserting that this provision places control in the hands of the victims, and prevents victims from having to participate in a grievance process against their will. Other commenters opposed this provision, arguing that it relieves institutions of the obligation to address sexual harassment claims of which they have actual

knowledge by discouraging institutions from investigating allegations in the absence of a formal complaint.

Many commenters expressed concern that institutions will merely "check" the procedural "boxes" outlined in § 106.45 without regard for the substantive outcomes of formal grievance processes. Many commenters asserted that this proposed safe harbor would only benefits respondents, and would provide no benefit to complainants. Other commenters asserted that if a recipient fails to follow procedural requirements in § 106.45, the safe harbor in § 106.44(b)(1) would only hold recipients to the standard of deliberate indifference, which commenters argued was too low a standard to ensure that recipients comply with the § 106.45 grievance process.

Many commenters argued that the safe harbor in § 106.44(b)(1) provided too little flexibility for institutions to develop their own grievance process. Some commenters expressed concern that a recipient would not have the flexibility to forgo a grievance process in a situation where the recipient determined that the allegations contained in a formal complaint were without merit, frivolous, or that the allegations had already been investigated. Some commenters asked the Department to clarify whether satisfying § 106.45 is the only way, or one of many ways, to comply with the proposed rules and receive the safe harbor protections of § 106.44(b)(1).

Another commenter suggested that the Department add a timeliness requirement to § 106.44(b)(1) so that a formal complaint must be filed within a certain time frame, in order to avoid prejudice or bias against a respondent.

Discussion: As explained in the "Section 106.44(b) Proposed 'Safe harbors,' generally," subsection of the "Recipient's Response in Specific Circumstances" section of this preamble, these final regulations do not include the safe harbor provision that if the recipient follows a grievance process (including implementing any appropriate remedy as required) that complies

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. The Department understands commenters' concerns that this safe harbor provision may have been confusing or misleading by somehow suggesting that full compliance with § 106.45 is not required – that is, by suggesting that a recipient must only follow § 106.45 in a way that is not deliberately indifferent. The Department is not including this proposed safe harbor provision in the final regulations to make it clear that recipients are always required to fully comply with § 106.45 in response to a formal complaint. Indeed, the Department retains the mandate in § 106.45(b)(1) and revises this mandate for clarity to state: "In response to a formal complaint, a recipient must follow a grievance process that complies with § 106.45." The Department also recognizes, as many commenters stated, that a complainant may not wish to initiate or participate in a grievance process for a variety of reasons, including fear of re-traumatization, and the Department affirms the autonomy of complainants by making it clear that a recipient *must* investigate and adjudicate when a complainant has filed a formal complaint. At the same time, the final regulations ensure that complainants must be offered supportive measures with or without filing a formal complaint, thus respecting the autonomy of complainants who do not wish to initiate or participate in a grievance process by ensuring that such complainants receive a supportive response from the recipient regardless of also choosing to file a formal complaint. For this reason, the Department revised § 106.44(b)(1) to expressly state: "With or without a formal complaint, a recipient must comply with § 106.44(a)." Section 106.44(a) requires a recipient to offer a complainant supportive measures as part of its prompt, non-deliberately indifferent response, whether or not the complainant chooses to file a formal complaint.

The Department disagrees that these final regulations discourage recipients from investigating allegations. As explained previously, a recipient *must* investigate a complainant's allegations when the complainant chooses to file a formal complaint, and a recipient *may* choose to initiate a grievance process to investigate the complainant's allegations even when the complainant chooses not to file a formal complaint, if the Title IX Coordinator signs a formal complaint, after having considered the complainant's wishes and evaluated whether an investigation is not clearly unreasonable in light of the specific circumstances. A recipient, however, cannot impose any disciplinary sanctions or other actions that are not supportive measures against a respondent until after the recipient follows a grievance process that complies with § 106.45. The recipient's Title IX Coordinator may always sign a formal complaint, as defined in § 106.30, to initiate an investigation. The formal complaint triggers the grievance process in § 106.45, which provides notice to both parties of the investigation and provides them an equal opportunity to participate and respond to the allegations of sexual harassment. These final regulations protect both complainants and respondents from the repercussions of an investigation that they do not know about and cannot participate in, and the complainant as well as the respondent may choose whether to participate in the grievance process.[937]

By eliminating § 106.44(b)(1), the Department makes it clear that recipients will not be able to merely "check boxes" or escape liability just for having a process that appears "on paper" to comply with § 106.45. We appreciate the opportunity to clarify that the Department will evaluate a recipient's compliance with § 106.45 without regard to whether the recipient was

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[937] Section 106.71 (added in the final regulations, prohibiting retaliation against any individual for exercising rights under Title IX, including an individual's right to participate, or to choose not to participate, in a Title IX grievance process). *See* the "Retaliation" section of this preamble for further discussion.

"deliberately indifferent" in failing to comply with those provisions. In other words, the Department may find that the recipient violated any of the requirements in § 106.45, whether or not the recipient believes that failure to comply was "not clearly unreasonable." As explained throughout this preamble, including in the "Role of Due Process in the Grievance Process" section of this preamble, the Department has selected all the provisions of the § 106.45 grievance process as those provisions needed to improve the fairness, reliability, predictability, and legitimacy of Title IX grievance processes, and expects recipients to comply with the entirety of § 106.45. For example, the Department may find that a recipient violated § 106.45(b)(2) if the recipient did not provide the requisite written notice of allegations to both parties, even if the recipient believes that the recipient had a good reason for refusing to send that initial written notice. Similarly, a recipient may violate § 106.45(b)(5)(ii) if the recipient does not provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence as part of the investigation, even if the recipient believes that refusing to do so was not clearly unreasonable.

The Department disagrees that the grievance process prescribed by § 106.45 favors respondents or provides no benefits to complainants. For reasons explained throughout this preamble, including in the "Role of Due Process in the Grievance Process" section and the "General Support and Opposition to the § 106.45 Grievance Process" section of this preamble, the Department believes that the § 106.45 grievance process gives complainants and respondents clear, strong procedural rights and protections that foster a fair process leading to reliable outcomes. For example, a complainant whose allegations of sexual harassment in a formal complaint are dismissed may appeal such a dismissal on specific grounds under § 106.45(b)(8)(i). The grievance process in § 106.45 provides consistency, predictability, and

transparency as to a recipient's obligations and what students can expect when a formal complaint is filed. As many commenters appreciated, under the final regulations, if the complainant decides to file a formal complaint, this will trigger a grievance process that includes the procedural safeguards set forth in § 106.45.

The Department understands commenters' arguments that § 106.44b)(1) does not afford recipients flexibility to select a grievance process that the recipient prefers over the process prescribed in § 106.45. For reasons described in the "Role of Due Process in the Grievance Process" section of this preamble, and in the "General Support and Opposition to the § 106.45 Grievance Process" section of this preamble, the Department believes that the grievance process prescribed by § 106.45 creates a standardized framework for resolving formal complaints of sexual harassment under Title IX while leaving recipients discretion to adopt rules and practices not required under § 106.45.[938] We reiterate that the § 106.45 grievance process applies only to formal complaints alleging sexual harassment as defined in § 106.30, that occurred in the recipient's education program or activity against a person in the United States. These final regulations do not dictate what kind of process a recipient should or must use to resolve allegations of other types of misconduct. Because a recipient's response to Title IX sexual harassment is part of a recipient's obligation to protect every student's Federal civil right to

[938] The revised introductory sentence in § 106.45(b) provides that any provisions, rules, or practices other than those required by § 106.45 that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in § 106.30, must apply equally to both parties. The final regulations grant flexibility to recipients in other respects. The discussion in the "Other Language/Terminology Comments" subsection of the "Section 106.30 Definitions" section of this preamble notes that recipients may decide whether to calculate time frames using calendar days, school days, or other method. *See also* § 106.45(b)(6)(i) (allowing, but not requiring, live hearings to be held virtually through use of technology); § 106.45(b)(5)(vi) (removing the requirement that evidence in the investigation be provided to the parties using a file-sharing platform); § 106.45(b)(7)(i) (giving recipients a choice between using the preponderance of the evidence standard or the clear and convincing evidence standard).

participate in education programs and activities free from sex discrimination a recipient's response is not simply a matter of the recipient's own codes of conduct or policies; a recipient's response is a matter of fulfilling obligations under a Federal civil rights law. The Department has carefully crafted a standardized grievance process for resolving allegations of Title IX sexual harassment so that every student (and employee) receives the benefit of transparent, predictable, consistent resolution of formal complaints that allege sex discrimination in the form of sexual harassment under Title IX.

The Department acknowledges commenters' concerns that recipients do not have the discretion to forgo a formal grievance process in a situation where the recipient determined the allegations were without merit, frivolous, or had already been investigated, but we decline to grant that kind of discretion because the Department believes that, where a complainant chooses to file a formal complaint and initiate a recipient's formal grievance process, that formal complaint should be taken seriously and not prejudged or subjected to cursory or conclusory evaluation by a recipient's administrators. The purpose of the § 106.45 grievance process is to resolve allegations of sexual harassment impartially, without conflicts of interest or bias, and to objectively examine relevant evidence before reaching a determination regarding responsibility. Permitting a recipient to deem allegations meritless or frivolous without following the § 106.45 grievance process would defeat the Department's purpose in providing both parties with a consistent, transparent, fair process, would not increase the reliability of outcomes, and would increase the risk that victims of sexual harassment will not be provided remedies. The Department notes that the final regulations give recipients discretion to offer informal resolution processes to resolve formal complaints (§ 106.45(b)(9)) and permit discretionary dismissal of a

formal complaint (or allegations therein) by a recipient under limited circumstances (§ 106.45(b)(3)(ii)).[939]

We have also considered commenters' suggestion that the Department add a requirement limiting the amount of time a complainant has for filing a formal complaint, but the Department declines to revise the final regulations to include a statute of limitations or similar time limit.[940] However, we have revised § 106.30 defining "formal complaint" to specify that at the time of filing a formal complaint, the complainant must be participating in or attempting to participate in the recipient's education program or activity. In addition, § 106.45(b)(3)(ii) allows a discretionary dismissal of a formal complaint where the complainant wishes to withdraw the formal complaint (if the complainant notifies the Title IX Coordinator, in writing, of this wish), where the respondent is no longer enrolled or employed by the recipient, or where specific circumstances prevent the recipient from meeting the recipient's burden of collecting evidence sufficient to reach a determination regarding responsibility. The length of time elapsed between an incident of alleged sexual harassment, and the filing of a formal complaint, may, in specific circumstances, prevent a recipient from collecting enough evidence to reach a determination, justifying a discretionary dismissal under § 106.45(b)(3)(ii).

Changes: The Department does not include the safe harbor provision regarding the § 106.45 grievance process that was proposed in § 106.44(b)(1) in the NPRM. Section 106.44(b)(1) in the

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[939] *See* the "Dismissal and Consolidation of Formal Complaints" section of this preamble. We note that one of the bases for discretionary dismissal of a formal complaint (or allegations therein) is where specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination. When a formal complaint contains allegations that are precisely the same as allegations the recipient has already investigated and adjudicated, that circumstance could justify the recipient exercising discretion to dismiss those allegations, under § 106.45(b)(3)(ii).
[940] For further discussion, see the "Formal Complaint" subsection of the "Section 106.30 Definitions" section of this preamble.

final regulations retains the mandate to follow a grievance process that complies with § 106.45 in response to a formal complaint, and adds a mandate that the recipient must comply with § 106.44(a) with or without a formal complaint.

Proposed § 106.44(b)(2) Reports by Multiple Complainants of Conduct by Same Respondent [removed in final regulations]

Comments: A number of commenters expressed opposition to proposed § 106.44(b)(2), which would have required Title IX Coordinators to file a formal complaint upon receiving reports from multiple complainants that a respondent engaged in conduct that could constitute sexual harassment. Commenters opposed this proposed provision due to concerns that the provision could place the safety of victims at risk by requiring a grievance process against a respondent over the wishes of the complainant and could place victims in harm's way without the victim's knowledge or input because nothing in the proposed provision required the Title IX Coordinator to first alert or warn the victim that the Title IX Coordinator would file a formal complaint. Commenters argued that this proposed provision implied that Title IX Coordinators could not file a formal complaint unless a respondent was a repeat offender.

A number of commenters expressed concern that the proposed provision would pose a particular risk in cases dealing with dating violence, domestic violence, or stalking. Commenters argued that survivors often choose not to report intimate partner violence or stalking to authorities for a multitude of reasons, one of which is fear that the perpetrator will retaliate or escalate the violence.

A number of commenters expressed concern that the mandatory filing requirement in proposed § 106.44(b)(2) would violate survivor autonomy. Commenters argued that the proposed provision would violate autonomy principles embedded elsewhere in the proposed

rules. Commenters argued the Department's contradictory statements regarding the importance of survivor autonomy were arbitrary and capricious. Commenters argued that requiring schools to trigger formal grievance procedures when the school has received multiple reports of harassment by the same perpetrator would violate survivor autonomy and discourage reporting. One commenter asserted that the proposed provision would retraumatize victims by forcing an investigation when no victim wants to testify against the perpetrator. One commenter asserted that this provision would exacerbate survivors' feelings of powerlessness. Commenters asserted that students should be able to discuss a situation without the Title IX office initiating a formal process without the complainant's permission. Commenters stated that sometimes a student may want advice, or want supportive measures, without desiring a formal process.

A number of commenters expressed concern that requiring Title IX Coordinators to file formal complaints against the wishes of complainants will lead to violations of confidentiality of survivors who already do not want to come forward, and may not come forward at all if there is a risk that the school will violate their wishes by investigating. Commenters argued that victims who report but do not wish to pursue a formal complaint would be forced into potentially dangerous situations unknowingly, since nothing in the proposed rules imposed a duty on the institution to offer safety measures or accommodations. Other commenters asserted that litigation arising out of Title IX proceedings is common, and that requiring a recipient to pursue a grievance proceeding against a respondent invites the respondent to then name the complainant as a party to subsequent litigation even when the complainant did not want to initiate an investigation in the first place.

A number of commenters expressed concern that deeming the Title IX Coordinator as a complainant (by requiring them to file a formal complaint) creates a significant conflict of

interest by placing the Title IX Coordinator in an adversarial position against the respondent. Other commenters argued that asking the Title IX Coordinator to sign and file a formal complaint in cases where complainants are unwilling to participate would make it impossible for the Title IX Coordinator to maintain the appearance of neutrality, even if they are in fact unbiased in all other ways. Other commenters expressed concern that if the person who reported the incident is reluctant to come forward, it would place the Title IX Coordinator, who should be an impartial resource, into a role of advocating for a specific person's report.

A number of commenters argued that the proposed provision would chill reporting of sexual harassment because victims would fear being drawn involuntarily into a formal process. Commenters suggested that, if institutions file formal complaints without the willing, informed participation of the victim, some requirements, including the cross-examination requirement, should be adjusted, to protect victims who did not consent to participate in a grievance process from negative consequences that commenters argued may possibly result from participating in a grievance process, especially a live hearing. Commenters argued that these consequences might include fear of re-traumatization from being cross-examined, questions perceived as invasions of privacy, and lawsuits filed by respondents based on testimony given during a Title IX hearing.

Commenters argued that this provision would depart from best practices for helping victims. Commenters asserted that in order to effectively address sex discrimination, educational institutions must be able to cultivate relationships of trust with community members with regard to reporting systems, and that this proposed provision would mean that recipients would violate the wishes of reporting parties, thereby betraying and violating their trust. Commenters asserted that the ability of a complainant to seek supportive measures without risking public exposure is foundational to creating conditions under which community members are more willing to avail

themselves of institutional support, including formal grievance proceedings. Commenters expressed concern that, in the absence of supportive measures, many survivors cannot keep up with the demands of rigorous schoolwork while dealing with the impacts of trauma, and this proposed provision would leave complainants in a position of never knowing whether the complainant's report of sexual harassment would result in a formal process, because the complainant would have no way of knowing whether another complainant's report would trigger proposed § 106.44(b)(2).

Commenters expressed concern that proposed § 106.44(b)(2) would conflict with or be in tension with the requirement in § 106.45(b)(6)(i) that schools disregard statements provided by witnesses or parties who do not submit to cross-examination at a hearing, because if alleged victims are unwilling to participate in the process and be subject to cross-examination, then the adjudicator is not permitted to consider the complainant's statements, rendering the filing of a formal complaint by a Title IX Coordinator potentially futile. Commenters argued that there was a conflict between proposed § 106.44(b)(2) and the proposed requirement in § 106.45(b)(3) that a recipient must dismiss a complaint if the alleged harassment did not occur within the recipient's education program or activity; commenters questioned how the recipient should respond when multiple reports are made against the same respondent, but one or more of the reported incidents did not take place within the education program or activity of the school and suggested that to solve this conflict, recipients should make a good faith investigation into all reports of sexual harassment, regardless of the location of the incident, when one or more parties involved in the report are under the "purview" of the recipient.

A number of commenters argued that proposed § 106.44(b)(2) would not meet its stated goal of protecting students because the provision would not be limited only to stopping serial

predators. Commenters argued that the proposed provision would incentivize schools to bring weak cases against serial perpetrators that may allow the predators to escape responsibility. Commenters expressed concern if schools are forced to move forward without the participation of complainants in every case where there are multiple reports of sexual harassment against the same respondent, then this may lead to dismissals or inaccurate findings of non-responsibility. Other commenters expressed concern that this proposed provision was designed to help recipients, not protect victims. Commenters argued the proposed provision was a designed-to-fail framework that would protect a recipient from a claim by another victim who is attacked by the same perpetrator, since all the recipient would be required to do is show that it made a *pro forma* attempt to comply with its obligations, to qualify for the safe harbor. Other commenters expressed concern that a recipient impermissibly motivated by sex stereotypes could exploit this proposed provision to engage in discriminatory practices that would otherwise constitute a violation of Title IX.

Commenters argued that this proposed provision could put a recipient in the untenable situation of being required to apply the formal grievance processes to a situation the recipient does not believe it can adequately investigate or that the recipient reasonably believes can be addressed through other appropriate means. A number of commenters expressed concern that this proposed provision would remove the Title IX Coordinator's discretion; commenters asserted that instead, Title IX Coordinators should evaluate what the appropriate response is, whether it be a formal investigation or putting the respondent on notice of the behavior complained about. Commenters argued that, consistent with the 2001 Guidance, recipients should continue to have discretion in determining whether or how to address multiple reports

involving a single respondent in cases where complainants wish to remain anonymous or for other reasons are unwilling to participate in formal proceedings.

A number of commenters argued that proposed § 106.44(b)(2) would alter and harm the valuable function of the Title IX Coordinator. Other commenters expressed concern that this proposed provision would complicate the role of the Title IX Coordinator because if the Title IX Coordinator receives a report from a resident advisor or faculty member (rather than from the victim themselves), and then subsequently receives a report from a victim alleging a similar incident involving the same perpetrator, the Title IX Coordinator might be confused about whether or not the proposed provision requires the Title IX Coordinator to file a formal complaint.

One commenter asserted that proposed § 106.44(b)(2) would put schools at risk for liability for monetary damages in private Title IX lawsuits, as well as other State tort actions.

Commenters asserted that sometimes a third party reports an alleged sexual harassment situation, but the alleged victim insists that there was no violation and in cases like that, the recipient should be required to make a report that is not attached to either party's transcript, but that can be referenced if the alleged victim later wishes to file a formal complaint.

Discussion: Despite the intended benefits of proposed § 106.44(b)(2) described in the NPRM, the Department is persuaded by the many commenters who expressed a variety of concerns about requiring the Title IX Coordinator to file a formal complaint after receiving multiple reports about the same respondent. In addition to raising serious concerns about the potential effects on complainants, commenters also described practical problems with proposed § 106.44(b)(2) in

relation to the rest of the final regulations. As a result, the Department is removing proposed § 106.44(b)(2) entirely.[941]

The Department is persuaded by commenters who argued that this proposed provision would have removed the Title IX Coordinator's discretion without necessary or sufficient reason to do so. The Department agrees that the Title IX Coordinator should have the flexibility to evaluate and determine an appropriate response under pertinent facts and circumstances. The Department agrees with commenters who argued that institutions should continue to have discretion in determining whether or how to address multiple reports involving a single respondent in cases where complainants wish to remain anonymous or otherwise are unwilling to participate in a formal process. Removing this proposed provision means that Title IX Coordinators retain discretion, but are not required, to sign formal complaints after receiving multiple reports of potential sexual harassment against the same respondent. We believe that this approach properly balances complainant autonomy, campus safety, and recipients' use of resources that would otherwise be required to be used to institute a potentially futile grievance process. The Department was persuaded by commenters' concerns that under the proposed rules, filing a formal complaint might have resulted in a Title IX Coordinator becoming a "complainant" during the grievance process, or creating a conflict of interest or lack of neutrality. We have revised the definitions of "complainant" and "formal complaint" in § 106.30 to clarify that when a Title IX Coordinator chooses to sign a formal complaint, that action is not taken "on behalf of" the complainant; the "complainant" is the person who is alleged to be the

[941] The section number, 106.44(b)(2), now refers to the provision discussed in the "Section 106.44(b)(2) OCR Will Not Re-weigh the Evidence" subsection of the "Recipient's Response in Specific Circumstances" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this preamble.

victim of conduct that could constitute sexual harassment. Those revisions further clarify that when a Title IX Coordinator signs a formal complaint, the Title IX Coordinator does not become a complainant or otherwise a party to the grievance process, and must abide by § 106.45(b)(1)(iii), which requires Title IX personnel to be free from conflicts of interest and bias, and serve impartially. We do not believe that signing a formal complaint that initiates a grievance process inherently creates a conflict of interest between the Title IX Coordinator and the respondent; in such a situation, the Title IX Coordinator is not advocating for or against the complainant or respondent, and is not subscribing to the truth of the allegations, but is rather instituting a grievance process (on behalf of the recipient, not on behalf of the complainant) based on reported sexual harassment so that the recipient may factually determine, through a fair and impartial grievance process, whether or not sexual harassment occurred in the recipient's education program or activity.

The Department is persuaded by commenters' concerns that the proposed provision would have created tension with § 106.45(b)(6)(i), which mandates that 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. The Department is persuaded by commenters' arguments that the proposed provision would have incentivized or forced recipients to file futile complaints against respondents with no complaining witness willing to testify at a live hearing. Whether or not proposed § 106.44(b)(2) would have conflicted with § 106.45(b)(3), the proposed provision § 106.44(b)(2) has been removed from the final regulations, and we have revised § 106.45(b)(3) to clarify that a recipient may choose to address allegations of sexual harassment that occurred outside the recipient's education program or activity, through non-Title IX codes of conduct. Where a complainant does

not wish to participate in a grievance process, including being cross-examined at a live hearing, the recipient is not permitted to threaten, coerce, intimidate, or discriminate against the complainant in an attempt to secure the complainant's participation.[942] Thus, even if a Title IX Coordinator has signed a formal complaint, the complainant is not obligated to participate in the ensuing grievance process and need not appear at a live hearing or be cross-examined. We have added § 106.71 prohibiting retaliation and expressly protecting any person's right *not* to participate in a Title IX proceeding.

The Department is also persuaded that a chilling effect on victim reporting can be avoided by eliminating this proposed provision. The Department is persuaded by commenters' concerns that complainants who are unwilling to file a formal complaint should be able to confidentially seek supportive measures without fear of being drawn into a formal complaint process whenever the Title IX Coordinator receives a second report from another complainant about the same respondent. The Department is persuaded by commenters' arguments that students should be able to discuss a situation with a Title IX Coordinator without the Title IX Coordinator being required to initiate a grievance process against the complainant's wishes, and by commenters' assertions that it is not uncommon for respondents filing private lawsuits against the recipient to include the complainant as a party to such lawsuits, so dragging a complainant into a grievance process against the complainant's wishes exposes the complainant to potential involvement in private litigation as well.

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[942] Section 106.71(a).

The Department appreciates commenters' suggestions for specific changes and clarifications to proposed § 106.44(b)(2); however, there is no need to consider such changes or clarifications because we are removing this proposed provision from the final regulations.

Changes: The Department has not included proposed § 106.44(b)(2) in the final regulations.

Comments: Some commenters expressed support for proposed § 106.44(b)(2), asserting that it would be valuable for the protection of sexual assault victims on university campuses. Other commenters argued that it is common sense for the Title IX Coordinator to be able to file complaints against bad actors. Some commenters argued that the provision would improve the responsiveness of university Title IX Coordinators to sexual assault or harassment allegations at institutions around the country. Other commenters supported this proposed provision so that Title IX Coordinators would file a complaint against repeat sexual offenders even when no victim was willing to file a formal complaint because this would protect a complainant's confidentiality.

Discussion: For the reasons discussed above, the Department is persuaded that eliminating proposed § 106.44(b)(2) better serves the Department's goals of ensuring that recipients respond adequately to reports of sexual harassment without infringing on complainant autonomy. Elimination of this proposed provision leaves Title IX Coordinators discretion to sign a formal complaint initiating a grievance process, when doing so is not clearly unreasonable in light of the known circumstances, without mandating such a response every time multiple reports against a respondent are received. We note that contrary to some commenters' belief, the proposed provision would not have protected complainants' confidentiality by requiring Title IX Coordinators to file formal complaints, because the recipient would still have been required

under § 106.45(b)(2) to send written notice of the allegations to both parties, and the written notice must include the complainant's identity, if known.

Changes: The Department has not included proposed § 106.44(b)(2) in the final regulations.

Comments: Some commenters suggested expanding or modifying proposed § 106.44(b)(2), for example by specifying factors to consider as to whether a pattern of behavior might present a potential threat to the recipient's community. Some commenters suggested specifying that a formal complaint must be filed where threats, serial predation, violence, or weapons were allegedly involved.

Commenters recommended adding a credibility threshold to proposed § 106.44(b)(2) specifying that a Title IX Coordinator would only be required to file a formal complaint upon receiving multiple *credible* reports against the same respondent, so that the Title IX Coordinator would not need to file a formal complaint where reports appeared frivolous or unfounded.

Commenters suggested that the Department adopt the model used by Harvard Law School for its Title IX compliance, which as described by commenters provides that (1) that there be a complainant willing to participate before the recipient will initiate a formal investigation and (2) the only time an action should be pursued without a willing complainant is if there is a serious risk to campus-wide safety and security. Several commenters suggested that, in instances where there are reports by multiple complainants but none are willing to participate in the proceedings, the Department could ensure accountability by requiring the recipient to document its reason for not initiating a formal complaint rather than requiring the recipient to file a formal complaint in every such situation.

Discussion: The Department appreciates commenters' suggestions for specific changes to proposed § 106.44(b)(2); however, we decline to make such changes because we are removing

this proposed provision from the final regulations for the reasons described above. The Department declines to adopt in these final regulations the suggestion that patterns of behavior be considered as a factor to determine whether possible future threats to the community warrant filing a formal complaint even where a complainant does not wish to file; however, as discussed above, elimination of proposed § 106.44(b)(2) leaves the Title IX Coordinator discretion to sign a formal complaint where doing so is not clearly unreasonable in light of the known circumstances. The Title IX Coordinator may consider a variety of factors, including a pattern of alleged misconduct by a particular respondent, in deciding whether to sign a formal complaint. By giving the recipient's Title IX Coordinator the discretion to sign a formal complaint in light of the specific facts and circumstances, the Department believes it has reached the appropriate balance between campus safety, survivor autonomy, and respect for the most efficient use of recipients' resources. We also note that under the final regulations, including revised § 106.44(a), a Title IX Coordinator's decision to sign a formal complaint may occur only after the Title IX Coordinator has promptly contacted the complainant (i.e., the person alleged to have been victimized by sexual harassment) to discuss availability of supportive measures, consider the complainant's wishes with respect to supportive measures, and explain to the complainant the process for filing a formal complaint. Thus, the Title IX Coordinator's decision to sign a formal complaint includes taking into account the complainant's wishes regarding how the recipient should respond to the complainant's allegations.

The Department disagrees with the suggestion to expand the proposed provision to cover other circumstances such as alleged use of threats, violence, or weapons, because we are persuaded by commenters that leaving the Title IX Coordinator discretion to sign a formal complaint is preferable to mandating circumstances under which a Title IX Coordinator must

sign a formal complaint. The final regulations give the Title IX Coordinator discretion to sign a formal complaint, and the Title IX Coordinator may take circumstances into account such as whether a complainant's allegations involved violence, use of weapons, or similar factors. The Department eliminated proposed § 106.44(b)(2) in part due to concerns expressed by commenters about survivor autonomy and safety; in some situations, the Title IX Coordinator may believe that signing a formal complaint is not in the best interest of the complainant and is not otherwise necessary for the recipient to respond in a non-deliberately indifferent manner. With the elimination of this provision, however, the Title IX Coordinator still possesses the discretion to sign formal complaints in situations involving threats, serial predation, violence, or weapons. Even in the absence of a formal complaint being filed, a recipient has authority under § 106.44(c) to order emergency removal of a respondent where the situation arising from sexual harassment allegations presents a risk to the physical health or safety of any person. Nothing in the final regulations prevents recipients, Title IX Coordinators, or complainants from contacting law enforcement to address imminent safety concerns.

Because the final regulations do not include this proposed provision, the Department does not further consider the commenter's suggestion to revise the eliminated provision by adding the word "credible" before "reports." As discussed previously, the Department has removed this provision to respect complainant autonomy and avoid chilling reporting by mandating that a Title IX Coordinator sign a formal complaint over a complainant's wishes; the commenter's suggestion for modifying this proposed § 106.44(b)(2) would not change the Department's belief that the proposed provision should be removed in its entirety, because narrowing the circumstances under which the Title IX Coordinator would be required to sign a formal complaint over the complainant's wishes would not address the concerns raised by many

commenters that persuaded the Department of the need to respect survivor autonomy by giving a Title IX Coordinator discretion (without making it mandatory) to sign a formal complaint. The Department further notes that one of the purposes of the § 106.45 grievance process is to ensure that determinations are reached only after objective evaluation of relevant evidence by impartial decision-makers, and therefore permitting or requiring a Title IX Coordinator to only respond to reports or formal complaints that the Title IX Coordinator deems "credible" would defeat the goal of following a grievance process to reach reliable outcomes. Similarly, the commenter's suggestion to require the recipient to document its reason for not initiating a formal complaint following reports by multiple complainants does not alter the Department's conclusion that the better way to respect survivor autonomy and the discretion of a Title IX Coordinator is to remove proposed § 106.44(b)(2) from the final regulations, so that a Title IX Coordinator retains the discretion to sign a formal complaint, but is not mandated to do so. We note that § 106.45(b)(10) does require a recipient to document the reasons for its conclusion that its response to any reported sexual harassment was not deliberately indifferent.

The Department declines to adopt the Harvard Law School model because we believe the final regulations provide the same or similar benefits with respect to requiring a grievance process only where a formal complaint has been filed by a complainant or signed by a Title IX Coordinator. For reasons discussed in the "Formal Complaint" subsection of the "Section 106.30 Definitions" section of this preamble, third parties are not allowed to file formal complaints.

Changes: None.

Proposed § 106.44(b)(3) Supportive Measures Safe Harbor in Absence of a Formal Complaint [removed in final regulations]

Comments: Many commenters appreciated that the proposed safe harbor regarding supportive measures would provide an incentive for institutions to offer supportive measures for both parties. Several commenters recounted personal stories of accused individuals being removed from classes and dorms before a determination had been made about pending allegations. Many commenters supported § 106.44(b)(2) for not requiring an individual to file a formal complaint in order to obtain supportive measures and for expressly including the requirement that, when offering supportive measures, recipients must notify a complainant of the right to file a formal complaint at a later date if they wish. Many commenters asserted that often, supportive measures are sufficient for both parties to deal with a situation without causing additional trauma to either party.

Some commenters expressed concern that the proposed safe harbor regarding supportive measures would effectively relieve institutions of the responsibility to hold respondents accountable and address sexual harassment on campuses. Many commenters argued that offering "meager" supportive measures to a student in lieu of investigating allegations would not satisfy a recipient's obligations under Title IX and asked the Department to clarify that the provision of supportive measures is not always adequate to satisfy the deliberate indifference standard.

Many commenters argued that the proposed safe harbor regarding supportive measures actually created a barrier to providing supportive measures for elementary and secondary school victims because the provision applied only to institutions of higher education, and asked the Department to modify the proposed rules to extend this supportive measures safe harbor to the elementary and secondary school context either by creating a separate safe harbor with nearly

identical language or by deleting the phrase "for institutions of higher education" in the proposed regulatory text. One commenter asserted that § 106.44(b)(3) is redundant because it merely repeats the standard of § 106.44(a). One commenter argued that, when combined with the Department's proposed definition of sexual harassment, this proposed provision would create a safe harbor for educational institutions to avoid liability.

Other commenters suggested that the Department modify the proposed safe harbor regarding supportive measures to expressly prohibit institutions from coercing a complainant into accepting supportive measures in lieu of filing a formal complaint. At least one commenter suggested adding an outer time limit to a party's right to file a formal complaint "at a later time," asserting that this proposed provision was inconsistent with the recordkeeping requirement in the proposed regulations, which would have allowed a record to be destroyed in three years (this retention period has been revised to seven years in § 106.45(b)(10) of the final regulations).

Discussion: As explained in the "Section 106.44(b) Proposed 'Safe harbors,' generally," subsection of the "Recipient's Response in Specific Circumstances" section of this preamble, these final regulations do not include the safe harbor provision that 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, and the recipient also informs the complainant in writing of the right to file a formal complaint. This safe harbor is now unworkable and unnecessary in light of other revisions made to the proposed regulations, specifically a recipient's obligations in § 106.44(a) and § 106.45(b)(10)(ii). Under § 106.44(a), a recipient's response must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30, and a Title IX Coordinator must promptly contact the complainant to

discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. As previously explained, § 106.45(b)(1) now contains an additional mandate that with or without a formal complaint, a recipient must comply with § 106.44(a), which places recipients on notice that it must offer supportive measures to a complainant. Additionally, under § 106.45(b)(10)(ii), if a recipient does not provide a complainant with supportive measures, then the recipient must document why such a response was not clearly unreasonable in light of the known circumstances. As recipients are now required to offer supportive measures to a complainant and to document why not providing a complainant with supportive measures was not clearly unreasonable in light of the known circumstances, the final regulations no longer provides a safe harbor. Recipients cannot receive a safe harbor for offering supportive measures because recipients are now required to offer supportive measures under these final regulations. Accordingly, the Department does not include the proposed safe harbor regarding supportive measures in these final regulations.

With respect to concerns that respondents may suffer disciplinary sanctions or punitive action stemming from pending allegations, the Department notes that § 106.44(a) expressly provides that a recipient's response must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. Additionally, supportive measures in § 106.30 are expressly defined as non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available,

and without fee or charge to the complainant or the respondent. Supportive measures must not have a punitive or disciplinary consequence for either complainants or respondents.

Even without the proposed safe harbor provision regarding supportive measures, the Department believes that these final regulations appropriately draw recipients' attention to the importance of offering supportive measures to all students, including students who do not wish to initiate a recipient's formal grievance process, and thus give complainants greater autonomy to decide if supportive measures, alone, represent the kind of school-level response that will best help the complainant heal after any trauma. The Department in part requires a recipient to offer supportive measures to all complainants under § 106.44(a) because the Department recognizes that, in many cases, a complainant's equal access to education can be effectively restored or preserved through the school's provision of supportive measures. Accordingly, the Department provides an additional mandate in § 106.44(b)(1), that with or without a formal complaint, a recipient must comply with § 106.44(a) (e.g., by offering the complainant supportive measures).

We are persuaded by commenters' assertions that providing supportive measures to a complainant does not always satisfy a recipient's obligation to respond in a non-deliberately indifferent manner to known sexual harassment. In some circumstances and depending on the unique facts, a non-deliberately indifferent response may require the recipient's Title IX Coordinator to sign a formal complaint as defined in § 106.30 so that the recipient initiates the grievance process in § 106.45. The Department acknowledges that a recipient should respect the complainant's autonomy and wishes with respect to a formal complaint and grievance process to the extent possible.

As the proposed safe harbor regarding supportive measures is no longer included in these final regulations, we do not revisit whether excluding elementary and secondary school

recipients from this safe harbor was preferable to modifying the proposed safe harbor to also apply to elementary and secondary schools. Revised § 106.44(a) requires every recipient (including elementary and secondary schools) to offer supportive measures to complainants.

The Department understands the concern that a recipient may coerce potential complainants into accepting supportive measures in lieu of a formal grievance process. Partly in response to these concerns, the Department revised § 106.44(a) to require that a Title IX Coordinator promptly contact a complainant not only to discuss supportive measures but also to explain to the complainant the process for filing a formal complaint. Accordingly, a complainant will know how to file a formal complaint, if the complainant wishes to do so. We have also added § 106.71 to expressly forbid a recipient from threatening, intimidating, coercing, or discriminating against any complainant for the purpose of chilling the complainant's exercise of any rights under Title IX, which includes the right to file a formal complaint, and to receive supportive measures even if the complainant chooses not to file a formal complaint.

The Department agrees that the safe harbor, as proposed, is redundant, especially in light of the revisions to § 106.44(a), requiring a recipient to offer supportive measures to a complainant. As this safe harbor is not included in these final regulations, this safe harbor does not provide a way for a recipient to avoid responsibility.

For reasons discussed above, the Department declines to revise the final regulations to include a statute of limitations or similar time limit on filing a formal complaint but as discussed in the "Formal Complaint" subsection of the "Section 106.30 Definitions" section of this preamble, the Department has revised the final regulations to provide that at the time of filing a formal complaint, the complainant must be participating in or attempting to participate in the recipient's education program or activity. This provides a reasonable condition on a

complainant's ability to require a recipient to investigate, based on the complainant's connection to the recipient's education program or activity rather than by imposing a statute of limitations or similar time-based deadline. A complainant may be "attempting to participate" in the recipient's education program or activity in a broad variety of circumstances that do not depend on a complainant being, for instance, enrolled as a student or employed as an employee. A complainant may be "attempting to participate," for example, where the complainant has withdrawn from the school due to alleged sexual harassment and expresses a desire to re-enroll if the recipient responds appropriately to the sexual harassment allegations, or if the complainant has graduated but would like to participate in alumni events at the school, or if the complainant is on a leave of absence to seek counseling to recover from trauma. In addition, the Department has also revised the final regulations to provide in § 106.45(b)(3)(ii) that a recipient has the discretion to dismiss a formal complaint against a respondent who is no longer enrolled or employed by the recipient. While these provisions are not an express limit on the amount of time a complainant has to file a formal complaint, the Department believes these provisions help address commenters' concerns about being forced to expend resources investigating situations where one or both parties have no affiliation with the recipient, without arbitrarily or unreasonably imposing a deadline on complainants, in recognition that complainants sometimes do not report or desire to pursue a formal process in the immediate aftermath of a sexual harassment incident.

Changes: The Department does not include the safe harbor provision proposed in the NPRM as § 106.44(b)(3). The Department adds a mandate to § 106.44(b)(1) that the recipient must comply with § 106.44(a), with or without a formal complaint.

Section 106.44(b)(2) OCR Will Not Re-weigh the Evidence

Comments: Some commenters appreciated that the proposed rules contained an express guarantee that an institution will not be deemed deliberately indifferent solely because the Assistant Secretary would have reached a different determination regarding responsibility based on an independent weighing of the evidence. Some commenters expressed concerns that § 106.44(b)(2) would result in a lack of accountability or oversight for how schools or colleges handle sexual harassment complaints. Other commenters contended that this provision would unjustifiably reduce the Department's oversight unless a school's actions are clearly unreasonable. Some commenters asserted that the provision would improperly defer to a school district's determination, which commenters argued is not always the appropriate way to ensure Title IX accountability. A number of commenters felt that § 106.44(b)(2) would spur more civil lawsuits to hold schools accountable, because the Department would no longer be holding schools accountable.

Several commenters argued that the proposed provision would negatively impact OCR's ability to investigate non-compliance under Title IX, which would dangerously lower the bar of compliance and signal that a bare, minimal response to sexual harassment would suffice. Other commenters warned that the provision would limit OCR's ability to evaluate a school's response to sexual harassment, which would effectively narrow over 20 years of Title IX enforcement standards. Several commenters expressed their belief that OCR plays a key role as an independent, impartial investigator. For example, one commenter argued that OCR, as an independent entity, is more qualified than a school to perform an impartial investigation because the school has its own financial interests at stake and is thus less likely to identify inaccuracies in its own procedures. Another commenter asserted that OCR's independent weighing of evidence

is a relevant factor because it may allow OCR to identify patterns or practices of shielding respondents or favoring complainants; the commenter argued that OCR should, after a thorough investigation, have discretion to decide if a school's determination regarding responsibility was discriminatory.

Some commenters expressed concern that proposed § 106.44(b)(2) was one-sided in a way that favored only respondents, because the language in the proposed provision would give deference to the school's determinations only where a respondent has been found not responsible. Commenters argued that as proposed, § 106.44(b)(2) would require OCR investigators to close investigations even if OCR found gross or malicious procedural violations affecting the determination reached by the school, as long as the school had determined the respondent to be not responsible. Another commenter expressed concern that a deferential procedural review by OCR may incentivize schools to find in favor of respondents so as to avoid OCR scrutiny; commenters argued that this would be perceived as biased against complainants, may chill reporting of sexual harassment at the school level, and would discourage complainants from filing OCR complaints alleging procedural defects that led to erroneous findings of non-responsibility.

Another commenter asserted that proposed § 106.44(b)(2) was inconsistent with Equal Employment Opportunity Commission (EEOC) practices with respect to employee sexual harassment claims; the commenter stated that the EEOC never defers to an employer's conclusion but conducts its own investigation and makes an independent assessment of the facts so that employers do not avoid liability merely by conducting exculpatory internal investigations. The commenter also asserted that applying § 106.44(b)(2) to employee sexual harassment claims would conflict with U.S. Department of Justice equal employment opportunity coordination

regulations' requirement that a referring agency must give due weight to an EEOC determination of reasonable cause to believe that Title VII has been violated,[943] which OCR could not give if it instead gave conclusive weight to a recipient's contrary factual determination.

Conversely, some commenters expressed support for § 106.44(b)(2). Commenters asserted that this provision, combined with other provisions in the proposed rules, would assist colleges and universities in ensuring an impartial, transparent, and fair process for both complainants and respondents, while also providing institutions flexibility reflecting their unique attributes (e.g., size, student population, location, mission). Several commenters expressed support for OCR not "second guessing" a school's response to incidents of sexual harassment. One commenter asserted that the provision was reasonable because OCR should not intrude into a school's decision making based on OCR's own weighing of the evidence.

One commenter expressed confusion as to whether OCR would defer to schools' determinations about sex discrimination not involving sexual harassment, or in instances when a person who filed a complaint with a recipient could have filed directly with OCR. Another commenter suggested clarifying that further scrutiny by OCR is not barred by this provision and may be called for if a responsibility determination seems to hold little basis.

Discussion: We appreciate commenters' concerns about, and support of, § 106.44(b)(2). The intent of this provision is to convey that the Department will not overturn the outcome of a Title IX grievance process solely based on whether the Department might have weighed the evidence in the case differently from how the recipient's decision-maker weighed the evidence.

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[943] 28 CFR 42.610(a).

This provision does not limit OCR's ability to evaluate a school's response to sexual harassment, and it does not narrow Title IX enforcement standards; OCR retains its full ability, and responsibility, to oversee recipients' adherence to the requirements of Title IX, including requirements imposed under these final regulations. The Department agrees with commenters who stated that OCR has special qualifications that enable OCR to perform independent, impartial investigations into whether recipients have violated Title IX and Title IX regulations. The Department will continue to vigorously enforce recipients' Title IX obligations.[944] The Department believes that the § 106.45 grievance process prescribes fair procedures likely to result in reliable outcomes; however, when a recipient does not comply with the requirements of § 106.45, nothing in § 106.44(b)(2) precludes the Department from holding the recipient accountable for violating these final regulations. Refraining from second guessing the determination reached by a recipient's decision-maker solely because the evidence could have been weighed differently does not prevent OCR from identifying and correcting any violations the recipient may have committed during the Title IX grievance process. The deference given to the recipient's determination regarding responsibility in § 106.44(b)(2) does not preclude OCR from overturning a determination regarding responsibility where setting aside the recipient's determination is necessary to remedy a recipient's violations of these final regulations. Rather, § 106.44(b)(2) promotes finality for parties and recipients by stating that OCR will not overturn determinations just because OCR would have weighed the evidence in the case differently. To clarify this point, we have revised § 106.44(b)(2) to use the phrase "solely because" instead of

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[944] *See* further discussion in the "Section 106.3(a) Remedial Action" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble, regarding remedies the Department may pursue in administrative enforcement actions against recipients.

"merely because." Nothing about § 106.44(b)(2) prevents OCR from taking into account the determination regarding responsibility as *one of* the factors OCR considers in deciding whether a recipient has complied with these final regulations, and whether any violations of these final regulations may require setting aside the determination regarding responsibility in order to remediate a recipient's violations.

If a recipient has not complied with any provision of the final regulations, nothing in § 106.44(b)(2) prevents OCR from holding the recipient accountable for non-compliance. The intent of the provision is to assure recipients that because the § 106.45 grievance process contains robust procedural and substantive requirements designed to produce reliable outcomes, OCR will not substitute its judgment for that of the recipient's decision-maker with respect to weighing the relevant evidence at issue in a particular case.

We believe that this limited deference also serves the interests of complainants and respondents in resolving sexual harassment allegations, by limiting the circumstances under which a "final" determination reached by the recipient may be subject to being setting aside and requiring the parties to go through a grievance process for a second time. As an example, if a decision-maker evaluates the relevant evidence in a case and judges one witness to be more credible than another witness, or finds one item of relevant evidence to be more persuasive than another item of relevant evidence, § 106.44(b)(2) provides that OCR will not set aside the determination regarding responsibility solely because OCR would have found the other witness more credible or the other item of evidence more persuasive. It does not mean that OCR would refrain from holding the recipient accountable for violations of the decision-maker's obligations, for instance to avoid basing credibility determinations on a party's status as a complainant,

respondent, or witness.[945] This provision does not meant that OCR would refrain from, for instance, independently determining that evidence deemed relevant by the decision-maker was in fact irrelevant and should not have been relied upon.[946] Violations of these final regulations may indeed result in a recipient's determination regarding responsibility being set aside by OCR, but determinations will not be overturned "solely" because OCR would have weighed the evidence differently.

Some commenters understood this provision to work in a one-sided way, giving recipients' determinations regarding responsibility deference only where a respondent has been found not responsible; one commenter reached this conclusion based on the provision's reference to "deliberate indifference" which is a theory usually only raised by complainants challenging the sufficiency of a recipient's response to sexual harassment. The Department appreciates these commenters' concerns; we intend this provision to apply equally to all outcomes, regardless of whether the determination found a respondent responsible or not responsible. For this reason, the provision uses the phrase "determination *regarding* responsibility" (emphasis added) and not determination *of* responsibility.[947] However, to clarify that this provision applies to all determinations of the outcome of a Title IX grievance process regardless of whether the respondent was found responsible or not responsible, we have revised § 106.44(b)(2) by adding "or otherwise evidence of discrimination under title IX by the recipient" so that the reference in

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[945] Section 106.45(b)(1)(ii).
[946] *E.g.,* § 106.45(b)(6) (deeming questions and evidence about a complainant's prior sexual history to be irrelevant, with limited exceptions); § 106.45(b)(1)(x) (barring use of privileged information in the grievance process).
[947] We use the phrase "determination *of* responsibility" (emphasis added) to describe a finding that the respondent is responsible for perpetrating sexual harassment, and "determination *regarding* responsibility" to describe a determination irrespective of whether that determination has found the respondent responsible, or not responsible. *E.g., compare* §§ 106.45(b)(1)(i) and 106.45(b)(1)(vi) *with* §§ 106.45(b)(1)(iv), 106.45(b)(2), 106.45(b)(5)(i), 106.45(b)(5)(vi)-(vii), 106.45(b)(6) through 106.45(b)(10).

this provision to "deliberate indifference" is not misunderstood to exclude theories of sex discrimination commonly raised by respondents after being found responsible. This additional phrase in § 106.44(b)(2) clarifies that this provision operates neutrally to all determinations regarding responsibility. The Department will not overturn the recipient's finding solely because the Department would have reached a different determination based on an independent weighing of the evidence, irrespective of whether the recipient found in favor of the complainant or the respondent. Whether the recipient found the respondent not responsible (and thus a complainant might allege deliberate indifference) or the recipient found the respondent responsible (and thus a respondent might allege sex discrimination under Title IX on a theory such as selective enforcement or erroneous outcome), this provision would equally apply to give deference to the recipient's determination where the challenge to the determination is solely based on whether the Department might have weighed the evidence differently.

In no manner does this limited deference by the Department restrict the Department's ability to identify patterns or practices of sex discrimination, or to investigate allegations of a recipient committing gross or malicious violations of Title IX or these final regulations. This provision gives a recipient deference *only* as to the decision-maker's weighing of evidence with respect to a determination regarding responsibility. Section 106.44(b)(2) simply clarifies OCR's role and standard of review under these final regulations, by providing that OCR will not conduct *de novo* reviews of determinations absent allegations that the recipient failed in some way to comply with Title IX or these final regulations. The provision is intended to alleviate potential confusion recipients may feel about needing to successfully predict how the Department would make factual determinations "in the shoes" of the recipient's decision-maker.

Indeed, it would be impractical and unhelpful, for all parties, if the Department conducted *de novo* reviews of all recipient determinations. Doing so would contravene the Department's goal of providing consistency, predictability, transparency, and reasonably prompt resolution, in Title IX grievance processes. The Department disagrees that § 106.44(b)(2) "dangerously" lowers the bar of compliance by signaling that recipients need only provide a "bare minimum response" to sexual harassment. The requirements of the final regulations do not constitute a low bar; rather, these final regulations expect – and the Department will hold recipients accountable for – responses to sexual harassment allegations that support complainants and treat both parties fairly by complying with specific, mandatory obligations. For instance, under the final regulations recipients are required to offer supportive measures to every complainant regardless of whether a grievance process is ever initiated.[948] When a recipient does investigate a complainant's sexual harassment allegations, the final regulations prescribe a grievance process that lays out clear, practical steps for processing a formal complaint of Title IX sexual harassment, including requirements that recipients: treat complainants and respondents equitably by providing remedies for complainants when a respondent is found responsible, and a grievance process prior to imposing disciplinary sanctions or other actions that are not supportive measures, against a respondent;[949] objectively evaluate all relevant evidence and give both parties equal opportunity to present witnesses and evidence;[950] not harbor a bias or conflict of interest against either party;[951] and resolve the allegations under designated, reasonably prompt

[948] Section 106.44(a).
[949] Section 106.45(b)(1)(i).
[950] Section 106.45(b)(1)(ii); § 106.45(b)(5)(ii).
[951] Section 106.45(b)(1)(iii).

time frames.[952] The Department will hold recipients accountable to follow these, and all the other, requirements set forth in § 106.45, whether failure to comply affected the complainant, the respondent, or both parties.

The Department does not agree that § 106.44(b)(2) will lead to increased litigation. The final regulations require recipients to protect complainants' equal educational access, while at the same time providing both parties due process protections throughout any grievance process, and § 106.44(b)(2) does not impair the Department's ability to hold recipients accountable for meeting these obligations. The Department does not believe that courts are inclined through private lawsuits to second guess a recipient's determinations regarding responsibility absent allegations that the recipient arrived at a determination due to discrimination, bias, procedural irregularity, deprivation of constitutionally guaranteed due process protections, or other defect that affected the outcome; in other words, the limited deference in § 106.44(b)(2) is no greater than the deference courts generally also give to recipients' determinations.[953] As discussed in the "Litigation Risk" subsection of the "Miscellaneous" section of this preamble, the Department

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[952] Section 106.45(b)(1)(v).

[953] *E.g., Wood v. Strickland*, 420 U.S. 308, 326 (1975), *overruled on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (absent "errors in the exercise of school officials' discretion" that "rise to the level of violations of specific constitutional guarantees" – as would reaching a determination in the complete "absence of evidence" which would be arbitrary and capricious – 42 U.S.C. 1983 "does not extend that right to relitigate in federal court evidentiary questions arising in school disciplinary proceedings"); *Nicholas B. v. Sch. Comm. of Worcester*, 412 Mass. 20, 23-24 (1992) (rejecting a student's claim that the student is "entitled to an independent judicial determination of the facts" concerning the school's finding that the student committed battery") (holding that "In deciding whether the discipline imposed was lawful, no *de novo* judicial fact-finding is required" and rejecting the contention that the State legislature, in enacting the State Civil Rights Act "intended a *de novo* review of the factual determinations of a school committee in an action challenging school discipline") (citing *Wood*, 420 U.S. at 326). The Department's view of restraint from conducting *de novo* review of recipient determinations regarding responsibility is consistent with judicial views recognizing that this type of limited restraint in no way impairs the ability of the courts to effectuate the purposes of Federal and State civil rights statutes. Similarly, § 106.44(b)(2) in no way impairs the Department's ability to effectuate the purposes of Title IX.

believes that these final regulations may have the effect of reducing litigation arising out of recipients' responses to sexual harassment.

These final regulations do not apply to the EEOC and do not dictate how the EEOC will administer Title VII or its implementing regulations. If the Assistant Secretary refers a complaint filed with OCR to the EEOC under Title VII or 28 CFR 42.605, then the EEOC will make a determination under its own regulations and not the Department's regulations. Even if the Department is required to give due weight to the EEOC's determination regarding Title VII under 28 CFR 42.610(a), the Department does not have authority to administer or enforce Title VII. There may be incidents of sexual harassment that implicate both Title VII and Title IX, and this Department will continue to administer Title IX and its implementing regulations and to defer to the EEOC to administer Title VII and its implementing regulations. Nothing in these final regulations precludes the Department from giving due weight to the EEOC's determination regarding Title VII under 28 CFR 42.610(a).[954] The Department recognizes that employers must fulfill their obligations under Title VII and also under Title IX. There is no inherent conflict between Title VII and Title IX, and the Department will construe Title IX and its implementing regulations in a manner to avoid an actual conflict between an employer's obligations under Title VII and Title IX.

The Department wishes to clarify that § 106.44(b)(2) applies only to determinations regarding responsibility reached in a § 106.45 grievance process, which in turn applies only to

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[954] 28 CFR 42.610(c) also states: "If the referring agency determines that the recipient has not violated any applicable civil rights provision(s) which the agency has a responsibility to enforce, the agency shall notify the complainant, the recipient, and the Assistant Attorney General and the Chairman of the EEOC in writing of the basis of that determination." Accordingly, these regulations contemplate that each agency enforces the civil rights provisions that the agency has the responsibility to enforce.

formal complaints (defined in § 106.30 to mean allegations of sexual harassment); the § 106.45 grievance process does not apply to complaints about other types of sex discrimination. Complaints about sex discrimination that is not sexual harassment may be filed with the recipient for processing under the prompt and equitable grievance procedures that recipients must adopt under § 106.8. We appreciate the opportunity to clarify that no regulation or Department practice precludes a person from filing a complaint with OCR, whether or not the person also could have filed, or did file, a complaint with the school.

Changes: Section 106.44(b)(2) is revised to reference not only deliberate indifference but also other sex discrimination under Title IX, and to replace the word "merely" with "solely" in the phrase describing situations in which the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence.

Additional Rules Governing Recipients' Responses to Sexual Harassment

Section 106.44(c) Emergency Removal

Overall Support and Opposition to Emergency Removals

Comments: Some commenters believed that § 106.44(c) provides due process protections for respondents while protecting campus safety. Some commenters supported this provision because it allows educational institutions to respond to situations of immediate danger, while protecting respondents from unfair or unnecessary removals. At least one commenter appreciated the latitude granted to educational institutions under § 106.44(c) to determine how to address safety emergencies arising from allegations of sexual harassment. Some commenters asserted that this provision appropriately reflects many schools' existing behavior risk assessment procedures. Several commenters supported § 106.44(c) and recounted personal stories of how a respondent was removed from classes, or from school, and the negative impact the removal had on that

student's professional, academic, or extracurricular life because the removal seemed to presume the "guilt" of the respondent without allegations ever being proved.

Some commenters wanted to omit the emergency removal provision entirely, arguing that if administrators at the postsecondary level have the power to preemptively suspend or expel a student, on the pretext of an emergency, then every sexual misconduct situation could be deemed an emergency and respondents would never receive the due process protections of the § 106.45 grievance process. One commenter suggested that instead of permitting removals, all allegations of sexual harassment should simply go through a more rapid investigation so that the respondent may remain in school and victims are protected, while any falsely accused respondent is quickly exonerated. Some commenters requested that this removal power be limited because of the negative consequences of involuntary removal; one commenter suggested the provision be modified so that the removal must be "narrowly tailored" and "no more extensive than is strictly necessary" to mitigate the health or safety risk. One commenter asserted that this provision should also require that interim emergency removals be based on objective evidence and on current medical knowledge where appropriate, made by a licensed, qualified evaluator.

Some commenters asserted that emergency removals should not be used just because sexual harassment or assault has been alleged, and that § 106.44(c) should more clearly define what counts as an emergency. Some commenters argued that emergency removals should be allowed if the sexual harassment allegation involves rape, but no emergency removal should be allowed if the sexual harassment allegation involves offensive speech.

Commenters argued that § 106.44(c) is unclear as to what constitutes an immediate threat to health or safety. Several commenters argued that emergency removals should be restricted to instances where there is "an immediate threat to safety" (not health), while other commenters

argued this provision must be limited to "physical" threats to health or safety. Commenters argued that a "threat to health or safety" is too nebulous a concept to justify immediate removal from campus. According to one commenter, even speaking on campus in favor of the NPRM could be construed by schools or student activists as a threat to the emotional or mental "health or safety" of survivors, even though discussion of public policy is core political speech protected by the First Amendment.

One commenter stated that the use of the plural "students and employees" in § 106.44(c) may preclude an institution from taking emergency action when the immediate threat is to a *single* student or employee. Commenters argued that postsecondary institutions need the flexibility to address immediate threats to the safety of one student or employee in the same manner as threats to multiple students or employees. Some commenters asserted that § 106.44(c) would unreasonably limit a postsecondary institution's ability to protect persons and property, or to protect against potential disruption of the educational environment, and argued that an institution should have the discretion to invoke an emergency removal under circumstances beyond those listed in § 106.44(c). Commenters argued that § 106.44(c) is too limiting because it does not allow recipients to pursue an emergency removal where the respondent poses a threat of illegal conduct that is not about a health or safety emergency; commenters contended this will subject the complainant or others to ongoing illegal conduct just because it does not constitute a threat to health or safety. Commenters argued that in addition to a health or safety threat, this provision should consider the need to restore or preserve equal access to education as justification for emergency removals. One commenter asserted that a legitimate reason to institute an emergency removal of a respondent is a threat that the respondent may obstruct the collection of relevant information regarding the sexual harassment allegations at issue.

One commenter cited New York Education Law Article 129-B as an example of a detailed framework under which campus officials may conduct an individualized threat assessment, order an interim suspension, and provide due process; commenters asserted that courts hold that the due process required for an interim suspension does not need to consist of a full hearing.[955] Another commenter argued that this provision would constitute an unprecedented Federal preemption of Oregon's existing State and local student discipline rules, which establish the due process requirements for emergency removals from school. Commenters argued that § 106.44(c) would create a higher level of due process for emergency removals in situations that involve alleged sexual harassment than for any other behavioral violation, and that the proposed rules are unclear whether this heightened procedural requirement is triggered only when a complainant alleges sexual harassment as defined in § 106.30, or is also triggered in any case where a complainant alleges sexual harassment that meets a State law definition or school code of conduct that may define sexual harassment more broadly than conduct meeting the § 106.30 definition.

Some commenters suggested that § 106.44(c) be modified to require periodic review of any emergency removal decision, to promote transparency and eliminate the possibility of leaving a respondent on interim suspension indefinitely. Commenters argued that immediate removal is very traumatic, and respondents who have been removed have a significant potential to react by harming themselves or others thus recipients should reduce these risks by ensuring a safe exit plan with adequate support for the respondent in place.

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[955] Commenters cited: *Haidak v. Univ. of Mass. at Amherst*, 299 F. Supp. 3d 242, 265-66 (D. Mass. 2018), *aff'd in part, vacated in part, remanded by Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56 (1st Cir. 2019).

Commenters asserted that the goal should be to preserve educational opportunities for all parties involved to the extent possible, so § 106.44(c) should require recipients to provide alternative academic accommodations for respondents who are removed. Some commenters suggested that this provision should address a respondent's access to a recipient's program or activity, post-removal. Because emergency removal is not premised on a finding of responsibility and occurs *ex parte*, commenters argued that the recipient should be required to provide a respondent with alternative access to the respondent's academic classes during the period of removal and that failure to do so would be sex discrimination against the respondent. Some commenters argued that as to a respondent who is removed on an emergency basis and later found to be not responsible, the final regulations should require the recipient to mitigate the damage caused by the removal, for example, by allowing the respondent to retake classes or exams missed during the removal. One commenter suggested that a recipient should secure the personal property of the removed person (such as the respondent's vehicle) and be responsible for any loss or damage occurring to personal property during a removal.

Other commenters asserted that an individualized risk assessment should be required after every report of sexual assault. Commenters argued that because insurance statistics show a high degree of recidivism among college rapists, and because Title IX is also supposed to deter discrimination based on sex, schools should be required to consider the safety of other students on their campus if they know there is a possible sexual assailant in their midst.

One commenter suggested that licensing board procedures provide the best model for campus procedures because they offer the closest parallel to the types of behavior evaluated and issues at stake for respondents such as reputation, future livelihood, and future opportunities; the commenter asserted that court precedents hold that both public and private recipients must

follow principles of fundamental due process and fundamental fairness in disciplinary processes,[956] and professional licensing board procedures adequately protect due process. One commenter applauded the Department for proposing to provide greater due process protections than what current procedures typically provide; however, this commenter asserted that Native American students attending institutions funded by the Bureau of Indian Affairs receive strong due process protections, including greater due process with respect to emergency removals than what § 106.44(c) provides, and the commenter contended that the stronger due process protections should be extended to non-Native American institutions.[957] According to this commenter, unlike Native American students attending schools funded by the Bureau of Indian Affairs, non-Native American students are at risk for permanent removal from campus with potentially devastating consequences.

One commenter asserted that § 106.44(c) should explicitly require the recipient to comply with the Clery Act, notify appropriate authorities, and provide any necessary safety interventions. Another commenter stated that recipients should be required to publicly report the annual number of emergency removals the recipient conducts under § 106.44(c).

Some commenters asserted that recipients need to do more than simply remove a respondent from its education program or activity. Commenters argued that trauma from sexual assault may cause a complainant to withdraw from an education program or activity, including due to fear of seeing the respondent, suggested that more resources should be made available to

[956] Commenter cited: *Boehm v. Univ. of Pa. Sch. of Veterinary Med.,* 573 A.2d 575, 578 (Pa. Super. Ct. 1990).
[957] Commenters cited: 25 CFR 42.1-42.10.

complainants, and asserted that the final regulations should specify best practices addressing how a recipient should respond to immediate threats.

Discussion: We appreciate commenters' support for the emergency removal provision in § 106.44(c). Revised in ways explained below, § 106.44(c) provides that in situations where a respondent poses an immediate threat to the physical health and safety of any individual before an investigation into sexual harassment allegations concludes (or where no grievance process is pending), a recipient may remove the respondent from the recipient's education programs or activities. A recipient may need to undertake an emergency removal in order to fulfill its duty not to be deliberately indifferent under § 106.44(a) and protect the safety of the recipient's community, and § 106.44(c) permits recipients to remove respondents in emergency situations that arise out of allegations of conduct that could constitute sexual harassment as defined in § 106.30. Emergency removal may be undertaken in addition to implementing supportive measures designed to restore or preserve a complainant's equal access to education.[958] While we recognize that emergency removal may have serious consequences for a respondent, we decline to remove this provision because where a genuine emergency exists, recipients need the authority to remove a respondent while providing notice and opportunity for the respondent to challenge that decision.

The Department does not believe that rushing all allegations of sexual harassment or sexual assault through expedited grievance procedures adequately promotes a fair grievance process, and forbidding an emergency removal until conclusion of a grievance process (no matter

[958] Section 106.44(a) requires a recipient to offer supportive measures to every complainant, including by having the Title IX Coordinator engage with the complainant in an interactive process that takes into account the complainant's wishes regarding available supportive measures.

how expedited such a process reasonably could be) might impair a recipient's ability to quickly respond to an emergency situation. The § 106.45 grievance process is designed to provide both parties with a prompt, fair investigation and adjudication likely to reach an accurate determination regarding the responsibility of the respondent for perpetrating sexual harassment. Emergency removal under § 106.44(c) is not a substitute for reaching a determination as to a respondent's responsibility for the sexual harassment allegations; rather, emergency removal is for the purpose of addressing imminent threats posed to any person's physical health or safety, which might arise out of the sexual harassment allegations. Upon reaching a determination that a respondent is responsible for sexual harassment, the final regulations do not restrict a recipient's discretion to impose a disciplinary sanction against the respondent, including suspension, expulsion, or other removal from the recipient's education program or activity. Section 106.44(c) allows recipients to address emergency situations, whether or not a grievance process is underway, provided that the recipient first undertakes an individualized safety and risk analysis and provides the respondent notice and opportunity to challenge the removal decision. We do not believe it is necessary to restrict a recipient's emergency removal authority to removal decisions that are "narrowly tailored" to address the risk because § 106.44(c) adequately requires that the threat "justifies" the removal. If the high threshold for removal under § 106.44(c) exists (i.e., an individualized safety and risk analysis determines the respondent poses an immediate threat to any person's physical health or safety), then we believe the recipient should have discretion to determine the appropriate scope and conditions of removal of the respondent from the recipient's education program or activity. Similarly, we decline to require recipients to follow more prescriptive requirements to undertake an emergency removal (such as requiring that the assessment be based on objective evidence, current medical knowledge, or performed by a

licensed evaluator). While such detailed requirements might apply to a recipient's risk assessments under other laws, for the purposes of these final regulations under Title IX, the Department desires to leave as much flexibility as possible for recipients to address any immediate threat to the physical health or safety of any student or other individual. Nothing in these final regulations precludes a recipient from adopting a policy or practice of relying on objective evidence, current medical knowledge, or a licensed evaluator when considering emergency removals under § 106.44(c).

We agree that emergency removal is not appropriate in every situation where sexual harassment has been alleged, but only in situations where an individualized safety and risk analysis determines that an immediate threat to the physical health or safety of any student or other individual justifies the removal, where the threat arises out of allegations of sexual harassment as defined in § 106.30. Because all the conduct that could constitute sexual harassment as defined in § 106.30 is serious conduct that jeopardizes a complainant's equal access to education, we decline to limit emergency removals only to instances where a complainant has alleged sexual assault or rape, or to prohibit emergency removals where the sexual harassment allegations involve verbal harassment. A threat posed by a respondent is not necessarily measured solely by the allegations made by the complainant; we have revised § 106.44(c) to add the phrase "arising from the allegations of sexual harassment" to clarify that the threat justifying a removal could consist of facts and circumstances "arising from" the sexual harassment allegations (and "sexual harassment" is a defined term, under § 106.30). For example, if a respondent threatens physical violence against the complainant in response to the complainant's allegations that the respondent verbally sexually harassed the complainant, the immediate threat to the complainant's physical safety posed by the respondent may "arise from"

the sexual harassment allegations. As a further example, if a respondent reacts to being accused of sexual harassment by threatening physical self-harm, an immediate threat to the respondent's physical safety may "arise from" the allegations of sexual harassment and could justify an emergency removal. The "arising from" revision also clarifies that recipients do not need to rely on, or meet the requirements of, § 106.44(c) to address emergency situations that do not arise from sexual harassment allegations under Title IX (for example, where a student has brought a weapon to school unrelated to any sexual harassment allegations).

We are persuaded by commenters that § 106.44(c) should be clarified. The final regulations revise this provision to state that the risk posed by the respondent must be to the "physical" health or safety, of "any student or other individual," arising from the allegations of sexual harassment. These revisions help ensure that this provision applies to genuine emergencies involving the physical health or safety of one or more individuals (including the respondent, complainant, or any other individual) and not only multiple students or employees. We agree with commenters who asserted that adding the word "physical" before "health or safety" will help ensure that the emergency removal provision is not used inappropriately to prematurely punish respondents by relying on a person's mental or emotional "health or safety" to justify an emergency removal, as the emotional and mental well-being of complainants may be addressed by recipients via supportive measures as defined in § 106.30. The revision to § 106.44(c) adding the word "physical" before "health and safety" and changing "students or employees" to "any student or other individual" also addresses commenters' concerns that the proposed rules were not specific enough about what kind of threat justifies an emergency removal; the latter revision clarifies that the threat might be to the physical health or safety of one or more persons, including the complainant, the respondent themselves, or any other

individual. We decline to remove "health" from the "physical health or safety" phrase in this provision because an emergency situation could arise from a threat to the physical health, or the physical safety, of a person, and because "health or safety" is a relatively recognized term used to describe emergency circumstances.[959]

We decline to add further bases that could justify an emergency removal under § 106.44(c). We recognize the importance of the need to restore or preserve equal access to education, but disagree that it should be a justification for emergency removal; supportive measures are intended to address restoration and preservation of equal educational access, while § 106.44(c) is intended to apply to genuine emergencies that justify essentially punishing a respondent (by separating the respondent from educational opportunities and benefits) arising out of sexual harassment allegations without having fairly, reliably determined whether the respondent is responsible for the alleged sexual harassment. As explained above, we have revised § 106.44(c) to apply only where the immediate threat to a person's physical health or safety arises from the allegations of sexual harassment; this clarifies that where a respondent poses a threat of illegal conduct (perhaps not constituting a threat to physical health or safety) that does not arise from the sexual harassment allegations, this provision does not apply. Nothing in these final regulations precludes a recipient from addressing a respondent's commission of illegal conduct under the recipient's own code of conduct, or pursuant to other laws, where such illegal conduct does not constitute sexual harassment as defined in § 106.30 or is not "arising

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[959] *E.g.*, 20 U.S.C. 1232g(b)(1)(I) (allowing disclosure, without prior written consent, of personally identifiable information from a student's education records "subject to regulations of the Secretary, in connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons"); 34 CFR 99.31(a)(10) and 34 CFR 99.36 (regulations implementing FERPA).

from the sexual harassment allegations." We disagree that a recipient's assessment that a respondent poses a threat of obstructing the sexual harassment investigation, or destroying relevant evidence, justifies an emergency removal under this provision, because this provision is intended to ensure that recipients have authority and discretion to address health or safety emergencies arising out of sexual harassment allegations, not to address all forms of misconduct that a respondent might commit during a grievance process.

The Department appreciates commenters' concerns that State or local law may present other considerations or impose other requirements before an emergency removal can occur. To the extent that other applicable laws establish additional relevant standards for emergency removals, recipients should also heed such standards. To the greatest degree possible, State and local law ought to be reconciled with the final regulations, but to the extent there is a direct conflict, the final regulations prevail.[960] While commenters correctly note that a "full hearing" is not a constitutional due process requirement in all interim suspension situations, § 106.44(c) does not impose a requirement to hold a "full hearing" and in fact, does not impose any pre-deprivation due process requirements; the opportunity for a respondent to challenge an emergency removal decision need only occur post-deprivation. For reasons described in the "Role of Due Process in the Grievance Process" section of this preamble, the Department has determined that postsecondary institutions must hold live hearings to reach determinations regarding responsibility for sexual harassment. However, because § 106.44(c) is intended to give recipients authority to respond quickly to emergencies, and does not substitute for a

[960] *See* discussion under the "Section 106.6(h) Preemptive Effect" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble; *see also* discussion under the "Spending Clause" subsection of the "Miscellaneous" section of this preamble.

determination regarding the responsibility of the respondent for the sexual harassment allegations at issue, recipients need only provide respondents the basic features of due process (notice and opportunity), and may do so after removal rather than before a removal occurs. An emergency removal under § 106.44(c) does not authorize a recipient to impose an interim suspension or expulsion on a respondent *because* the respondent has been accused of sexual harassment. Rather, this provision authorizes a recipient to remove a respondent from the recipient's education program or activity (whether or not the recipient labels such a removal as an interim suspension or expulsion, or uses any different label to describe the removal) when an individualized safety and risk analysis determines that an imminent threat to the physical health or safety of any person, *arising from* sexual harassment allegations, justifies removal.

Section 106.44(c) expressly acknowledges that recipients may be obligated under applicable disability laws to conduct emergency removals differently with respect to individuals with disabilities, and these final regulations do not alter a recipient's obligation to adhere to the IDEA, Section 504, or the ADA. Due to a recipient's obligations under applicable State laws or disability laws, uniformity with respect to how a recipient addresses all cases involving immediate threats to physical health and safety may not be possible. However, the Department believes that § 106.44(c) appropriately balances the need for schools to remove a respondent posing an immediate threat to the physical health or safety of any person, with the need to ensure that such an ability is not used inappropriately, for instance to bypass the prohibition in § 106.44(a) and § 106.45(b)(1)(i) against imposition of disciplinary sanctions or other actions that are not supportive measures against a respondent without first following the § 106.45 grievance process. The Department does not believe that a lower threshold for an emergency removal appropriately balances these interests, even if this means that emergency removals arising from

allegations of sexual harassment must meet a higher standard than when a threat arises from conduct allegations unrelated to Title IX sexual harassment. In response to commenters' reasonable concerns about the potential for confusion, we have added the phrase "arising from the allegations of sexual harassment" (and "sexual harassment" is a defined term under § 106.30) into this provision to clarify that this emergency removal provision only governs situations that arise under Title IX, and not under State or other laws that might apply to other emergency situations.

The Department does not see a need to add language stating that the emergency removal must be periodically reviewed. Emergency removal is not a substitute for the § 106.45 grievance process, and § 106.45(b)(1)(v) requires reasonably prompt time frames for that grievance process. We acknowledge that a recipient could remove a respondent under § 106.44(c) without a formal complaint having triggered the § 106.45 grievance process; in such situations, the requirements in § 106.44(c) giving the respondent notice and opportunity to be heard post-removal suffice to protect a respondent from a removal without a fair process for challenging that outcome, and the Department does not believe it is necessary to require periodic review of the removal decision. We decline to impose layers of complexity onto the emergency removal process, leaving procedures in recipients' discretion; in many cases, recipients will develop a "safe exit plan" as part of implementing an emergency removal, and accommodate students who have been removed on an emergency basis with alternative means to continue academic coursework during a removal period or provide for a respondent to re-take classes upon a return from an emergency removal, or secure personal property left on a recipient's campus when a respondent is removed. We disagree that a recipient's failure to refusal to take any of the foregoing steps necessarily constitutes sex discrimination under Title IX, although a recipient

would violate Title IX by, for example, applying different policies to female respondents than to male respondents removed on an emergency basis. Nothing in the final regulations prevents students who have been removed from asserting rights under State law or contract against the recipient arising from a removal under this provision.

We decline to require an individualized safety and risk analysis upon every reported sexual assault, because the § 106.45 grievance process is designed to bring all relevant evidence concerning sexual harassment allegations to the decision-maker's attention so that a determination regarding responsibility is reached fairly and reliably. A recipient is obligated under § 106.44(a) to provide a complainant with a non-deliberately indifferent response to a sexual assault report, which includes offering supportive measures designed to protect the complainant's safety, and if a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances pursuant to § 106.45(b)(10)(ii). Emergency removals under § 106.44(c) remain an option for recipients to respond to situations where an individualized safety and risk analysis determines that a respondent poses an immediate threat to health or safety.

The Department appreciates commenters' assertions that § 106.44(c) should provide more due process protections, similar to those applied in professional licensing board cases or under Federal laws that apply to schools funded by the Bureau of Indian Affairs; however, we believe that § 106.44(c) appropriately balances a recipient's need to protect individuals from emergency threats, with providing adequate due process to the respondent under such emergency circumstances. Notice and an opportunity to be heard constitute the fundamental features of procedural due process, and the Department does not wish to prescribe specific procedures that a

recipient must apply in emergency situations. Accordingly, the Department does not wish to adopt the same due process protections that commenters asserted are applied in professional licensing revocation proceedings, or that are provided to Native American students in schools funded by the Bureau of Indian Affairs. The Department acknowledges that schools receiving funding from the Bureau of Indian Affairs must provide even greater due process protections than what these final regulations require, but these greater due process protections do not conflict with these final regulations. These final regulations govern a variety of recipients, including elementary and secondary schools and postsecondary institutions, but also recipients that are not educational institutions; for example, some libraries and museums are recipients of Federal financial assistance operating education programs or activities. These final regulations provide the appropriate amount of due process for a wide variety of recipients of Federal financial assistance with respect to a recipient's response to emergency situations.

As discussed in the "Clery Act" subsection of the "Miscellaneous" section of this preamble, postsecondary institutions subject to these Title IX regulations may also be subject to the Clery Act. We decline to state in § 106.44(c) that recipients must also comply with the Clery Act because we do not wish to create confusion about whether § 106.44(c) applies only to postsecondary institutions (because the Clery Act does not apply to elementary and secondary schools). We decline to require recipients to notify authorities, provide safety interventions, or annually report the number of emergency removals conducted under § 106.44(c), because we do not wish to prescribe requirements on recipients beyond what we have determined is necessary to fulfill the purpose of this provision: granting recipients authority and discretion to appropriately respond to emergency situations arising from sexual harassment allegations. Nothing in these final regulations precludes a recipient from notifying authorities, providing safety interventions,

or reporting the number of emergency removals, to comply with other laws requiring such steps or based on a recipient's desire to take such steps. For similar reasons, we decline to require recipients to adopt "best practices" for responding to threats. We note that these final regulations require recipients to offer supportive measures to every complainant, and do not preclude a recipient from providing resources to complainants or respondents.

Changes: We have revised § 106.44(c) so that a respondent removed on an emergency basis must pose an immediate threat to the "physical" health or safety (adding the word "physical") of "any student or other individual" (replacing the phrase "students or employees"). We have also revised the proposed language to clarify that the justification for emergency removal must arise from allegations of sexual harassment under Title IX.

Intersection with the IDEA, Section 504, and ADA

Comments: Some commenters applauded the "saving clause" in § 106.44(c) acknowledging that the respondent may have rights under the IDEA, Section 504, or the ADA. Several commenters asserted that § 106.44(c) would create uncertainty regarding the interplay between Title IX and relevant disabilities laws, which would further exacerbate the uncertainty regarding involuntary removal of students who pose a threat to themselves. Other commenters stated that the result of this provision would likely be different handling of Title IX cases for students with disabilities versus students without disabilities because of the requirements of the IDEA, Section 504, and the ADA. Some commenters believed this provision (and the proposed rules overall) appear to give consideration to the rights and needs of respondents with disabilities, without similar consideration for the rights of complainants or witnesses with disabilities. Commenters asserted that § 106.44(c) is subject to problematic interpretation because by expressly referencing the IDEA, Section 504, and the ADA this provision might wrongly encourage schools to remove

students with disabilities because of implicit bias against students with disabilities, especially students with intellectual disabilities.

One commenter suggested that § 106.44(c) should track the definition of "direct threat" used in the Equal Employment Opportunity Commission's (EEOC) regulations, upheld by the Supreme Court,[961] and as outlined in ADA regulations[962] because this would give recipients and respondents a clearer standard and reduce the chances that removal decisions will be based on generalizations, ignorance, fear, patronizing attitudes, or stereotypes regarding individuals with disabilities.

Some commenters argued that this provision conflicts with the IDEA, Section 504, and the ADA, and that removals are not as simple as conducting a mere risk assessment, because the IDEA governs emergency removal of students in elementary school who are receiving special education and related services.[963] Commenters asserted that under the IDEA, a school administrator cannot make a unilateral risk assessment, and placement decisions cannot be made by an administrator alone; rather, commenters argued, these decisions must be made by a team that includes the parent and relevant members of the IEP (Individualized Education Program) Team and if the conduct in question was a manifestation of a disability, the recipient cannot make a unilateral threat assessment and remove a child from school, absent extreme

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[961] Commenters cited: *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002).
[962] Commenters cited: 28 CFR 35.139(b) ("In determining whether an individual poses a direct threat to the health or safety of others, a public entity must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.").
[963] Commenters cited: *Glen by & through Glen v. Charlotte-Mecklenburg Sch. Bd. of Educ.*, 903 F. Supp. 918, 935 (W.D.N.C. 1995) ("[W]here student poses an immediate threat, [the school] may temporarily suspend up to 10 school days.").

circumstances. These commenters further argued that sometimes certain behaviors are the result or manifestation of a disability, despite being sexually offensive, e.g., a student with Tourette's syndrome blurting out sexually offensive language. Commenters argued that under disability laws schools cannot remove those students from school without complying with the IDEA, Section 504, and the ADA. One commenter recommended that § 106.44(c) require, at a minimum, training for Title IX administrators on the intersection among Title IX and applicable disability laws. In the college setting, the commenter further recommended that Title IX Coordinators not be permitted to impose supportive measures that involve removal without feedback from administrators from the institution's office of disability services, provided that the student is registered with the pertinent office. If a student has an Individualized Education Plan (IEP) in secondary school, commenters recommended that the administration immediately call for a team meeting to determine the next steps.

Other commenters asserted that any language under § 106.44(c) must make clear that the free appropriate public education (FAPE) to which students with disabilities are entitled must continue, even in circumstances when emergency removal is deemed necessary under Title IX. Given this, one commenter recommended that the language in § 106.44(c) clarify that this provision does not supersede rights under disability laws.

Some commenters, while expressing overall support for § 106.44(c), requested additional guidance on the intersection of Title IX, the IDEA, and the ADA, and how elementary and secondary schools would implement § 106.44(c). The commenters asserted that the final regulations should be explicit that regardless of a student's IEP or "504 plan" under the IDEA or Section 504, the student is not allowed to engage in threatening or harmful behavior and that this would be similar to the response a campus might have to any other serious violation, such as

bringing a firearm to class. Commenters also argued that the final regulations should clarify that separation of elementary and secondary school students with disabilities from classroom settings should be rare and only when done in compliance with the IDEA. Commenters argued that recipients must be made aware that a student with a disability does not have to be eligible for a free appropriate public education (FAPE) in order for § 106.44(c) to apply, and that recipients must not be misled into thinking there are different standards for elementary and secondary school and postsecondary education environments when it comes to equal access to educational opportunities.

Other commenters argued that § 106.44(c) may violate compulsory educational laws by removing elementary-age students from school on an emergency basis. When an elementary school student is removed under § 106.44(c), commenters wondered whether the school is supposed to have a designated site for housing or educating removed students during the investigation.

Discussion: Section 106.44(c) states that this provision does not modify any rights under the IDEA, Section 504, or the ADA. In the final regulations, we removed reference to certain titles of the ADA and refer instead to the "Americans with Disabilities Act" so that application of any portion of the ADA requires a recipient to meet ADA obligations while also complying with these final regulations. We disagree that this provision will create ambiguity or otherwise supersede rights that students have under these disability statutes. Additionally, we do not believe that expressly acknowledging recipients' obligations under disability laws incentivizes recipients to remove respondents with disabilities; rather, reference in this provision to those disability laws will help protect respondents from emergency removals that do not also protect the respondents' rights under applicable disability laws. With respect to implicit bias against

students with disabilities, recipients must be careful to ensure that all emergency removal proceedings are impartial, without bias or conflicts of interest[964] and the final regulations do not preclude a recipient from providing training to employees, including Title IX personnel, regarding a recipient's obligations under both Title IX and applicable disability laws. Any different treatment between students without disabilities and students with disabilities with respect to emergency removals, may occur due to a recipient's need to comply with the IDEA, Section 504, the ADA, or other disability laws, but would not be permissible due to bias or stereotypes against individuals with disabilities.

As explained in the "Directed Question 5: Individuals with Disabilities" subsection of the "Directed Questions" section of this preamble, recipients have an obligation to comply with applicable disability laws with respect to complainants as well as respondents (and any other individual involved in a Title IX matter, such as a witness), and the reference to disability laws in § 106.44(c) does not obviate recipients' responsibilities to comply with disability laws with respect to other applications of these final regulations.

The Department appreciates commenters' suggestion to mirror the "direct threat" language utilized in ADA regulations; however, we have instead revised § 106.44(c) to refer to the physical health or safety of "any student or other individual" because this language better aligns this provision with the FERPA health and safety emergency exception, and avoids the

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[964] Section 106.45(b)(1)(iii) requires all Title IX Coordinators (and investigators, decision-makers, and persons who facilitate informal resolution processes) to be free from conflicts of interest or bias against complainants and respondents generally or against an individual complainant or respondent, and requires training for such personnel that includes (among other things) how to serve impartially. A "respondent" under § 106.30 means any individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment; thus, a Title IX Coordinator interacting with a respondent undergoing an emergency removal must serve impartially, without conflict of interest or bias.

confusion caused by the "direct threat" language under ADA regulations because those regulations refer to a "direct threat to the health or safety *of others*"[965] which does not clearly encompass a threat to the respondent themselves (e.g., where a respondent threatens self-harm). By revising § 106.44(c) to refer to a threat to the physical health or safety "of any student or other individual" this provision does encompass a respondent's threat of self-harm (when the threat arises from the allegations of sexual harassment), and is aligned with the language used in FERPA's health or safety exception.[966] We note that recipients still need to comply with applicable disability laws, including the ADA, in making emergency removal decisions.

The Department appreciates commenters' varied concerns that complying with these final regulations, and with disability laws, may pose challenges for recipients, including specific challenges for elementary and secondary schools, and postsecondary institutions, because of the intersection among the IDEA, Section 504, the ADA, and how to conduct an emergency removal under these final regulations under Title IX. The Department will offer technical assistance to recipients regarding compliance with laws under the Department's enforcement authority. However, the Department does not believe that recipients' obligations under multiple civil rights laws requires changing the emergency removal provision in § 106.44(c) because this is an important provision to ensure that recipients have flexibility to balance the need to address

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[965] 28 CFR 35.139(b) ("In determining whether an individual *poses a direct threat to the health or safety of others*, a public entity must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.") (emphasis added).

[966] *E.g.*, 20 U.S.C. 1232g(b)(1)(I) (allowing disclosure, without prior written consent, of personally identifiable information from a student's education records "subject to regulations of the Secretary, in connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons"); *see also* regulations implementing FERPA, 34 CFR 99.31(a)(10) and 99.36.

emergency situations with fair treatment of a respondent who has not yet been proved responsible for sexual harassment. The Department does not believe that applicable disability laws, or other State laws, render a recipient unable to comply with all relevant legal obligations. For instance, with respect to compulsory education laws, nothing in § 106.44(c) relieves a recipient from complying with State laws requiring that students under a certain age receive government-provided education services. As a further example, nothing in § 106.44(c) prevents a recipient from involving a student's IEP team before making an emergency removal decision, and § 106.44(c) does not require a recipient to remove a respondent where the recipient has determined that the threat posed by the respondent, arising from the sexual harassment allegations, is a manifestation of a disability such that the recipient's discretion to remove the respondent is constrained by IDEA requirements.

Changes: We have replaced the phrase "students or employees" with the phrase "any student or other individual" in § 106.44(c) and removed specification of certain titles of the ADA, instead referencing the whole of the ADA.

Post-Removal Challenges

Comments: Some commenters supported § 106.44(c) giving respondents notice and opportunity to challenge the removal immediately after the removal, because during a removal a respondent might lose a significant amount of instructional time while waiting for a grievance proceeding to conclude, and being out of school can harm the academic success and emotional health of the removed student. Other commenters asserted that respondents should not be excluded from a recipient's education program or activity until conclusion of a grievance process, and a post-removal challenge after the fact is insufficient to assure due process for respondents, especially

because § 106.44(c) does not specify requirements for the time frame or procedures used for a challenging the removal decision.

Some commenters argued that the ability of a removed respondent to challenge the removal would pose an unnecessary increased risk to the safety of the community, especially because § 106.44(c) already requires the recipient to determine the removal was justified by an individualized safety and risk analysis. Commenters argued that a school's emergency removal decision should stand until a threat assessment team has met and given a recommendation to affirm or overrule the decision.

Some commenters asserted that § 106.44(c) is ambiguous about the right to a post-removal challenge and argued that the failure to provide more clarity is problematic because it is unclear if the "immediate" challenge must occur minutes, hours, one day, or several days after the removal. Commenters argued that a plain language interpretation of "immediately" may require the challenge to occur minutes after the suspension, but this could jeopardize the safety of the complainant and the community, because the very point of an interim suspension is to remove a known risk from campus. Other commenters argued that requiring an "immediate" post-removal challenge could undermine the respondent's due process rights, because the respondent might not be physically present on campus when the interim suspension (e.g., removal) is issued. Some commenters argued that there should be a delay between when the removal occurred and when the opportunity to challenge occurs, because students and employees are often afraid of providing information to college administrations due to legitimate, reasonable fear for their own safety. Commenters requested that this provision be modified to give the respondent a challenge opportunity "as soon as reasonably practicable" rather than

"immediately." Commenters asked whether providing a challenge opportunity "immediately" must, or could, be the same as the "prompt" time frames required under § 106.45.

Discussion: The Department appreciates commenters' support of the post-removal challenge opportunity provided in § 106.44(c). The Department disagrees with commenters who suggested that no challenge to removals ought to be possible, and believes that § 106.44(c) appropriately balances the interests involved in emergency situations. We do not believe that prescribing procedures for the post-removal challenge is necessary or desirable, because this provision ensures that respondents receive the essential due process requirements of notice and opportunity to be heard while leaving recipients flexibility to use procedures that a recipient deems most appropriate.[967] These final regulations aim to improve the perception and reality of the fairness and accuracy by which a recipient resolves allegations of sexual harassment, and therefore the § 106.45 grievance process prescribes a consistent framework and specific procedures for resolving formal complaints of sexual harassment. By contrast, § 106.44(c) is not designed to resolve the underlying allegations of sexual harassment against a respondent, but rather to ensure that recipients have the authority and discretion to appropriately handle emergency situations that may arise from allegations of sexual harassment. As discussed above, the final regulations revise the language in § 106.44(c) to add the phrase "arising from the allegations of sexual harassment," which clarifies that the facts or circumstances that justify a removal might not be the same as the sexual harassment allegations but might "arise from" those allegations.

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[967] *E.g.*, *Goss v. Lopez*, 419 U.S. 565, 582-83 (1975) ("Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable").

The Department disagrees that a post-removal challenge is unnecessary because the individualized safety and risk analysis already determined that removal was justified; the purpose of a true emergency removal is to authorize a recipient to respond to immediate threats even without providing the respondent with pre-deprivation notice and opportunity to be heard because this permits a recipient to protect the one or more persons whose physical health or safety may be in jeopardy. The respondent's first opportunity to challenge the removal (e.g., by presenting the recipient with facts that might contradict the existence of an immediate threat to physical health or safety) might be after the recipient already reached its determination that removal is justified, and due process principles (whether constitutional due process of law, or fundamental fairness) require that the respondent be given notice and opportunity to be heard.[968] Section 106.44(c) does not preclude a recipient from convening a threat assessment team to review the recipient's emergency removal determination, but § 106.44(c) still requires the recipient to give the respondent post-removal notice and opportunity to challenge the removal decision.

The Department expects the emergency removal process to be used in genuine emergency situations, but when it is used, recipients must provide an opportunity for a removed individual to challenge their removal immediately after the removal. The term "immediately" will be fact-specific, but is generally understood in the context of a legal process as occurring without delay, as soon as possible, given the circumstances. "Immediately" does not require a time frame of "minutes" because in the context of a legal proceeding the term immediately is not

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[968] *Goss*, 419 U.S. at 580 ("At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing.").

generally understood to mean an absolute exclusion of any time interval. "Immediately" does not imply the same time frame as the "reasonably prompt" time frames that govern the grievance process under § 106.45, because "immediately" suggests a more pressing, urgent time frame than "reasonable promptness." This is appropriate because § 106.44(c) does not require a recipient to provide the respondent with any pre-deprivation notice or opportunity to be heard, so requiring post-deprivation due process protections "immediately" after the deprivation ensures that a respondent's interest in access to education is appropriately balanced against the recipient's interest in quickly addressing an emergency situation posed by a respondent's risk to the physical health or safety of any student or other individual. We decline to require the post-removal notice and challenge to be given "as soon as reasonably practicable" instead of "immediately" because that would provide the respondent less adequate post-deprivation due process protections.

Changes: None.

No Stated Time Limitation for the Emergency Removal

Comments: Some commenters viewed the absence of a time limitation with respect to how long an emergency removal could be as a source of harm to both respondents and complainants. Commenters asserted that, given how long the grievance process could take, students and employees removed from their education or employment until conclusion of the grievance process could experience considerable negative consequences. Commenters argued that the proposed rules should not encourage emergency removal, particularly not when other, less severe measures could be taken to ensure safety pending an investigation. Commenters proposed limiting an emergency removal to seven days, during which time an institution would determine in writing that an immediate threat to health or safety exists, warranting the emergency action, and if no such determination is reached, the respondent would be reinstated.

Discussion: The final regulations require schools to offer supportive measures to complainants and permit recipients to offer supportive measures to respondents. We decline to require emergency removals in every situation where a formal complaint triggers a grievance process. The grievance process is designed to conclude promptly, and the issue of whether a respondent needs to be removed on an emergency basis should not arise in most cases, since § 106.44(c) applies only where emergency removal is justified by an immediate threat to the physical health or safety of any student or other individual. Revised § 106.44(a), and revised § 106.45(b)(1)(i), prohibit a recipient from imposing against a respondent disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, without following the § 106.45 grievance process. Emergency removal under § 106.44(c) constitutes an exception to those prohibitions, and should not be undertaken in every situation where sexual harassment has been alleged. Rather, emergency removal is appropriate only when necessary to address imminent threats to a person's physical health or safety arising from the allegations of sexual harassment.

The Department declines to put any temporal limitation on the length of a valid emergency removal, although nothing in the final regulations precludes a recipient from periodically assessing whether an immediate threat to physical health or safety is ongoing or has dissipated.

Changes: None.

"removal"

Comments: Commenters requested clarification in the following regards: Would removing a respondent from a class, or changing the respondent's class schedule, before a grievance process is completed (or where no formal complaint has initiated a grievance process), require a recipient to undertake emergency removal procedures? Under § 106.44(c) must a recipient remove a

respondent from the entirety of recipient's education program or activity, or may a recipient choose to only remove the respondent to the extent the individual poses an emergency in a specific setting, i.e., a certain class, student organization, living space, athletic team, etc.?

Commenters argued that the § 106.30 definition of supportive measures and § 106.44(c) regarding emergency removal could lead to confusion among recipients about what steps they can take to protect a complainant's safety and access to education prior to conclusion of a grievance process, or where no formal complaint has initiated a grievance process. One commenter suggested modifying this provision to expressly permit partial exclusion from programs or activities by adding the phrase "or any part thereof."

Commenters argued that § 106.44(c) would make it too difficult to remove a respondent before the completion of a disciplinary proceeding absent an extreme emergency. Commenters suggested that the Department should consider a more nuanced approach that provides schools with a range of options, short of emergency removal, that are proportionate to the alleged misconduct and meet the needs of the victim. Commenters requested that § 106.44(c) be revised to allow an appropriate administrator (such as a dean of students), in consultation with the Title IX Coordinator, discretion to determine the appropriateness of an emergency removal based on a standard that is in the best interest of the institution.

Some commenters argued that even where an emergency threat exists, § 106.44(c) does not provide a time frame in which the recipient must make this emergency removal decision, leaving survivors vulnerable to daily contact with a dangerous respondent. Commenters asserted that recipients should be able to remove a respondent from a dorm or shared classes before conclusion of a disciplinary proceeding, particularly when it is clear that the survivor's education will be harmed otherwise. Commenters asserted that 80 percent of rapes and sexual assaults are

committed by someone known to the victim,[969] which means that it is highly likely that the victim and perpetrator share a dormitory, a class, or other aspect of the school environment and that § 106.44(c) (combined with the § 106.30 definition of "supportive measures") leaves victims in continual contact with their harasser, thereby prioritizing the education of accused harassers over the education of survivors. Commenters argued that survivors should not have to wait until the end of a grievance process to be protected from seeing a perpetrator in class or on campus, and this provision would pressure survivors to file formal complaints when many survivors do not want a formal process for valid personal reasons, because a formal process would be the only avenue for ensuring that a "guilty" respondent will be suspended or expelled. Commenters recommended adding language to clarify that nothing shall prevent elementary and secondary schools from implementing an "alternate assignment" during the pendency of an investigation, provided that the same is otherwise permitted by law.

One commenter suggested combining the emergency removal and supportive measures provisions into a single "interim measures" provision.

Discussion: The Department believes the § 106.30 definition of supportive measures, and § 106.44(c) governing emergency removals, in the context of the revised requirements in § 106.44(a) and § 106.45(b)(1)(i) (requiring recipients to offer supportive measures to complainants while not imposing against respondents disciplinary sanctions or other actions that are not "supportive measures") provide a wide range and variety of options for a recipient to

[969] Commenters cited: U.S. Dep't. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Special Report: Rape and Sexual Assault Victimization Among College-Age Females, 1995-2013* (2014).

preserve equal educational access, protect the safety of all parties, deter sexual harassment, and respond to emergency situations.

Under § 106.30, a supportive measure must not be punitive or disciplinary, but may burden a respondent as long as the burden is not unreasonable. As discussed in the "Supportive Measures" subsection of the "Section 106.30 Definitions" section of this preamble, whether a certain measure unreasonably burdens a respondent requires a fact-specific inquiry. Changing a respondent's class schedule or changing a respondent's housing or dining hall assignment may be a permissible supportive measure depending on the circumstances. By contrast, removing a respondent from the entirety of the recipient's education programs and activities, or removing a respondent from one or more of the recipient's education programs or activities (such as removal from a team, club, or extracurricular activity), likely would constitute an unreasonable burden on the respondent or be deemed disciplinary or punitive, and therefore would not likely qualify as a supportive measure. Until or unless the recipient has followed the § 106.45 grievance process (at which point the recipient may impose any disciplinary sanction or other punitive or adverse consequence of the recipient's choice), removals of the respondent from the recipient's education program or activity[970] need to meet the standards for emergency removals under § 106.44(c).[971] Supportive measures provide one avenue for recipients to protect the safety of parties and

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[970] As discussed in the "Section 106.44(a) 'education program or activity'" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this preamble, the Title IX statute and existing regulations provide definitions of "program or activity" that apply to interpretation of a recipient's "education program or activity" in these final regulations, and we have clarified in § 106.44(a) that for purposes of responding to sexual harassment a recipient's education program or activity includes circumstances over which the recipient exercised substantial control. 20 U.S.C. 1687; 34 CFR 106.2(h); 34 CFR 106.2(i) (defining "recipient"); 34 CFR 106.31(a) (referring to "any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance").

[971] *Cf.* § 106.44(d) (a non-student employee-respondent may be placed on administrative leave (with or without pay) while a § 106.45 grievance process is pending, without needing to meet the emergency removal standards in § 106.44(c)).

permissibly may affect and even burden the respondent, so long as the burden is not unreasonable. Supportive measures may include, for example, mutual or unilateral restrictions on contact between parties or re-arranging class schedules or classroom seating assignments, so complainants need not remain in constant or daily contact with a respondent while an investigation is pending, or even where no grievance process is pending.

Whether an elementary and secondary school recipient may implement an "alternate assignment" during the pendency of an investigation (or without a grievance process pending), in circumstances that do not justify an emergency removal, when such action is otherwise permitted by law, depends on whether the alternate assignment constitutes a disciplinary or punitive action or unreasonably burdens the respondent (in which case it would not qualify as a supportive measure as defined in § 106.30).[972] Whether an action "unreasonably burdens" a respondent is fact-specific, but should be evaluated in light of the nature and purpose of the benefits, opportunities, programs and activities, of the recipient in which the respondent is participating, and the extent to which an action taken as a supportive measure would result in the respondent forgoing benefits, opportunities, programs, or activities in which the respondent has been participating. An alternate assignment may, of course, be appropriate when an immediate threat justifies an emergency removal of the respondent because under the final regulations, emergency removal may justify total removal from the recipient's education program or activity, so offering the respondent alternate assignment is included within the potential scope of an emergency

[972] For discussion of alternate assignments when the respondent is a non-student employee, see the "Section 106.44(d) Administrative Leave" subsection of the "Additional Rules Governing Recipients' Responses to Sexual Harassment" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this preamble.

removal. Under § 106.44(a), the recipient must offer supportive measures to the complainant, and if a particular action – such as alternate assignment – does not, under specific circumstances, meet the definition of a supportive measure, then the recipient must carefully consider other individualized services, reasonably available, designed to restore or preserve the complainant's equal educational access and/or protect safety and deter sexual harassment, that the recipient will offer to the complainant.

We do not believe that the final regulations incentivize complainants to file formal complaints when they otherwise do not wish to do so just to avoid contacting or communicating with a respondent, because supportive measures permit a range of actions that are non-punitive, non-disciplinary, and do not *unreasonably* burden a respondent, such that a recipient often may implement supportive measures that do meet a complainant's desire to avoid contact with the respondent. For example, if a complainant and respondent are both members of the same athletic team, a carefully crafted unilateral no-contact order could restrict a respondent from communicating directly with the complainant so that even when the parties practice on the same field together or attend the same team functions together, the respondent is not permitted to directly communicate with the complainant. Further, the recipient may counsel the respondent about the recipient's anti-sexual harassment policy and anti-retaliation policy, and instruct the team coaches, trainers, and staff to monitor the respondent, to help enforce the no-contact order and deter any sexual harassment or retaliation by the respondent against the complainant. Further, nothing in the final regulations, or in the definition of supportive measures in § 106.30, precludes a recipient from altering the nature of supportive measures provided, if circumstances change. For example, if the Title IX Coordinator initially implements a supportive measure prohibiting the respondent from directly communicating with the complainant, but the parties

later each independently decide to take the same lab class, the Title IX Coordinator may, at the complainant's request, reevaluate the circumstances and offer the complainant additional supportive measures, such as requiring the professor teaching the lab class to ensure that the complainant and respondent are not "teamed up" or assigned to sit near each other or assigned as to be "partners," during or as part of the lab class.

Commenters correctly observe that the final regulations prohibit suspending or expelling a respondent without first following the § 106.45 grievance process, or unless an emergency situation justices removal from the recipient's education program or activity (which removal may, or may not, be labeled a "suspension" or "expulsion" by the recipient). We do not believe this constitutes unfairness to survivors, or poses a threat to survivors' equal educational access, because there are many actions that meet the definition of supportive measures that may restore or preserve a complainant's equal access, protect a complainant's safety, and/or deter sexual harassment without punishing or unreasonably burdening a respondent. As discussed in the "Section 106.45(b)(1)(iv) Presumption of Non-Responsibility" subsection of the "General Requirements for § 106.45 Grievance Process" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble, refraining from treating people accused of wrongdoing as responsible for the wrongdoing prior to evidence proving the person is responsible is a fundamental tenet of American justice. These final regulations appropriately ensure that respondents are not unfairly, prematurely *treated* as responsible before being proved responsible, with certain reasonable exceptions: emergency removals, administrative leave for employees, and informal resolution of a formal complaint that resolves the allegations without a full investigation and adjudication but may result in consequences for a respondent including suspension or expulsion. In this way, the final regulations ensure that every complainant is

offered supportive measures designed to preserve their equal educational access and protect their safety (even without any proof of the merits of the complainant's allegations) consistent with due process protections and fundamental fairness. As an example, a complainant understandably may desire as a supportive measure the ability to avoid being in the same classroom with a respondent, whether or not the complainant wants to file a formal complaint. A school may conclude that transferring the respondent to a different section of that class (e.g., that meets on a different day or different time than the class section in which the complainant and respondent are enrolled) is a reasonably available supportive measure that preserves the complainant's equal access and protects the complainant's safety or deters sexual harassment, while not constituting an unreasonable burden on the respondent (because the respondent is still able to take that same class and earn the same credits toward graduation, for instance). If, on the other hand, that class in which both parties are enrolled does not have alternative sections that meet at different times, and precluding the respondent from completing that class would delay the respondent's progression toward graduation, then the school may determinate that requiring the respondent to drop that class would constitute an unreasonable burden on the respondent and would not quality as a supportive measure, although granting the complainant an approved withdrawal from that class with permission to take the class in the future, would of course constitute a permissible supportive measure for the recipient to offer the complainant. Alternatively in such a circumstance (where the complainant, like the respondent, cannot withdraw from that class and take it later without delaying progress toward graduation), the school may offer the complainant as a supportive measure, for example, a one-way no contact order that prohibits the respondent from communicating with the complainant and assigns the respondent to sit across the classroom from the complainant. As such an example shows, these final regulations allow, and require, a

recipient to carefully consider the specific facts and circumstances unique to each situation to craft supportive measures to help a complainant without prematurely penalizing a respondent.

The Department does not believe it is necessary or appropriate to require a time frame for when a recipient must undertake an emergency removal, because the risk arising from the sexual harassment allegations that may justify a removal may arise at any time; further, § 106.44(a) requires a recipient to respond "promptly" to sexual harassment, and if an emergency removal is a necessary part of a recipient's non-deliberately indifferent response then such a response must be prompt. We reiterate that emergency removal is not about reaching factual conclusions about whether the respondent is responsible for the underlying sexual harassment allegations. Emergency removal is about determining whether an immediate threat arising out of the sexual harassment allegations justifies removal of the respondent.

We appreciate the opportunity to clarify that, where the standards for emergency removal are met under § 106.44(c), the recipient has discretion whether to remove the respondent from all the recipient's education programs and activities, or to narrow the removal to certain classes, teams, clubs, organizations, or activities. We decline to add the phrase "or any part thereof" to this provision because a "part of" a program may not be readily understood, and we believe the authority to exclude *entirely* includes the lesser authority to exclude partially.

Section 106.44(a) and § 106.45(b)(1)(i) forbid a recipient from imposing disciplinary sanctions (or other actions that are not supportive measures) on a respondent without first following a grievance process that complies with § 106.45. We reiterate that a § 106.44(c) emergency removal may be appropriate whether or not a grievance process is underway, and that the purpose of an emergency removal is to protect the physical health or safety of any student or other individual to whom the respondent poses an immediate threat, arising from allegations of

sexual harassment, not to impose an interim suspension or expulsion on a respondent, or penalize a respondent by suspending the respondent from, for instance, playing on a sports team or holding a student government position, while a grievance process is pending. The final regulations respect complainants' autonomy and understand that not every complainant wishes to participate in a grievance process, but a complainant's choice not to file a formal complaint or not to participate in a grievance process does not permit a recipient to bypass a grievance process and suspend or expel (or otherwise discipline, penalize, or unreasonably burden) a respondent accused of sexual harassment. An emergency removal under § 106.44(c) separates a respondent from educational opportunities and benefits, and is permissible only when the high threshold of an immediate threat to a person's physical health or safety justifies the removal.

Because the purposes of, and conditions for, "supportive measures" as defined in § 106.30 differ from the purposes of, and conditions for, an emergency removal under § 106.44(c), we decline to combine these provisions. Both provisions, and the final regulations as a whole, do not prioritize the educational needs of a respondent over a complainant, or vice versa, but aim to ensure that complainants receive a prompt, supportive response from a recipient, respondents are treated fairly, and recipients retain latitude to address emergency situations that may arise.

Changes: None.

"individualized safety and risk analysis"

Comments: Many commenters argued that the lack of guidance in § 106.44(c) on the requirements for conducting the "individualized safety and risk analysis" is confusing, and should be better defined because it could lead to inconsistent results from school to school, county to county, and State to State. Some commenters expressed overall support for this provision, but argued that the power of removal should not be wielded without careful

consideration, and requested clarity about who would undertake the risk analysis (e.g., an internal or external individual on behalf of a recipient). Other commenters stated that § 106.44(c) should list factors to consider in the required safety and risk analysis including: whether violence was alleged (which commenters asserted is rare in cases involving alleged incapacitation), how long the complainant took to file a complaint, whether the complainant has reported the allegations to the police, and whether there are other, less restrictive measures that could be taken. Commenters argued that the risk assessment requirement may prevent the removal of respondents who are in fact dangerous because context and other nuances may not be accounted for in the assessment. One commenter stated that the § 106.44(c) safety and risk analysis requirements are "good, but sometimes not realistic" because threat assessment teams do not meet daily, and it is sometimes necessary to decide a removal in a matter of hours. Other commenters stated some recipients have already incorporated this sort of threat assessment into their decision matrix because postsecondary institutions are obligated to take reasonable steps to address dangers or threats to their students.

Some commenters were concerned that institutions lack sufficient resources to properly conduct the required safety and risk analysis, that institutions lack the proper tools to conduct assessments calibrated to the age and developmental issues of the respondent, and that institutions lack the training and knowledge to properly implement such assessments. Commenters asserted that this provision would require institutions to train employees to conduct an individualized safety and risk analysis before removing students on an emergency basis, but that such assessments are rarely within the capacity or expertise of a single employee, and thus may require a committee or task force dedicated for this purpose.

Discussion: Recipients are entitled to use § 106.44(c) to remove a respondent on an emergency basis, only where there is an immediate threat to the physical health or safety of any student or other individual. The "individualized safety or risk analysis" requirement ensures that the recipient should not remove a respondent from the recipient's education program or activity pursuant to § 106.44(c) unless there is more than a generalized, hypothetical, or speculative belief that the respondent may pose a risk to someone's physical health or safety. The Department believes that the immediate threat to physical health or safety threshold for justifying a removal sufficiently restricts § 106.44(c) to permitting only emergency removals and believes that further describing what might constitute an emergency would undermine the purpose of this provision, which is to set a high threshold for emergency removal yet ensure that the provision will apply to the variety of circumstances that could present such an emergency. The Department also believes that the final regulations adequately protect respondents, since in cases where the recipient removes a respondent, the recipient must follow appropriate procedures, including bearing the burden of demonstrating that the removal meets the threshold specified by the final regulations, based on a factual, individualized safety and risk analysis. We understand commenters' concerns that the individualized, fact-based nature of an emergency removal assessment may lead to different results from school to school or State to State, but different results may be reasonable based on the unique circumstances presented in individual situations.

Because the safety and risk analysis under § 106.44(c) must be "individualized," the analysis cannot be based on general assumptions about sex, or research that purports to profile characteristics of sex offense perpetrators, or statistical data about the frequency or infrequency of false or unfounded sexual misconduct allegations. The safety and risk analysis must be individualized with respect to the particular respondent and must examine the circumstances

"arising from the allegations of sexual harassment" giving rise to an immediate threat to a person's physical health or safety. These circumstances may include factors such as whether violence was allegedly involved in the conduct constituting sexual harassment, but could also include circumstances that "arise from" the allegations yet do not constitute the alleged conduct itself; for example, a respondent could pose an immediate threat of physical self-harm in reaction to being accused of sexual harassment. For a respondent to be removed on an emergency basis, the school must determine that an immediate threat exists, and that the threat justifies removal. Section 106.44(c) does not limit the factors that a recipient may consider in reaching that determination.

We appreciate commenters' concerns that performing safety and risk analyses may require a recipient to expend resources or train employees, but without an individualized safety and risk analysis a recipient's decision to remove a respondent might be arbitrary, and would fail to apprise the respondent of the basis for the recipient's removal decision so that the respondent has an opportunity to challenge the decision. Procedural due process of law and fundamental fairness require that a respondent deprived of an educational benefit be given notice and opportunity to contest the deprivation;[973] without knowing the individualized reasons why a recipient determined that the respondent posed a threat to someone's physical health or safety, the respondent cannot assess a basis for challenging the recipient's removal decision. Recipients may choose to provide specialized training to employees or convene interdisciplinary threat assessment teams, or be required to take such actions under other laws, and § 106.44(c) leaves

[973] *See* the "Role of Due Process in the Grievance Process" section of this preamble.

recipients flexibility to decide how to conduct an individualized safety and risk analysis, as well as who will conduct the analysis.

Changes: None.

"provides the respondent with notice and an opportunity to challenge the decision immediately following the removal"

Comments: One commenter stated that during any emergency removal hearing, schools should be required to share all available evidence with the respondent, permit that person an opportunity to be heard, and allow the respondent's advisor to cross-examine any witnesses. According to the commenter, if these full procedural rights are not extended, this provision would create a loophole that allows emergency measures to effectively replace a full grievance process. Commenters also argued that a recipient's emergency removal decisions would often be hastily made, and that recipients would ignore requirements that a removed student be given the opportunity to review or challenge the decision made by the recipient. Commenters argued that § 106.44(c) should include express language safeguarding students against abusive practices during the challenge procedure. One commenter suggested adding the word "meaningful" so the respondent would have "a meaningful opportunity" to challenge the removal decision, asserting that certain institutions of higher education in California have not consistently given respondents meaningful opportunities to "make their case." While supportive of § 106.44(c), one commenter suggested modifying this provision to require the recipient to send the respondent written notice of the specific facts that supported the recipient's decision to remove the student, so the respondent can meaningfully challenge the removal decision.

Some commenters asserted that if the respondent has a right to challenge the emergency removal, the recipient must offer an equitable opportunity for the complainant to contest an

overturned removal or participate in the respondent's challenge process. Other commenters asked whether § 106.44(c) requires, or allows, a recipient to notify the complainant that a respondent has been removed under this provision, that a respondent is challenging a removal decision, or that a removal decision has been overturned by the recipient after a respondent's challenge.

Commenters argued that § 106.44(c) would also effectively mandate that an institution's employees must be trained to conduct hearings or other undefined post-removal procedures in the event that a respondent exercises the right to challenge the emergency removal. Commenters argued that this burden likely would require a dedicated officer or committee to carry out procedural obligations that did not previously exist, and these burdens were not contemplated at the time of the recipient's acceptance of the Federal funding. Commenters argued that § 106.44(c) would provide rights to at-will employees that are otherwise unavailable, restricting employment actions that are normally within the discretion of an employer.

Commenters requested clarification about the procedures for challenging a removal decision, such as: whether a respondent's opportunity challenge the emergency removal means the recipient must, or may, use processes under § 106.45 to meet its obligations, including whether evidence must be gathered, witnesses must be interviewed, or a live hearing with cross-examination must be held; whether the recipient, or respondent, will bear the burden of proof that the removal decision was correct or incorrect; whether the recipient must, or may, involve the complainant in the challenge procedure; whether the recipient must, or may, use the investigators and decision-makers that have been trained pursuant to § 106.45 to conduct the post-removal challenge procedure; and whether the determinations about an emergency removal

must, or may, influence a determination regarding responsibility during a grievance process under § 106.45.

Discussion: The Department disagrees that § 106.44(c) poses a possible loophole through which recipients may bypass giving respondents the due process protections in the § 106.45 grievance process. The threshold for an emergency removal under § 106.44(c) is adequately high to prevent recipients from using emergency removal as a pretense for imposing interim suspensions and expulsions. We do not believe it is necessary to revise § 106.44(c) to prevent recipients from imposing "abusive" procedures on respondents; recipients will be held accountable for reaching removal decisions under the standards of § 106.44(c), giving recipients adequate incentive to give respondents the immediate notice and challenge opportunity following a removal decision. We do not believe that recipients will make emergency removal decisions "hastily," and a respondent who believes a recipient has violated these final regulations may file a complaint with OCR.

The Department does not want to prescribe more than minimal requirements on recipients for purposes of responding to emergency situations. We decline to require written notice to the respondent because minimal due process requires some kind of notice, and compliance with a notice requirement suffices for a recipient's handling of an emergency situation.[974] We decline to add the modifier "meaningful" before "opportunity" because the basic due process requirement of an opportunity to be heard entails an opportunity that is appropriate under the circumstances,

[974] *E.g.*, *Goss*, 419 U.S. at 578-79 (holding that in the public school context "the interpretation and application of the Due Process Clause are intensely practical matters" that require at a minimum notice and "opportunity for hearing appropriate to the nature of the case") (internal quotation marks and citations omitted).

which ensures a meaningful opportunity.[975] While a recipient has discretion (subject to FERPA and other laws restricting the nonconsensual disclosure of personally identifiable information from education records) to notify the complainant of removal decisions regarding a respondent, or post-removal challenges by a respondent, we do not require the complainant to receive notice under § 106.44(c) because not every emergency removal directly relates to the complainant. As discussed above, circumstances that justify removal must be "arising from the allegations of sexual harassment" yet may consist of a threat to the physical health or safety of a person other than the complainant (for example, where the respondent has threatened self-harm).[976]

The Department disagrees that § 106.44(c) requires a recipient to go through excessively burdensome procedures prior to removing a respondent on an emergency basis. The seriousness of the consequence of a recipient's decision to removal of a student or employee, without a hearing beforehand, naturally requires the school to meet a high threshold (i.e., an individualized safety and risk assessment shows that the respondent poses an immediate threat to a person's physical health or safety justifying removal). At the same time, § 106.44(c) leaves recipients wide latitude to select the procedures for giving notice and opportunity to challenge a removal.

A recipient owes a general duty under § 106.44(a) to respond to sexual harassment in a manner that is not deliberately indifferent. Where removing an individual on an emergency basis

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[975] *Id.*

[976] As discussed in the "Section 106.6(e) FERPA" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble, the complainant has a right to know the nature of any disciplinary sanctions imposed on a respondent after the recipient has found the respondent to be responsible for sexual harassment alleged by the complainant, because the disciplinary sanctions are directly related to the allegations made by the complainant. By contrast, emergency removal of a respondent does not involve a recipient's determination that the respondent committed sexual harassment as alleged by the complainant, and information about the emergency removal is not necessarily directly related to the complainant. Thus, FERPA (or other privacy laws) may restrict a recipient's discretion to disclose information relating to the emergency removal.

is necessary to avoid acting with deliberate indifference, a recipient must meet the requirements in § 106.44(c). The Department disagrees that § 106.44(c) imposes requirements on recipients that violate the Spending Clause, because recipients understand that compliance with Title IX will require dedication of personnel, time, and resources.[977] Because this provision does not prescribe specific post-removal challenge procedures, we do not believe recipients face significant burdens in training personnel to comply with new or unknown requirements; this provision ensures that the essential features of due process of law, or fundamental fairness, are provided to the respondent (i.e., notice and opportunity to be heard), and we believe that recipients are already familiar with these basic requirements of due process (for public institutions) or fair process (for private institutions).

In response to commenters' clarification requests, the post-removal procedure may, but need not, utilize some or all the procedures prescribed in § 106.45, such as providing for collection and presentation of evidence. Nothing in § 106.44(c) or the final regulations precludes a recipient from placing the burden of proof on the respondent to show that the removal decision was incorrect. Section 106.44(c) does not preclude a recipient from using Title IX personnel trained under § 106.45(b)(1)(iii) to make the emergency removal decision or conduct a post-removal challenge proceeding, but if involvement with the emergency removal process results in bias or conflict of interest for or against the complainant or respondent, § 106.45(b)(1)(iii) would preclude such personnel from serving in those roles during a grievance process.[978] Facts and

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[977] *See* discussion under the "Spending Clause" subsection of the "Miscellaneous" section of this preamble.
[978] Section 106.45(b)(1)(iii) requires all Title IX Coordinators, investigators, decision-makers, and persons who facilitate an informal resolution to be free from bias or conflicts of interest for or against complainants or respondents generally, or for or against any individual complainant or respondent.

evidence relied on during an emergency removal decision and post-removal challenge procedure may be relevant in a § 106.45 grievance process against the respondent but would need to meet the requirements in § 106.45; for example, a witness who provided information to a postsecondary institution recipient for use in reaching an emergency removal decision would need to appear and be cross-examined at a live hearing under § 106.45(b)(6)(i) in order for the witness's statement to be relied on by the decision-maker.

Changes: None.

How OCR Will Enforce the Provision

Comments: Commenters requested clarification about how OCR would enforce § 106.44(c), including what standard OCR would use in deciding whether a removal was proper; whether OCR would only find a violation if the recipient violates § 106.44(c) with deliberate indifference; whether violating this provision constitutes a violation of Title IX; whether OCR would defer to the determination reached by the recipient even if OCR would have reached a different determination based on the independent weighing of the evidence; whether a harmless error standard would apply to OCR's evaluation of a proper removal decision and only require reversing the recipient's removal decision if OCR thinks the outcome was affected by a recipient's violation of § 106.44(c); and whether OCR, or the recipient, would bear the burden of showing the correctness or incorrectness of the removal decision or the burden of showing that any violation affected the outcome or not.

Discussion: OCR will enforce this provision fully and consistently with other enforcement practices. OCR will not apply a harmless error standard to violations of Title IX, and will fulfill its role to ensure compliance with Title IX and these final regulations regardless of whether a recipient's non-compliance is the result of the recipient's deliberate indifference or other level of

intentionality. Recipients whose removal decisions fail to comply with § 106.44(c) may be found by OCR to be in violation of these final regulations. As discussed above, a recipient may need to undertake an emergency removal under § 106.44(c) in order to meet its duty not to be deliberately indifferent to sexual harassment. However, OCR will not second guess the decisions made under a recipient's exercise of discretion so long as those decisions comply with the terms of § 106.44(c). For example, OCR may assess whether a recipient's failure to undertake an individualized risk assessment was deliberately indifferent under § 106.44(a), but OCR will not second guess a recipient's removal decision based on whether OCR would have weighed the evidence of risk differently from how the recipient weighed such evidence. While not every regulatory requirement purports to represent a definition of sex discrimination, Title IX regulations are designed to make it more likely that a recipient does not violate Title IX's non-discrimination mandate, and the Department will vigorously enforce Title IX and these final regulations.

Changes: None.

Section 106.44(d) Administrative Leave

Comments: Some commenters expressed support for § 106.44(d), asserting that this provision appropriately recognizes that cases involving employees as respondents, especially faculty or administrative staff, should have different frameworks than cases involving students.

Some commenters asserted that it is unclear what standard a recipient must satisfy before it may place an employee on administrative leave. Commenters recommended giving discretion to an elementary and secondary school recipient to implement an alternate assignment (such as administrative reassignment to home) for staff during the pendency of an investigation, provided the same is otherwise permitted by law.

Commenters wondered how the Department defines "administrative leave," whether § 106.44(d) applies to paid or unpaid leave, and whether that would depend on how existing recipient employee conduct codes or employment contracts address the issue of paid or unpaid leave. Commenters asked whether an employee-respondent placed on leave may collect back pay from the recipient, if the grievance process determines there was insufficient evidence of misconduct. One commenter argued that administrative leave must include pay and benefits, as well as lodging if the employee-respondent resided in campus housing.

One commenter asserted that treating non-student employees differently than students or student-employees under § 106.44(d) constitutes discrimination. Another commenter questioned why recipients can deny employees paychecks for months until the conclusion of a formal grievance process, but give immediate due process for students to challenge an emergency removal; the commenter asserted that the recipient could simply provide a free semester of college to cover any loss to a student yet the proposed rules do not require a recipient to give back pay to an employee. Some commenters argued that § 106.44(c) emergency removal requirements to undertake an individualized safety and risk analysis and provide notice and an opportunity to challenge should also apply to administrative leave so that employees receive the same due process protections as students. Commenters argued that school investigations can take several months and that being on leave, especially without pay, can be a severe hardship for many employees. Commenters asserted that the Department should explicitly require recipients to secure a removed employee's personal property and be responsible for any damage occurring to the property before the removed employee can regain custody.

Commenters asserted that § 106.44(d) should apply to student-employee respondents and should be revised to limit the provision to administrative leave "from the person's employment,"

so that a student-employee respondent could still have access to the recipient's educational programs but the recipient would not be forced to continue an active employment relationship with that respondent during the investigation. For example, commenters argued, a recipient should not be compelled to allow a teaching assistant who has been accused of sexual harassment to continue teaching while the accusations are being investigated.

Commenters argued that § 106.44(d) should reference disability laws that protect employees parallel to the references to disability laws in § 106.44(c).

Discussion: The Department appreciates the support from commenters for § 106.44(d), giving a recipient discretion to place respondents who are employees on administrative leave during the pendency of an investigation.

We acknowledge commenters' concerns that § 106.44(d) does not specify conditions justifying administrative leave; however, we desire to give recipients flexibility to decide when administrative leave is appropriate. If State law allows or requires a school district to place an accused employee on "reassignment to home" or alternative assignment, § 106.44(d) does not preclude such action while an investigation under § 106.45 into sexual harassment allegations against the employee is pending.

The Department does not define "administrative leave" in this provision, but administrative leave is generally understood as temporary separation from a person's job, often with pay and benefits intact. However, these final regulations do not dictate whether administrative leave during the pendency of an investigation under § 106.45 must be with pay (or benefits) or without pay (or benefits). With respect to the terms of administrative leave, recipients who owe obligations to employees under State laws or contractual arrangements may comply with those obligations without violating § 106.44(d). Similarly, these final regulations do

not require back pay to an employee when the pending investigation results in a determination that the employee was not responsible. Further, this provision does not require a recipient to cover the costs of lodging for, or to secure the personal property of, an employee placed on administrative leave, although the final regulations do not preclude a recipient from taking such actions. We note that these final regulations similarly allow – but do not require – a recipient to repay a respondent for expenses incurred as a result of an emergency removal or to take actions to secure personal property during a removal under § 106.44(c) (whether the removed respondent was a student, or an employee). We also note that § 106.6(f) provides that nothing in this part may be read in derogation of an individual's rights, including an employee's rights, under Title VII[979] and that other laws such as Title VII may dictate whether administrative leave should be paid or unpaid and whether a respondent should be repaid for expenses incurred as a result of any of the recipient's actions.

The Department acknowledges that being placed on administrative leave – especially if the leave is without pay – may constitute a hardship for the employee. However, no respondent who is an employee may be kept on administrative leave indefinitely, because § 106.44(d) does not authorize administrative leave unless a § 106.45 grievance process has been initiated, and § 106.45(b)(1)(v) requires the grievance process to be concluded within a designated reasonably prompt time frame. As proposed in the NPRM, § 106.44(d) provided that a recipient may place a non-student employee respondent on administrative leave during the pendency of an

[979] For discussion of the revision to language in § 106.6(f) (i.e., stating in these final regulations that nothing in this part may be read in derogation of *an individual's* rights instead of *an employee's* rights, under Title VII), see the "Section 106.6(f) Title VII and Directed Question 3 (Application to Employees)" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble.

investigation; this was intended to refer to an investigation conducted pursuant to the § 106.45 grievance process. To clarify this point, the Department replaces "an investigation" with "a grievance process that complies with § 106.45" in § 106.44(d) to make it clear that a recipient may place a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45. The Department also revised § 106.44(d) to provide that "nothing in this subpart" instead of "nothing in this section" precludes a recipient from placing a non-student employee respondent on administrative leave to clarify that § 106.44(d) applies to subpart D of Part 106 of Title 34 of the Code of Federal Regulations. This revision makes it clear that nothing in subpart D of Part 106 of Title, which concerns nondiscrimination on the basis of sex in education programs or activities receiving Federal financial assistance and which includes other provisions such as § 106.44 and § 106.45, precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45.

The Department appreciates commenters' suggestions that the same due process protections (notice and opportunity to challenge a removal) that apply to respondents under § 106.44(c) should apply to an employee placed on administrative leave under § 106.44(d). This is unnecessary, because § 106.44(c) applies to an emergency removal of *any* respondent. Any respondent (whether an employee, a student, or other person) who poses an immediate threat to the health or safety of any student or other individual may be removed from the recipient's education program or activity on an emergency basis, where an individualized safety and risk analysis justifies the removal. Thus, respondents who are employees receive the same due process protections with respect to emergency removals (i.e., post-removal notice and opportunity to challenge the removal) as respondents who are students.

The Department also clarifies that pursuant to §106.44(d), a recipient may place a non-student employee respondent on administrative leave, even if the emergency removal provision in § 106.44(c) does not apply. With respect to student-employee respondents, we explain more fully, below, that these final regulations do not necessarily prohibit a recipient from placing a student-employee respondent on administrative leave if doing so does not violate other regulatory provisions. For example, placing a student-employee respondent on administrative leave with pay may be permissible as a supportive measure, defined in § 106.30, for a complainant (for instance, to maintain the complainant's equal educational access and/or to protect the complainant's safety or deter sexual harassment) as long as that action meets the conditions that a supportive measure is not punitive, disciplinary, or unreasonably burdensome to the respondent. Whether a recipient considers placing a student-employee respondent on administrative leave as part of a non-deliberately indifferent response under § 106.44(a) is a decision that the Department will evaluate based on whether such a response is clearly unreasonable in light of the known circumstances. The Department will interpret these final regulations in a manner that complements an employer's obligations under Title VII, and nothing in these final regulations or in Part 106 of Title 34 of the Code of Federal Regulations may be read in derogation of any individual's rights, including any employee's rights, under Title VII, as explained in more detail in the "Section 106.6(f) Title VII and Directed Question 3 (Application to Employees)" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble.

Section 106.44(a) prohibits a recipient from imposing disciplinary sanctions against a respondent without following a grievance process that complies with § 106.45. Administrative leave without pay is generally considered disciplinary, and would likely be prohibited under §

106.44(a) in the absence of the § 106.44(d) administrative leave provision. The Department believes that while an investigation is pending, a recipient should have discretion to place an employee-respondent on any form of administrative leave the recipient deems appropriate, so that the recipient has flexibility to protect students from exposure to a potentially sexually abusive employee. Numerous commenters asserted that educator sexual misconduct is prevalent throughout elementary and secondary schools, and postsecondary institutions.[980] For these reasons, the final regulations permit, but do not require, what may amount to an interim suspension of an employee-respondent (i.e., administrative leave without pay) even though the final regulations prohibit interim suspensions of student-respondents. We reiterate that any respondent may be removed on an emergency basis under § 106.44(c).

We do not believe that employees placed on administrative leave are denied sufficient due process under these circumstances, because in order for § 106.44(d) to apply, a § 106.45 grievance process must be underway, and that grievance process provides the respondent (and complainant) with clear, strong procedural protections designed to reach accurate outcomes, including the right to conclusion of the grievance process within the recipient's designated, reasonably prompt time frame. As previously explained, the Department revised § 106.44(d) to clarify that a recipient may place a non-student respondent on administrative leave during the pendency of a grievance process that complies with § 106.45.

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[980] *E.g.,* Charol Shakeshaft, *Educator Sexual Misconduct: A Synthesis of Existing Literature* (2004) (prepared for the U.S. Dep't. of Education) (ten percent of children were targets of educator sexual misconduct by the time they graduated from high school); National Academies of Science, Engineering, and Medicine, *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine* 61 (Frasier F. Benya *et al.* eds., 2018) (describing the prevalence of faculty-on-student sexual harassment at the postsecondary level).

Commenters erroneously asserted that because § 106.44(d) applies only to "non-student employees," a recipient is always precluded from placing an employee-respondent on administrative leave if the employee is also a student. We decline to make § 106.44(d) apply to student-employees or to change this provision to specify that administrative leave is "from the person's employment." Consistent with § 106.6(f), where an employee is not a student, we do not preclude a recipient-employer from placing a non-student employee on administrative leave during the pendency of a grievance process that complies with § 106.45. These final regulations do not prohibit a recipient from placing a student-employee respondent on administrative leave if doing so does not violate other regulatory provisions. As discussed above, placing a student-employee respondent on administrative leave with pay may be permissible as a supportive measure, defined in § 106.30, and may be considered by the recipient as part of the recipient's obligation to respond in a non-deliberately indifferent manner under § 106.44(a). Where a student is also employed by their school, college, or university, it is likely that the student depends on that employment in order to pay tuition, or that the employment is important to the student's academic opportunities. Administrative leave may jeopardize a student-employee's access to educational benefits and opportunities in a way that a non-student employee's access to education is not jeopardized. Accordingly, administrative leave is not always appropriate for student-employees. There may be circumstances that justify administrative leave with pay for student-employees, and the specific facts of a particular matter will dictate whether a recipient's response in placing a student-employee on administrative leave is permissible. For example, if a student-employee respondent works at a school cafeteria where the complainant usually eats, a recipient may determine that placing the student-employee respondent on administrative leave with pay, during the pendency of a grievance process that complies with § 106.45, will not

unreasonably burden the student-employee respondent, or the recipient may determine that re-assigning the student-employee respondent to a different position during pendency of a § 106.45 grievance process, will not unreasonably burden the student-employee respondent. If a recipient places a party who is a student-employee on administrative leave with pay as a supportive measure, then such administrative leave must be non-disciplinary, non-punitive, not unreasonably burdensome, and otherwise satisfy the definition of supportive measures in § 106.30. With respect to a student-employee respondent, a recipient also may choose to take measures other than administrative leave that could constitute supportive measures for a complainant, designed to protect safety or deter sexual harassment without unreasonably burdening the respondent. For example, where an employee is also a recipient's student, it is likely that the recipient has the ability to supervise the student-employee to ensure that any continued contact between the student-employee respondent and other students occurs under monitored or supervised conditions (e.g., where the respondent is a teaching assistant), during the pendency of an investigation. If a recipient removes a respondent pursuant to § 106.44(c) after conducting an individualized safety and risk analysis and determining that an immediate threat to the physical health or safety of any students or other individuals justifies removal, then a recipient also may remove a student-employee respondent from any employment opportunity that is part of the recipient's education program or activity.

The Department is persuaded by commenters who asserted that analogous disability protections should expressly apply for employee-respondents under § 106.44(d) as for respondents under the § 106.44(c) emergency removal provision. We have revised § 106.44(d) of the final regulations to state that this provision may not be construed to modify any rights under Section 504 or the ADA.

Changes: We have revised § 106.44(d) to clarify that it will not be construed to modify Section 504 or the ADA.[981] We also revised § 106.44(d) to clarify that nothing in subpart D of Part 106, Title 34 of the Code of Regulations, precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45.

Section 106.45 Recipient's Response to Formal Complaints

General Requirements for § 106.45 Grievance Process

Section 106.45(a) Treatment of Complainants or Respondents Can Violate Title IX

Comments: Commenters including students, professors, campus administrators, and attorneys, expressed appreciation and support for § 106.45(a). Some commenters asserted that § 106.45(a) is a welcome addition because in recent years, Federal judges have expressed concerns about how university treatment of respondents (or complainants) might run afoul of Title IX and contradict Title IX's promise of gender equity. Some commenters noted that although Federal courts have not assumed that all unfair procedures depriving respondents of a fair process necessarily equate to sex discrimination,[982] numerous Federal courts have identified plausible claims of an institutions' sex discrimination against respondents, and commenters cited Federal

[981] As discussed in the "Section 106.6(f) Title VII and Directed Question 3 (Application to Employees)" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble, we revised the reference to "this section" to "this subpart" in § 106.44(d).

[982] Commenters cited: *Nokes v. Miami Univ.*, 1:17-CV-482, 2017 WL 3674910 (S.D. Ohio Aug. 25, 2017); *Sahm v. Miami Univ.*, 110 F. Supp. 3d 774 (S.D. Ohio 2015); *Bleiler v. Coll. of the Holy Cross*, No. 1:11-CV-11541, 2013 WL 4714340 (D. Mass. Aug. 26, 2013).

cases[983] where courts noted sex discrimination may exist where an institution failed to investigate evidence that the complainant might also have committed sexual misconduct in the same case, credited only female witnesses, ignored exonerating evidence because of preconceived notions about how males and females behave, used gender-biased training materials that portray only men as sexual predators or only women as victims, or denied the respondent necessary statistical information to test allegations of gender bias.

Other commenters gave examples of how they have observed sex-driven unfair treatment against respondents in campus Title IX proceedings. A few commenters pointed out that when a sexual harassment grievance process favors females over males in an attempt to be equitable to victims, the result is often that male victims of sexual harassment are not treated equitably; some commenters cited to statistics showing that similar percentages of men (5.3 percent) and women (5.6 percent) experience sexual violence other than rape each year,[984] that about 14 percent of reported rape cases involve men or boys, one in six reported sexual assaults is against a boy, one in 25 reported sexual assaults is against a man,[985] and that a survey of 27 colleges and universities revealed that 40.9 percent of undergraduate heterosexual males had experienced sexual harassment, intimate partner violence, or stalking, compared to 60.5 percent of

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[983] Commenters cited: *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018); *Doe v. Miami Univ.*, 882 F.3d 579 (6th Cir. 2018); *Rossley v. Drake Univ.*, 342 F. Supp. 3d 904 (S.D. Iowa 2018); *Doe v. Univ. of Miss.*, No. 3:16-CV-63, 2018 WL 3570229 (S.D. Miss. July 14, 2018); *Doe v. Univ. of Pa.*, 270 F. Supp. 3d 799 (E.D. Pa. 2017); *Doe v. Amherst Coll.*, 238 F. Supp. 3d 195 (D. Mass. 2017); *Doe v. Williams Coll.*, No. 3:16-CV-30184 (D. Mass. Apr. 28, 2017); *Saravanan v. Drexel Univ.*, No. 2:17-CV-03409, 2017 WL 5659821 (E.D. Pa. Nov. 24, 2017); *Marshall v. Ind. Univ.*, No. 1:15-CV-00726, 2016 WL 4541431 (S.D. Ind. Aug. 31, 2016).

[984] Commenters cited: Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Summary Report* Tables 2.1 and 2.2 (Nov. 2011).

[985] Commenters cited: National Alliance to End Sexual Violence, "Male Victims," ("About 14% of reported rapes involve men or boys, 1 in 6 reported sexual assaults is against a boy, and 1 in 25 reported sexual assaults is against a man."), https://www.endsexualviolence.org/where_we_stand/male-victims/.

undergraduate heterosexual females.[986] Some commenters opined that the Department's withdrawn 2011 Dear Colleague Letter contributed to more instances of universities applying grievance procedures in a sex-discriminatory manner (usually against respondents, who, commenters argued, are overwhelmingly male). At least one commenter supportive of § 106.45(a) cited a white paper by NCHERM cautioning colleges and universities to avoid applying grievance procedures in an unfair, biased manner (whether favoring complainants, or favoring the accused) and urging institutions to have balanced processes.[987] Several commenters, including attorneys and organizations with experience representing accused students, supported § 106.45(a) because although the provision only clarifies what is already the intent of the law, the provision is necessary to counter institutional bias in favor of female accusers and against male accused students, as both are entitled to equally fair procedures untainted by gender bias; one such commenter referred to § 106.45(a) as an "essential corrective" to gender bias that permeates campus sexual misconduct proceedings, and another believed that the provision will encourage schools to be more careful in how they treat both sides.

Discussion: The Department appreciates commenters' support for § 106.45(a) and acknowledges that many commenters have observed through personal experiences navigating campus sexual misconduct proceedings that some recipients have applied grievance procedures in a manner that

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[986] Commenters cited: The Association of American Universities, *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct* (Westat 2015).

[987] Commenters cited: National Center for Higher Education Risk Management (NCHERM), *White Paper: Due Process and the Sex Police* 14-15 (2017) ("There are always unintended consequences to showing favoritism. If a college is known to be biased toward responding parties, this can chill the willingness of victims/survivors to report. If a college is known to be biased toward reporting parties, a victim/survivor's sense of safety or justice based on the campus outcome in the short run may be quickly compromised by a court order or lawsuit reinstating the responding party, giving her a Pyrrhic victory, at best. What is needed for all of our students is a balanced process that centers on their respective rights while showing favoritism to neither. Not only is that best, it is required by law.").

shows discrimination against respondents on the basis of sex. We note that other commenters have recounted personal experiences navigating campus sexual misconduct proceedings perceived to be biased against complainants on the basis of sex. To the extent that such discriminatory practices occur, § 106.45(a) advises recipients against sex discriminatory practices during the grievance process and to avoid different treatment favoring or disfavoring any party on the basis of sex. However, to clarify that § 106.45(a) applies as much to complainants as to respondents, the final regulations revise the language in this provision but retain the provision's statement that how a recipient treats a complainant, or a respondent, "may" constitute sex discrimination under Title IX. The Department emphasizes that any person regardless of sex may be a victim or perpetrator of sexual harassment and that different treatment due to sex-based stereotypes about how men or women behave with respect to sexual violence violates Title IX's non-discrimination mandate.

Changes: The final regulations revise § 106.45(a) to state more clearly that treatment of a complainant or respondent may constitute sex discrimination in violation of Title IX.

Comments: Some commenters opposed § 106.45(a), claiming that this provision would harbor perpetrators by permitting them to claim a Title IX violation even if the recipient merely opens an investigation into their conduct, and would revictimize and retraumatize survivors. Some commenters argued that this provision operates from a premise of false equivalency since the respondent is not involved in the process on the basis of their sex but rather on the basis of their alleged behavior whereas the complainant alleges to have suffered Title IX sexual harassment (discrimination on the basis of sex). Some commenters argued that a recipient's treatment of the respondent does not constitute discrimination on the basis of sex under Title IX unless sex bias was a factor and therefore the Department lacks authority to issue a regulation that equates unfair

treatment of a respondent with sex discrimination. Other commenters contended that Title IX[988] does not include the grievance process prescribed in these final regulations and does not address the conduct of school officials implementing a grievance process, and that the Department has no authority to create new individual rights under Title IX. At least one commenter argued that the purpose of § 106.45(a) appears to be justifying the entirety of the Department's prescribed grievance process (which the commenter argued is characterized by rape exceptionalism with many provisions designed to benefit only respondents) by wrongfully characterizing procedural protections for respondents as needed to avoid sex discrimination. Another commenter argued that § 106.45(a) turns Title IX on its head by making respondents accused of sexual harassment into a protected class, enabling respondents to make a sex discrimination claim for any deviation from the § 106.45 grievance process requirements while complainants would need to show deliberate indifference to claim sex discrimination.

Some commenters asserted that this provision hamstrings recipients excessively and that the provision is fundamentally unfair to survivors. Some commenters argued that the provision grants respondents the right to sue for sex discrimination under Title IX and contended that fear of respondent litigation causes recipients to deprive complainants of due process and fair procedures by, for example, giving respondents access to information or accommodations not given to the complainant or to deliberately mislead the complainant about the investigation. One commenter characterized § 106.45(a) as giving an "unsubstantiated right of action for respondents under Title IX" that will cause "risk-averse universities to fail to investigate properly, and that schools and university legal counsel will be incentivized to never find in a

[988] Commenters cited: 20 U.S.C. 1681(a).

survivor's favor, even when the facts clearly indicate that sexual violence occurred," leading to more complainants suing recipients privately under Title IX just to force institutions to treat complainants equally. This concern was echoed by a few commenters who argued that this provision would cause institutions to ignore reports and refuse to punish perpetrators for fear of respondent lawsuits.

Other commenters characterized § 106.45(a) as purporting to consider the treatment of the respondent as equally violating Title IX as the alleged behavior (sexual violence) prompting the Title IX case in the first place, while another commenter believed this provision meant that unfair treatment of a respondent constituted sexual harassment. A few commenters argued that § 106.45(a) unnecessarily risks incentivizing institutions to treat survivors unfairly, because respondents already have legal theories (such as violation of due process and breach of contract) with which to challenge unfair discipline, and Federal courts[989] have appropriately made it difficult for respondents to successfully challenge unfair discipline as sex discrimination, either on an erroneous outcome or selective enforcement theory – a result that would be undermined by § 106.45(a) giving respondents new rights to pursue unfair discipline claims under the auspices of Title IX.

One commenter, a Title IX Coordinator, stated that § 106.45(a) seems unnecessary because typically both parties are members of the recipient's community and the recipient should

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[989] Commenters cited, e.g.: *Doe v. Colgate Univ. Bd. of Trustees*, 760 F. App'x 22 (2d Cir. 2019); *Doe v. Cummins*, 662 F. App'x 437, 451-53 (6th Cir. 2016); *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994); *Preston v. Va. ex rel. New River Comm. Coll.*, 31 F.3d 203, 207 (4th Cir. 1994); *Doe v. Univ. of Cincinnati*, 173 F. Supp. 3d 586, 606-07 (S.D. Ohio 2016); *Winter v. Pa. State Univ*., 172 F. Supp. 3d 756, 775-76 (M.D. Pa. 2016); *Nungesser v. Columbia Univ.*, 169 F. Supp. 3d 353, 364 (S.D.N.Y. 2016); *Doe v. Columbia Univ*., 101 F. Supp. 3d 356, 372 (S.D.N.Y. 2015); *Doe v. Univ. of the So.*, 687 F. Supp. 2d 744, 756 (E.D. Tenn. 2011); *Patenaude v. Salmon River Cent. Sch. Dist.*, No. 3:03-CV-1016, 2005 WL 6152380 (N.D.N.Y. Feb. 16, 2005).

not discriminate against any member of its community. One commenter opposed § 106.45(a) because it tells male students they have been victimized and gives male students more incentive to gratify themselves at the expense of a woman's education. One commenter argued that if stating that a recipient's treatment of a party in sexual harassment proceedings "may" constitute sex discrimination is sufficient to justify the Department regulating extensive grievance procedures in sexual harassment cases, there is no end to the Department's authority, on the same reasoning, to regulate any other type of interaction between a school and its students or employees, since any action taken by a recipient "may" constitute sex discrimination.

Some commenters suggested modifications in language including to specify that a recipient's response to a complaint may constitute sex discrimination where: the recipient deprives a respondent of access to education based on sex stereotypes or by using procedures that discriminate on the basis of sex; the recipient acts with deliberate indifference; by a reasonable and objective standard, the "treatment" is sufficiently severe or pervasive so as to interfere with a student's educational opportunities and/or create a hostile work environment; there is evidence of discriminatory application of Title IX or acts of retaliation; the recipient uses investigatory or other acts to mistreat (or not adequately treat well) the respondent. Another commenter asserted that § 106.45(a) should specify that programs funded by the U.S. Department of Justice's Office on Violence Against Women (OVW) must comply with these final regulations. Another commenter argued that §106.45 should consider that when in doubt, the recipient may err on side of releasing information in order to avoid liability under these final regulations.

Discussion: The Department disagrees with commenters who believed that § 106.45(a) would harbor perpetrators and revictimize or retraumatize survivors by permitting respondents to claim

a Title IX violation based on a recipient's opening of an investigation into alleged sexual harassment. This provision does not declare that actions toward a respondent (or complainant) *do* constitute sex discrimination in violation of Title IX, but states only that treatment of a respondent (or treatment of a complainant) *may* constitute sex discrimination. Title IX prohibits sex discrimination against all individuals on the basis of the protected characteristic (sex), and § 106.45(a) advises recipients to be aware that taking action with respect to either party in a grievance process resolving allegations of sexual harassment may not be done in a sex discriminatory manner. This provision operates to protect complainants and respondents equally, irrespective of sex, by emphasizing to recipients that although a grievance process takes place in the context of resolving allegations of one type of sex discrimination (sexual harassment), a recipient must take care not to treat a party differently on the basis of the party's sex because to do so would inject further sex discrimination into the situation. For example, a recipient's decision to investigate sexual harassment complaints brought by women but not by men may constitute sex discrimination in the context of a sexual harassment grievance process; similarly, a recipient's practice of imposing a sanction of expulsion on female respondents found responsible for sexual harassment, but suspension on male respondents found responsible, may constitute sex discrimination.

The Department acknowledges that the text of the Title IX statute does not specify grievance procedures for resolving allegations of sexual harassment. However, at the time Title IX was enacted in 1972, Federal courts had not yet addressed sexual harassment as a form of sex discrimination, but the Supreme Court's *Gebser/Davis* framework explicitly interpreted Title IX's non-discrimination mandate to include sexual harassment as a form of sex discrimination. Since 1975 the Department's Title IX regulations have required recipients to adopt and publish

"grievance procedures" for the prompt and equitable resolution of complaints that recipients are committing sex discrimination against students or employees.[990] The Department's authority to enforce such regulations has been acknowledged by the Supreme Court.[991] The Department has determined that current regulatory reference to "grievance procedures" that are "prompt and equitable" does not adequately prescribe a consistent, fair, reliable grievance process for resolving allegations of Title IX sexual harassment; in accordance with the Department's regulatory authority under Title IX, the final regulations now set forth a grievance process for resolving formal complaints raising allegations of sexual harassment.

The Department disagrees that § 106.45(a) turns Title IX on its head or creates a new protected class (respondents); this provision focuses on the central purpose of Title IX, to provide protections from sex-discriminatory practices to all persons, acknowledging that the ways in which complainants and respondents are treated must not be affected by the sex of a person even though the underlying allegations involve allegations of a type of sex discrimination (sexual harassment) that make it tempting for recipients to intentionally or unintentionally allow sex-based biases, stereotypes, and generalizations to influence how procedures are applied. Partly in response to commenters' misapprehension that § 106.45(a) allows respondents – but not complainants – to claim sex discrimination whenever a requirement in § 106.45 is not met, the final regulations permit either party equally to appeal a determination regarding responsibility on the basis of procedural irregularity.[992] Similarly, either party believing a recipient failed to follow the § 106.45 grievance process could file a complaint with OCR that could result in the

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[990] 34 CFR 106.8(b).
[991] *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 291-92 (1998).
[992] Section 106.45(b)(8).

Department requiring the recipient to come into compliance with § 106.45, regardless of whether the violation of § 106.45 also amounted to deliberate indifference (as to a complainant) or otherwise constituted sex discrimination (as to a respondent). A violation of § 106.45 need not, and might not necessarily, constitute sex discrimination, whether the violation disfavored a complainant or a respondent. Thus, § 106.45(a) does not create a special protection for respondents or special burden for complainants with respect to allegations that a recipient failed to comply with the § 106.45 grievance process.

For similar reasons, the Department disagrees that § 106.45(a) in any way "hamstrings" recipients into catering to respondents' interests or permits recipients to ignore complainants or treat complainants unfavorably out of fear of being sued by respondents. Rather, § 106.45(a) reminds recipients that Title IX requires recipients to avoid bias, prejudice, or stereotypes based on sex whether the recipient's intent is to favor or disfavor complainants or respondents. As to commenters' concerns that out of fear of respondent lawsuits recipients will, for example, give respondents access to information or accommodations not given to the complainant or deliberately mislead the complainant about the investigation, the Department notes that such actions likely will either violate specific provisions of § 106.45 (e.g., § 106.45(b)(5)(vi) requires the parties to have equal opportunity to inspect and review evidence) or constitute the very treatment against a complainant that § 106.45(a) cautions against. For reasons discussed in the "General Support and Opposition for the § 106.45 Grievance Process" section of this preamble, the Department disputes that the § 106.45 grievance process is premised on rape exceptionalism. The prescribed grievance process is tailored to resolve allegations of sexual harassment that constitute sex discrimination under a Federal civil rights law, not to adjudicate criminal charges; the fact that resolution of sexual harassment under Title IX requires, in the Department's

judgment, a consistent, predictable grievance process in no way implies that a "special" process is needed due to rape myths or sex-based generalizations (such as, "women lie about rape"). The § 106.45 grievance process does not prioritize respondent's rights over those of complainants. Rather, § 106.45 contains important procedural protections that apply equally to both parties with three exceptions: one provision that treats complainants and respondents equitably instead of equally (by recognizing a complainant's interest in a recipient providing remedies, and a respondent's interest in disciplinary sanctions imposed only after a recipient follows a fair process);[993] one provision that applies only to respondents (a presumption of non-responsibility until conclusion of a fair process);[994] and one provision that applies only to complainants (protection from questions and evidence regarding sexual history).[995]

The Department is aware that in private lawsuits brought under Title IX, Federal courts have been reluctant to equate unfair treatment of a respondent during a sexual misconduct disciplinary proceeding with sex discrimination unless the respondent can show that the unfair treatment was motivated by the party's sex. Contrary to commenters' assertions, § 106.45(a) does not assume that any unfair treatment constitutes sex discrimination, but does caution recipients that treatment of any party could constitute sex discrimination. In this way, § 106.45(a) shields parties (both complainants and respondents) from recipient actions during the grievance process that are impermissibly motivated by sex-based bias or stereotypes in violation of Title IX's non-discrimination mandate. However, as discussed above, this does not mean that every violation of § 106.45 necessarily equates to sex discrimination. The Department disagrees

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[993] Section 106.45(b)(1)(i).
[994] Section 106.45(b)(1)(iv).
[995] Section 106.45(b)(6)(i)-(ii).

that § 106.45(a) purports to consider treatment of a respondent during a grievance process as the same type of behavior that prompted the respondent to become a respondent in the first place (e.g., alleged sexual misconduct), or that this provision equates unfair discipline with sexual harassment. The Department appreciates the opportunity to clarify that when a respondent is treated differently based on sex during a grievance process designed to resolve allegations that the respondent perpetrated sexual harassment, the sex-based treatment of the respondent violates Title IX's non-discrimination mandate in a different way than sexual harassment does when sexual harassment constitutes sex discrimination under Title IX. Title IX prohibits different treatment on the basis of sex, which § 106.45(a) acknowledges may occur against respondents or complainants in violation of Title IX. Title IX also requires recipients to respond appropriately to allegations of sexual harassment, because sexual harassment constitutes a particular form of sex discrimination. The Department also appreciates the opportunity to clarify that the Department does not draw an equivalency among different types of sex discrimination prohibited under Title IX, and recognizes that when sex discrimination takes the form of sexual harassment victims often face trauma and negative impacts unique to that particular form of sex discrimination; indeed, it is this recognition that has prompted the Department to promulgate legally binding regulations governing recipients' response to sexual harassment rather than continuing to rely on guidance documents that lack the force and effect of law.

The Department disagrees with commenters who argued that § 106.45(a) is unnecessary because respondents already have non-Title IX legal theories on which to challenge unfair discipline and have erroneous outcome and selective enforcement theories with which to challenge unfair discipline under Title IX. While it is true that respondents have relied on such theories to pursue private lawsuits, similarly complainants already have a judicially implied

private right of action under Title IX to sue a recipient for being deliberately indifferent to a complainant victimized by sexual harassment. The existence of private rights of action under Title IX, or under other laws, does not obviate the importance of the Department using its statutory authorization to effectuate the purposes of Title IX through administrative enforcement by promulgating regulations designed to provide individuals with effective protections against discriminatory practices. Indeed, in the final regulations some requirements intended to protect against sex discrimination apply only to the benefit of complainants (e.g., § 106.44(a) has been revised to require as part of a non-deliberately indifferent response that recipients notify complainants of the availability of supportive measures with or without the filing of a formal complaint, offer supportive measures to the complainant, and explain to complainants the process for filing a formal complaint) while other provisions aim to ensure protections against sex discrimination for both complainants and respondents (e.g., § 106.45(a)). The Department has administrative authority to enforce such provisions, whether or not Federal courts would impose the same requirements under a complainant's or respondent's private Title IX lawsuit.

The Department agrees with the commenter who asserted that recipients should not discriminate against any member of the recipient's community but maintains that § 106.45(a) is not rendered unnecessary by that belief. The Department disagrees that § 106.45(a) conveys to male students that being treated unfairly in the grievance process gives license to perpetrate sexual misconduct against women; while a recipient must treat a respondent in a manner free from sex discrimination and impose discipline only after following a fair grievance process, those restrictions in no way encourage or incentivize perpetration of sexual misconduct and in fact help ensure that sexual misconduct, where reliably determined to have occurred, is addressed through remedies for victims and disciplinary sanctions for perpetrators.

The Department understands the commenter's concern that § 106.45(a) could be misunderstood to justify the Department regulating any facet of a recipient's interaction with students and employees because in any circumstance a recipient "may" act in a sex-biased manner. The Department appreciates the opportunity to clarify that § 106.45(a) is necessary in the context of sexual harassment because allegations of such conduct present an inherent risk of sex-based biases, stereotypes, and generalizations permeating the way parties are treated, such that a consistent, fair process applied without sex bias to any party is needed.

The Department's authority to promulgate regulations under Title IX encompasses regulations to effectuate the purpose of Title IX, and as commenters acknowledged, one of the two main purposes of Title IX is providing individuals with protections against discriminatory practices.[996] Implementation of a grievance process for resolution of sexual harassment lies within the Department's statutory authority to regulate under Title IX,[997] and § 106.45(a) is a provision designed to protect all individuals involved in a sexual harassment situation from sex discriminatory practices in the context of a grievance process to resolve formal complaints of sexual harassment. Thus, § 106.45, and paragraph (a) in particular, does not create new individual rights but rather prescribes procedures designed to protect the rights granted all persons under Title IX to be free from sex discrimination with respect to participation in education programs or activities.

The Department notes that nothing about § 106.45(a) creates or grants respondents (or complainants) rights to file private lawsuits, whether under Title IX or otherwise. Title IX does

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[996] *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979).
[997] 20 U.S.C. 1682.

not contain an express private right of action, but the Supreme Court has judicially implied such a right.[998] In *Gebser*, the Supreme Court declined to allow petitioner to seek damages in a private suit under Title IX for the school's alleged failure to have a grievance procedure as required under Department regulations because "failure to promulgate a grievance procedure does not itself constitute 'discrimination' under Title IX."[999] The Court continued, "Of course, the Department of Education could enforce the requirement administratively: Agencies generally have authority to promulgate and enforce requirements that effectuate the statute's non-discrimination mandate, 20 U.S.C. 1682, even if those requirements do not purport to represent a definition of discrimination under the statute."[1000] Thus, the Department's exercise of administrative enforcement authority does not grant new rights to respondents (or complainants) who pursue remedies against recipients in private lawsuits under Title IX.

The Department appreciates commenters' suggestions for modifications to this provision, but declines to add modifiers or qualifiers that would further describe how and when a recipient's treatment of a complainant or respondent might constitute sex discrimination. In the interest of retaining the broad intent of Title IX's non-discrimination mandate, § 106.45(a) in the final regulations begins the entirety of a Title IX sexual harassment grievance process under § 106.45 by advising recipients to avoid treatment of any party in a manner that discriminates on the basis of sex. The § 106.45 grievance process leaves recipients with significant discretion to adopt procedures that are not required or prohibited by § 106.45, including, for example, rules designed to conduct hearings in an orderly manner respectful to all parties. Section 106.45(a)

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[998] *Cannon*, 441 U.S. at 691.
[999] *Gebser*, 524 U.S. at 292.
[1000] *Id.*

emphasizes to recipients that such rules or practices that a recipient chooses to adopt must be applied without different treatment on the basis of sex. To reinforce the importance of treating complainants and respondents equally in a grievance process, the final regulations also revise the introductory sentence of § 106.45(b) to indicate that any grievance process rules a recipient chooses to adopt (that are not already required under § 106.45) must treat the parties equally. Together with § 106.45(a), this modification emphasizes, for the benefit of any person involved in a Title IX grievance process, that recipients must treat both parties equally and without regard to sex.

The Department declines to specify what programs (including those funded by OVW grants) must comply with this provision; questions about application of Title IX to individual recipients may be submitted to the recipient's Title IX Coordinator, the Assistant Secretary, or both, under § 106.8(b)(1). The Department disagrees with the commenter who suggested that § 106.45(a) will cause a recipient to err on the side of releasing information or increase a recipient's fear of retaliation; however, in response to many comments concerning confidentiality and retaliation, the final regulations include § 106.71 prohibiting retaliation and specifying that the recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by FERPA, required by law, or as necessary to conduct the grievance process, and providing that complaints alleging retaliation may be filed according to the prompt and equitable grievance procedures for sex discrimination that recipients must adopt under § 106.8(c).

Changes: We are adding § 106.71, prohibiting retaliation and specifying that the recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute or regulations, 20 U.S.C. 1232g and 34 CFR part 99, or required by law, or to carry out the purposes of 34 CFR part 106, and providing that complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination that recipients must adopt under § 106.8(c). We are revising § 106.45(b)(8) regarding appeals, to expressly permit both parties equally to appeal a determination regarding responsibility on the basis of procedural irregularity. We are revising the introductory sentence of § 106.45(b) to state that any rules a recipient chooses to adopt (that are not required under § 106.45) must apply equally to both parties.

Section 106.45(b)(1)(i) Equitable Treatment of Complainants and Respondents

Comments: Many commenters expressed support for § 106.45(b)(1)(i). Some commenters asserted that this provision rectifies sex discrimination against males that has occurred in recipients' Title IX campus proceedings.[1001] Other commenters stated that this provision advances Title IX's goal of due process-type fundamental fairness to both complainants and respondents alike by balancing the scales. One commenter supported this provision because, in the commenter's view, too many institutions view allegations as "self-proving." At least one

[1001] Commenters cited, for example: Jeannie Suk Gersen, *The Transformation of Sexual-Harassment Law Will Be Double-Faced*, THE NEW YORKER (Dec. 20, 2017); American Association of University Women Educational Foundation, *Drawing the Line: Sexual Harassment on Campus* (2005).

commenter approved of this provision as being consistent with existing § 106.8 requiring "prompt and equitable" resolution of sex discrimination complaints. Another commenter asserted that § 106.45(b)(1)(i) is consistent with our Nation's fundamental values that persons accused of serious misconduct should receive notice and a fair hearing before unbiased decision makers, and a presumption of innocence. Another commenter supported this provision because everyone on campus benefits from fundamentally fair proceedings. One commenter called this provision a "welcome change" because, in the commenter's view, accused students at institutions of higher education have had a difficult time restoring their reputations after the institution removes the accused student before a fair determination of the truth of the allegations.

Discussion: The Department appreciates commenters' support for this provision. The Department agrees that a fair process benefits both parties, and recipients, by leading to reliable outcomes and increasing the confidence that parties and the public have regarding Title IX proceedings in schools, colleges, and universities. The Department also agrees with the commenter who noted that this provision is consistent with the principle underlying existing § 106.8 wherein recipients have long been required to have "prompt and equitable" grievance procedures for handling sex discrimination complaints. The purpose of § 106.45(b)(1)(i) is to emphasize the importance of treating complainants and respondents equitably in the specific context of Title IX sexual harassment, by drawing a recipient's attention to the need to provide remedies to complainants and avoid punishing respondents prior to conclusion of a fair process. As discussed in the "Role of Due Process in the Grievance Process" section of this preamble, the § 106.45 grievance process generally treats both parties equally, and § 106.45(b)(1)(i) is one of the few exceptions to strict equality where equitable treatment of the parties requires recognizing that a complainant's interests differ from those of a respondent with respect to the purpose of the

grievance process. This is intended to provide both parties with a fair, truth-seeking process that reasonably takes into account differences between a party's status as a complainant, versus as a respondent. Thus, with respect to remedies and disciplinary sanctions, strictly equal treatment of the parties does not make sense, and to treat the parties equitably, a complainant must be provided with remedies where the outcome shows the complainant to have been victimized by sexual harassment; similarly, a respondent must be sanctioned only after a fair process has determined whether or not the respondent has perpetrated sexual harassment.

Changes: None.

Comments: Some commenters objected to § 106.45(b)(1)(i) on the ground that it reinforces the approach of the overall grievance process that commenters believed requires a complainant to undergo a protracted, often traumatic investigation necessitating continuous interrogation of the complainant, all while forcing the complainant to continue seeing the respondent on campus because the respondent is protected from removal until completion of the grievance process; some of these commenters asserted that this will chill reporting.

Some commenters opposed this provision on the ground that it aims to treat victims and perpetrators as equals, which is inappropriate because a victim has suffered harm inflicted by a perpetrator, placing them in inherently unequal positions of power; some of these commenters expressed particular concern that this dynamic perpetuates the status quo where teachers accused of harassing students are believed because of their position of authority.

Some commenters claimed that by being gender-neutral this provision makes campuses and Title IX proceedings an unsafe space for victims and is biased against women because it reflects obsolete and unfounded assumptions about sexual harassment and sexual violence and perpetuates harm against women and vulnerable populations. At least one such commenter urged

the Department to instead adopt a feminist model that supports the healing of survivors of gender-based violence, prevents revictimization following assault, and seeks to restore power and control the survivor has lost.[1002]

Discussion: The Department believes that § 106.45(b)(1)(i) reflects the critical way in which that a recipient must, throughout a grievance process, treat the parties equitably. The Department disagrees that the final regulations require complainants to undergo protracted, traumatic investigations or necessarily require complainants to interact with respondents on campus while a process is pending. The final regulations require a recipient to offer supportive measures to a complainant with or without the filing of a formal complaint triggering the grievance process.[1003] The final regulations have removed proposed § 106.44(b)(2) and revised the § 106.30 definition of "complainant" such that in combination, those revisions ensure that the final regulations do not require a Title IX Coordinator to initiate a grievance process over the wishes of a complainant, and never require a complainant to become a party or to participate in a grievance process.[1004] In these ways, the final regulations respect the autonomy of survivors to choose whether to participate in a grievance process, while ensuring that regardless of that choice, survivors are entitled to supportive measures. Although supportive measures must be non-punitive and non-disciplinary (to any party) and cannot unreasonably burden the other party,[1005]

[1002] Commenters cited: Tara N. Richards *et al.*, *A feminist analysis of campus sexual assault policies: Results from a national sample*, 66 FAMILY RELATIONS 1 (2017) (criticizing gender-neutral policy approaches because "In gender-neutral advocacy, policies and practices are uniformly applied and do not take gender dynamics into consideration, thus increasing the risk of victim-blaming attitudes and adherence to myths about rape and other forms of gendered violence").

[1003] Section 106.44(a) (further requiring the Title IX Coordinator to contact each complainant to discuss the availability of supportive measures with or without a formal complaint, consider the complainant's wishes regarding supportive measures, and explain to the complainant the process for filing a formal complaint).

[1004] Section 106.71 (prohibiting retaliation for the purpose of interfering with any right under Title IX, including the right to refuse to participate in a Title IX proceeding).

[1005] Section 106.30 (defining "supportive measures").

supportive measures do allow complainants options with respect to changes in class schedules or housing re-assignments even while a grievance process is still pending, or where no formal complaint has initiated a grievance process. Moreover, § 106.44(c) permits a recipient to remove a respondent from the recipient's education program or activity without undergoing a grievance process, where an individualized risk assessment shows the respondent poses a threat to any person's physical health or safety, so long as the respondent is afforded post-removal notice and opportunity to challenge the removal decision. The final regulations thus effectuate the purpose of Title IX to provide protection for complainants, while ensuring that a fair process is used to generate a factually reliable resolution of sexual harassment allegations before a respondent is sanctioned based on such allegations. To clarify that the § 106.30 definition of "supportive measures" gives recipients wide latitude to take actions to support a complainant, even while having to refrain from imposing disciplinary sanctions against the respondent, we have added to § 106.45(b)(1)(i) the phrase "or other actions that are not supportive measures as defined in § 106.30."[1006] Even where supportive measures, emergency removal where appropriate, the right of both parties to be accompanied by an advisor of choice,[1007] and other provisions intended to ease the stress of a formal process may result in a complainant finding the process traumatizing,[1008] the Department maintains that allegations of sexual harassment must be

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[1006] Section 106.45(b)(1)(i), stating that equitable treatment of the parties means following a § 106.45 grievance process before imposing disciplinary sanctions or other actions that are not "supportive measures" as defined in § 106.30, and remedies for a complainant whenever a respondent is determined to be responsible, is mirrored in § 106.44(a), which requires equitable treatment of respondents in the same manner and (because no grievance process is required for a recipient's response obligations under § 106.44 to be triggered) equitable treatment of complainants by offering supportive measures.

[1007] Section 106.45(b)(5)(iv).

[1008] *E.g.*, § 106.45(b)(6)(i) (either party has the right to undergo a live hearing and cross-examination in a separate room, and this provision deems irrelevant any questions or evidence regarding a complainant's sexual predisposition (without exception) and any questions or evidence about a complainant's sexual behavior with two exceptions).

resolved accurately in order to ensure that recipients remedy sex discrimination occurring in education programs or activities.

The Department disagrees that treating parties equally throughout the grievance process, and recognizing specific ways in which complainants and respondents must be treated equitably under § 106.45(b)(1)(i), inappropriately attempts to place victims and perpetrators on equal footing without recognizing that victims are suffering from a perpetrator's conduct. The Department recognizes that a variety of power dynamics can affect perpetration and victimization in the sexual violence context, including differences in the sex, age, or positions of authority of the parties. The Department believes that a fair process provides procedural tools to parties that can counteract situations where a power imbalance led to the alleged incident. By providing both parties with strong, clear procedural rights – including the right to an advisor of choice to assist a party in navigating the process – a party perceived as being in a weaker position has the same rights as the party perceived as having greater power (perhaps due to sex, age, or a position of authority over the other party), and the process is more likely to generate accurate determinations about what occurred between the parties.

The Department disagrees with commenters who criticized this provision (and the overall approach of the final regulations) for being gender-neutral. Title IX's non-discrimination mandate benefits "persons" without regard to sex.[1009] The Department believes that Title IX's non-discrimination mandate is served by an approach that is neutral with respect to sex. The Department notes that applying a sex-neutral framework does not imply that recipients cannot gain understanding about the dynamics of sexual violence including particular impacts of sexual

[1009] 20 U.S.C. 1681(a) ("No person in the United States shall, on the basis of sex . . .").

violence on women or other demographic groups – but such background knowledge and information cannot be applied in a way that injects bias or lack of impartiality into a process designed to resolve particular allegations of sexual harassment. Contrary to some commenters' concerns, sex-neutrality in the grievance process helps prevent the very kind of victim-blaming and rape myths that have improperly affected responses to females, and does so in a manner that also prevents improper injection of sex-bias against males. A sex-neutral approach is also the only approach that appropriately prohibits generalizations about "women as victims" and "men as perpetrators" from improperly affecting an objective evaluation of the facts surrounding each particular allegation and emphasizes for students and recipients the fact that with respect to sexual harassment, any person can be a victim and any person can be a perpetrator, regardless of sex.

Changes: We have revised § 106.45(b)(1)(i) to include the phrase "or other actions that are not supportive measures as defined in § 106.30" in addition to disciplinary sanctions, to describe equitable treatment of a respondent during a grievance process.

Comments: Some commenters characterized this provision as a "weak" attempt to restore or preserve a complainant's access to education without sufficiently acknowledging that often, sexual harassment causes a complete or total denial of access for the victim (for example, where a victim drops out of school entirely).[1010] Some commenters viewed this provision's description of remedies for a complainant as too narrow because such remedies must be "designed to restore or preserve access" to the recipient's education program or activity. At least one commenter

[1010] Many commenters cited: Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18 JOURNAL OF COLL. STUDENT RETENTION: RESEARCH, THEORY & PRACTICE 2, 234, 244 (2015), for the proposition that survivors drop out of school at higher rates than non-survivors.

understood the phrase "designed to restore or preserve access" to forbid a recipient from imposing a disciplinary sanction on a respondent unless the sanction itself is designed to restore or preserve access to education. At least one commenter suggested adding the word "equal" before "access" in this provision to align this provision with the "equal access" language used in § 106.30 defining sexual harassment. A few commenters urged the Department to add a list of possible remedies for complainants including counseling, supportive services, and training for staff. At least one commenter suggested that remedies for a complainant must actually restore or preserve the complainant's access to education and so proposed deleting "designed to" from this provision.

Discussion: The Department believes that § 106.45(b)(1)(i) provides a strong, clear requirement for the benefit of victims of sexual harassment: where a § 106.45 grievance process results in a determination that the respondent in fact committed sexual harassment against the complainant, the complainant must be given remedies. The Department understands that research shows that sexual harassment victims drop out of school more often than other students, and in an effort to prevent that loss of access to education, this provision mandates that recipients provide remedies. In response to commenters concerned that the description of remedies is too narrow or unclear, the final regulations revise this provision. This provision now uses the phrase "equal access" rather than simply "access," in response to commenters who pointed out that "equal access" is the phrase used in § 106.30 defining sexual harassment. Further, the final regulations substitute "determination of responsibility" for "finding of responsibility," out of caution that this provision's use of "finding" instead of "determination" (when the latter is used elsewhere throughout the proposed rules) caused a commenter's confusion between remedies for a complainant (which are designed to restore the complainant's equal access to education) versus

disciplinary sanctions against a respondent (which are not designed to restore a respondent's access to education). Moreover, the final regulations revise § 106.45(b)(1)(i) to state that remedies may consist of the same individualized services listed illustratively in § 106.30 as "supportive measures" but remedies need not meet the limitations of supportive measures (i.e., unlike supportive measures, remedies may in fact burden the respondent, or be punitive or disciplinary in nature). The Department believes that this additional language in the final regulations obviates the need to repeat a non-exhaustive list of possible remedies and gives recipients and complainants additional clarity about the kind of remedies available to help restore or preserve equal educational access for victims of sexual harassment.

The Department declines to remove "designed to" from this provision. Sexual harassment can cause severe trauma to victims, and while Title IX obligates a recipient to respond appropriately when students or employees are victimized with measures aimed at ensuring a victim's equal access, the Department does not believe it is reasonable to hold recipients accountable for situations where despite a recipient's reasonably designed and implemented remedies, a victim still suffers loss of access (for example, by dropping out) due to the underlying trauma. We have also added § 106.45(b)(7)(iv) requiring Title IX Coordinators to be responsible for the "effective implementation" of remedies to clarify that the burden of effectively implementing the remedies designed to restore or preserve the complainant's equal access to education rests on the recipient and must not fall on the complainant.

The Department acknowledges that the 2001 Guidance discussed corrective action in terms of both remedying effects of the harassment on the victim and measures that end the

harassment and prevent its recurrence.[1011] For reasons described in the "Deliberate Indifference" subsection of the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, the Department believes that remedies designed to restore and preserve equal access to the recipient's education programs or activities is the appropriate focus of these final regulations, and a recipient's selection and implementation of remedies will be evaluated by what is not clearly unreasonable in light of the known circumstances.[1012] The Department is persuaded by the Supreme Court's rationale in *Davis* that courts (and administrative agencies) should not second guess a school's disciplinary decisions, and the Department desires to avoid creating regulatory rules that effectively dictate particular disciplinary sanctions that obligate recipients to attempt to guarantee that sexual harassment does not recur, instead focusing on whether a recipient is effectively implementing remedies to complainants where respondents are found responsible for sexual harassment.

Changes: The final regulations revise § 106.45(b)(1)(i) to use the phrase "equal access" instead of "access," substitute "determination of responsibility" for "finding of responsibility," and state that remedies may include the same individualized services described in § 106.30 defining "supportive measures" but unlike supportive measures, remedies need not avoid burdening the respondent and can be punitive or disciplinary. We have also added § 106.45(b)(7)(iv) requiring Title IX Coordinators to be responsible for the "effective implementation" of remedies.

[1011] 2001 Guidance at 10 (stating that where the school has determined that sexual harassed occurred, "The recipient is, therefore, also responsible for remedying any effects of the harassment on the victim, as well as for ending the harassment and preventing its recurrence.").

[1012] Recipients must also document their reasons for concluding that the recipient's response to sexual harassment was not deliberately indifferent, under § 106.45(b)(10).

Comments: Some commenters objected to § 106.45(b)(1)(i) for referencing "due process protections" owed to respondents, claiming that respondents have no right to due process in campus administrative proceedings, or that courts do not require the specific due process protections that the proposed rules require. Some commenters criticized this provision for referring to due process protections for respondents because the reference implies that due process protections are not important for complainants and thereby discounts and downplays the needs of victims. At least one commenter recommended modifying this provision to specify that equitable treatment of both parties requires due process protections for both parties. Other commenters urged the Department not to use "due process" or "due process protections" in the final regulations and to instead refer to a "fair process" for all parties; similarly, at least one commenter asked for clarification whether by using the phrase "due process protections" the Department intended to reference constitutional due process or only those protections set forth in the proposed regulations.

Some commenters contended that § 106.45(b)(1)(i) is contradicted by other provisions in the proposed rules; for example, commenters characterized the § 106.44(c) emergency removal provision as contrary to the requirement for equitable treatment of a respondent in § 106.45(b)(1)(i) because the emergency removal section permits schools to remove respondents without due process protections. Other commenters pointed to the requirement in proposed § 106.44(b)(2) that Title IX Coordinators must file a formal complaint upon receiving multiple reports against the same respondent as inequitable to respondents in contravention of § 106.45(b)(1)(i) because a respondent should not have to undergo a grievance process without a cooperating complainant. Other commenters pointed to the presumption of non-responsibility in § 106.45(b)(1)(iv) as "inequitable" to complainants in contradiction with § 106.45(b)(1)(i); other

commenters characterized the live hearing and cross-examination requirements of § 106.45(b)(6)(i) as inequitable treatment of complainants.

At least one commenter asked the Department to answer whether being sensitive to the trauma experienced by victims would violate this provision by being inequitable to respondents. At least one commenter requested that as part of treating the parties equitably, this provision should require a Title IX Coordinator to offer, and keep lists available that describe, various off-campus supportive resources available to both complainants and respondents, including resources oriented toward survivors and those oriented toward accused students. One commenter asserted that this provision should include a statement that equitable treatment of a respondent must include remedies for a respondent where a complainant is found to have brought a false allegation.

Discussion: The Department appreciates commenters' varied concerns about use of the phrase "due process protections" in § 106.45(b)(1)(i) and perceived tension between this provision and other provisions in the proposed rules. The Department agrees with commenters that "due process protections" caused unnecessary confusion about whether the proposed rules intended to reference due process of law under the U.S. Constitution, or only those protections embodied in the proposed rules. In response to such comments, the final regulations replace "due process protections" with "a grievance process that complies with § 106.45" throughout the final regulations, including in this provision, § 106.45(b)(1)(i). As explained in the "Role of Due Process in the Grievance Process" section of this preamble, while the Department believes that the § 106.45 grievance process is consistent with constitutional due process obligations, these final regulations apply to all recipients including private institutions that do not owe

constitutional protections to their students and employees, and making this terminology change throughout the final regulations helps clarify that position.

The Department disagrees that § 106.45(b)(1)(i) implies that the protections in the grievance process do not also benefit complainants, or should not be given to complainants. The grievance process is of equal benefit to complainants and respondents and each provision has been selected for the purpose of creating a fair process likely to result in reliable outcomes resolving sexual harassment allegations. The equitable distinction in § 106.45(b)(1)(i) recognizes the significance of remedies for complainants and disciplinary sanctions for respondents, but does not alter the benefit of the § 106.45 grievance process providing procedural rights and protections for both parties.

The Department understands commenters' views that certain other provisions in the final regulations are "inequitable" for either complainants or respondents. For reasons explained in this preamble with respect to each particular provision, the Department believes that each provision in the final regulations contributes to effectuating Title IX's non-discrimination mandate while providing a fair process for both parties. Section 106.45(b)(1)(i) was not intended to create a standard of "equitableness" under which other provisions of the proposed rules should be measured. In response to commenters' apparent perception that § 106.45(b)(1)(i) created a general equitability requirement that applied to the proposed rules or created conflict between this provision and other parts of the proposed rules, the final regulations revise § 106.45(b)(1)(i) to more clearly express its intent – that equitable treatment of a complainant means providing

remedies, and equitable treatment of a respondent means imposing disciplinary sanctions only after following the grievance process.[1013]

Being sensitive to the trauma a complainant may have experienced does not violate § 106.45(b)(1)(i) or any other provision of the grievance process, so long as what the commenter means by "being sensitive" does not lead a Title IX Coordinator, investigator, or decision-maker to lose impartiality, prejudge the facts at issue, or demonstrate bias for or against any party.[1014] The Department declines to require recipients to list off-campus supportive resources for complainants, respondents, or both, though the final regulations do not prohibit a recipient from choosing to do this. The Department believes that § 106.45(b)(1)(ix), requiring recipients to describe the range of supportive measures available to complainants and respondents, is sufficient to serve the Department's interest in ensuring that parties are aware of the availability of supportive measures. The Department declines to require remedies for respondents in situations where a complainant is found to have brought a false allegation. These final regulations are focused on sexual harassment allegations, including remedies for victims of sexual harassment, and not on remedies for other kinds of misconduct.[1015]

Changes: Section 106.45(b)(1)(i) is revised by replacing "due process protections" with "a grievance process that complies with § 106.45" and by stating that treating complainants

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[1013] The Department notes that similar language is included in the final regulations in § 106.44(a) such that a recipient's response in the absence of a formal complaint must treat complainants equitably by offering supportive measures and must treat respondents equitably by imposing sanctions only after following a grievance process that complies with § 106.45.

[1014] Section 106.45(b)(1)(iii).

[1015] The Department notes that the final regulations add § 106.71 prohibiting retaliation, and paragraph (b)(2) of that section cautions recipients that a determination regarding responsibility, alone, is not sufficient to conclude that a party has made a materially false statement in bad faith. The Department leaves recipients with discretion to address false statements (by any party) under the recipient's own code of conduct.

equitably means providing remedies where a respondent has been determined to be responsible, and treating respondents equitably means imposing disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30 only after following the § 106.45 grievance process.

Section 106.45(b)(1)(ii) Objective Evaluation of All Relevant Evidence

Comments: Numerous commenters supported § 106.45(b)(1)(ii) asserting that it ensures fairness, accuracy, due process, and impartiality to all parties. Several commenters shared personal experiences with Title IX investigations in which they witnessed the recipient ignoring, discounting, burying, or destroying exculpatory evidence. Similarly, other commenters stated that they have observed inculpatory evidence being ignored or discounted particularly when a respondent is a star athlete or otherwise prominent within the recipient's educational community.

Other commenters expressed concerns about requiring an objective evaluation of relevant evidence. Some commenters asserted that it would be challenging to get such evidence in sexual assault cases, because sexual assault often happens without witnesses who can corroborate stories. One commenter contended that getting objective evidence every time would be a "near-impossible task," while another felt it is "unrealistic" to expect tangible evidence in all cases. Some commenters argued that such a high standard would likely chill reporting. One commenter was concerned that an objective evaluation of *all* relevant evidence could lead to respondents extending investigations indefinitely since almost anything could be relevant and new evidence or witnesses might surface regularly.

Some commenters expressed support for this provision's preclusion of making credibility determinations based on party status because it is inappropriate to make presumptions about trustworthiness based on whether a person is a complainant or respondent. Other commenters

opposed this part of § 106.45(b)(1)(ii) and suggested modifying the provision to require that credibility determinations not be based "solely" on a person's status, but argued that fact-finders could base credibility determinations in part on a person's status as a complainant or respondent. These commenters opposed any categorical bar to the fact-finder's considerations when determining credibility, and questioned whether this provision is in significant tension with the presumption of non-responsibility in § 106.45(b)(1)(iv). Commenters asserted that § 106.45(b)(1)(ii)'s requirement is problematic for adjudicators because it directs them to ignore central factors in credibility determinations, such as what interests a party has at stake. Commenters argued that courts, law enforcement, and other investigators have always considered a party's status as a defendant or plaintiff when determining how to weigh evidence and testimony. Commenters argued that recipients should be permitted to consider a party's status when considering the totality of the circumstances to reach credibility determinations.

A number of commenters proposed modifications related to training that commenters believed would improve implementation of this provision and promote objectivity and competence, such as training about applying rules of evidence, how to collect and evaluate evidence, and how to determine if evidence is credible, relevant, or reliable.

Many commenters suggested types of evidence that should be considered, specific investigative processes, or other evidentiary requirements. Commenters proposed, for example, that the final regulations should require consideration of letters, videos, photos, e-mails, texts, phone calls, social media, mental health history, drug, alcohol, and medication use, and rape kits. Commenters also proposed requiring a variety of investigative techniques, including asking the Department to require recipients to take immediate action to collect and test all evidence, including permitting recipients to interview community members and other witnesses (e.g.,

roommates, dorm residents, classmates, fraternity members). Commenters also asked whether the recipient may consider evidence of the respondent's lack of credibility, other bad acts, and misrepresentation of key facts. Some commenters asked whether the proposed rules would allow respondents to introduce lie detector test results and impact statements. Some commenters wanted the final regulations to require investigators to identify any data gaps in investigative report noting unavailable information (e.g., unable to interview eyewitnesses or to visit the scene of an incident) and all attempts to fill those data gaps, as well as requiring hearing boards to explain the specific evidentiary basis for each finding. Other commenters asserted that the final regulations should require all evidence to be shared with the parties to ensure fairness, and that an investigator should not get to decide what is relevant.

Commenters requested that the Department clarify how to evaluate whether evidence is relevant. Commenters asked how recipients should make credibility determinations, and whether it would be permissible to admit character and reputation evidence, including past sexual history or testimony based on hearsay. One commenter asserted that requiring an "objective evaluation" leaves questions about what this term will mean in practice, noting that similar provisions in the VAWA negotiated rulemaking in 2012 raised concerns that the subjectivity (at least in defining bias) would be an overreach into campus administrative decisions.

Some commenters suggested specific modifications to the wording of the proposed provision. For example, individual commenters suggested that the Department: replace "objective" with "impartial' for consistency with VAWA; add language emphasizing that the recipient's determination must be unbiased since recipient bias has been a significant problem in Title IX investigations; add that objective evaluation be "based on rules of evidence under applicable State law;" add that schools shall resolve doubts "in favor of considering evidence to

be relevant and exculpatory" to address the danger that recipients will narrowly construe what constitutes exculpatory evidence; and add that unsubstantiated theories of trauma cannot be relied on to conclude that a particular complainant suffered from trauma or be used to explain away a complainant's inconsistencies. One commenter asserted that underweighting relevant testimony simply because someone is a friend to a party in a case will make it materially harder to prove an assault and will not promote equitable treatment for all parties; this commenter mistakenly believed that the proposed rules used the phrase "arbiters should underweight character feedback from biased witnesses" and wanted that language changed.

Discussion: The Department appreciates commenters' support of this provision and acknowledges other commenters' concerns about § 106.45(b)(1)(ii). While the gathering and evaluation of available evidence will take time and effort on the part of the recipient, the Department views any difficulties associated with the provision's evidence requirement to be outweighed by the due process benefits the provision will bring to both parties during the grievance process. The recipient's investigation and adjudication of the allegations must be based on an objective evaluation of the evidence available in a particular case; the type and extent of evidence available will differ based on the facts of each incident. The Department understands that in some situations, there may be little or no evidence other than the statements of the parties themselves, and this provision applies to those situations. As some commenters have observed, Title IX campus proceedings often involve allegations with competing plausible narratives and no eyewitnesses, and such situations still must be evaluated by objectively evaluating the relevant evidence, regardless of whether that available, relevant evidence consists of the parties' own statements, statements of witnesses, or other evidence. This provision does not require "objective" evidence (as in, corroborating evidence); this provision requires that the

recipient objectively evaluate the relevant evidence that is available in a particular case. The Department disagrees that this provision could permit endlessly delayed proceedings while parties or the recipient search for "all" relevant evidence; § 106.45(b)(1)(v) requires recipients to conclude the grievance process within designated reasonable time frames and thus "all" the evidence is tempered by what a thorough investigation effort can gather within a reasonably prompt time frame.

The Department agrees with commenters who noted the inappropriateness of investigators and decision-makers drawing conclusions about credibility based on a party's status as a complainant or respondent. While the Department appreciates the concerns by commenters advocating that the final regulations should permit status-based inferences as to a person's credibility, the Department believes that to do so would invite bias and partiality. To that end, we disagree with commenters who opposed categorical bars on the factors that investigators or decision-makers may consider, and who want to partially judge a person's credibility based on the person's status as a complainant, respondent, or witness. A process that permitted credibility inferences or conclusions to be based on party status would inevitably prejudge the facts at issue rather than determine facts based on the objective evaluation of evidence, and this would decrease the likelihood that the outcome reached would be accurate.

The Department disagrees that § 106.45(b)(1)(ii) conflicts with the presumption of non-responsibility; in fact, § 106.45(b)(1)(ii) helps to ensure that the presumption is not improperly applied by recipients. Section 106.45(b)(1)(iv) affords respondents a presumption of non-responsibility until the conclusion of the grievance process. Section 106.45(b)(1)(ii) applies throughout the grievance process, including with respect to application of the presumption, to ensure that the presumption of non-responsibility is not interpreted to mean that a respondent is

considered truthful, or that the respondent's statements are credible or not credible, based on the respondent's status as a respondent. Treating the respondent as not responsible until the conclusion of the grievance process does not mean considering the respondent truthful or credible; rather, that presumption buttresses the requirement that investigators and decision-makers serve impartially without prejudging the facts at issue.[1016] Determinations of credibility, including of the respondent, must be based on objective evaluation of relevant evidence – not on inferences based on party status. Both the presumption of non-responsibility and this provision are designed to promote a fair process by which an impartial fact-finder determines whether the respondent is responsible for perpetrating sexual harassment. Every determination regarding responsibility must be based on evidence, not assumptions about respondents or complainants. The Department disagrees that disregarding party status poses problems for investigators or adjudicators or directs them to ignore central factors in reaching credibility determinations. Title IX personnel are not prevented from understanding and taking into account each party's interests and the "stakes" at issue for each party, yet what is at stake does not, by itself, reflect on the party's truthfulness.

In response to commenters' concerns about how to determine "relevance" in the context of these final regulations, we have revised § 106.45(b)(1)(iii) specifically to require training on issues of relevance (including application of the "rape shield" protections in § 106.45(b)(6)). Thus, these final regulations require Title IX personnel to be well trained in how to conduct a

[1016] For further discussion on the purpose and function of the presumption of non-responsibility, see the "Section 106.45(b)(1)(iv) Presumption of Non-Responsibility" subsection of the "General Requirements for § 106.45 Grievance Process" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble.

grievance process; within the requirements stated in § 106.45(b)(1)(iii) recipients have flexibility to adopt additional training requirements concerning evidence collection or evaluation.

Similarly, the Department declines to adopt commenters' suggestions that the final regulations explicitly allow or disallow certain types of evidence or utilize specific investigative techniques. The Department believes that the final regulations reach the appropriate balance between prescribing sufficiently detailed procedures to foster a consistently applied grievance process, while deferring to recipients to tailor rules that best fit each recipient's unique needs. While the proposed rules do not speak to admissibility of hearsay,[1017] prior bad acts, character evidence, polygraph (lie detector) results, standards for authentication of evidence, or similar issues concerning evidence, the final regulations require recipients to gather and evaluate relevant evidence,[1018] with the understanding that this includes both inculpatory and exculpatory evidence, and the final regulations deem questions and evidence about a complainant's prior sexual behavior to be irrelevant with two exceptions[1019] and preclude use of any information protected by a legally recognized privilege (e.g., attorney-client).[1020] Within these evidentiary parameters recipients retain the flexibility to adopt rules that govern how the recipient's investigator and decision-maker evaluate evidence and conduct the grievance process (so long as

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[1017] While not addressed to hearsay evidence as such, § 106.45(b)(6)(i), which requires postsecondary institutions to hold live hearings to adjudicate formal complaints of sexual harassment, states that the decision-maker must not rely on the statement of a party or witness who does not submit to cross-examination, resulting in exclusion of statements that remain untested by cross-examination.

[1018] The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied.

[1019] Section 106.45(b)(6) contains rape shield protections, providing that questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

[1020] Section 106.45(b)(1)(x) (precluding a recipient from using information or evidence protected by a legally recognized privilege unless the holder of the privilege has waived the privilege).

such rules apply equally to both parties).[1021] Relevance is the standard that these final regulations require, and any evidentiary rules that a recipient chooses must respect this standard of relevance. For example, a recipient may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence. A recipient may adopt rules of order or decorum to forbid badgering a witness, and may fairly deem repetition of the same question to be irrelevant.

The Department disagrees that requiring an "objective evaluation" leaves questions about what this will mean in practice; the final regulations contain sufficient clarity concerning objectivity, while leaving recipients discretion to apply the grievance process in a manner that best fits the recipient's needs. Similarly, the Department is not persuaded that the final regulations permit inappropriate subjectivity as to defining bias or constitute overreach into campus administrative proceedings. A commenter raising that concern noted that the same issue was raised during negotiated rulemaking under VAWA; however, the Department believes that these final regulations prohibit bias with adequate specificity (i.e., bias against complainants or respondents generally, or against an individual complainant or respondent) yet reserve adequate flexibility for recipients to apply the prohibition against bias without unduly overreaching into a

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[1021] Of course, the manner in which a recipient adopted or applied such a rule or practice concerning evaluation of evidence could constitute sex discrimination, a situation that § 106.45(a) cautions recipients against, and the entirety of a recipient's grievance process must be conducted impartially, free from conflicts of interest or bias for or against complainants or respondents. Further, the introductory sentence of § 106.45(b) has been revised in the final regulations to ensure that a recipient's self-selected rules must apply equally to both parties. The Department notes that the universe of evidence given to the parties for inspection and review under § 106.45(b)(5)(vi) must consist of all evidence directly related to the allegations; determinations as to whether evidence is "relevant" are made when finalizing the investigative report, pursuant to § 106.45(b)(5)(vii) (requiring creation of an investigative report that "fairly summarizes all relevant evidence"). Only "relevant" evidence can be subject to the decision-maker's objective evaluation in reaching a determination, and relevant evidence must be considered, subject to the rape shield and legally recognized privilege exceptions contained in the final regulations. This does not preclude, for instance, a recipient adopting a rule or providing training to a decision-maker regarding how to assign weight to a given type of relevant evidence, so long as such a rule applies equally to both parties.

recipient's internal administrative affairs. To the extent that the commenter was arguing that prohibiting bias is itself an overreach into campus administrative decisions, the Department does not agree. The text of Title IX prohibits recipients from engaging in discrimination on the basis of sex. Biased decision making increases the risk of erroneous outcomes because bias, rather than evidence, dictates the conclusion. Sex-based bias is a specific risk in the context of sexual harassment allegations, where the underlying conduct at issue inherently raises issues related to sex, making these proceedings susceptible to improper sex-based bias that prevents reliable outcomes. Other forms of bias on the part of individuals in charge of investigating and adjudicating allegations also lessen the likelihood that outcomes are reliable and viewed as legitimate; because Title IX's non-discrimination mandate requires that recipients accurately identify (and remedy) sexual harassment occurring in education programs or activities, these final regulations prohibit bias on the part of Title IX personnel (in § 106.45(b)(1)(iii)) and require objective evaluation of evidence (in § 106.45(b)(1)(ii)).

Rather than require recipients to take "immediate action" to collect all evidence, the final regulations require the recipient to investigate the allegations in a formal complaint[1022] yet permit recipients flexibility to conduct the investigation, under the constraint that the investigation (and adjudication) must be completed within the recipient's designated, reasonably prompt time frames.[1023]

While the final regulations do not require hearing boards (as opposed to a single individual acting as the decision-maker), the final regulations do not preclude the recipient from

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[1022] Section 106.45(b)(5).
[1023] Section 106.45(b)(1)(v).

using a hearing board to function as a decision-maker, such that more than one individual serves as a decision-maker, each of whom must fulfill the obligations under § 106.45(b)(1)(iii). Whether or not the determination regarding responsibility is made by a single decision-maker or by multiple decision-makers serving as a hearing board, § 106.45(b)(7)(ii) requires that decision-makers lay out the evidentiary basis for conclusions reached in the case, in a written determination regarding responsibility. Prior to the time that a determination regarding responsibility will be reached, § 106.45(b)(5)(vi) requires the recipient to make all evidence directly related to the allegations available to the parties for their inspection and review, and § 106.45(b)(5)(vii) requires that recipients create an investigative report that fairly summarizes all relevant evidence. The final regulations add language in § 106.45(b)(5)(vi) stating that evidence subject to inspection and review must include inculpatory and exculpatory evidence whether obtained from a party or from another source. The Department does not believe it is necessary to require investigators to identify data gaps in the investigative report, because the parties' right to inspect and review evidence, and review and respond to the investigative report, adequately provide opportunity to identify any perceived data gaps and challenge such deficiencies.

The Department disagrees that an investigator should not get to decide what is relevant, and the final regulations give the parties ample opportunity to challenge relevancy determinations. The investigator is obligated to gather evidence directly related to the allegations whether or not the recipient intends to rely on such evidence (for instance, where evidence is directly related to the allegations but the recipient's investigator does not believe the evidence to be credible and thus does not intend to rely on it). The parties may then inspect and review the

evidence directly related to the allegations.[1024] The investigator must take into consideration the parties' responses and then determine what evidence is relevant and summarize the relevant evidence in the investigative report.[1025] The parties then have equal opportunity to review the investigative report; if a party disagrees with an investigator's determination about relevance, the party can make that argument in the party's written response to the investigative report under § 106.45(b)(5)(vii) and to the decision-maker at any hearing held; either way the decision-maker is obligated to objectively evaluate all relevant evidence and the parties have the opportunity to argue about what is relevant (and about the persuasiveness of relevant evidence). The final regulations also provide the parties equal appeal rights including on the ground of procedural irregularity,[1026] which could include a recipient's failure to objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence. Furthermore, § 106.45(b)(1)(iii) requires the recipient's investigator and decision-maker to be well-trained to conduct a grievance process compliant with § 106.45 including determining "relevance" within the parameters of the final regulations.

While the Department appreciates commenters' desire for more oversight as to how a recipient defines or "counts" exculpatory evidence, based on commenters' observations that recipients have not consistently understood the need to consider exculpatory evidence as relevant, the Department believes that the final regulations adequately address this concern by specifying that relevant evidence must include both inculpatory and exculpatory evidence, ensuring the parties have opportunities to challenge relevance determinations, and requiring Title

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[1024] Section 106.45(b)(5)(vi).
[1025] Section 106.45(b)(5)(vii).
[1026] Section 106.45(b)(8).

IX personnel to be trained to serve impartially including specific training for investigators and decision-makers on issues of relevance.

While some commenters wished to alter the wording of the provision in numerous ways, for the reasons explained above the Department believes that § 106.45(b)(1)(ii) appropriately serves the Department's goal of providing clear parameters for evaluation of evidence while leaving flexibility for recipients within those parameters. The Department thus declines to remove the word "objective," require recipients to adopt any jurisdiction's rules of evidence, or add rules or presumptions that would require particular types of evidence to be relevant.

Changes: In the final regulations we add § 106.45(b)(1)(x), precluding the recipient from using evidence that would result in disclosure of information protected by a legally recognized privilege. The final regulations add language in § 106.45(b)(5)(vi) stating that evidence subject to inspection and review must include inculpatory and exculpatory evidence whether obtained from a party or from another source. We have also revised § 106.45(b)(1)(iii) to specifically require investigators and decision-makers to receive training on issues of relevance.

Section 106.45(b)(1)(iii) Impartiality and Mandatory Training of Title IX Personnel; Directed Question 4 (training)

Comments: Many commenters expressed support for § 106.45(b)(1)(iii) and, in response to the NPRM's directed question about training, stated that the training provided for in this provision is adequate. Several commenters believed this provision provides recipients with appropriate flexibility to decide the amount and type of training recipients must provide to individuals involved with Title IX proceedings. At least one commenter, on behalf of a college, noted that the college already provides for investigators free from bias or conflict of interest. Several commenters supported this provision because its prohibition on bias, conflicts of interest, and

training materials that rely on sex stereotypes will lead to impartial investigations and adjudications. One commenter asserted that the proposed regulations help reduce bias by ensuring that training programs are fair and neutral and noted that social scientists and legal academics have argued that training programs can help adjudicatory bodies make better decisions.[1027]

Many commenters supported § 106.45(b)(1)(iii) because of personal experiences with Title IX campus proceedings involving perceived bias or conflicts of interest that commenters believed rendered the investigation or adjudication unfair. One commenter supported this provision because the commenter believed it will counteract the ideological propaganda having to do with sex and gender that has been disseminated throughout institutions of higher education. Another commenter believed this provision will help remedy widespread sex bias against male students at colleges and universities. One commenter favored this provision because the topics considered in a Title IX process are sensitive and personal, improper handling of cases can potentially retraumatize survivors or lead to unfair outcomes for both survivors and the accused, and mandatory training should lead to better results for all involved. One commenter analyzed how and why unconscious biases and sex-based stereotypes are pernicious especially in university disciplinary hearings, can constitute Title IX violations, and lead to biased outcomes. This commenter argued that bias can subvert procedural protections, which are necessary to

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[1027] Commenters cited: Stephen E. Fienberg & Mark J. Schervish, *The Relevance of Bayesian Inference for the Presentation of Statistical Evidence and Legal Decisionmaking*, 66 BOSTON UNIV. L. REV. 771 (1986) (advocating that jurors be instructed in Bayesian probabilities); James J. Gobert, *In Search of the Impartial Jury*, 79 J. CRIM. L. & CRIMINOLOGY 269, 326 (1988) (suggesting that juries receive "impartiality training"); Jennifer A. Richeson & Richard J. Nussbaum, *The Impact of Multiculturalism Versus Color-Blindness on Racial Bias*, 40 J. OF EXPERIMENTAL SOCIAL PSYCHOL. 417 (2004) (explaining how diversity training can lead to less implicit bias); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, DUKE L. J. 345 (2007) (arguing for diversity training).

render fair outcomes, and biased adjudicators cannot properly carry out their duties. One commenter supported this provision's restriction against sex stereotyping in training materials for Title IX personnel, arguing that while appropriate training can reduce bias, improper trainings can leave biases unchecked or exacerbate underlying biases. The commenter argued that numerous examples exist showing that recipients' training documents given to adjudicators in university sexual misconduct processes have demonstrated bias especially against respondents, making it impossible for decision-makers to be impartial and unbiased.[1028]

Another commenter supported § 106.45(b)(1)(iii) combined with the other provisions in § 106.45 because while nothing can completely eliminate gender or racial bias from the system, bias can be reduced by expanding the evidence considered by decision-makers, a function served by a full investigation and hearings with cross-examination. The commenter argued that decisions are most biased when they rely on less evidence and more hunches because hunches are easily tainted by subconscious racial or gender bias.[1029] The commenter asserted that the obligation of the law under Title IX is to treat each person as an individual, not as a member of a class subject to prejudgment and prejudice on the basis of sex, and nowhere is the problem of sex

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[1028] Commenters asserted that as of 2014, Harvard Law School's disciplinary board training contained slides to this effect and that one Harvard Law School professor stated that these slides were "100% aimed to convince [adjudicators] to believe complainants, precisely *when* they seem unreliable and incoherent" *citing to* Emily Yoffe, *The Bad Science Behind Campus Response to Sexual Assault*, THE ATLANTIC (Sept. 8, 2017). Commenters further stated that at Ohio State University, for instance, decision-makers were told that a "victim centered approach can lead to safer campus communities." *Doe v. Ohio State Univ.*, No. 2:15-CV-2830, 2016 WL 692547, at *3 (S.D. Ohio, Feb. 22, 2016). Commenters further stated that same Ohio State University training guide, for example, told decision-makers that "[s]ex offenders are overwhelmingly white males." *Id.*; *see also Doe v. Univ. of Pa.*, 270 F. Supp. 3d 799, 823 (E.D. Pa. 2017).

[1029] In support of the proposition that most decisions after a full trial are not based on using race as a proxy but rather on the evidence at trial, resulting in racially fair decisions, while racial bias is rampant in low-stakes, low-evidence decision making where people make decisions on little evidence, the commenter cited Stephen P. Klein, *et al.*, *Race and Imprisonment Decisions in California*, 247 SCIENCE 812 (1990). More than one commenter cited to *Driving While Black in Maryland*, AMERICAN CIVIL LIBERTIES UNION (ACLU) (Feb. 2, 2010) https://www.aclu.org/cases/driving-while-black-maryland, for similar propositions.

bias more pronounced than in the area of perception, prejudgment, and prejudice in the matter of incidences of violence between members of the opposite sex. The commenter supported the Department's proposed rules, including this provision, based on the Department's authority and obligation to issue regulations that end the discrimination based on sex that exists in Title IX programs themselves.[1030]

One commenter supported this provision but noted that the Supreme Court has recognized that as a practical matter it is difficult if not impossible for an adjudicator "to free himself from the influence" of circumstances that would give rise to bias, and the private nature of motives "underscore the need for objective rules" for determining when an adjudicator is biased.[1031] This commenter asserted recipients thus need to have objective rules for determining bias. A few commenters supporting this provision recommended that the Department, or recipients on their own, establish a clear process or mechanism for reporting conflicts of interest or demanding recusal for bias during the investigative process.

Several commenters supported this provision but urged the Department to make the training materials referred to in § 106.45(b)(1)(iii) publicly available because transparency is the most effective means to eradicate the problems with biased Title IX proceedings, which problems are often rooted in biased training materials. These commenters argued that when recipients know that their training materials are subject to scrutiny, recipients will be more

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[1030] Commenters asserted that services for male victims of opposite sex violence are nearly non-existent at educational institutions and in society at large because of an ingrained "man as perpetrator/woman as victim" stereotype, which stereotype has always been false, shown by CDC data revealing the prevalence of male victims of sexual violence: Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, *The National Intimate Partner and Sexual Violence Survey (NISVS): 2015 Data Brief* Tables 9, 11 (2018).

[1031] Commenters cited: *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 883 (2009) (holding that a judge cannot hear a case centered on the financial interests of someone who substantially supported the judge's election campaign).

careful to ensure that Title IX personnel are being trained to be impartial. One commenter asserted that a lot of training is conducted via webinars and that public disclosure of training materials must include audio and video of the training as well as documents or slideshow presentations used during the training.

Discussion: The Department appreciates commenters' support for § 106.45(b)(1)(iii), and the commenters who provided feedback in response to the Department's directed question as to whether this provision adequately addresses training implicated under the proposed rules. The Department agrees with commenters who noted that prohibiting conflicts of interest and bias, including racial bias, on the part of people administering a grievance process is an essential part of providing both parties a fair process and increasing the accuracy and reliability of determinations reached in grievance processes. Recognizing that commenters recounted instances of experience with perceived conflicts of interest and bias that resulted in unfair treatment and biased outcomes, the Department believes that this provision provides a necessary safeguard to improve the impartiality, reliability, and legitimacy of Title IX proceedings.[1032] The Department agrees with a commenter who asserted that recipients should have objective rules for determining when an adjudicator (or Title IX Coordinator, investigator, or person who facilitates an informal resolution process) is biased, and the Department leaves recipients discretion to decide how best to implement the prohibition on conflicts of interest and bias, including whether a recipient wishes to provide a process for parties to assert claims of conflict of interest of bias during the investigation. The Department notes that § 106.45(b)(8) in the final regulations

[1032] The 2001 Guidance at 21 contained a similar training recommendation: "Finally, the school must make sure that all designated employees [referring to designated Title IX Coordinators] have adequate training as to what conduct constitutes sexual harassment and are able to explain how the grievance procedure operates."

requires recipients to allow both parties equal right to appeal including on the basis that the Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias that affected the outcome. The Department is persuaded by the numerous commenters who urged the Department to require training materials to be available for public inspection, to create transparency and better effectuate the requirements of § 106.45(b)(1)(iii). The final regulations impose that requirement in § 106.45(b)(10).

Additionally, the Department will not tolerate discrimination on the basis of race, color, or national origin, which is prohibited under Title VI. If any recipient discriminates against any person involved in a Title IX proceeding on the basis of that person's race, color, or national origin, then the Department will address such discrimination under Title VI and its implementing regulations, in addition to such discrimination potentially constituting bias prohibited under § 106.45(b)(1)(iii) of these final regulations.

Changes: The final regulations revise § 106.45(b)(10)(i)(D) to require that training materials referred to in § 106.45(b)(1)(iii) must be made publicly available on a recipient's website, or if the recipient does not have a website such materials must be made available upon request for inspection by members of the public.

Comments: Several commenters expressed skepticism that any recipient employees can be objective, fair, unbiased, or free from conflicts of interest because a recipient's employees share the recipient's interest in protecting the recipient's reputation or furthering a recipient's financial interests. Some commenters asserted this leads to recipient employees being unwilling to treat complainants fairly while others asserted this leads to recipient employees being unwilling to treat respondents fairly. A few commenters asserted that this problem of inherent conflicts of interest between recipient employees and complainants means that the only way to avoid

conflicts of interest is to require recipients to use an external, impartial arbiter or require investigations to be done by people unaffiliated with any students in the school, and one commenter argued that because all paid staff members are biased (in favor of the recipient), the solution is to allow complainants and respondents to pick the persons who run the grievance proceedings similar to jury selection. One commenter suggested that to counter institutional bias, which the commenter argued was on display in notorious cover-up situations at prestigious universities where employees committed sexual abuse, the proposed rules should specifically require training on conflicts of interest caused by employees' misplaced loyalty to the recipient. Another commenter stated that schools must be required to purchase liability insurance covering exposure arising from the handling of sexual harassment claims, to ensure that they do not have a secret conflict of interest that might cause them to put a finger on the scale one way or the other in the course of investigating or adjudicating a Title IX complaint.

Several commenters indicated that this provision seems reasonable but requested clarity as to what might in practice constitute a conflict of interest under § 106.45(b)(1)(iii), with one commenter noting that this issue often arises when a school district hires their legal counsel, insurance carrier, or risk pool to complete an investigation or respond to a formal complaint. Another commenter requested more information on what would constitute "general bias" for or against complainants or respondents under this provision, expressing concern that without any framework for evaluating whether a particular administrator is tainted by such bias this provision is amorphous and will add confusion and grounds for attack at smaller institutions where many student affairs administrators fill several different roles. Another commenter asked for clarification that school employees serving in the Title IX process should be presumed to be unbiased notwithstanding having previously investigated a matter involving one or more of

particular parties, or else this provision could be quite costly by requiring a school district to hire outside investigators every time an investigator deals with a party more than once.

Several commenters recommended countering inherent institutional conflicts of interest on the part of recipient employees by revising the final regulations to avoid any commingling of administrative and adjudicative roles. Several commenters offered the specific recommendation that the Title IX Coordinator must not be an employment supervisor of the decision-maker in the school's administrative hierarchy and if investigators are independent contractors, the Title IX Coordinator should not have a role in hiring or firing such investigators. The same commenters recommended bolstering neutrality and independence by removing the role of counseling complainants from the office that coordinates the grievance process and requiring that investigators have some degree of institutional independence. One commenter asserted that if the Department intends to prohibit any overlap in responsibilities among the Title IX Coordinator, investigator, or decision-maker, the Department must make that intention clear.

Many commenters requested clarification as to whether this provision's prohibition against conflicts of interest and bias would be interpreted to bar anyone from being a Title IX Coordinator, investigator, or decision-maker if the person currently or in their past has ever advocated for victims' rights or otherwise worked in sexual violence prevention fields. Several commenters argued against such an interpretation because individuals with that kind of experience are often highly knowledgeable about sexual violence and able to serve impartially, while several other commenters argued that Title IX-related personnel are a self-selected group likely to include victim advocates, self-identified victims, and those associated with women's studies and thus come to a Title IX role with biases against men, respondents, or both. One commenter asserted that while the choice of a professor's field of study may or may not indicate

bias, the fact that a university relies on volunteers to staff Title IX hearing panels is highly questionable because self-selection creates the likelihood that those who "want" to serve on a Title IX hearing board have preconceived ideas and views about whether male students are guilty, regardless of the actual facts and circumstances, and thus the final regulations should require the recipient to select decision-makers based on random selection from its entire faculty and administrators. One commenter shared an example of bias on the part of the single administrator tasked with ruling on the commenter's client's appeal of a responsibility finding, where the appeal decision-maker had recently retweeted a survivor advocacy organization's tweet "To survivors everywhere, we believe you," yet the recipient overruled a bias objection stating that nothing suggested that such a tweet meant the appeal decision-maker was biased against that particular respondent. This commenter proposed adding language explaining that a "reasonable person" standard will be applied to determine bias, along with cautionary language that a history of working or advocating on one side or another of this issue might constitute bias. One commenter asserted that Federal courts of appeal, including the Sixth Circuit, agree that "being a feminist, being affiliated with a gender-studies program, or researching sexual assault does not support a reasonable inference than an individual is biased against men."[1033] This commenter believed that the proposed rules offered no clarity on whether the Department would consider bias claims based on being a feminist or working in the sexual assault field to be "frivolous" or would be taken seriously.

Several commenters urged the Department to expand this provision to prohibit "perceived" conflicts of interest or "the appearance" of bias in line with standards that require

[1033] Commenter cited: *Doe v. Miami Univ.*, 882 F.3d 579, 593 fn. 6 (6th Cir. 2018).

judges not to have even the appearance of bias or impropriety; other commenters urged the Department to apply a presumption that campus decision-makers are free of bias, noting that courts require proof that a conduct official had an "actual" bias against the party because of the party's sex, and the proposed rules seem to reverse this judicial presumption, opening the door to numerous claims that undermine the presumption of honesty in campus proceedings. One commenter suggested a more clearly defined standard by specifying that Title IX personnel not have a personal bias or prejudice for or against complainants or respondents generally, and not have an interest, relationship, or other consideration that may compromise or have the appearance of compromising the individual's judgment with respect to any individual complainant or respondent. One commenter suggested that this provision should require "nondiscriminatory" investigations and adjudications instead of being "not biased." One commenter believed that student leaders should take more responsibility for addressing sexual misconduct and might do a better job than bureaucrats can; the commenter asserted that the final regulations should not prohibit recipients from relying on students to investigate and adjudicate sexual misconduct cases.

Discussion: The Department understands commenters' concerns that the final regulations work within a framework where a recipient's own employees are permitted to serve as Title IX personnel,[1034] and the potential conflicts of interest this creates. The final regulations leave recipients flexibility to use their own employees, or to outsource Title IX investigation and adjudication functions, and the Department encourages recipients to pursue alternatives to the

[1034] References in this preamble to "Title IX personnel" mean Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolution processes.

inherent difficulties that arise when a recipient's own employees are expected to perform these functions free from conflicts of interest and bias. The Department notes that several commenters favorably described regional center models that could involve recipients coordinating with each other to outsource Title IX grievance proceedings to experts free from potential conflicts of interest stemming from affiliation with the recipient. The Department declines to require recipients to use outside, unaffiliated Title IX personnel because the Department does not conclude that such prescription is necessary to effectuate the purposes of the final regulations; although recipients may face challenges with respect to ensuring that personnel serve free from conflicts of interest and bias, recipients can comply with the final regulations by using the recipient's own employees. Unless prescription is necessary to achieve compliance with the final regulations, the Department does not wish to interfere with recipients' discretion to conduct a recipient's own internal, administrative affairs. The Department is also sensitive to the reality that prescriptions regarding employment relationships likely will result in many recipients being compelled to hire additional personnel in order to comply with these final regulations, and the Department wishes to prescribe only those measures necessary for compliance, without unnecessarily diverting recipients' resources into hiring personnel and away from other priorities important to recipients and the students they serve. For these reasons, the Department declines to define certain employment relationships or administrative hierarchy arrangements as *per se* prohibited conflicts of interest under § 106.45(b)(1)(iii).[1035] The Department is cognizant that the

[1035] Although the decision-maker must be different from any individual serving as a Title IX Coordinator or investigator, pursuant to § 106.45(b)(7)(i), the final regulations do not preclude a Title IX Coordinator from also serving as the investigator, and the final regulations do not prescribe any particular administrative "chain of reporting" restrictions or declare any such administrative arrangements to be *per se* conflicts of interest prohibited under § 106.45(b)(1)(iii).

Department's authority under Title IX extends to regulation of recipients themselves, and not to the individual personnel serving as Title IX Coordinators, investigators, decision-makers, or persons who facilitate an informal resolution process. Thus, the Department will hold a recipient accountable for the end result of using Title IX personnel free from conflicts of interest and bias, regardless of the employment or supervisory relationships among various Title IX personnel. To the extent that recipients wish to adopt best practices to better ensure that conflicts of interest do not cause violations of the final regulations, recipients have discretion to adopt practices suggested by commenters, such as ensuring that investigators have institutional independence or deciding that Title IX Coordinators should have no role in the hiring or firing of investigators.

For similar reasons, the Department declines to state whether particular professional experiences or affiliations do or do not constitute *per se* violations of § 106.45(b)(1)(iii). The Department acknowledges the concerns expressed both by commenters concerned that certain professional qualifications (e.g., a history of working in the field of sexual violence) may indicate bias, and by commenters concerned that excluding certain professionals out of fear of bias would improperly exclude experienced, knowledgeable individuals who are capable of serving impartially. Whether bias exists requires examination of the particular facts of a situation and the Department encourages recipients to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased, exercising caution not to apply generalizations that might unreasonably conclude that bias exists (for example, assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents), bearing in mind that the very training

required by § 106.45(b)(1)(iii) is intended to provide Title IX personnel with the tools needed to serve impartially and without bias such that the prior professional experience of a person whom a recipient would like to have in a Title IX role need not disqualify the person from obtaining the requisite training to serve impartially in a Title IX role.

In response to commenters' concerns that the prohibition against conflicts of interest and bias is unclear, the Department revises this provision to mandate training in "how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias" in place of the proposed language for training to "protect the safety of students, ensure due process protections for all parties, and promote accountability." This shift in language is intended to reinforce that recipients have significant control, and flexibility, to prevent conflicts of interest and bias by carefully selecting training content focused on impartiality and avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

The Department disagrees with the commenter who suggested replacing "bias" in this provision with "non-discrimination." Based on anecdotal evidence from commenters asserting specific instances that ostensibly reveal a recipient's Title IX personnel exhibiting bias for or against men, women, complainants, or respondents, the Department believes that bias, especially sex-based bias, is a particular risk in Title IX proceedings and aims specifically to reduce and prevent bias from influencing how a recipient responds to sexual harassment including through required training for Title IX personnel.[1036]

[1036] *E.g.*, Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L. J. 345 (2007) (arguing for diversity training); Jennifer A. Richeson & Richard J. Nussbaum, *The Impact of Multiculturalism Versus Color-Blindness on Racial Bias*, 40 J. OF EXPERIMENTAL SOCIAL PSYCHOL. 417 (2004) (explaining how diversity training can lead to less implicit bias).

The Department declines to narrow or widen this provision by specifying whether conflicts of interest or bias must be "actual" or "perceived," and declines to adopt an "appearance of bias" standard. As noted above, the topic of sexual harassment inherently involves issues revolving around sex and sexual dynamics such that a standard of "appearance of" or "perceived" bias might lead to conclusions that most people are biased in one direction or another by virtue of being male, being female, supporting women's rights or supporting men's rights, or having had personal, negative experiences with men or with women. The Department believes that keeping this provision focused on "bias" paired with an expectation of impartiality helps appropriately focus on bias that impedes impartiality. The Department cautions parties and recipients from concluding bias, or possible bias, based solely on the outcomes of grievance processes decided under the final regulations; for example, the mere fact that a certain number of outcomes result in determinations of responsibility, or non-responsibility, does not necessarily indicate or imply bias on the part of Title IX personnel. The entire purpose of the § 106.45 grievance process is to increase the reliability and accuracy of outcomes in Title IX proceedings, and the number of particular outcomes, alone, thus does not raise an inference of bias because the final regulations help ensure that each individual case is decided on its merits.

The Department notes that the final regulations do not preclude a recipient from allowing student leaders to serve in Title IX roles so long as the recipient can meet all requirements in § 106.45 and these final regulations,[1037] and leaves it to a recipient's judgment to decide under what circumstances, if any, a recipient wants to involve student leaders in Title IX roles.

[1037] For example, § 106.8(a) specifies that the Title IX Coordinator must be an "employee" designated and authorized by the recipient to coordinate the recipient's efforts to comply with Title IX obligations. No such requirement of employee status applies to, for instance, serving as a decision-maker on a hearing panel.

Changes: Section 106.45(b)(1)(iii) is revised to specify that the required training include "how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias" in place of the proposed language "that protect the safety of students, ensure due process protections for all parties, and promote accountability." [1038]

Comments: One commenter asked whether the training on the definition of sexual harassment referenced in § 106.45(b)(1)(iii) means the definition in § 106.30, a definition used by the recipient (that might be broader than in § 106.30), or both. One commenter wondered why this provision removes vital sexual harassment training of school personnel but gave no explanation for drawing this conclusion. Several commenters noted that § 106.45(b)(1)(iii) does not state the frequency for the required training and wondered if it must be annual, while several others requested more clarity about what would be considered adequate training especially for a decision-maker expected to conduct a live hearing with cross-examination, and further explanation of what kinds of training materials foster impartial determinations. One commenter stated that § 106.45(b)(1)(iii) does not provide for a standardized level of training or offer financial assistance for training personnel. One commenter agreed with the proposed rules' effort to diagnose severe training gaps in the Title IX system but because this provision mandates training "conceptually" without specifying what the training must include, the commenter asserted that the inevitable result will be more Dear Colleague Letters and guidance from the Department, which the Department should avoid by taking time to include more specific training requirements in these final regulations.

[1038] Because revised § 106.45(b)(8) now requires recipients to offer appeals, § 106.45(b)(1)(iii) has also been revised to include training on conducting appeals.

Many commenters expressed views about this provision's prohibition against the use of "sex stereotypes" in training materials. Some commenters urged the Department to include a definition of "sex stereotypes," asserting that without clarity this provision is a legal morass exposing recipients to liability. One commenter asserted that "bias" lacks a definitive legal meaning and should be replaced by "non-discriminatory." Some commenters argued that without a definition, this provision could be interpreted to forbid recipients from relying on research and evidence-based practices that instruct personnel to reject notions of "regret sex" and women lying about sexual assault. Other commenters requested clarity that stereotypes of men as sexually aggressive or likely to perpetrate sexual assault and references to "toxic masculinity" are prohibited under this provision. One commenter argued that the First Amendment likely prohibits the Department from dictating that training materials be free from sex stereotypes or that if the Department no longer perceives the First Amendment as a barrier to the Federal government prohibiting sex stereotyping materials then the Department should repeal 34 CFR 106.42 and replace it with a prohibition against reliance on sex stereotyping that extends to all training or educational materials used by a recipient for any purpose. This commenter also requested clarification as to whether § 106.45(b)(1)(iii) would prohibit reliance on peer-reviewed journal articles that state, for example,[1039] that trauma victims often recall only some vivid details from their ordeal and that memories may be impaired with amnesia or gaps or contain false details following extreme cases of negative emotions, such as rape trauma. Another commenter expressed concern that this provision might result in information provided by sexual violence

[1039] Commenters cited: Katrin Hohl & Martin Conway, *Memory as Evidence: How Normal Features of Victim Memory Lead to the Attrition of Rape Complaints*, 17 CRIMINOLOGY & CRIMINAL JUSTICE 3 (2017).

experts being forbidden, resulting in respondents' lawyers' opinions replacing peer-reviewed, scientific data. One commenter urged the Department to interpret this provision to require training around bias that exists against complainants and to clarify that the "Start by Believing" approach promoted by End Violence Against Women International should be part of these training requirements because that approach trains investigators to start by believing the survivor to avoid incorporating personal bias and victim-blaming myths that might bias the investigation against the survivor. The commenter asserted that understanding the dynamics of sexual trauma is necessary in order to treat both complainants and respondents fairly without bias. Another commenter asserted that "start by believing" is not appropriate for investigations but is appropriate for counseling and thus, the final regulations should require that for counseling purposes personnel must "start by believing" a complainant or a respondent seeking counseling.

One commenter suggested this provision be modified to require training to have a working understanding of impartiality. One commenter contended that training materials should never be allowed to refer to the AAU/Westat Report[1040] for the statistic that one-in-four women are raped on college campuses because there are so many methodological problems with that report that using it constitutes sex discrimination under Title IX. One commenter argued that § 106.45(b)(1)(iii) must not be applied to exclude the application of proven profiles and indicators of certain predictive behaviors because that is a tried and tested practice in professional law enforcement and should be utilized according to best practices of trained investigators in any quest for the truth.

[1040] Commenters cited: The Association of American Universities, *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct* (Westat 2015).

Discussion: The Department appreciates a commenter asking whether the training on the definition of sexual harassment in this provision was intended to refer to the definition of sexual harassment in § 106.30; to clarify that was the intent of this provision, § 106.45(b)(1)(iii) has been revised to so state. The Department disagrees that this provision removes vital training regarding a recipient's responses to sexual harassment; rather, this provision prescribes mandatory training for Title IX personnel that promotes the purpose of a Title IX process and compliance with these final regulations, and leaves recipients free to adopt additional education and training content that a recipient believes serves the needs of the recipient's community. Commenters correctly noted that the final regulations do not impose an annual or other frequency condition on the mandatory training required in § 106.45(b)(1)(iii). The Department interprets this provision as requiring that any Title IX Coordinator, investigator, decision-maker, or person who facilitates an informal resolution process will, when serving in such a role, be trained to serve in that role. The Department wishes to leave recipients flexibility to decide to what extent additional training is needed to ensure that Title IX personnel are trained when they serve[1041] so that recipients efficiently allocate their resources among Title IX compliance obligations and other important needs of their educational communities. The Department disagrees with a commenter concerned that failing to be more prescriptive about the content of training in these final regulations necessarily will result in the Department issuing Dear

[1041] Some commenters questioned whether advisors provided to a party by a postsecondary institution recipient pursuant to § 106.45(b)(6)(i) must be free from conflicts of interest and bias and must be trained. The final regulations impose no prohibition of conflict of interest or bias for such advisors, nor any training requirement for such advisors, in order to leave recipients as much flexibility as possible to comply with the requirement to provide those advisors. The Department believes that advisors in such a role do not need to be unbiased or lack conflicts of interest precisely because the role of such advisor is to conduct cross-examination on behalf of one party, and recipients can determine to what extent a recipient wishes to provide training for advisors whom a recipient may need to provide to a party to conduct cross-examination.

Colleague Letters imposing training content requirements in the future. The Department is committed to imposing legally binding requirements by following applicable rulemaking processes.

The Department is persuaded by commenters' concerns that it is beneficial for § 106.45(b)(1)(iii) to emphasize the need for decision-makers to receive training in how to conduct hearings, and we have revised this provision to specify that decision-makers receive training in how to conduct a grievance process including how to use technology that will be used by a recipient to conduct a live hearing, and on issues of the relevance of questions and evidence (including how to determine the relevance or irrelevance of a complainant's prior sexual history), and that investigators receive training on issues of relevance in order to prepare an investigative report that fairly summarizes relevant evidence.

The Department appreciates the many commenters who requested a definition of "sex stereotypes" and asked that such a definition include, or exclude, particular generalizations and notions about women or about men. For reasons similar to those discussed above with respect to defining "bias" on the part of Title IX personnel, the Department declines to list or define what notions do or do not constitute sex stereotypes on which training materials must not rely. The Department disagrees that a broad prohibition against sex stereotypes is a legal morass exposing recipients to liability, any more than Title IX's broad prohibition against "sex discrimination" does so. It is not feasible to catalog the variety of notions expressing generalizations and stereotypes about the sexes that might constitute sex stereotypes, and the Department's interest in ensuring impartial Title IX proceedings that avoid prejudgment of the facts at issue necessitates a broad prohibition on sex stereotypes so that decisions are made on the basis of individualized facts and not on stereotypical notions of what "men" or "women" do or do not do. To reinforce

this necessity, the final regulations use "must" instead of "may" to state that training materials "must" not rely on sex stereotypes.

Contrary to the concerns of some commenters, a prohibition against reliance on sex stereotypes does not forbid training content that references evidence-based information or peer-reviewed scientific research into sexual violence dynamics, including the impact of trauma on sexual assault victims. Rather, § 106.45(b)(1)(iii) cautions recipients not to use training materials that "rely" on sex stereotypes in training Title IX personnel on how to serve in those roles impartially and without prejudgment of the facts at issue, meaning that research and data concerning sexual violence dynamics may be valuable and useful, but cannot be relied on to apply generalizations to particular allegations of sexual harassment. Commenters provided numerous examples of training materials containing phrases that may, or may not, violate the final regulations, but a fact-specific evaluation of the training materials and their use by the recipient would be needed to reach a conclusion regarding whether such materials comply with § 106.45(b)(1)(iii). We have revised § 106.45(b)(10) to require recipients to post on a recipient's website the training materials referred to in § 106.45(b)(1)(iii) so that a recipient's approach to training Title IX personnel may be transparently viewed by the recipient's educational community and the public, including for the purpose of holding a recipient accountable for using training materials that comply with these final regulations.

The Department does not believe that placing parameters around the training materials specifically needed to comply with Title IX regulations violates the First Amendment rights of recipients because the final regulations do not interfere with the right of recipients to control the recipient's own curricula and academic instruction materials. The Department is not proactively scouring recipients' curricula to spot instances of sex stereotyping; rather, the Department is

placing reasonable conditions on materials specifically used by recipients to carry out recipients' obligations under these final regulations.

For reasons explained above, the Department does not wish to be more prescriptive than necessary to achieve the purposes of these final regulations, and respects the discretion of recipients to choose how best to serve the needs of each recipient's community with respect to the content of training provided to Title IX personnel so long as the training meets the requirements in these final regulations. Thus, the Department declines to require recipients to adopt the "Start by Believing" approach promoted by End Violence Against Women, and cautions that a training approach that encourages Title IX personnel to "believe" one party or the other would fail to comply with the requirement that Title IX personnel be trained to serve impartially, and violate § 106.45(b)(1)(ii) precluding credibility determinations based on a party's status as a complainant or respondent. The Department takes no position on whether "start by believing" should be an approach adopted by non-Title IX personnel affiliated with a recipient, such as counselors who provide services to complainants or respondents. The Department wishes to emphasize that parties should be treated with equal dignity and respect by Title IX personnel, but doing so does not mean that either party is automatically "believed." The credibility of any party, as well as ultimate conclusions about responsibility for sexual harassment, must not be prejudged and must be based on objective evaluation of the relevant evidence in a particular case; for this reason, the Department cautions against training materials that promote the application of "profiles" or "predictive behaviors" to particular cases. The Department declines to predetermine whether particular studies or reports do or do not violate § 106.45(b)(1)(iii) or opine on the validity of particular reports, but encourages recipients to

examine the information utilized in training of Title IX personnel to ensure compliance with this provision.

Changes: Section 106.45(b)(1)(iii) clarifies that the training on the definition of sexual harassment means the definition in § 106.30,[1042] requires Title IX personnel to be trained on how to conduct a grievance process, requires investigators and decision-makers to be trained on issues of relevance (including when questions and evidence about a complainant's sexual predisposition or prior sexual behavior are not relevant), requires decision-makers to be trained on technology to be used at any live hearing, and changes "may" to "must" in the directive that training materials not rely on sex stereotypes.

Comments: Several commenters suggested that § 106.45(b)(1)(iii) be expanded to include training for Title IX personnel on a variety of subjects. At least one commenter urged the Department to adopt the training language from the withdrawn 2014 Q&A.[1043] Without referencing the 2014 Q&A a few commenters suggested that training address similar topics such as: the neurobiology of trauma, counterintuitive responses to sexual violence, false reporting, barriers to reporting, incapacitation versus intoxication and blackout behaviors, assessing credibility in the context of trauma, Title IX compliance as it intersects with the Clery Act,

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[1042] As discussed in the "Section 106.44(a) 'education program or activity'" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this preamble, the training requirements for Title IX personnel in § 106.45(b)(1)(iii) now also include training on the scope of the recipient's education program or activity.

[1043] Commenters cited: 2014 Q&A at 40 ("Training should include information on working with and interviewing persons subjected to sexual violence; information on particular types of conduct that would constitute sexual violence, including same-sex sexual violence; the proper standard of review for sexual violence complaints (preponderance of the evidence standard); information on consent and the role drugs or alcohol can play in the ability to consent; the importance of accountability for individuals found to have committed sexual violence; the need for remedial actions for the perpetrator, complainant, and school community; how to determine credibility; how to evaluate evidence and weigh it in an impartial manner; how to conduct investigations; confidentiality; the effects of trauma, including neurobiological change; and cultural awareness training regarding how sexual violence may impact students differently depending on their cultural backgrounds.").

FERPA, child protective services legislation, disability laws, and other laws that may intersect with Title IX, healthy sexuality and consent including affirmative consent, risk factors for sexual violence victimization, bystander intervention, rates of prevalence, addressing bias using an anti-oppression framework, effective interviewing of survivors such as forensic experiential models, cultural competency to address specific issues that affect marginalized survivors (e.g., LGBTQ individuals, persons with disabilities, persons of color, or persons who are undocumented or economically disadvantaged).

One commenter stated that training should ensure that Title IX personnel are first "mentored" by someone with experience before working directly with survivors. One commenter suggested the Department create an aspirational list of training components. One commenter asked the Department to define "training materials" as limited to material the recipient itself designates as essential for performing the applicable Title IX role, so as not to sweep up a range of professional continuing education presentations into the ambit of § 106.45(b)(1)(iii) just because such professional training seminars might mention something relevant to Title IX.

Discussion: For the reasons explained above, the Department has determined that § 106.45(b)(1)(iii) in the final regulations strikes the appropriate balance between mandating training topics the Department believe are necessary to promote a recipient's compliance with these final regulations while leaving as much flexibility as possible to recipients to choose the content and substance of training topics in addition to the topics mandated by this provision. Thus, the Department declines to expand this provision to mandate that training address the topics suggested by commenters. As discussed in this preamble under the § 106.44(a) "education program or activity" condition, the final regulations revise the training requirements in § 106.45(b)(1)(iii) to require training of Title IX personnel on the "scope of the recipient's

education program or activity." The Department makes this change in response to commenters concerned that the "education program or activity" condition was misunderstood too narrowly, for example as excluding all sexual harassment incidents that occur off campus. This revision to the training requirements in § 106.45(b)(1)(iii) helps to ensure that recipients do not inadvertently fail to treat as Title IX matters sexual harassment incidents that occur in the recipient's education program or activity. As explained above in this section of the preamble, we have also revised this provision to: add training on appeals and informal resolution processes in addition to hearings (as applicable); specify that Title IX personnel must be trained on the definition of sexual harassment in § 106.30 and on how to serve impartially without prejudgment of the facts at issue and how to avoid bias and conflicts of interest; specify that investigators and decision-makers must be trained on issues of relevance; and specify that decision-makers receive training on how to use technology at live hearings. As explained below in this section of the preamble, we also revise § 106.45(b)(1)(iii) to include "person who facilitates an informal resolution process" to the list of Title IX personnel who must receive training.

The Department declines to require that Title IX personnel be "mentored" before working with parties, or to create an aspirational list of training components. The Department's intent with respect to this provision is to provide flexibility for each recipient to design or select training components that best serve the recipient's unique needs and educational environment, while prescribing those training topics necessary for a recipient to comply with these final regulations. The Department appreciates the commenter's request for clarification that the training materials subject to these final regulations should be only those training materials specifically designated by the recipient as essential to performing Title IX personnel functions. In order to reasonably gauge compliance with the final regulations, the Department instead

reserves the right to examine training materials whether or not a recipient has not specifically designated the material as essential to performing a Title IX role.

Changes: The final regulations revise this provision to include training on the scope of a recipient's education program or activity; add training on appeals and informal resolution processes in addition to hearings (as applicable); specify that Title IX personnel must be trained on the definition of sexual harassment in § 106.30 and on how to serve impartially without prejudgment of the facts at issue and how to avoid bias and conflicts of interest; specify that investigators and decision-makers must be trained on issues of relevance; specify that decision-makers receive training on how to use technology at live hearings; and add "person who facilitates an informal resolution process" to the list of Title IX personnel who must receive training.

Comments: Many commenters expressed views about whether § 106.45(b)(1)(iii) should be applied to include or exclude training materials promoting "trauma-informed" practices, techniques, and approaches. One commenter believed that using "impartial" instead of "trauma-informed" is offensive to rape victims, for whom trauma necessitates a cognitive interview that takes the effects of trauma into account, while another commenter believed training must require trauma-informed best practices. A few commenters believed that the provision should address the use of trauma-informed theories by cautioning against misuse of victim-centered approaches for any purpose other than interviewing or counseling; these commenters distinguished between remaining "impartial," one the one hand, while still using trauma-informed methods when questioning a complainant so that the investigator does not expect a trauma victim to provide details in chronological order, on the other hand. Several commenters asserted that trauma-informed and believe-the-victim approaches must be prohibited in the interview process because

those approaches compromise objectivity, create presumptions of guilt, and result in exclusion of relevant (often exculpatory) evidence. At least one commenter suggested that FETI (forensic experimental trauma interview) techniques should be required. One commenter stated that several states including New York, California, and Illinois mandate trauma-informed training[1044] for campus officials who respond to sexual assault and asserted that the proposed rules are unclear about whether the Department's position is that trauma-informed practices constitute a form of sex discrimination,[1045] thus inviting further litigation on this issue.

Discussion: The Department understands from personal anecdotes and research studies that sexual violence is a traumatic experience for survivors. The Department is aware that the neurobiology of trauma and the impact of trauma on a survivor's neurobiological functioning is a developing field of study with application to the way in which investigators of sexual violence offenses interact with victims in criminal justice systems and campus sexual misconduct proceedings. The Department appreciates the views of commenters urging that trauma-informed practices be mandatory, and those urging that such practices be forbidden, and the commenters noting that trauma-informed practices are required in some States, and noting there is a difference between applying such practices in different contexts (i.e., interview and questioning techniques, providing counseling services, or when making investigatory decisions about relevant evidence and credibility or adjudicatory decisions about responsibility). For reasons explained above, the Department believes that § 106.45(b)(1)(iii) appropriately forbids conflicts

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[1044] Commenters cited a white paper by Jeffrey J. Nolan, *Promoting Fairness in Trauma-Informed Investigation Training*, NACUA Notes, vol. 16, no. 5, p. 3 (Feb. 8, 2018), now updated as: Jeffrey J. Nolan, *Fair, Equitable Trauma-Informed Investigation Training* (Holland & Knight updated July 19, 2019).

[1045] The commenter asserted that Federal courts tend to reject this proposition, citing for example *Doe v. Univ. of Or.*, No. 6:17-CV-01103, 2018 WL 1474531 (D. Or. Mar. 26, 2018).

of interest and bias, mandates training on topics necessary to promote recipients' compliance with these final regulations (including how to serve impartially), and precludes training materials that rely on sex stereotypes. Recipients have flexibility to choose how to meet those requirements in a way that best serves the needs, and reflects the values, of a recipient's community including selecting best practices that exceed (though must be consistent with) the legal requirements imposed by these final regulations. The Department notes that although there is no fixed definition of "trauma-informed" practices with respect to all the contexts to which such practices may apply in an educational setting, practitioners and experts believe that application of such practices is possible – albeit challenging – to apply in a truly impartial, non-biased manner.[1046]

Changes: None.

Comments: One commenter suggested expanding the persons who must be trained to include counselors, diversity and inclusion departments, deans of students, ombudspersons, and restorative justice committees. A few commenters suggested that training about Title IX rights and Title IX procedures should be mandatory for all students and all staff, including teachers and

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[1046] *E.g.*, Jeffrey J. Nolan, *Fair, Equitable Trauma-Informed Investigation Training* 14-15 (Holland & Knight updated July 19, 2019) (concluding that "All parties can benefit if trauma-informed training is provided in a manner that is fair, equitable, nuanced, and adapted appropriately to the context of college and university investigations and disciplinary proceedings, and that does 'not rely on sex stereotypes.' Given the complexity of these issues and the importance of training as a matter of substance and potential litigation risk, institutions should strive to ensure that their training programs are truly fair and trauma-informed."); "Recommendations of the Post-SB 169 Working Group," 3 (Nov. 14, 2018) (report by a task force convened by former Governor of California Jerry Brown to make recommendations about how California institutions of higher education should address allegations of sexual misconduct) (trauma-informed "approaches have different meanings in different contexts. Trauma-informed training should be provided to investigators so 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.").

faculty so that everyone affiliated with a recipient knows the definition of sexual harassment and the complaint procedures. A few commenters noted that the proposed rules lacked any training requirements for staff that work on informal resolution processes and urged the Department to set minimum standards for training of those individuals so that all students are served by individuals with high levels of training whether they go through a formal or informal process.

Discussion: The intent of § 106.45(b)(1)(iii) is to ensure that Title IX personnel directly involved in carrying out the recipient's Title IX response duties are trained in a manner that promotes a recipient's compliance with these final regulations. The Department appreciates commenters suggesting that additional school personnel, or students, need training about Title IX, but the Department leaves such decisions to recipients' discretion. The Department appreciates commenters who noted that the proposed rules contemplated the recipient facilitating informal resolution processes yet omitted such a role from the listed personnel who must receive training under § 106.45(b)(1)(iii), resulting in parties interacting with well-trained personnel during a formal process but perhaps with untrained personnel during an informal process. The commenters' concerns are well-founded, and the final regulations include "any person who facilitates an informal resolution process" wherever reference had been made to "Title IX Coordinators, investigators, and decision-makers."

Changes: Section 106.45(b)(1)(iii) is revised to include "any person who facilitates an informal resolution process" in addition to Title IX Coordinators, investigators, and decision-makers, as a person whom the recipient must ensure is free from conflicts of interest and bias, and receives the training specified in this provision.

Comments: At least one commenter requested more information about who is expected to provide the training required under § 106.45(b)(1)(iii), for example whether training presenters

must have experience with administrative proceedings in order to provide qualified training to others. One commenter with extensive experience as a sexual assault investigator proposed that the Federal Law Enforcement Training Center (FLETC) should be mandated to create a Title IX focused training program to which recipients would send Title IX investigators within a certain time frame after being hired; the commenter stated that FLETC already has instructors, resources, and qualified, experienced professionals that provide accredited training to sexual assault investigators, so expanding FLETC training to be specific to Title IX proceedings would create consistent knowledge and best practices across all institutions.

Discussion: For reasons explained above, the Department believes that the mandated training requirements in § 106.45(b)(1)(iii) are sufficient to effectuate the purposes of these final regulations, without unduly restricting recipients' flexibility to design and select training that best serves each recipient's unique needs. For similar reasons, the Department declines to prescribe whether training presenters must possess certain qualifications and will enforce § 106.45(b)(1)(iii) based on whether a recipient trains Title IX personnel in conformity with this provision rather than on the qualifications or expertise of the trainers. The Department appreciates the commenter's suggestion regarding FLETC creating a Title IX-specific training program. While adoption of that suggestion is outside the scope of these final regulations because it is not within the Department's regulatory authority under Title IX to direct FLETC to expand its programming,[1047] the Department encourages recipients to pursue training from sources that rely on qualified, experienced professionals likely to result in best practices for

[1047] FLETC is part of the Department of Homeland Security. U.S. Dep't. of Homeland Security, *Federal Law Enforcement Training Centers*, https://www fletc.gov/.

effective, impartial investigations. The Department does not certify, endorse, or otherwise approve or disapprove of particular organizations (whether for-profit or non-profit) or individuals that provide Title IX-related training and consulting services to recipients. Whether or not a recipient has complied with § 106.45(b)(1)(iii) is not determined by the source of the training materials or training presentations utilized by a recipient.

Changes: None.

Section 106.45(b)(1)(iv) Presumption of Non-Responsibility

Purpose of the Presumption

Comments: Many commenters supported § 106.45(b)(1)(iv), requiring a recipient's grievance process to apply a presumption that a respondent is not responsible until conclusion of a grievance process (referred to in this section as the "presumption"), because such a presumption means that recipients will adjudicate based on evidence rather than beliefs or assumptions. Commenters referred to the presumption as the equivalent of a "presumption of innocence" which, commenters asserted, is crucial for determining the truth of what happened when one party levies an accusation against another party. Commenters shared personal experiences with campus Title IX proceedings in which the commenters believed that the process unfairly placed the respondent in a position of having to try to prove non-responsibility rather than being treated as not responsible unless evidence proved otherwise. Commenters who agreed with the presumption asserted that, especially under a preponderance of the evidence standard, it is important that an accused student be presumed innocent, to stress for decision-makers that if they believe the complainant and respondent are equally truthful, the required finding must be not-responsible. Commenters asserted that lawsuits filed against universities by respondents accused of sexual misconduct have revealed that universities often do not presume the respondent

innocent[1048] and that this may lead schools to place the burden of proof on respondents.[1049] Commenters asserted that § 106.45(b)(1)(iv) will clarify that respondents do not have the burden of proving their innocence.

Several commenters who supported the presumption cited an article arguing that believing complainants is the beginning and the end of a search for the truth.[1050] Several commenters asserted that the mantra of "Believe Survivors" encourages a presumption of guilt against respondents. Other commenters opined that a person can both believe complainants and presume the respondent is innocent during an investigation.

Commenters argued that the presumption of non-responsibility is essential to affording respondents an opportunity to defend themselves. Commenters supportive of the presumption shared personal stories in which they or their family members were respondents in Title IX grievance hearings and as respondents and felt as though the recipient placed the burden of proving innocence on the respondent's shoulders and made it seem that the accusations had been prejudged as truthful; others shared experiences of interim suspensions imposed prior to any facts or evidence leading to a conclusion of "guilt." Commenters argued that it is imperative that accusations are not equated with "guilt." One commenter described living in countries that were behind the Iron Curtain, where to be accused was the same as to be proven guilty without evidence.

[1048] Commenters cited: *Doe v. Univ. of Cincinnati*, *aff'd sub nom. Doe v. Cummins*, 662 F. App'x 437, 447 (6th Cir. 2016).
[1049] Commenters cited: *Wells v. Xavier Univ.*, 7 F. Supp. 3d 746 (S.D. Ohio 2014).
[1050] Commenters cited: Emily Yoffe, *The problem with #BelieveSurvivors*, THE ATLANTIC (Oct. 3, 2018).

Commenters who opposed the presumption argued that the purpose of the presumption is to favor respondents over complainants. Commenters asserted that the presumption is evidence of the Department's animus towards complainants. Commenters asserted that the presumption codifies a unique status for sexual harassment and assault complainants, explicitly requiring that schools treat them with heightened skepticism. Additionally, several commenters argued that the Department proposed the presumption because the Department seeks to perpetuate the myth of false reporting in Federal policy and desires to protect the reputation and interests of the accused. Commenters argued that the presumption gives special, greater rights to the respondent, creating a procedural bias against complainants that violates complainants' rights to an impartial grievance procedure under Title IX and the Clery Act.

Many commenters argued that the presumption of non-responsibility is a presumption that the alleged harassment did not occur. Commenters questioned how the recipient can adequately listen to the complainant if the recipient is required to presume that no harassment occurred. Commenters argued that the presumption creates a hostile environment for complainants by implying that the complainant is dishonest. Commenters argued that the presumption will increase negative social reactions to complainants, such as minimization and victim-blaming, and predicted that these negative reactions will create adverse health effects for complainants including post-traumatic stress disorder symptoms.

Commenters opposed the requirement in the proposed rules for the recipient to expressly state the presumption of non-responsibility in its first communication with the complainant, arguing that this provision seems "deliberately cruel" towards complainants.

Commenters argued that the presumption would encourage schools to ignore or punish historically marginalized groups that report sexual harassment by implying such complainants

are "lying" about sexual harassment, and that complainants will feel chilled from reporting out of belief that they will be retaliated against (i.e., by being punished for "lying") when they do report.[1051]

Commenters asserted that in a criminal proceeding, there is an imbalance of power between the accused person and the government prosecuting the accused, and therefore the U.S. Constitution gives the criminal defendant a presumption of innocence; commenters argued that this dynamic is absent in a Title IX proceeding where the complainant does not represent the power of the government prosecuting a criminal defendant, and thus a Title IX respondent should not enjoy the presumption given to a criminal defendant.

Discussion: The Department appreciates commenters' support for § 106.45(b)(1)(iv) and acknowledges the many commenters who shared personal experiences as respondents in Title IX proceedings where the investigation process made the commenter feel like the burden was on the respondent to prove non-responsibility rather than being presumed not responsible unless evidence showed otherwise.

The Department disagrees with commenters who believed that the purpose of the presumption of non-responsibility is to favor respondents at the expense of complainants or that a presumption of non-responsibility demonstrates animus or hostility toward complainants. The Department does not seek to "perpetuate the myth of false reporting in Federal policy," nor does it desire "to protect the reputation and interests of the accused" at the expense of victims as some commenters claimed. To the contrary, we seek to establish a fair grievance process for all parties,

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[1051] Commenters cited, *e.g.*, Tyler Kingkade, *When Colleges Threaten To Punish Students Who Report Sexual Violence*, THE HUFFINGTON POST (Sept. 9, 2015).

and the presumption does not affect or diminish the strong procedural rights granted to complainants throughout the grievance process.

The Department acknowledges that these final regulations apply only to allegations of Title IX sexual harassment, and as such these final regulations do not impose a presumption of non-responsibility in other types of student misconduct proceedings. This does not indicate that the allegations in formal complaints of sexual harassment are more suspect or warrant more skepticism than allegations of other types of misconduct. The Department believes that the notion of presuming a student not responsible until facts show otherwise represents a basic concept of fairness, but these regulations address only recipients' responses to Title IX sexual harassment and do not dictate whether a similar presumption should be applied to other forms of student misconduct.

While the Department acknowledges that Title IX proceedings are not criminal in nature and do not require application of constitutional protections granted to criminal defendants, the Department believes that a presumption of non-responsibility is critical to ensuring a fair proceeding in the Title IX sexual harassment context, rooted in the same principle that underlies the constitutional presumption of innocence afforded to criminal defendants.[1052] In the noncriminal context of a Title IX grievance process, the presumption reinforces the final regulations' prohibition against a recipient treating a respondent as responsible until conclusion

[1052] *See* François Quintard-Morénas, *The Presumption of Innocence in the French and Anglo-American Legal Traditions*, 58 AM. J. OF COMPARATIVE L. 107, 110 (2010) ("Because one can be accused of a crime without being a criminal, an elementary principle of justice requires that plaintiffs prove their allegations and that the accused be considered innocent in the interval between accusation and judgment.").

of a grievance process[1053] and reinforces correct application of the standard of evidence selected by the recipient for use in the recipient's Title IX sexual harassment grievance process. These aspects of the presumption improve the fairness of the process and increase party and public confidence in such outcomes,[1054] thereby leading to greater compliance with rules against sexual

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[1053] Sections 106.44(a), 106.45(b)(1)(i) (recipients may not impose disciplinary sanctions on a respondent, or otherwise take actions against the respondent that do not constitute supportive measures as defined in § 106.30, without following a grievance process that complies with § 106.45). The final regulations expressly allow exceptions to this principle, where in certain circumstances a respondent may be treated adversely even though responsibility has not been determined at the conclusion of a grievance process. *See* § 106.30 (defining "supportive measures" under which a supportive measure must not "unreasonably burden" the other party, so reasonably burdening a respondent to accomplish the aim of a supportive measure is permissible); § 106.44(c) (a respondent may be removed from education programs or activities where the respondent poses an immediate threat to the physical health or safety of one or more individuals, and while a post-removal opportunity to challenge the removal must be given to the respondent, such an emergency removal may occur prior to conclusion of a grievance process or where no grievance process is pending at all); § 106.44(d) (allowing a recipient to place a (non-student) employee on administrative leaving while an investigation under § 106.45 is pending). The Department notes that in an essay cited by commenters, the author criticizes the presumption of non-responsibility in the NPRM, arguing that if the presumption is intended only to mean that the burden of proof remains on the recipient (and not on the respondent) then the presumption is "unobjectionable as a matter of substance, although a seeming invitation to confusion" because recipients may wrongly believe that a presumption of non-responsibility implies that the recipient must apply the criminal burden of proof (beyond a reasonable doubt). Michael C. Dorf, *What Does a Presumption of Non-Responsibility Mean in a Civil Context*, DORF ON LAW (Nov. 28, 2018), http://www.dorfonlaw.org/2018/11/what-does-presumption-of-non html. The author recognized that the second purpose of the presumption seemed to be treating the respondent as not responsible throughout a grievance process and believed that to be "quite a bad idea" because in daily life we make decisions based on someone being accused of a crime even before a conviction. The author correctly noted that one purpose of the presumption is to reinforce that the burden of proof remains on the recipient and not on the respondent (or complainant). The Department clarifies that contrary to the author's concerns, and for reasons discussed in the "Section 106.45(b)(7)(i) Standard of Evidence and Directed Question 6" subsection of the "Determinations Regarding Responsibility" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble, recipients may *not* apply the criminal standard of beyond a reasonable doubt. Further, while the author of that essay correctly identified a second purpose of the presumption as ensuring that recipients do not treat the respondent as responsible until the respondent is proved responsible, as explained above in this footnote that principle is subject to exceptions.

[1054] Rinat Kitai, *Presuming Innocence*, 55 OKLAHOMA L. REV. 257, 272 (2002) (the "presumption of innocence is based mainly on grounds of public policy relating to political morality and human dignity. The presumption of innocence is a normative principle, directing state authorities as to the proper way of treating a person who has not yet been convicted. This principle is not tied to empirical data about the incidence of criminal offenses or the probability of innocence in certain circumstances."); Dale A. Nance, *Civility and the Burden of Proof*, 17 HARV. J. OF L. & PUB. POL'Y 647, 689 (1994) ("we should not forget that the moral order that the law endorses carries with it certain obligations concerning its application, one of which is *the obligation to presume compliance with legal duties, at least to the extent they represent a consensus about serious moral duties*. . . . Even if that principle has lost its constitutional luster, the very fact that it has attained such status, off and on over the years, is evidence of the weight the law accords it. A presumption of innocence applies quite generally, though not of course with perfect uniformity, in both civil and criminal cases.") (emphasis added).

misconduct.[1055] Without expressly stating a presumption of non-responsibility, a perception that recipients may prejudge respondents as responsible will continue to negatively affect party and public confidence in Title IX proceedings.[1056]

On the other hand, nothing about this presumption deprives complainants of the robust procedural protections granted to both parties under § 106.45, or the protections granted only to complainants in § 106.44(a) (including the right to be offered supportive measures with or without filing a formal complaint). The presumption does not imply that the alleged harassment did not occur; the presumption ensures that recipients do not take action against a respondent *as though* the harassment occurred prior to the allegations being proved,[1057] and the final regulations require a recipient's Title IX personnel to interact with both the complainant and respondent in an impartial manner throughout the grievance process without prejudgment of the facts at issue,[1058] and without drawing inferences about credibility based on a party's status as a complainant or respondent.[1059] The presumption therefore serves rather than frustrates the goal of

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[1055] *E.g.*, Rebecca Holland-Blumoff, *Fairness Beyond the Adversary System: Procedural Justice Norms for Legal Negotiation*, 85 FORDHAM L. REV. 2081, 2084 (2017) ("A fair process provided by a third party leads to higher perceptions of legitimacy; in turn, legitimacy leads to increased compliance with the law") (internal citation omitted).

[1056] For example, the Foundation for Individual Rights in Education (FIRE) published a 2017 report, *Spotlight on Due Process*, https://www.thefire.org/resources/spotlight/due-process-reports/due-process-report-2017/, finding that "Nearly three-quarters (73.6%) of America's top 53 universities do not even guarantee students that they will be presumed innocent until proven guilty." The Department recognizes that a presumption of non-liability does not formally apply in Federal civil lawsuits the way that a presumption of innocence applies to criminal defendants; however, civil court procedures do generally place the burden of proof on the plaintiff to prove the defendant's civil liability, which echoes the principle that civil defendants generally are not liable until proved otherwise.

[1057] Under § 106.45(b)(9), a recipient may choose to facilitate an informal resolution process (except as to allegations that an employee sexually harassed a student) and an informal resolution may result in the parties, and the recipient, agreeing on a resolution of the allegations of a formal complaint that involves punishing or disciplining a respondent. This result comports with the prescription in § 106.44(a) and § 106.45(b)(1)(i) that a recipient may not discipline a respondent without following a grievance process that complies with § 106.45, because § 106.45 expressly authorizes a recipient to pursue an informal resolution process (with the informed, written, voluntary consent of both parties).

[1058] Section 106.45(b)(1)(iii).

[1059] Section 106.45(b)(1)(ii).

an impartial process. The Department expects that a fair grievance process will lend greater legitimacy to the resolution of complainants' allegations, which will improve the environment for complainants rather than perpetuate a hostile environment or increase negative social reactions to complainants, such as disbelief and blame. The presumption of non-responsibility does not interfere with a complainant's right under § 106.44(a) to receive supportive measures offered by the recipient; this obligation imposed on recipients does not depend at all on waiting for evidence to show a respondent's responsibility. Section 106.44(a) is intended to assure complainants of a prompt, supportive response from their school, college, or university notwithstanding the recipient's obligation not to treat the respondent as responsible for sexual harassment until the conclusion of a grievance process.

While the recipient must include a statement of the presumption in the initial written notice sent to both parties after a formal complaint has been filed,[1060] the Department does not believe that this communication from the recipient is "deliberately cruel" to complainants; rather, both parties benefit from understanding that the purpose of a grievance process is to reach reliable decisions based on evidence instead of equating allegations with the outcome, especially where the recipient's own code of conduct penalizes a party for making false statements during a grievance proceeding. The final regulations place the burden of proof solely on a recipient[1061] – not on a complainant or respondent – and therefore the presumption does not operate to burden or disfavor a complainant. Under § 106.44(a) and the § 106.30 definition of "supportive measures," recipients must offer complainants supportive measures designed to restore or

[1060] Section 106.45(b)(2)(i)(B).
[1061] Section 106.45(b)(5)(i).

preserve complainants' equal educational access (with or without a grievance process pending), and the final regulations' prohibition against a recipient punishing a respondent without following a fair grievance process, including application of a presumption of non-responsibility until conclusion of the grievance process, does not diminish the supportive, meaningful response that a recipient is obligated to offer complainants.[1062]

The Department disagrees that the presumption would encourage schools to ignore or punish historically marginalized groups that report sexual harassment, for "lying" about it. The Department requires a recipient to respond promptly to actual knowledge of sexual harassment in its education program or activity against a person in the United States, including by offering supportive measures to the complainant. Thus, ignoring sexual harassment violates these final regulations and places the recipient's Federal funding in jeopardy. The presumption does not imply that a respondent is truthful or that a complainant is lying, and a recipient cannot use the presumption as an excuse not to respond to a complainant as required under § 106.44(a), or not to objectively evaluate all relevant evidence in reaching a determination regarding responsibility. Finally, § 106.71(b)(2) cautions recipients that it may constitute retaliation to punish a complainant (or any party) for making false statements unless the recipient determines that the party made materially false statements in bad faith and that determination is not based solely on the outcome of the case.

The Department acknowledges that Title IX grievance processes are very different from criminal proceedings and that the presumption of innocence afforded to criminal defendants is

[1062] Nothing in the final regulations precludes a recipient from continuing to provide supportive measures to assist any party regardless of the outcome of a case.

not a constitutional requirement in Title IX proceedings, but believes that a presumption of non-responsibility is needed in Title IX proceedings. While commenters correctly noted that a complainant does not wield the power of the government prosecuting a criminal charge, the purposes served by the presumption of non-responsibility still apply: ensuring that the burden of proof remains on the recipient (not on the respondent or complainant) and that the standard of evidence is correctly applied, and ensuring the recipient does not treat the respondent as responsible until conclusion of the grievance process. The procedural requirements of § 106.45 equalize the rights of complainants and respondents to participate in the investigation and adjudication by presenting each party's own view of the evidence and desire for the case outcome, while leaving the burden of gathering evidence and the burden of proof on the recipient.

Changes: We have added § 106.71(a) to the final regulations, prohibiting retaliation against any person exercising rights under Title IX. In addition, § 106.71(b)(2) clarifies that charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance process does not constitute retaliation, but a determination regarding responsibility, alone, is not sufficient to conclude that an individual made a materially false statement in bad faith.

Students of Color, LGBTQ Students, and Individuals with Disabilities

Comments: Multiple commenters asserted that, because of the presumption of non-responsibility, schools may be more likely to ignore or punish survivors who are women and girls of color, pregnant and parenting students, and LGBTQ students because of harmful stereotypes. Commenters argued that the presumption would especially harm Asian Pacific Islander women who, because of social taboos about sexual activity prevalent in Asian cultures, are significantly

less likely to report instances of sexual assault and will feel further deterred by a presumption favoring the respondent. Commenters argued that Black women and girls are more likely to be punished by schools who stereotype them as the aggressor when they defend themselves against their harassers or when they respond to trauma.

Several commenters argued that the presumption would harm students with disabilities because they are more likely to be victims of sexual assault and may be particularly vulnerable to unfair treatment due to the presumption of non-responsibility, and because students with disabilities are less likely to be believed when they report these experiences and often have greater difficulty describing the harassment they experience.[1063] One commenter opposed § 106.45(b)(1)(iv) because the provision does not address sexual harassment and assault cases involving students with disabilities.

Other commenters who agreed with the proposed rules, including the presumption, recounted personal stories in which family members and friends who are Black males were falsely accused of sexual assault yet the recipient seemed to treat the respondent as guilty unless proven innocent. One commenter asserted that the sexual assault grievance process has become a tool for white administrators to punish Black males as young as five years old. The commenter wished to see what they called an outdated Jim Crow-era system replaced with a system that is fair to all.

[1063] Commenters cited: U.S. Dep't. of Justice, National Institute of Justice, *The Many Challenges Facing Sexual Assault Survivors With Disabilities* (July 19, 2017), https://www nij.gov/topics/crime/rape-sexual-violence/Pages/challenges-facing-sexual-assault-survivors-with-disabilities.aspx.

Other commenters supported this provision based on personal stories about students with disabilities whom commenters believed had been falsely accused of sexual misconduct, including students with autism who found the Title IX grievance process traumatic.

Discussion: The Department understands commenters' concerns that students of color, LGBTQ students, students with disabilities, and other students will be adversely affected by the presumption of non-responsibility. The Department does not believe that the presumption will adversely affect the rights of any complainant, including complainants of demographic groups who may suffer sexual harassment at greater rates than members of other demographic groups. The Department believes that a presumption that protects respondents from being treated as responsible until conclusion of a grievance process furthers the recipient's obligation to fairly resolve allegations of sexual harassment and increases the likelihood that every outcome will carry greater legitimacy.

Further, students of color, LGBTQ students, and students with disabilities may be respondents in Title IX grievance processes, in which situation the presumption of non-responsibility reinforces the recipient's obligation not to prejudge responsibility, countering negative stereotypes that may affect such respondents.

The presumption of non-responsibility in § 106.45(b)(1)(iv) does not contribute to negative stereotypes that commenters characterize as causing people to disbelieve students of color, pregnant or parenting students, LGBTQ students, or students with disabilities (or conversely, to rush to assume the responsibility of such students based on similar negative stereotypes). The presumption protects respondents against being treated as responsible until conclusion of the grievance process but this does not entail disbelieving complainants. Any person may be a complainant or a respondent, and the final regulations require all Title IX

personnel to serve impartially, without prejudging the facts at issue, and without bias toward complainants or respondents generally or toward an individual complainant or respondent.

Changes: None.

The Complainant's Right to Due Process Protections

Comments: Commenters argued that the presumption of non-responsibility is a deprivation of the complainant's own due process rights, and argued that the complainant will be forced to proceed blindly, at a severe information deficit, while being forced to overcome the presumption. Other commenters argued that merely stating that the recipient will bear the burden of proof does not in practical terms make it so, and a presumption that the respondent is not responsible in reality shifts the burden of proof onto the complainant. Many commenters asserted that the respondent should bear the burden to prove the respondent is innocent.

One commenter, citing *John Doe v. University of Cincinnati*,[1064] noted that a court in the Southern District of Ohio found no violation of due process where the respondent argued that the recipient failed to grant the respondent a presumption of non-responsibility. Another commenter asserted that the U.S. Supreme Court has already balanced the competing interests and determined what process is due and it does not require a presumption of non-responsibility, because in *Mathews v. Eldridge*[1065] the U.S. Supreme Court considered (1) the private interest that will be affected; (2) the risk of an erroneous deprivation of such interest through procedures used, and the probable value, if any, of additional procedural safeguards; and (3) the government's interest, yet did not specify that a presumption favoring any party was required.

[1064] Commenters cited: *Doe v. Univ. of Cincinnati*, 173 F. Supp. 3d 586, 604 (S.D. Ohio 2016), *aff'd sub nom. Doe v. Cummins*, 662 F. App'x 437, 447 (6th Cir. 2016).
[1065] Commenters cited: *Mathews v. Eldridge*, 424 U.S. 319 (1976).

Many commenters argued that the presumption will make many women feel it is not worth it to report their assaulters to authorities because survivors already often do not report their sexual assaults due to fear of being disbelieved and the presumption will only heighten the perception that the recipient believes respondents and disbelieves complainants.[1066] One commenter asserted that, out of every 1,000 rapes, only 230 are reported to police, and just five result in conviction,[1067] and argued that a presumption in favor of respondents will lead to even fewer perpetrators of rape being held accountable.

Discussion: The presumption of non-responsibility does not hold complainants to a higher standard of evidence, shift the burden of proof onto complainants, require complainants to "overcome" the presumption or proceed "blindly" through an investigation, or deny complainants due process. Rather, the presumption simply requires that the recipient not treat the respondent as responsible until the recipient has objectively evaluated the evidence, and reinforces application of the standard of evidence the recipient has already selected (which may be the preponderance of the evidence standard, or the clear and convincing evidence standard).[1068] The final regulations require the burden of proof to remain on the recipient,[1069] and the recipient must reach a determination of responsibility against the respondent if the evidence meets the applicable standard of evidence. The complainant therefore does not bear any burden of proof and does not have to "overcome" the presumption. The presumption does not negate the strong procedural protections given to complainants throughout the grievance process, and these

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[1066] Commenters cited: Kathryn J. Holland & Lilia M. Cortina, *The evolving landscape of Title IX: Predicting mandatory reporters' responses to sexual assault disclosures*, 41 LAW & HUM. BEHAVIOR 5 (2017).
[1067] Commenters cited: U.S. Dep't. of Justice, Federal Bureau of Investigation, *National Incident-Based Reporting System, 2012-2016* (2017).
[1068] Section 106.45(b)(1)(vii).
[1069] Section 106.45(b)(5)(i).

due process protections ensure that complainants have a meaningful opportunity (equal to that of respondents) to put forward the complainant's own evidence and arguments about the evidence, even though the burden of proof remains on the recipient.

The Department declines to place the burden of proof on respondents to prove non-responsibility because the purpose of Title IX is to ensure that the recipient, not the parties, bears responsibility to draw accurate conclusions about whether sexual harassment has occurred in the recipient's education program or activity. Title IX obligates *recipients*, not individual students or employees, to operate education programs or activities free from sex discrimination, so it is the recipient's burden to gather relevant evidence and carry the burden of proof.

While the Department acknowledges the Federal district court decision cited by a commenter for the proposition that courts do not require a presumption of non-responsibility in Title IX proceedings, neither the Federal district court, nor the Sixth Circuit on appeal of that case, disapproved of a recipient applying a presumption of non-responsibility in a Title IX case or suggested that such a presumption would be constitutionally problematic; rather, the district court's opinion held that the recipient's alleged failure to provide such a presumption (even if true) would not amount to a due process deprivation under the U.S. Constitution.[1070] On appeal, the Sixth Circuit did not address the presumption of non-responsibility issue at all, and noted that it appeared the recipient placed the burden of proof on the itself (not on either party), a practice

[1070] *Doe v. Univ. of Cincinnati*, 173 F. Supp. 3d 586, 604 (S.D. Ohio 2016), *aff'd sub nom. Doe v. Cummins*, 662 F. App'x 437, 447 (6th Cir. 2016) ("Nevertheless, even assuming that the [recipient] placed the burden of proof on Plaintiffs as they claim, they have not stated a due process violation. As Defendants correctly argue in their brief, "[o]utside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of Federal constitutional moment."). This does not imply that a presumption of non-responsibility would be problematic under a constitutional analysis.

that was constitutionally sound[1071] and a requirement the final regulations impose on recipients in § 106.45(b)(5)(i).

Additionally, the Department is not persuaded by the commenter's citation to *Mathews v. Eldridge*, a U.S. Supreme Court case which set forth a three-part balancing test for determining the amount of process due to meet the basic requirements of providing notice and meaningful opportunity to be heard in particular situations and held that an evidentiary hearing is not required prior to the Social Security Administration's termination of social security benefits (in part because the basic due process requirements of notice and meaningful opportunity to be heard were met when an evidentiary hearing *was* available before a termination decision became final).[1072] The *Mathews* Court did not address the issue of whether a presumption is appropriate in an administrative proceeding and is inapposite on that particular point. As noted in the "Role of Due Process in the Grievance Process" section of this preamble, the Department believes that the § 106.45 grievance process is consistent with constitutional due process requirements and serves important policy purposes with respect to the fairness, accuracy, and perception of legitimacy of Title IX grievance processes.

Changes: None.

[1071] *Cummins*, 662 F. App'x at 449 (noting that the recipient appeared to place the burden of proof on the recipient rather than on either the complainant or respondent and stating "Allocating the burden of proof in this manner – in addition to having other procedural mechanisms in place that counterbalance the lower standard used . . . is constitutionally sound and does not give rise to a due-process violation."). The final regulations similarly allocate the burden of proof on the recipient (and not on either party). § 106.45(b)(5)(i).

[1072] *See Mathews v. Eldridge,* 424 U.S. 319, 335, 349 (1976) (holding that determining the adequacy of due process procedures involves a balancing test that considers the private interest affected, the risk of erroneous deprivation and benefit of additional procedures, and the government's interest including the burden and cost of providing additional procedures).

False Allegations

Comments: Many commenters cited statistics that most people who report sexual assault are telling the truth, so a presumption of non-responsibility does not reflect reality. Several commenters urged the Department not to require recipients to presume that the respondent is not responsible, since they say that statistics show that most respondents are guilty. Numerous commenters asserted that the rate of false reporting of sexual assault is between two to ten percent.[1073] Other commenters asserted that 95 percent of sexual assault reports to the police are true.[1074] Commenters asserted that since data collection began in 1989, there are only 52 cases where men have been exonerated after being falsely convicted of sexual assault while in the same period, 790 men were exonerated for murder.[1075]

Commenters argued that all false accusations, wrongful expulsions, suspensions, punishments, and undue burdens levied against respondents still do not add up to the overwhelming numbers of victims, so any provision that makes it harder for victims to prevail only serves to harm a greater number (of victims) in an attempt to protect a very small number (of falsely accused respondents), leading to greater unequal access to education for victims. Commenters argued that very few respondents who are found guilty are expelled, and therefore respondents are usually not in danger of losing their access to educational opportunities, so a

[1073] Commenters cited, *e.g.*, David Lisak *et al.*, *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 12, 1318 (2010); *see also* the "False Allegations" subsection of the "General Support and Opposition" section of this preamble.
[1074] Commenters cited: Claire E. Ferguson & John M. Malouff, *Assessing Police Classifications of Sexual Assault Reports: A Meta-Analysis of False Reporting Rates*, 45 ARCHIVES OF SEXUAL BEHAVIOR 5, 1185 (2016).
[1075] Commenters cited: National Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/browse.aspx.

wrongful result adverse to a respondent is not as consequential as a wrongful result adverse to a complainant.

Other commenters argued that a presumption against responsibility is not needed because it is easy to identify patterns of individuals who file false accusations, because almost all false accusers have "a history of bizarre fabrications or criminal fraud."[1076] Commenters stated that false accusations are unusually dramatic, involving gang rape, a gun or a knife, or violent attacks from strangers resulting in severe injuries.

Other commenters supported the presumption by asserting that false allegations do occur, and with more regularity than other commenters claim. Commenters cited the incidence of numerous lawsuits filed by students claiming they had been falsely accused,[1077] arguing that the prevalence of these lawsuits shows that many respondents, mostly young men, have been falsely accused and suspended or expelled from school under procedures that lacked fairness and reliability, often resulting in a respondent *de facto* being required to try to prove innocence. Commenters referred to high-profile campus sexual assault situations that commenters argued demonstrate the fact that false rape accusations do occur and damage respondents caught in systems that prejudge them without any benefit of being presumed innocent. Commenters argued that the frequency of false accusations is not as low as other commenters have claimed because studies examining the rate of false accusations only count accusations proven to be false, and do not count accusations dismissed for lack of evidence. One commenter shared details of the

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[1076] Commenters cited: Sandra Newman, *What Kind of Person Makes False Rape Accusations*, QUARTZ (May 11, 2017).
[1077] Commenters cited: T. Rees Shapiro, *Expelled for sex assault, young men are filing more lawsuits to clear their names*, THE WASHINGTON POST (Apr. 28, 2017).

commenter's own research finding that 53 percent of sexual assault allegations were false, which the commenter argued is much higher than the "2-10%" statistic relied on by many victim advocates;[1078] the commenter argued that the 53 percent number is more accurate because it counted "not responsible" determinations as "false accusations."

One commenter asserted that high-conflict divorce proceedings take into account the reality that spite plays a role in some parties' negotiations and litigation strategies, but many people seem to believe sexual harassment allegations are almost entirely free of such distorting motives.

Discussion: The Department is not persuaded by commenters who argued that we should remove the presumption of non-responsibility from the final regulations because of studies showing that many, or even the vast majority, of allegations of sexual assault are true. Statistical findings can be instructive but not dispositive, and statistics cannot by themselves justify or rationalize procedural protections in a process designed to determine the truth of particular allegations involving specific individuals.[1079] Even if only two to ten percent of rape allegations are false or unfounded, the Department believes that statistical generalizations must not compel conclusions about the truth of particular allegations because without careful assessment of the facts of each particular situation it is not be possible to know whether the respondent is one of the 90 to 98

[1078] Commenters cited: National Sexual Violence Resource Center, *False Reporting: Overview* (2012); *see also* the "False allegations" subsection of the "General Support and Opposition" section of this preamble.
[1079] V.C. Ball, *The Moment of Truth: Probability Theory and Standards of Proof*, 14 VAND. L. REV. 807, 811 (1961) ("[F]or individuals there are no statistics, and for statistics no individuals.").

percent who statistically are "guilty" or among the two to ten percent who are statistically "innocent."[1080]

Similarly, whether respondents are expelled at low rates or high rates, the final regulations are concerned with ensuring that the determination regarding responsibility is reliable and perceived as legitimate. For reasons described elsewhere in this preamble, the Department does not require any particular disciplinary sanctions against respondents, because these Title IX regulations are focused on requiring remedies for victims, leaving disciplinary decisions to recipients' discretion. For similar reasons, the Department declines to adopt a premise that most false allegations are "easy to identify" because even if research has identified certain patterns, common features, or motives for false allegations, it is not possible to assess the veracity of a complainant's specific allegations, or an individual complainant's motive, based on generalizations. Therefore, procedural rules designed for fairness and accuracy cannot be based on statistics or studies about what kind of allegations tend to be false. The Department disagrees that all determinations of non-responsibility are fairly characterized as involving a false or unfounded allegation; as numerous commenters have pointed out, an allegation may be true and lack sufficient evidence to meet a standard of evidence proving responsibility, or an allegation may be inaccurate but not intentionally falsified. The final regulations add § 106.71(b) cautioning recipients that punishing a party ostensibly for making false statements during a grievance process may constitute unlawful retaliation unless the recipient has concluded that a

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[1080] *See* Alex Stein, *An Essay on Uncertainty and Fact-Finding in Civil Litigation, with Special Reference to Contract Cases*, 48 UNIV. OF TORONTO L. J. 299, 301 (1998) ("Allowing verdicts to be based upon bare statistical evidence, rather than on case-specific proof, is generally regarded as problematic. Adjudication involves individuals and their individual affairs, which need to be translated into individual rights and duties. This is not the case with bare statistical evidence. As the famous saying goes, for statistics there are no individuals and for individuals, no statistics.").

party made a bad faith materially false statement and that conclusion is not based solely on the determination regarding responsibility. This provision acknowledges the reality that a complainant's allegations may not have been false even where the ultimate determination is that the respondent is not responsible and/or that the complainant may not have acted subjectively in bad faith (and conversely, that a respondent may not have made false, or subjectively bad faith, denials even where the respondent is found responsible).

The presumption of non-responsibility is not designed to protect "a few" falsely accused respondents at the expense of "the many" sexual harassment victims; the presumption is designed to improve the accuracy and legitimacy of the outcome in *each individual* formal complaint of sexual harassment to prevent injustice to any complainant or any respondent.

Changes: Section 106.71(b) states that charging an individual with a code of conduct violation for making a bad faith materially false statement during a grievance process is not retaliation so long as that conclusion is not based solely on the determination regarding responsibility.

Inaccurate Findings of Non-Responsibility

Comments: Commenters argued that, in a misguided attempt to shield falsely accused people, the presumption of non-responsibility will allow assailants to go unpunished, which will further traumatize and disempower victims. Commenters argued that the presumption would allow more sexual harassment perpetrators to escape responsibility because it can be difficult to prove sexual assault, and evidence is frequently scant or based heavily on testimony alone so overcoming a presumption is yet another unfair obstacle for survivors to receive justice.

Commenters argued that, for those schools that employ a clear and convincing evidence standard, complainants will be more likely to lose the case, a result compounded by the presumption of non-responsibility. Commenters argued that abusive people will be found not

responsible more often, making campuses less safe and increasing the number of sexual assaults on campuses. Another commenter argued that the presumption ensures that only the most egregious cases of sexual assault will be punished, which is unjust for many women.

Some commenters disagreed with the presumption, asserting that it requires fact-finding doctrines used in criminal law proceedings. Commenters expressed concern that, if schools handle complaints of sexual assault the same way law enforcement handles them, most complaints will not be pursued. One commenter asserted that 69 percent of survivors have experienced police officers discouraging them from filing a report and one-third of survivors have experienced police refusing to take their reports.[1081]

Commenters argued that the presumption is in tension with § 106.45(b)(1)(ii), which states that "credibility determinations may not be based on a person's status as a complainant" or "respondent."

One commenter asserted that the presumption would not work for medical schools, because medical students frequently experience sexual harassment or assault from patients or visitors, and medical schools do not have the authority to compel them to participate in investigatory interviews or live hearings.[1082]

Discussion: As applied under these final regulations, in the context of a Title IX grievance process, the presumption does not operate to let "guilty" respondents go free. While the presumption is based on a similar principle animating the presumption of innocence in criminal

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[1081] Commenters cited: Rebecca Campbell, *Survivors' Help-Seeking Experiences with the Legal and Medical Systems*, 20 VIOLENCE & VICTIMS 1 (2005).
[1082] Commenters cited: Charlotte Grinberg, *'These Things Sometimes Happen': Speaking Up About Harassment*, 37 HEALTH AFFAIRS 6 (2018).

law, the § 106.45 grievance process generally, including the presumption under § 106.45(b)(1)(iv), does not mirror criminal law protections or mimic criminal courts. As discussed below, the presumption of non-responsibility reinforces that the burden of proof remains on the recipient, not on either party, and reinforces application of the standard of evidence, which under the final regulations must be lower than the criminal standard of beyond a reasonable doubt.

The Department disagrees that the final regulations require schools to handle reports or formal complaints of sexual assault the same way law enforcement handles them. Recipients are prohibited from showing deliberate indifference towards sexual harassment complainants, including by offering supporting measures to complainants irrespective of whether a formal complaint is ever filed, and under these final regulations recipients are obligated to investigate formal complaints, unlike law enforcement where officers and prosecutors generally have discretion to decline to investigate and prosecute. Further, law enforcement and criminal prosecutors gather evidence under a burden to prove guilt beyond a reasonable doubt, but the final regulations place a burden on recipients to meet a burden of proof that shows a respondent responsible measured against a lower standard of evidence.[1083]

The Department is unpersuaded by commenters who asserted that the presumption will make campuses more dangerous because it will chill reporting or prevent recipients from punishing and expelling offenders from campuses because § 106.45 is too similar to criminal procedures. A presumption of non-responsibility need not chill or deter reporting of sexual

[1083] Section 106.45(b)(1)(vii) (requiring recipients to select and apply to all Title IX sexual harassment cases a standard of evidence that is either the preponderance of the evidence standard, or the clear and convincing evidence standard).

harassment, because reporting under the final regulations leaves complainants autonomy over whether to seek supportive measures or also participate in a grievance process, and because a fair process with procedures rooted in principles of due process provides assurance that the outcome of a grievance process (when a complainant or Title IX Coordinator decides to initiate a grievance process) is reliable and viewed as legitimate.

Refraining from treating a respondent as responsible until conclusion of the grievance process does not make it more difficult to hold a respondent responsible or prevent implementation of supportive measures for a complainant. To the extent that commenters are advocating for latitude for recipients to impose *interim* suspensions or expulsions, the Department believes that without a fair, reliable process the recipient cannot know whether it has interim-expelled a respondent who is actually responsible for the allegations, or a respondent who is not responsible. However, the Department reiterates that § 106.44(c) allows emergency removals of respondents prior to conclusion of a grievance process (or even where no grievance process is pending), thus protecting the safety of a recipient's community where an immediate threat exists.

Because the standard of evidence is lower in the Title IX grievance process (recipients must select and apply either the preponderance of the evidence standard or the clear and convincing evidence standard) than in a criminal proceeding (beyond a reasonable doubt), the presumption in § 106.45(b)(1)(iv) does not convert the standard of evidence to the criminal standard (beyond a reasonable doubt). Under the § 106.45 grievance process, the § 106.45(b)(1)(iv) presumption ensures that recipients correctly apply the standard of evidence selected by each recipient, but no recipient is permitted to select the criminal "beyond a

reasonable doubt" standard.[1084] Thus, the presumption helps to ensure that the recipient does not treat a respondent as responsible until conclusion of the grievance process, and to reinforce a recipient's proper application of the standard of evidence the recipient has selected[1085] without converting the Title IX grievance process to a criminal court proceeding. The presumption does not make it more difficult to hold a respondent responsible, because the presumption reinforces, but does not change, the burden of proof that rests on the recipient and the obligation to appropriately apply the recipient's selected standard of evidence in reaching a determination regarding responsibility to decide if the recipient's burden of proof has been met. The presumption will not result in assailants going unpunished; a perpetrator of sexual harassment proved responsible for the alleged conduct may be punished at the recipient's discretion, and these final regulations require the recipient to effectively implement remedies for the complainant where a respondent is found to be responsible.[1086]

The structure of the fact-finding process, including the presumption, prevents recipients from acting on an assumption that a particular complainant is (or is not) truthful; similarly,

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[1084] Section 106.45(b)(1)(vii); § 106.45(b)(7)(i); *see also* discussion in the "Section 106.45(b)(7)(i) Standard of Evidence and Directed Question 6" subsection of the "Determinations Regarding Responsibility" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble.

[1085] Because the Department has determined that the preponderance of the evidence standard is the lowest possible standard of evidence that a recipient may select for a § 106.45 grievance process, the presumption of non-responsibility's function of ensuring proper application of the standard of evidence is particularly important where a recipient has selected the preponderance of the evidence standard, to ensure that in cases where the evidence is in equipoise (i.e., "50/50") the result is a determination of non-responsibility. *E.g.*, Vern R. Walker, *Preponderance, Probability, and Warranted Factfinding*, 62 BROOKLYN L. REV. 1075, 1076 (1996) (noting that the traditional formulation of the preponderance of the evidence standard by courts and legal scholars is that the party with the burden of persuasion must prove that a proposition is more probably true than false meaning a probability of truth greater than 50 percent); Neil B. Cohen, *The Gatekeeping Role in Civil Litigation and the Abdication of Legal Values in Favor of Scientific Values*, 33 SETON HALL L. REV. 943, 954-56 (2003) (noting that the preponderance of the evidence standard applied in civil litigation results in the plaintiff losing the case where the plaintiff's and defendant's positions are "in equipoise" i.e., where the evidence presented makes the case "too close to call").

[1086] Section 106.45(b)(1)(i); § 106.45(b)(7)(iv).

recipients may not look to the presumption as an excuse to "believe" or find credible, the respondent and to do so would violate § 106.45(b)(1)(ii). Thus, the Department disagrees with commenters who argue that the presumption contradicts § 106.45(b)(1)(ii) which requires that recipients may not make credibility determinations based on a party's status as a complainant or respondent. The presumption in § 106.45(b)(1)(iv) reinforces the obligation in § 106.45(b)(1)(ii) to refrain from drawing inferences about credibility based on a party's status as a complainant or respondent.

Nothing in the final regulations, including the presumption of non-responsibility, prevents recipients who are medical schools from offering supportive measures to medical students who allege that hospital patients or visitors are sexually harassing them. Section 106.30 defining "supportive measures" provides that the recipient may offer such measures either before or after the filing of a formal complaint or where no formal complaint has been filed, for the purpose of restoring the complainant's access to the education program without unreasonably burdening the respondent. The Department cannot comment more specifically as to what supportive measures might be reasonably available to preserve a medical student's equal access and avoid unreasonably burdening a respondent who is a patient or visitor, because each case requires the recipient's independent review and judgment. Where the respondent is a patient or visitor to the recipient's campus or facility and the recipient thus lacks an employment or enrollment relationship with the respondent, a recipient has discretion under § 106.45(b)(3)(ii) to dismiss a formal complaint where the respondent is not enrolled or employed by the recipient; or, also in the recipient's discretion, the recipient may investigate and adjudicate a formal complaint against such a respondent and, for example, issue a no-trespass order following a determination regarding responsibility. Regardless of how a recipient exercises its discretion with respect to

formal complaints against respondents over whom a recipient lacks disciplinary authority, medical schools may still comply with the requirements in these final regulations to respond to sexual harassment that occurs in the recipient's education program or activity.

Changes: None.

Recipients Should Apply Dual Presumptions or No Presumption

Comments: Commenters stated that § 106.45(b)(1)(iv) equates to a presumption that the complainant is lying, or a presumption that the alleged harassment never occurred. Commenters asserted if presumptions exist, the provision should direct the recipient to presume, in addition to the respondent's presumption of non-responsibility, that the complainant is credible and making a good faith complaint. One commenter asserted that the Department should provide training to address bias against complainants.

Commenters argued that, because the grievance process is not a criminal proceeding, there should be no presumption in favor of either party. Commenters argued that investigators should have no presumption – either in favor or against either party – when performing their fact-finding duties. Commenters argued that it is unfair to complainants to start an investigation with a presumption of the respondent's innocence, just as it would be unfair to the respondent to start with a presumption of guilt. Commenters argued that in civil and administrative proceedings, both parties start on equal footing in the process with a blank slate in front of the decision-maker, and there is no reason why Title IX proceedings should not treat the parties equally in this manner. Commenters argued that while criminal proceedings give defendants a presumption of innocence, State and Federal victims' rights laws balance even that presumption of innocence to ensure victims are treated fairly. Commenters argued that a civil case requires

that the victim and perpetrator appear as equals[1087] and argued that a Title IX investigation should treat both parties equally regarding credibility, with no presumption of innocence or presumption of guilt. One commenter argued that the presumption makes no sense in an educational environment because the complainant and respondent are tied together because of their relationship to the institution, which is different from the relationship between defendants and the government in criminal matters, and the § 106.45(b)(1)(iv) presumption will negatively impact every complainant's education because the complainant will be assumed to be lying just by filing a complaint.

Commenters asserted that currently there is no presumption of non-responsibility for respondents in other student misconduct proceedings, such as theft, cheating, plagiarism, and even physical assault. Commenters argued that if the Department believes such a presumption is important in sexual misconduct cases, then it should require the presumption in all student misconduct cases for the sake of uniformity.

Discussion: The Department declines to adopt commenters' recommendations that recipients should presume that complainants are credible. If the presumption of non-responsibility meant assuming that the respondent is credible, then the Department would agree that such a presumption would be unfair to complainants and should be balanced by an equal presumption of credibility for complainants (or, more reasonably, no presumptions at all). However, the presumption of non-responsibility is *not* a presumption about the respondent's credibility, believability, or truthfulness, and § 106.45(b)(1)(ii) requires recipients not to make credibility

[1087] Commenters cited: The National Center for Victims of Crime, "Criminal and Civil Justice," http://victimsofcrime.org/media/reporting-on-child-sexual-abuse/criminal-and-civil-justice, for this proposition.

determinations based on a party's status as complainant or respondent. A critical feature of a fair grievance process is that Title IX personnel refrain from drawing conclusions or making assumptions about either party's credibility or truthfulness until conclusion of the grievance process; therefore, the Department declines to impose a presumption that either party (or both parties) are credible or truthful. Because the presumption of non-responsibility is not a presumption that a respondent is credible, there is no need for a presumption specific to complainants to balance or counteract the presumption of non-responsibility.[1088] The presumption of non-responsibility does not assume, or allow recipients to act as though, complainants are lying; under the final regulations, recipients must not prejudge the facts at issue, must not draw inferences about credibility based on a party's status as a complainant or

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[1088] A presumption specific to a complainant that corresponds to the presumption of a respondent's non-responsibility might, hypothetically, be a presumption that the complainant is not responsible – but such a presumption simply does not apply to a complainant, because a complainant by definition is not alleged to be responsible for misconduct. Alternatively, a presumption specific to a complainant analogous to the presumption of non-responsibility might be that the complainant must be treated as a victim of the respondent's conduct until conclusion of the grievance process (because, as explained above, the presumption of non-responsibility operates to treat a respondent as "not a perpetrator" until conclusion of the grievance process, subject to the § 106.44(c) and § 106.44(d) exceptions for emergency removals and administrative leave for employee-respondents). However, the Department does not believe such a presumption would operate to protect complainants in any manner not already provided for in the final regulations. Section 106.44(a) already requires the recipient essentially to treat a complainant as a victim in need of services in the aftermath of suffering sexual harassment (by offering supportive measures and engaging in an interactive discussion with the complainant to arrive at helpful supportive measures to preserve the complainant's equal educational access) even before, or without, a fact-finding process that has determined that the respondent victimized the complainant. Moreover, the grievance process effectively requires a complainant to be treated as a victim in two specific provisions that apply for complainants' benefit: § 106.45(b)(6)(i)-(ii) provides rape shield protection for complainants – but not respondents – against questions and evidence inquiring into the complainant's prior sexual behavior; and § 106.45(b)(6)(i) allows either party to request that a live hearing (including cross-examination) occurs in separate rooms. While the latter provision applies on its face to both parties, the provision is responsive to public comment informing the Department that complainants already traumatized by sexual violence likely will be traumatized by coming face-to-face with the respondent; no such concerns about the traumatic effect of personal confrontation were raised on behalf of respondents. Thus, where appropriate, the grievance process takes into account the unique needs of complainants, in ways that the Department believes serve Title IX's non-discrimination mandate by protecting complainants *as though* every complainant has been victimized, without unfairness to the respondent. A presumption of non-responsibility does not deprive a complainant of the protections given solely to complainants under § 106.44(a) and § 106.45, nor deprive a complainant of the benefits of the robust procedural rights given equally to both parties during the grievance process.

respondent, and must objectively evaluate all relevant evidence to reach a determination regarding responsibility.

The procedural rights granted to both parties under § 106.45 ensure that complainants and respondents have equal opportunities to meaningfully participate in putting forth their views about the allegations and their desired case outcome, an essential requirement for due process even in a civil (noncriminal) setting.[1089] The Department disagrees that in civil (as opposed to criminal) trials the plaintiff and defendant "appear as equals" in every regard, because even in civil trials the burden of proof generally rests on the plaintiff to prove allegations, not on the defendant to prove non-liability.[1090] Thus, while parties in civil litigation (and under § 106.45) have equal rights to participate in the process (for example, by gathering and presenting evidence), a burden of proof must still be met. The final regulations ensure that *neither* party bears the burden of proof (which remains on the recipient) yet give both parties equal procedural rights throughout the grievance process. The presumption does not create inequality between the complainant and respondent; the presumption reinforces the recipient's burden of proof and correct application of the standard of evidence, neither of which burdens or disadvantages the complainant.

[1089] *E.g.*, Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE LAW & POL. REV. 1, 10-11 (2006) (due process in civil settings "places central importance on the participation of the affected party in decision-making. Ex parte procedures are the exception, while participatory procedures are the rule. Notice and an opportunity to be heard is, obviously, the principle without which a participatory model of justice cannot work effectively. Unless a party is notified that there is a controversy, it cannot participate in decision-making; unless a party has the opportunity for a hearing, it cannot present its side of the controversy; and unless the decision-maker hears from both parties, there cannot be a meaningful ruling. This is the adversary system's vision of justice.").

[1090] *E.g.*, Dale A. Nance, *Civility and the Burden of Proof*, 17 HARV. J. OF L. & PUB. POL'Y 647, 659 (1994) (in civil litigation "it remains true that the burden is placed, in the vast majority of contexts, on the person or institution claiming that someone has breached a duty serious enough to warrant legal recognition."). We reiterate that the final regulations, § 106.45(b)(1)(i), place the burden squarely on the recipient – not on the complainant – to prove that a respondent has committed sexual harassment.

The Department notes that § 106.45(b)(1)(iii) not only requires Title IX personnel to serve without bias for or against complainants or respondents, but also requires training for Title IX personnel, expressly to avoid bias for or against complainants or respondents generally or for or against an individual complainant or respondent. Recipients have discretion as to the content and approaches of such training so long as the requirements of § 106.45(b)(1)(iii) are met.

A presumption of non-responsibility reinforces placement of the burden of proof, proper application of the standard of evidence, and fair treatment of an accused person prior to adjudication of responsibility. These features of a fair grievance process may be beneficial to the legitimacy and reliability of outcomes of non-sexual harassment student misconduct proceedings. However, these final regulations focus only on effectuating Title IX's non-discrimination mandate by improving the perception and reality that recipients' Title IX proceedings reach fair, accurate outcomes; these regulations do not impose requirements on recipients for grievance proceedings other than for Title IX sexual harassment.

Changes: None.

The Adversarial Nature of the Grievance Process

Comments: Commenters asserted that universities already treat both parties equitably and the presumption in § 106.45(b)(1)(iv) escalates the adversarial nature of Title IX proceedings; commenters argued this will raise the financial and emotional toll the grievance process will have on both complainants and respondents. Commenters argued that the proposed regulations ask a university to act as a judicial system, placing an undue burden on the educational system and imposing an unprecedented amount of control over a school's – especially a private school's – ability to develop and implement disciplinary processes in a way that best serves its community and upholds its values, which often include using codes of conduct to educate

students rather than be punitive. One commenter opposed the presumption because recipients already train staff and faculty to serve neutrally, bearing in mind the educational context in student misconduct cases, because the student is paying to be in an educational environment, not a prison system. One commenter warned that the presumption of non-responsibility would create an "inaccessibility to justice."

Other commenters supported the presumption of non-responsibility, arguing that Title IX proceedings are often highly contested, yet school proceedings are biased against the accused; commenters cited articles showing that over 150 lawsuits have been filed arising from fundamental unfairness in schools' Title IX proceedings.[1091] Commenters argued that a presumption of non-responsibility is essential because recipients have denied respondents the right to know the allegations against them or the identity of the person accusing them, and that respondents have been repeatedly denied the ability to question the complainant, submit exculpatory evidence, or have their witnesses interviewed by the recipient. Commenters argued that respondents have sued recipients for expelling them or finding them responsible without first giving them procedural protections, and that some courts have agreed that some recipients committed due process or fairness violations. One commenter shared information from a university's website promoting adherence to the public awareness campaign "Start by Believing,"[1092] which the commenter argued shows the university's bias against accused students. Commenters argued that college environments are highly politicized and college

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[1091] Commenters cited: Foundation for Individual Rights in Education (FIRE), *Report: As changes to Title IX enforcement loom, America's top universities overwhelmingly fail to guarantee fair hearings for students* (Dec. 18, 2018); *see also* T. Rees Shapiro, *Expelled for sex assault, young men are filing more lawsuits to clear their names*, THE WASHINGTON POST (Apr. 28, 2017).

[1092] Commenters cited: University of Iowa Rape Victim Advocacy program, *Start By Believing*, https://rvap.uiowa.edu/take-action/prevent-and-educate/start-by-believing/.

administrators and faculty are not objective fact-finders, and a presumption of non-responsibility helps counteract that lack of objectivity.

Discussion: The Department disagrees that the presumption of non-responsibility increases the adversarial nature of Title IX proceedings; Title IX proceedings are often inherently adversarial, due to the need to resolve contested factual allegations. The Department understands commenters' concerns that an adversarial process may take an emotional toll on participants, and the final regulations encourage provision of supportive measures to both parties and give both parties an equal right to select an advisor of choice to assist the parties during a grievance process. The presumption of non-responsibility does not magnify the adversarial nature of the grievance process; rather, the presumption reinforces the recipient's burden of proof, proper application of the standard of evidence, and how a respondent is treated pending the outcome of the grievance process. The Department disagrees that the presumption will lead to "inaccessibility" of justice; rather, complainants will benefit from increased legitimacy of recipient determinations when respondents are found responsible, while respondents will benefit from assurance that a recipient cannot treat the respondent as though responsibility has been determined until the conclusion of a fair grievance process. The § 106.45 grievance process, and the final regulations as a whole, impose an obligation on recipients to remain impartial toward parties whose views about the allegations are adverse to each other. To the extent that commenters' concerns about an adversarial process reflect concern that financial inequities can affect the process (for example, where one party can afford to hire an attorney to further the party's interests and the other party cannot afford an attorney), the final regulations permit, but do not require, advisors to be attorneys, allow recipients to limit the active participation of advisors significantly, with the exception of conducting cross-examination at a live hearing in

postsecondary institutions,[1093] and do not preclude recipients from offering both parties legal representation.[1094] This approach reflects the reality that recipients are not courts, yet do need to apply a fair, truth-seeking process to resolve factual allegations of Title IX sexual harassment.

The Department recognizes that some recipients expressed concerns that the presumption of non-responsibility, in conjunction with other provisions in § 106.45, requires educational institutions to mimic courts of law. The Department acknowledges, and the final regulations reflect, that recipients' purpose is to educate, not to act as courts. The § 106.45 grievance process is designed for implementation by non-lawyer recipient officials, and the final regulations do not intrude on a recipient's discretion to use disciplinary sanctions as educational tools of behavior modification rather than, or in addition to, punitive measures. However, to effectuate Title IX's non-discrimination mandate, recipients must accurately resolve allegations of sexual harassment in order to identify and address sex discrimination in the recipient's education program or activity. The Department believes the presumption of non-responsibility is important to ensure that recipients do not treat respondents as responsible until conclusion of the grievance process and to reinforce the recipient's burden of proof and proper application of the standard of evidence, and these features will improve the legitimacy and reliability of the outcomes of recipients' Title IX grievance processes.

[1093] Section 106.45(b)(5)(iv); § 106.45(b)(6)(i).

[1094] The Department realizes that only a fraction of postsecondary institutions currently offer to provide both parties in a grievance proceeding with legal representation, but such an option remains available to recipients who choose to address disparity with respect to the financial ability of parties to hire legal representation in the recipient's educational community. *E.g.*, Kristen N. Jozkowski & Jacquelyn D. Wiersma-Mosley, *The Greek System: How Gender Inequality and Class Privilege Perpetuate Rape Culture*, 66 FAM. RELATIONS 1 (2017) (noting that only about three percent of colleges and universities provide victims with legal representation and arguing that colleges and universities should provide free legal representation to both complainants and respondents in campus sexual assault proceedings).

Changes: None.

Supportive Measures

Comments: Several commenters sought clarification as to whether the presumption in § 106.45(b)(1)(iv) would preclude a recipient from taking interim or emergency actions as dictated by individual circumstances when needed to ensure safety. For example, if a respondent is presumed not to be responsible for stalking a complainant until the end of the grievance process, commenters asked how a recipient could take effective measures to ensure that the respondent will not stalk the complainant prior to the conclusion of the grievance proceeding. Commenters asserted that the presumption appeared to require the recipient to remove the complainant from dorms and classes rather than the respondent, and that the presumption would curtail the ability of recipients to remove harassers and abusers from dorms and classes, which will lead to more sexual assaults because research indicates that most perpetrators are repeat offenders.[1095] Commenters argued that the presumption may discourage schools from providing crucial supportive measures to complainants to avoid being perceived as punishing respondents.[1096]

Commenters argued that the proposed rules not only give respondents a presumption of innocence but also require recipients to provide supportive measures to respondents, constituting unprecedented concern with the well-being of accused harassers above the interests of victims.

Discussion: The § 106.30 definition of "supportive measures" permits recipients to provide either party, or both parties, individualized services, without fee or charge, before or after filing a

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[1095] Commenters cited: David Lisak & Paul Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 1 (2002), for the proposition that a majority of "undetected rapists" were repeat rapists and undetected repeat rapists committed an average of 5.8 rapes each.

[1096] Commenters cited: Michael C. Dorf, *What Does a Presumption of Non-Responsibility Mean in a Civil Context*, DORF ON LAW (Nov. 28, 2018), http://www.dorfonlaw.org/2018/11/what-does-presumption-of-non.html.

formal complainant, or where no formal complaint has been filed. Section 106.44(a) *obligates* a recipient to offer supportive measures to every complainant, by engaging in an interactive process by which the Title IX Coordinator contacts the complainant, discusses available supportive measures, considers the complainant's wishes with respect to supportive measures, and explains to the complainant the option for filing a formal complaint. Title IX Coordinators are responsible for the effective implementation of supportive measures, and under revised § 106.45(b)(10) if a recipient's response to sexual harassment does *not* include providing supportive measures to a complainant the recipient must specifically document why that response was not clearly unreasonable in light of the known circumstances (for example, because the complainant did not wish to receive supportive measures or refused to discuss supportive measures with the Title IX Coordinator when the Title IX Coordinator contacted the complainant to have such a discussion). Thus, unless a complainant does not desire supportive measures (i.e., refuses the offer of supportive measures), complainants must receive supportive measures designed to restore or preserve the complainant's equal educational access, regardless of whether a grievance process is ever initiated. There is no corresponding obligation to offer supportive measures to respondents; rather, recipients may provide supportive measures to respondents and under § 106.45(b)(1)(ix) the recipient's grievance process must describe the range of supportive measures available to complainants and respondents.

The presumption of non-responsibility, which operates throughout a grievance process, does not prohibit the recipient from providing a complainant with supportive measures, but does reinforce the provision in the § 106.30 definition of "supportive measures" that supportive measures are designed to restore or preserve equal access to education "without unreasonably burdening the other party" including measures designed to protect a complainant's safety or

deter sexual harassment (which includes stalking), but supportive measures cannot be punitive or disciplinary. This does not bar all measures that place *any* burden on a respondent, but only those that "unreasonably burden" a respondent (or a complainant). Thus, changing a respondent's class schedule, or forbidding the respondent from communicating with the complainant, may be an appropriate supportive measure for a complainant if such measures do not "unreasonably burden" the respondent, and such measures do not violate the presumption of non-responsibility.

To the extent that commenters' concern is that current Department guidance affords recipients more discretion to impose interim measures that in fact do constitute disciplinary actions against the respondent (for example, interim suspensions), the Department has reconsidered that approach and, based on public comments on the NPRM, concluded that the non-discrimination mandate of Title IX is better served by the framework in the final regulations than the approach taken in guidance documents. With respect to disciplinary or punitive actions taken prior to an adjudication factually establishing a respondent's responsibility for sexual harassment, the final regulations circumscribe a recipient's discretion to treat a respondent as though accusations are true before the accusations have been proved.[1097] When applied in the

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[1097] The final regulations prohibit a recipient from taking disciplinary action, or other action that does not meet the definition of a supportive measure, against a respondent without following a grievance process that complies with § 106.45. § 106.44(a); § 106.45(b)(1). Through an informal resolution process (which is authorized under § 106.45) a recipient may impose disciplinary sanctions against a respondent without concluding an investigation or adjudication. § 106.45(b)(9). An exception to the requirement not to impose punitive or disciplinary action until conclusion of a grievance process is § 106.44(c), permitting a recipient to remove a respondent from an education program or activity in an emergency situation whether or not a grievance process has been concluded or is even pending. Supportive measures designed to restore or preserve a complainant's equal access to education, protect parties' safety, and/or deter sexual harassment, may be imposed even where such measures burden a respondent, so long as the burden is not unreasonable. § 106.30 (defining "supportive measures"). Thus, the final regulations are premised on the principle that a recipient must not treat a respondent as responsible prior to an adjudication finding the respondent responsible, yet that principle is not absolute and leave recipients with the ability (and, judged under the deliberate indifference standard, the obligation) to protect and support complainants and respond to emergency threat situations, without unduly, prematurely punishing a respondent based on accusations that have not been factually proved.

context of these final regulations, the presumption of non-responsibility's reinforcement of the notion that a person accused should not be treated as though accusations are true until the accusations have been proved increases the legitimacy of a recipient's response to sexual harassment, while preserving every complainant's right to supportive measures designed to maintain a complainant's equal educational access and protect a complainant's safety. This approach directly effectuates Title IX's non-discrimination mandate by improving the fairness and accuracy of a recipient's response to sexual harassment occurring in the recipient's education programs or activities.

The Department understands commenters' concerns that restricting a recipient's ability to impose interim discipline poses a risk that perpetrators may repeat an offense because they remain on campus while a grievance process is pending; however, even in situations that do not constitute the kind of immediate threat justifying an emergency removal under § 106.44(c), there are supportive measures short of disciplinary actions that a recipient may take to protect the safety of parties and deter sexual harassment, such as a no-contact order prohibiting communication with the complainant, supervising the respondent, and informing the respondent of the recipient's policy against sexual harassment.[1098]

Changes: None.

[1098] *E.g.*, *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1296 (11th Cir. 2007) (pointing to the recipient's failure to supervise the respondent or inform the respondent of the recipient's expectations of behavior under the recipient's sexual harassment policy as evidence of the recipient's deliberate indifference that subjected the complainant to sexual harassment).

Miscellaneous Concerns

Comments: At least one commenter asked the Department to add at the end of the presumption provision the language ". . . respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process *or any subsequent litigation.*" Commenters asked the Department to provide the respondent with a right to remain silent, since the respondent's statements during any investigation or hearing could be used against the respondent at a criminal trial. One commenter recommended inserting the following language: "The recipient bears the burden of demonstrating that the respondent is responsible for the alleged conduct and may not infer responsibility based solely on the respondent declining to present testimony, evidence, or witnesses in response to a formal complaint."

Another commenter urged the Department to add to § 106.45(b)(1)(iv) a sentence declaring that it is the obligation of the recipient to prove every element of every alleged offense before the accused student may be found responsible and punished for committing an alleged offense.

Discussion: The Department does not attempt to regulate procedures that apply in private lawsuits and so declines commenters' request that the Department require a recipient to abide by a presumption of non-responsibility until conclusion of "any subsequent litigation." The recipient's obligation is to conclude a grievance process by reaching a determination regarding responsibility when presented with a formal complaint of sexual harassment under Title IX, whether or not litigation arises from the same allegations.

Section 106.6(d) provides that these regulations do not require a recipient to restrict any rights that would otherwise be protected from government action under the U.S. Constitution,

which includes the Fifth Amendment right against self-incrimination. To ensure that the determination regarding responsibility is reached in a manner that does not require violation of that constitutional right, we revised § 106.45(b)(6)(i) in the final regulations to provide that a decision-maker cannot draw any inferences about the determination regarding responsibility based on a party's failure to appear at the hearing or answer cross-examination or other questions. While this applies equally to respondents and complainants, this modification addresses commenters' concerns that a respondent should not be found responsible solely because the respondent refused to provide self-incriminating statements. The Department declines to change § 106.45(b)(1)(iv) to add language about the recipient's burden to prove each element of an offense, because § 106.45(b)(5)(i) places the burden of proof on the recipient.

Changes: We revised § 106.45(b)(6)(i) of the final regulations to provide that a decision-maker cannot draw any inferences about the determination regarding responsibility based on a party's failure to appear at the hearing or answer cross-examination or other questions.

Section 106.45(b)(1)(v) Reasonably Prompt Time Frames

Support

Comments: A number of commenters expressed support for this section. Some did not expand upon the reasons for their support. Others, primarily some college and university commenters, expressed particular support for eliminating the 60-day time frame contained in withdrawn Department guidance. Some commenters identified concerns with a 60-day time frame, such as asserting that: it does not reflect the complex nature of these cases, such as multiple parties, various witnesses, time to obtain evidence, and school breaks; it is arbitrary and hard to adhere to while providing due process for all; it interferes with the time parties need to provide evidence and to make their case; it has not been required by courts; and it increases the risks of decisions

based on conjecture or gender or racial stereotypes. Other commenters contended that eliminating such a constrained timeline would be beneficial, by for instance allowing for more thorough investigations, collection of more evidence, and added accommodation of disabilities.

A number of the supportive commenters also noted support more generally for the NPRM's flexibility regarding the time to conclude Title IX investigations and extensions for good cause. Some emphasized that prompt resolution is important, but contended that various factors may delay proceedings (such as police investigations, witness availability, school breaks, faculty sabbaticals) and asserted that fairness demands thoroughness. According to these commenters, § 106.45(b)(1)(v) appropriately accounts for schools' unique attributes (for example, their size, population, location, or mission), recognizes that complex matters may not lend themselves to set deadlines, and acknowledges that delays may sometimes be necessary, especially with a concurrent criminal investigation. Likewise, some commenters expressed support for good cause extensions for a related criminal proceeding in the belief that students should not be forced to choose between participating in campus proceedings and giving up their right to silence in criminal proceedings.

Discussion: The Department appreciates the commenters' support for § 106.45(b)(1)(v) under which a recipient's grievance process must include reasonably prompt time frames for concluding the grievance process, including appeals and any informal resolution processes, with temporary delays and limited extensions of time frames permitted only for good cause. The Department agrees with commenters that this provision appropriately requires prompt resolution of a grievance process while leaving recipients flexibility to designate reasonable time frames and address situations that justify short-term delays or extensions. This is the same recommendation made in the 2001 Guidance, which advised recipients that grievance procedures

should include "Designated and reasonably prompt time frames for the major stages of the complaint process."[1099]

Changes: None.

Opposition – Lack of Specified Time Limit

Comments: Many commenters expressed opposition to § 106.45(b)(1)(v) because of concerns about the absence of specific time frames for completing investigations and adjudications, including appeals. Commenters asserted that schools could delay investigations indefinitely or for unspecified periods of time and that students might wait months or years for resolution of their complaint. Commenters identified a number of other drawbacks they felt would result from uncertain, indefinite time frames with possible delays. Commenters asserted that this provision would: make it less likely that survivors will report, less likely parties will receive justice, and more likely that students will lose faith in the reporting process; eliminate the mechanism for discovering and correcting harassment as early and effectively as possible; result in inconsistent resolution time frames at different schools; and only further delay the already lengthy process to reach resolution of sexual misconduct cases (for example, long unexplained delays even under the prior guidance with a 60-day time frame). Some commenters noted other concerns about the proposed time frames and potential delays or extensions.

Commenters asserted that indefinite time frames and probable delays would create uncertainty and a longer process that would harm survivors' well-being, safety, and education, and subject them to unreasonable physical, mental, time, and cost demands. Some felt that the proposal would: deny due process; exacerbate survivors' emotional distress; heighten the

[1099] 2001 Guidance at 20.

chances survivors would drop their cases or drop out of school as investigations drag on; increase risks of self-harm or suicide as delays might take too long for schools to provide prompt supports; prolong the period of survivors' exposure to their attackers; and add costs for counseling services or medical assistance, which would especially burden low-income students. Other commenters emphasized their belief that the indefinite time frames and delays would harm the mental health and education of both complainants and respondents, by adding uncertainty and stress for lengthy periods without resolution, exoneration, or closure. Other commenters expressed concerns about increasing safety risks to all students by allowing a hostile environment to continue unchecked, and assailants to harass, assault, or retaliate against their victims or others during the long waiting period. One commenter expressed concern that the NPRM would permit delays even when a respondent poses a clear threat to the campus community.

Some commenters contended that delays or extensions may result in: information, memory, and witnesses being lost; less, lost, or corrupted evidence, including fewer witnesses who may no longer be available or on campus (for example, students or short-term staff); and parties who have left school or graduated impairing schools from investigating or resolving concerns. Other commenters believed that a lengthier process and delays would: signal that schools do not care about the safety or education of victims; make it more likely that a victim will be identified or lose confidentiality; force survivors to rely on supportive measures for longer than they may be adequate or effective; allow a respondent's refusal to cooperate to delay a case indefinitely; permit recipients to place respondents on administrative leave to further delay an investigation; and particularly harm schools' short-term staff or contractors. A few commenters asserted that delays have increased in resolving Title IX cases since the Department

withdrew the 2011 Dear Colleague Letter, and at least one commenter expressed concern that the Department failed to offer data that a 60-day time frame had compromised accuracy and fairness.

Discussion: The Department disagrees that this provision allows recipients to conduct grievance processes without specified time frames, or allows indefinite delays. This provision specifically requires a recipient's grievance process to include reasonably prompt time frames; thus, a recipient must resolve each formal complaint of sexual harassment according to the time frames the recipient has committed to in its grievance process. Any delays or extensions of the recipient's designated time frames must be "temporary" and "limited" and "for good cause" and the recipient must notify the parties of the reason for any such short-term delay or extension. This provision thus does not allow for open-ended or indefinite grievance processes.

Under existing regulations at 34 CFR 106.8(b), in effect since 1975, recipients have been required to "adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging" sex discrimination. The final regulations require more of recipients than do existing regulations, because § 106.45(b)(1)(v) requires recipients to include "reasonably prompt time frames" in the recipient's grievance process, rather than simply "providing for prompt" resolution. Further, the final regulations specify that the time frames designated by the recipient must account for conclusion of the entire grievance process, including appeals and any informal resolutions processes. Thus, no avenue for handling a formal complaint of sexual harassment is subject to an open-ended time frame.

Any time frame included by the recipient must be "reasonably prompt," where the reasonableness of the time frame is evaluated in the context of the recipient's operation of an education program or activity. The Department believes that conclusion of the grievance process must be reasonably prompt, because students (or employees) should not have to wait longer than

necessary to know the resolution of a formal complaint of sexual harassment; any grievance process is difficult for both parties, and participating in such a process likely detracts from students' ability to focus on participating in the recipient's education program or activity. Furthermore, victims of sexual harassment are entitled to remedies to restore or preserve equal access to education, and while supportive measures should be implemented as appropriate designed to achieve the same ends while a grievance process is pending, remedies *after* a respondent is found responsible may consist of measures not permissible as supportive measures. Thus, prompt resolution of a formal complaint of sexual harassment is necessary to further Title IX's non-discrimination mandate. At the same time, grievance processes must be fair and lead to reliable outcomes, so that sexual harassment in a recipient's education program or activity is accurately identified and remedied. The final regulations prescribe procedures and protections throughout the § 106.45 grievance process that the Department has concluded are necessary to ensure fairness and accuracy. The Department believes that each recipient is in the best position to balance promptness with fairness and accuracy based on the recipient's unique attributes and the recipient's experience with its own student disciplinary proceedings, and thus requires recipients to include "reasonably prompt time frames" for conclusion of a grievance process that complies with these final regulations.

The Department acknowledges that withdrawn Department guidance referred to a 60-day time frame for sexual harassment complaints. For recipients who determine that 60 days represents a reasonable time frame under which that recipient can conclude a grievance process that complies with § 106.45, a recipient has discretion to include that time frame under the final regulations. For recipients who determine that a shorter or longer period of time represents the time frame under which the recipient can conclude a grievance process, the recipient has

discretion to include that time frame. The Department emphasizes that what a recipient selects as a "reasonable" time frame is judged in the context of the recipient's obligation to provide students and employees with education programs and activities free from sex discrimination, so that the recipient's selection of time frames must reflect the goal of resolving a grievance process as quickly as possible while complying with the procedures set forth in § 106.45 that aim to ensure fairness and accuracy. Because the final regulations allow short-term delays and extensions for good cause, recipients need not base designated time frames on, for example, the most complex, time-consuming investigation that a formal complaint of sexual harassment *might* present. Rather, the recipient may select time frames under which the recipient is confident it can conclude the grievance process in most situations, knowing that case-specific complexities may be accounted for with factually justified short-term delays and extensions.

Commenters correctly noted that this provision allows different recipients to select different designated time frames and thus a grievance process may take longer at one school than at another. The Department believes that each recipient's commitment to a designated, reasonable time frame known to its students and employees,[1100] where each recipient has determined what time frame to designate by considering its own unique educational community and operations, is more effective than imposing a fixed time frame across all recipients because it results in each recipient being held accountable for complying with time frames the recipient has selected (and made known to its educational community), while ensuring that *all* recipients select time frames that are reasonably prompt.

[1100] Section 106.45(b)(1)(v) (requiring a recipient's grievance process to designate reasonably prompt time frames); § 106.8 (requiring recipients to notify students and employees (and others) of its non-discrimination policy and its grievance process for resolution of formal complaints of sexual harassment).

The non-exhaustive list in § 106.45(b)(1)(v) of factors that may constitute good cause for short-term delays or extensions of the recipient's designated time frames relate to the fundamental fairness of the proceedings. Delays caused solely by administrative needs, for example, would be insufficient to satisfy this standard.[1101] Furthermore, even where good cause exists, the final regulations make clear that recipients may only delay the grievance process on a temporary basis for a limited time. A respondent (or other party, advisor, or witness) would not be able to indefinitely delay a Title IX proceeding by refusing to cooperate. While recipients must attempt to accommodate the schedules of parties and witnesses throughout the grievance process in order to provide parties with a meaningful opportunity to exercise the rights granted to parties under these final regulations, it is the recipient's obligation to meet its own designated time frames, and the final regulations provide that a grievance process can proceed to conclusion even in the absence of a party or witness.

The Department understands commenters' concerns that the longer a grievance process is pending, the more risk there is of loss of information, evidence, and availability of witnesses. These concerns are addressed through requiring that a grievance process is concluded within a "reasonably prompt" time frame, yet in a manner that applies procedures designed to ensure fairness and accuracy. Administrative leave under § 106.44(d) of the final regulations would not preclude an investigation from proceeding; regardless of whether a party has been voluntarily or involuntarily separated from the recipient's campus, the recipient can provide for the party to

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[1101] The Department notes that temporary delay of a hearing caused by a recipient's need to provide an advisor to conduct cross-examination on behalf of a party at a hearing as required under § 106.45(b)(6)(i) *may* constitute good cause rather than mere administrative convenience, although a recipient aware of that potential obligation ought to take affirmative steps to ascertain whether a party will require an advisor provided by the recipient or not, in advance of the hearing, so as not to delay the proceedings.

return to participate in the grievance process, including with safety measures in place for the other parties and witnesses. Under § 106.45(b)(6)(i) a postsecondary institution has discretion to hold a live hearing virtually, or to allow any participant to participate remotely, using technology. Where a party refuses to participate, the recipient may still proceed with the grievance process (though the recipient must still send to a party who has chosen not to participate notices required under § 106.45; for instance, a written notice of the date, time, and location of a live hearing).

The Department disagrees that § 106.45(b)(1)(v) will jeopardize the safety of complainants or the educational environment, or that complainants will feel deterred from filing formal complainants because the grievance process might drag on indefinitely. As noted above, supportive measures designed to protect safety and deter sexual harassment are available during the pendency of the grievance process.[1102] Furthermore, under § 106.44(c) recipients may remove a respondent on an emergency basis without awaiting conclusion of a grievance process. As also noted above, the final regulations do not permit any recipient's grievance process to go on indefinitely.

With respect to a commenter's assertion that the Department did not provide data to show that the 60-day time frame has compromised accuracy and fairness, commenters on behalf of complainants and respondents have noted that the grievance process often takes too long, which may indicate that a 60-day time frame was not a reasonable expectation for recipients to conclude a fair process, and some comments on behalf of recipients expressed that many of the

[1102] Section 106.30 (defining "supportive measures"); § 106.44(a) (requiring recipients to offer supportive measures to complainants, with or without the filing of a formal complaint).

cases that go through a Title IX proceeding present complex facts that require more than 60 days for a recipient to conclude a fair process. For recipients who determine that 60 days (or less) is a reasonable time frame under which to conclude a fair process, recipients may designate such a time frame as part of their § 106.45 grievance process.

Changes: To ensure that reasonably prompt time frames are included for every stage of a grievance process, we have revised § 106.45(b)(1)(v) of the final regulations to apply the reasonably prompt time frame requirement to informal resolution processes, if recipients choose to offer them, and we have removed the phrase "if the recipient offers an appeal" because under the final regulations, § 106.45(b)(8), appeals are mandatory, not optional.

Effects on Recipients

Comments: Other commenters expressed opposition to § 106.45(b)(1)(v) because they believed it would weaken schools' accountability and incentives for prioritizing sexual harassment complaints and would increase the chances that reports are brushed under the rug or not promptly and appropriately handled. Some commenters noted concerns that the provision is too vague to be clear, effective, and enforceable, and would give schools too much leeway to decide what is reasonably prompt. Other commenters expressed concern that schools already have incentives to delay, such as to protect their reputations or resources, and so might drag out investigations until one or both parties graduate, a survivor drops the case, or until after a season ends or a major game is played, in cases involving athletes. A number of commenters called for set time frames for clearer expectations and accountability. One commenter felt that a set time frame would also leave schools less vulnerable to lawsuits or complaints.

Discussion: The Department does not believe that this provision perversely incentivizes recipients to sweep allegations of sexual harassment under the rug, gives recipients the freedom

to simply indefinitely delay proceedings against the interests of fairness and justice, or increases the risk of litigation against recipients. The Department believes that § 106.45(b)(1)(v) strikes an appropriate balance between imposing clear constraints on recipients in the interests of achieving Title IX's purpose, and ensuring they have adequate flexibility and discretion to select reasonably prompt time frames in a manner that each recipient can apply within its own unique educational environment. We also believe that moving away from a strict timeline that does not permit short-term extensions will help to address pitfalls and implementation problems that commenters have recounted in recipients' Title IX proceedings under the previous guidance, where some recipients felt pressure to resolve their grievance processes within 60 days regardless of the circumstances of the situation. The Department believes that recipients are in the best position to balance the interests of promptness, and fairness and accuracy, within the confines of such a decision resulting in "reasonably prompt" conclusion of grievance processes. This provision does not permit a recipient to conduct a grievance process without a "set" time frame; to the contrary, this provision requires a recipient to designate and include in its grievance process what its set time frame will be, for each phase of the grievance process (including appeals and any informal resolution process). Permitting recipients to set their own reasonably prompt time frames increases the likelihood that recipients will meet the time frames they have designated and thereby more often meet the expectations of students and employees as to how long a recipient's grievance process will take. Requiring recipients to notify the parties whenever the recipient applies a short-term delay or extension will further promote predictability and transparency of recipients' grievance process. Prescribing that any delay or extension must be for good cause, and must be temporary and limited in duration, ensures that no grievance process is open-ended and that parties receive a reasonably prompt resolution of each formal complaint.

Changes: None.

Concerns Regarding Concurrent Law Enforcement Activity

Comments: Some commenters opposed to this provision emphasized concerns about permitting delay for concurrent ongoing criminal investigations. Commenters asserted that criminal investigations can and often do take months or years because of rape kit backlogs or lengthy DNA analyses, and expressed concern about allowing schools to delay action for unspecified and lengthy periods. These commenters felt this would force students to wait months or longer for resolution as they suffer serious emotional and academic harm when they need timely responses and support to continue in school and to heal from their trauma. Some commenters felt that it would deny due process in school Title IX proceedings, ignore schools' independent Title IX obligations to remedy sex-based harassment, and allow perpetrators to evade responsibility or consequences or to perpetrate again. A number of commenters were concerned that schools delaying or suspending investigations at the request of law enforcement or prosecutors creates a safety risk to the survivor and to other students, by allowing assailants to harass or assault survivors or others during the waiting period. Commenters also asserted that Title IX and criminal justice proceedings have different purposes, considerations, rules of evidence, burdens of proof, and outcomes, and felt as a result that their determinations are separate and independent from each other. Some of these commenters also argued that schools should prioritize and not delay a complainant's educational access and can provide supportive measures that are not available from the police.

A number of commenters emphasized concerns about problematic incentives and consequences that they believed would result from permitting delays for concurrent ongoing criminal investigations. For example, some commenters felt that such a provision would

incentivize survivors not to report to law enforcement, since it would delay resolution of their Title IX case, thereby increasing safety risks to both survivors and school communities. Other commenters believed this provision would force survivors who pursue a police investigation to wait a long time for it to end before receiving accommodations from their school or to drop their criminal case to get measures only schools can provide. At least one commenter expressed concern that students would be forced to bring civil cases to protect themselves during a criminal investigation. Many others asserted that it would force elementary and secondary school students to wait months or even longer for any resolution to their complaints as most school employees are legally required to report child sexual abuse to the police as mandatory reporters. A number of these commenters expressed concern that this might impede elementary and secondary schools from implementing critical safety measures for child victims until a criminal investigation is completed.

Discussion: We acknowledge the concerns raised by some commenters specifically relating to recipients' flexibility under § 106.45(b)(1)(v) to temporarily delay the grievance process due to concurrent law enforcement activity. The Department acknowledges that the criminal justice system and the Title IX grievance process serve distinct purposes. However, the two systems sometimes overlap with respect to allegations of conduct that constitutes sex discrimination under Title IX and criminal offenses under State or other laws. By acknowledging that concurrent law enforcement activity *may* constitute good cause for short-term delays or extensions of a recipient's designated time frames, this provision helps recipients navigate situations where a recipient is expected to meet its Title IX obligations while intersecting with criminal investigations that involve the same facts and parties. For example, if a concurrent law enforcement investigation uncovers evidence that the police plan to release on a specific time

frame and that evidence would likely be material to the recipient's determination regarding responsibility, then the recipient may have good cause for a temporary delay or limited extension of its grievance process in order to allow that evidence to be included as part of the Title IX investigation. Because the final regulations only permit "temporary" delays or "limited" extensions of time frames even for good cause such as concurrent law enforcement activity, this provision does not result in protracted or open-ended investigations in situations where law enforcement's evidence collection (e.g., processing rape kits) occurs over a time period that extends more than briefly beyond the recipient's designated time frames.[1103]

In response to commenters concerned that concurrent law enforcement activity is prevalent especially in sexual misconduct situations in elementary and secondary schools (where mandatory child abuse reporting laws often require reporting sexual misconduct to law enforcement), § 106.45(b)(1)(v) benefits recipients and young victims in such situations by allowing circumstance-driven flexibility for schools and law enforcement to coordinate efforts so that sexual abuse against children is effectively addressed both in terms of the purposes of the criminal justice system and Title IX's non-discrimination mandate. While a grievance process is pending, recipients may (and must, if refusing to do so is clearly unreasonable under the circumstances) implement supportive measures designed to ensure a complainant's equal access to education, protect the safety of parties, and deter sexual harassment.

Changes: None.

[1103] *E.g.*, *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1297 (11th Cir. 2007) ("[T]he pending criminal charges did not affect [the university's] ability to institute its own procedures" and did not justify university waiting 11 months for outcome of the criminal matter before finishing its own investigation and conducting its own disciplinary proceeding against sexual misconduct respondents).

Consistency with Other Federal Law

Comments: Some commenters raised concerns that allowing temporary delays or limited extensions conflicts with Title IX and Clery Act requirements that schools provide "prompt" resolution of complaints. Similarly, some commenters felt that permitting extensions for language assistance or disability accommodations is inconsistent with statutory obligations to provide these in a timely manner under Title VI, the Equal Educational Opportunities Act of 1974 ("EEOA"), ADA, and Section 504. Commenters also expressed concerns that the final regulations would permit delays for far longer than is permitted of employers under Title VII.

Discussion: Section 106.45(b)(1)(v) requires recipients to have good cause for any short-term delays or extensions, with written notice to the parties and an explanation for the delay or extension. Because the overall time frame must be reasonably prompt, and any delay or extension must be temporary or limited, § 106.45(b)(1)(v) poses no conflict with the Clery Act or other laws that require "prompt" resolution of processes designed to redress sexual harassment or sex offenses.[1104] Neither does application of short-term delays or extensions violate the "promptness" requirement that Title IX regulations have required since 1975; under the final regulations the grievance process still must be concluded in a "reasonably prompt" time frame and any delay or extension, even for good cause, may only be brief in length.

Recipients must still satisfy their legal obligation to provide timely auxiliary aids and services and reasonable accommodations under the ADA, Section 504, and Title VI, and should reasonably consider other services such as meaningful access to language assistance. With respect to the EEOA, Title VII, or other laws that may impose time frames on the same

[1104] For further discussion see the "Clery Act" subsection of the "Miscellaneous" section of this preamble.

grievance process that recipients must apply under § 106.45, these final regulations *permit* a recipient to apply short-term delays or extensions for good cause. These final regulations do not *require* a recipient to apply short-term delays or extensions, and thus if a recipient is precluded by another law from extending a time frame the recipient is not required to do so under these final regulations.

Changes: None.

Alternative Proposals

Comments: A number of commenters suggested alternative approaches to address their concerns about the proposed time frames. Commenters also suggested other approaches such as: eliminating any time frame requirement for recipients; barring delays due to an ongoing criminal investigation; prohibiting extensions for refusal to cooperate, lack of witnesses, or the need for language assistance or accommodation of disabilities; setting a time limit for law enforcement delays that is brief, such as three to ten days; setting a time limit for temporary delays and allowing delays for concurrent law enforcement activity only if requested by external municipal entities to gather evidence and for not more than ten days except when specifically requested and justified; and narrowing delay for law enforcement activity to only when absolutely necessary like when a school cannot proceed without evidence in law enforcement's exclusive domain (for example, a DNA sample to identify an unknown assailant). Other suggestions raised by commenters included: requiring supportive measures while criminal and school investigations are ongoing; and ensuring schools and criminal justice agencies set protocols for concurrent investigations that are responsive to the complexity of these situations and to each entity's duties and timelines.

Discussion: The Department believes that recipients are in the best position to designate "reasonably prompt time frames" that balance the need to conclude Title IX grievance processes promptly with providing the fairness and accuracy that these final regulations require. For reasons discussed above, prompt resolution is important to serve the purpose of Title IX's non-discrimination mandate, and the Department thus declines to remove the requirement that recipients conclude grievance processes promptly. For reasons discussed above, the Department believes that categorically prohibiting delays based on concurrent law enforcement investigations would deprive recipients of flexibility to work effectively and appropriately with law enforcement where the purpose of both the criminal justice system and the Title IX grievance process is to protect victims of sexual misconduct, and this discretion is appropriately balanced by not permitting a recipient to apply a delay or extension (even for good cause) that is not "temporary" or "limited." For similar reasons, the Department declines to specify a particular number of days that constitute "temporary" delays or "limited" extensions of time frames. State laws that do specify such maximum delays may be complied with by recipients without violating these final regulations, because § 106.45(b)(1)(v) allows but does not require a recipient to implement short-term delays even for good cause. The Department also reiterates that nothing in the final regulations precludes recipients from offering supportive measures to one or both parties while the grievance process is temporarily delayed, and revised § 106.44(a) obligates a recipient to offer supportive measures to complainants, with or without a grievance process pending.

The Department declines to allow short-term delays on the basis of working with a concurrent law enforcement effort only where the law enforcement agency specifically requests that the recipient delay, or only where the school and law enforcement agency have a

memorandum of understanding or similar cooperative agreement in place. Recipients' obligations under Title IX are independent of recipients' obligations to cooperate or coordinate with law enforcement with respect to investigations or proceedings affecting the recipient's students or employees. These final regulations do not attempt to govern the circumstances where such cooperation or coordination may be required under other laws, or advisable as a best practice, but § 106.45(b)(1)(v) gives recipients flexibility to address situations that overlap with law enforcement activities so that potential victims of sex offenses are better served by both systems while ensuring that a recipient's grievance process is not made dependent on a concurrent law enforcement investigation, and thus a Title IX grievance process will still be concluded promptly even if the law enforcement matter is still ongoing.

Changes: None.

Clarification Requests

Comments: Commenters requested clarifications of certain terms used in this provision, including the terms reasonably prompt, absence of the parties or witnesses, administrative delay, limited extensions, and temporary delay. Commenters also requested clarification as to what does or does not constitute good cause for delay, such as with respect to administrative needs or accommodation of disabilities, as well as when and for how long schools should delay for law enforcement activity. Some commenters asked for more clarity about the limits on extensions, the mechanisms to end delays when the advantages are outweighed by the benefits of resolution, the steps schools must take to protect students regardless of law enforcement activity, and what OCR will assess in determining if a grievance process is prompt. Other commenters asked for a clarification that the list of examples of good cause for delay are not exhaustive, and several commenters requested clarifying that schools can excuse complainants from participating in the

process for study abroad or other academic programming involving a significant time away from campus.

Discussion: As clarified above, the Department believes that recipients should retain flexibility to designate time frames that are reasonably prompt, and what is "reasonable" is a decision made in the context of a recipient's purpose of providing education programs or activities free from sex discrimination, thus requiring recipients to designate time frames taking into account the importance to students of resolving grievance processes so that students may focus their attention on participating in education programs or activities, and the reality that every academic term (e.g., an academic quarter, semester, trimester, etc.) is important to a student's progress toward advancing a grade level or completing a degree. A recipient must balance the foregoing realities with the need for recipients to conduct grievance processes fairly in a manner that reaches reliable outcomes, meeting the requirements of § 106.45, in deciding what time frames to include as "reasonably prompt" in a recipient's grievance process for formal complaints of sexual harassment under Title IX.

This provision's reference to the absence of parties or witnesses has its ordinary meaning, suggesting that the reasons for a party or witness's absence is a factor in a recipient deciding whether circumstances constitute "good cause" for a short-term delay or extension. With respect to administrative delay, we intend that concept to include delays caused by recipient inefficiencies or mismanagement of their own resources, but not necessarily circumstances outside the recipient's control (e.g., if technology relied on to conduct a live hearing is interrupted due to a power outage). We intend delay to have its ordinary meaning; a delay is a postponement of a deadline that would otherwise have applied. We appreciate the opportunity to clarify here that the examples of good cause listed in § 106.45(b)(1)(v) of the final regulations

are illustrative, not exhaustive. We defer to recipients' experience and familiarity with the cases recipients investigate to determine whether other factual circumstances present good cause that could justify extending the time frame. Further, we wish to emphasize that any delay or extension contemplated by § 106.45(b)(1)(v) must be on a limited and temporary basis, regardless of the good cause that exists. The Department trusts recipients to make sound determinations regarding the length of a brief delay; we believe recipients are in the best position to make these decisions as they may be closer to the parties and have a deeper understanding of how to balance the interests of promptness, fairness to the parties, and accuracy of adjudications in each case. As noted above, a recipient's response to sexual harassment must include offering supportive measures to a complainant (with or without a grievance process pending). While a recipient is not obligated in every situation to offer supportive measures to a respondent, if refusing to offer supportive measures to a respondent (for instance, where a live hearing date that falls on a respondent's final examination date results in a respondent needing to reschedule the examination) would be clearly unreasonable in light of the known circumstances such a refusal could also violate these final regulations.

Changes: None.

Section 106.45(b)(1)(vi) Describe Range or List of Possible Sanctions and Remedies

Comments: Several commenters support this provision because it furthers due process. One commenter supported § 106.45(b)(1)(vi) because it will increase parties' understanding of the proceedings and decrease the possibility of arbitrary, disproportionate, or inconsistent sanctions. A group of concerned attorneys and educators commented that consistent standards, such as this provision, are necessary to ensure a fair process will benefit everyone. Another commenter expressed support for § 106.45(b)(1)(vi) because it promotes parity between parties; requiring

recipients' grievance procedures to contain significant specificity is key because individuals must have a clear understanding of the procedures and possible penalties for wrongdoing. One commenter agreed that full and proper notice to all students, faculty, and other personnel is critical to the effective implementation of Title IX and therefore consistent with due process, so a recipient's grievance procedures must describe the range of possible sanctions and remedies that the recipient may implement following any determination of responsibility.

Discussion: The Department agrees with commenters that it is important to provide to all students, faculty, and other personnel a clear understanding of the possible remedies and sanctions under a recipient's Title IX grievance process. The Department agrees with commenters who asserted that § 106.45(b)(1)(vi) furthers due process protections for both parties and lessens the likelihood of ineffective remedies and arbitrary, disproportionate, or inconsistent disciplinary sanctions. For consistency of terminology, the final regulations use "disciplinary sanctions" rather than "sanctions" including in this provision, to avoid ambiguity as to whether a "sanction" differed from a "disciplinary sanction." Throughout the NPRM and these final regulations, where reference is made to disciplinary sanctions, the provisions are calling attention to the disciplinary nature of the action taken by the recipient, and the phrase "disciplinary sanctions" is thus more specific and accurate than the word "sanctions." Because the intent of this provision is to provide clarity for recipients and their educational communities, we have also revised this provision to state that the recipient's grievance process must describe "or list" the range of disciplinary sanctions, to clarify that complying with this provision also complies with the Clery Act.[1105]

[1105] For further discussion see the "Clery Act" subsection of the "Miscellaneous" section of this preamble.

Changes: We have revised the final regulations to use the phrase "disciplinary sanctions" consistently, replacing "sanctions" with "disciplinary sanctions" in provisions such as § 106.45(b)(1)(vi). We have also revised § 106.45(b)(1)(vi) to state that a recipient may describe the range of possible sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility.

Comments: A number of commenters opposed § 106.45(b)(1)(vi). One commenter expressed concern that this provision is too restrictive because disciplinary actions are often implemented in a number of creative ways that are specific to each individual case. One commenter expressed concern that the proposed regulations, including this provision, are unconstitutional, since the decisions to be made by the "decision-maker" determining responsibility and sanctions against a student are those that must be made by the judicial branch of government acting under Article III of the U.S. Constitution, and not by the executive branch, or by the recipient.

Several commenters expressed concern that recipients should not be required to describe a range of sanctions. One commenter expressed concern that each type of employee at their university has their own grievance procedures and penalties and appeals process, and the university does not have the expertise to know in certain circumstances how a faculty member's tenure would be implicated. One university commented that notice of investigation letters may exacerbate tense situations because the practice will be to describe every possible sanction, including termination, even when the possibility of some sanctions is remote or would contravene good practice.

Several commenters proposed modifications to § 106.45(b)(1)(vi). One commenter urged the Department to offer examples of the types of remedies it would find equitable, and the types of sanctions it would find acceptable, asserting that at a minimum, the Department should make

clear that it defers to the educational judgment of schools to take into consideration the myriad factors impacting the elementary and secondary school environment, from age to developmental level and beyond, in implementing the "equitability" requirement. One commenter suggested the language be altered due to the importance of ensuring that any sanction imposed be proportional to the offense committed, and noted that this principle reflects our societal understanding of punishment, as reflected in the U.S. Constitution's prohibition on "cruel and unusual punishment." The commenter argued that the proposed language would allow minor violations of university policy to be punished in extreme, disproportionate ways and would also allow for different violations to be punished in the same manner as long as the punishment had been described in the grievance process. One commenter suggested that this provision should be altered to clarify that collective punishment is unacceptable to the extent that it punishes individuals or organizations that did not perpetrate, or were not found responsible for perpetrating, the offense in question.

One commenter suggested that recipients should be required to list any factors that will or will not be considered in issuing a sanction. One commenter suggested the Department should make clear how specific the range of sanctions must be and that recipients be permitted to state, for example, "suspension of varying lengths" rather than having to itemize every possible length of a suspension.

Discussion: The Department proposed § 106.45(b)(1)(vi) to provide consistency, predictability, and transparency as to the range of consequences (both in terms of remedies for complainants, and disciplinary sanctions for respondents) students can expect from the outcome of a grievance process. A transparent grievance process benefits all parties because they are more likely to trust in, engage with, and rely upon the process as legitimate. After a respondent has been found

responsible for sexual harassment, any disciplinary sanction decision rests within the discretion of the recipient, and the recipient must provide remedies to the complainant designed to restore or preserve the complainant's educational access, as provided for in § 106.45(b)(1)(i). Both parties should be advised of the potential range of remedies and disciplinary sanctions.

The Department disagrees that the decision-maker imposing disciplinary sanctions must be a judge appointed under Article III of the Constitution. As discussed in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, Title IX is a Federal civil rights law, and the Supreme Court has judicially implied a private right of action under Title IX, and in private litigation in Federal courts a Federal judge may impose remedies to effectuate the purposes of Title IX. However, the Title IX statute expressly authorizes Federal agencies, such as the Department, to administratively enforce Title IX and require recipients to take remedial action following violations of Title IX or regulations implementing Title IX. Such administrative enforcement of Title IX does not require the participation or direction of an Article III Federal judge. In these final regulations, the Department has determined that the Department's interest in effectuating Title IX's non-discrimination mandate necessitates setting forth a predictable, fair grievance process for resolving allegations of Title IX sexual harassment and requiring recipients to provide remedies to complainants if a respondent is found responsible. The Department has determined that administrative enforcement of Title IX does not require overriding recipients' discretion to make decisions regarding disciplinary sanctions, and thus these final regulations focus on ensuring that respondents are not punished or disciplined unless a fair process has determined responsibility, but respects the discretion of State and local educators to make disciplinary decisions pursuant to a recipient's own code of conduct.

The Department acknowledges commenters' concerns that each type of employee at their university has their own grievance procedures, penalties, and appeals process as well as concerns about whether tenure may be implicated, but disagrees that this presents a problem under § 106.45(b)(1)(vi). The Department believes that simply providing a *range* of sanctions to respondents is feasible despite the reality of the different grievance procedures and penalties and appeals that may apply depending on whether a recipient's employee is tenured, and the final regulations permit the recipient to either list the possible disciplinary sanctions or describe the range of possible disciplinary sanctions. Describing a range of disciplinary sanctions should not be difficult for recipients, particularly regarding a maximum sanction.

Nothing in the final regulations prevents the recipient from communicating that the described range is required by Federal law under Title IX and that the published range is purely for purposes of notice as to the possibility of a range of remedies and disciplinary sanctions and does not reflect the probability that any particular outcome will occur.

The Department does not believe offering examples of types of appropriate disciplinary sanctions is necessary because as discussed above, whether and what type of sanctions are imposed is a decision left to the sound discretion of recipients. Similarly, these final regulations do not impose a standard of proportionality on disciplinary sanctions. Some commenters raised concerns that disciplinary sanctions against respondents found responsible are too severe, not severe enough, or that student discipline should be an educational process rather than a punitive process. These final regulations permit recipients to evaluate such considerations and make disciplinary decisions that each recipient believes are in the best interest of the recipient's educational environment. Because the recipient's grievance process must describe the range, or list the possible, disciplinary sanctions and remedies, a recipient's students and employees will

understand whether the recipient has, for example, decided that certain disciplinary sanctions or certain remedies are not available following a grievance process. This clarity gives potential complainants a sense of what a recipient intends provide in terms of remedies and potential respondents a sense of what a recipient is prepared to impose in terms of disciplinary sanctions, with respect to victimization and perpetration of Title IX sexual harassment.

Because remedies are required under the final regulations, the Department agrees with commenters who suggested more clarity as to what constitute possible remedies. The final regulations revise another provision, § 106.45(b)(1)(i), to specify that remedies designed to restore or preserve equal access to the recipient's education program or activity may include the same individualized services described in § 106.30 "supportive measures," but that remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent. The Department believes this level of specificity is sufficient to emphasize that remedies aim to ensure a complainant's equal educational access. As discussed in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, a recipient's choice of remedies will be evaluated under the deliberate indifference standard.

With respect to a recipient punishing an organization or group of individuals following a member of the organization or group being found responsible for sexual harassment, these final regulations require a recipient to respond to sexual harassment incidents in specific ways, including by investigating and adjudicating allegations of sexual harassment made in a formal complaint. The final regulations only contemplate adjudication of allegations against a respondent (defined in § 106.30 as an "individual," not a group or organization). In order for a respondent to face disciplinary sanctions under the final regulations, the respondent must be brought into the grievance process through a formal complaint alleging conduct that could

constitute sexual harassment defined in § 106.30.[1106] The final regulations do not address sanctions by a recipient imposed against groups for non-sexual harassment offenses.

By describing the range, or listing the possible disciplinary sanctions, a recipient is notifying its community of the possible consequences of a determination that a respondent is responsible for Title IX sexual harassment; this provision is thus intended to increase the transparency and predictability of the grievance process, but it is not intended to unnecessarily restrict a recipient's ability to tailor disciplinary sanctions to address specific situations. We therefore decline to state that the range or list provided by the recipient under this provision is exclusive. For similar reasons, we decline to require a recipient to state what factors might be considered with respect to decisions regarding disciplinary sanctions or to impose more detailed requirements in this provision than the requirement to describe a range, or list the possible disciplinary sanctions. As described above, in response to commenters' desire for more specificity in this provision, the final regulations revise this provision to permit a recipient to either "describe the range" or "list the possible" disciplinary sanctions and remedies; this change gives recipients the option to comply with this provision in a more specific manner (i.e., by listing possible disciplinary sanctions and remedies rather than by describing a range).

Changes: The final regulations revise § 106.45(b)(1)(vi) to give recipients the option to either "describe the range of" or "list the possible" disciplinary sanctions and remedies.

[1106] Emergency removal under § 106.44(c) is an exception that allows punitive action (i.e., removal from education programs or activities) against a respondent without going through a grievance process.

Section 106.45(b)(1)(vii) Describe Standard of Evidence

Comments: A number of commenters expressed support for § 106.45(b)(1)(vii). One commenter stated that fully informing the parties of the standard of evidence as part of the recipients' policies is very important in Title IX procedures, since the respondent and the complainant must understand how such proceedings will unfold. Other commenters expressed support because a consistent standard of evidence is necessary to ensure a fair process. One commenter expressed support because this is a common-sense provision. One commenter supported §106.45(b)(1)(vii) because it will increase parties' understanding of the proceedings and decrease the possibility of arbitrary, disproportionate, or inconsistent decisions.

Discussion: The Department agrees that fully informing the parties of the standard of evidence that a recipient has determined most appropriate for reaching conclusions about Title IX sexual harassment, by describing that standard of evidence in the recipient's grievance process, is an important element of a fair process. The Department agrees that a standard of evidence selected by each recipient and applied consistently to formal complaints of sexual harassment is necessary to ensure a fair process.[1107]

In response to commenters who noted, under comments directed to § 106.45(b)(7), that the NPRM lacked clarity as to whether a recipient's choice between the preponderance of the evidence standard and the clear and convincing evidence standard was a choice that a recipient

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[1107] *E.g.*, Lavinia M. Weizel, *The Process That Is Due: Preponderance of The Evidence as The Standard of Proof For University Adjudications of Student-On-Student Sexual Assault Complaints*, 53 BOSTON COLLEGE L. REV. 1613, 1631 (2012) (explaining that selecting a standard of evidence (also called a standard of proof) "is important for theoretical and practical reasons" including that the "standard of proof imposed in a particular class of cases reflects the value society places on the rights that are in jeopardy" because "standards of proof signal to the fact-finder the level of certainty society requires before the state may act to impair an individual's rights" and whichever standard is selected, "articulating a specific standard of proof for a particular type of hearing . . . helps to ensure the meaningfulness of the hearing's other procedural safeguards") (internal citations omitted).

could make in each individual case, the Department revised language in § 106.45(b)(7) and correspondingly revised language in § 106.45(b)(1)(vii) to read: "State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment[.]" These revisions clarify that the standard of evidence must be selected, stated, and applied consistently by each recipient to all formal complaints of sexual harassment.

Changes: The final regulations revise § 106.45(b)(1)(vii) to clearly require a recipient's grievance process to state up front which of the two permissible standards of evidence the recipient has selected and then to apply that selected standard to all formal complaints of sexual harassment, including those against employees.

Section 106.45(b)(1)(viii) Procedures and Bases for Appeal

Comments: Some commenters expressed general support for § 106.45(b)(1)(viii), arguing that requiring recipients to specify appeal procedures will promote a fair process that will benefit everyone and ensure parity between the parties. Two commenters recommended that the Department add specific language regarding when a decision may be appealed. One commenter suggested that the Department clarify that the parties are allowed to raise a procedural problem at the hearing without waiting to file an appeal over the procedural breach. Another commenter suggested that the Department add language describing the specific instances in which a complainant or respondent is permitted to appeal. The commenter stated that in instances where the recipient determines the respondent to be responsible for the alleged conduct and implements a remedy designed to restore a complainant's equal access to the recipient's education program

or activity, the complainant may appeal the remedy as inadequate to restore the complainant's equal access to the recipient's education program or activity to prevent its reoccurrence, and address its adverse effects on the complainant and others who may have been adversely affected by the sexual harassment. The commenter further stated that in instances where the recipient determines the respondent to be responsible for the alleged conduct, the respondent can appeal the recipient's determination of responsibility. The commenter explained that these should be the only two situations in which an appeal is permitted because allowing a complainant to appeal a recipient's determination of non-responsibility subjects the respondent to administrative double jeopardy and contravenes the principles of basic fairness. The commenter asserted that this is especially troublesome for students from low-income families with little or no access to free legal counsel.

Discussion: The Department appreciates the general support received from commenters for §106.45(b)(1)(viii), which requires recipients' Title IX grievance process to include the permissible bases and procedures for complainants and respondents to appeal. The Department is persuaded by commenters that we should clarify the circumstances in which the parties may appeal, and that both parties should have equal appeal rights, and §106.45(b)(8) of the final regulations require recipients to offer appeals, equally to both parties, on at least the three following bases: (1) procedural irregularity that affected the outcome; (2) new evidence that was not reasonably available when the determination of responsibility was made that could affect the outcome; or (3) the Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias that affected the outcome. Nothing in the final regulations precludes a party from raising the existence of procedural defects that occurred during the grievance process during a live hearing, and the final regulations ensure that whether or not a party has observed or objected

to a procedural defect during the hearing, the party may still appeal on the basis of procedural irregularity after the determination regarding responsibility has been made. The Department believes that a complainant entitled to remedies should not need to file an appeal to challenge the recipient's selection of remedies; instead, we have revised § 106.45(b)(7)(iv) to require that Title IX Coordinator is responsible for effective implementation of remedies. This permits a complainant to work with the Title IX Coordinator to select and effectively implement remedies designed to restore or preserve the complainant's equal access to education.

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" and to expect recipients to respond promptly to complaints.[1108] 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'[.]"[1109] Although these interests may differ, each represents high-stakes, potentially life-altering consequences deserving of an accurate outcome.[1110]

We disagree with the commenters who argued that the final regulations should prohibit appeals of not responsible determinations because of double jeopardy concerns. The Department emphasizes that the constitutional prohibition on double jeopardy does not apply to Title IX proceedings and the Department does not believe that such a prohibition is needed to ensure fair and accurate resolution of sexual harassment allegations under Title IX. Where a procedural error, newly discovered evidence, or conflict of interest or bias has affected the outcome

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[1108] *Doe v. Univ. Of Cincinnati*, 872 F.3d 393, 403 (6th Cir. 2017).
[1109] *Id.* at 400 (internal citations omitted).
[1110] *Id*. at 404 (recognizing that the complainant "deserves a reliable, accurate outcome as much as" the respondent).

resulting in an *inaccurate* determination of non-responsibility, the recipient's obligation to redress sexual harassment in its education program or activity may be hindered, but the recipient may correct that inaccurate outcome on appeal and thus accurately identify the nature of sexual harassment in its education program or activity and provide remedies to the victim. Further, and as discussed above, we believe that both respondents and complainants face potentially life-altering consequences from the outcomes of Title IX proceedings. Both parties have a strong interest in accurate determinations regarding responsibility and it is important to protect complainants' right to appeal as well as respondents' right to appeal. We note that the final regulations do not require a party to hire an attorney for any phase of the grievance process, including on appeal.

Changes: We have revised § 106.45(b)(1)(viii) to remove the "if the recipient offers an appeal" language because § 106.45(b)(8) of the final regulations make appeals for both parties mandatory, on three bases: procedural irregularity, newly discovered evidence, and bias or conflict of interest on the part of the Title IX Coordinator, investigator, or decision-maker.

Section 106.45(b)(1)(ix) Describe Range of Supportive Measures

Comments: Several commenters supported § 106.45(b)(1)(ix) requiring recipients to describe the range of supportive measures available to complainants and respondents. Some commenters asserted that this requirement would promote parity between the parties and ensure a fair process that will benefit everyone. One commenter recommended that the Department encourage recipients to retain and maintain the names and contact information for individual groups, and other entities that provide support in these circumstances, including counselors, psychiatrists, law firms, and educational advocates, and make the information available to all parties. Two commenters suggested that the Department add language to the final regulations clarifying that

complainants and respondents must be afforded the same level of advocacy and supportive care so that both parties are treated equally. Another commenter was concerned that the requirement would be difficult to meet because supportive measures are often determined on an ad hoc basis and vary from investigation to investigation. To address this concern, the commenter recommended that the Department instead require grievance procedures to address the availability of supportive measures and describe some common examples.

Discussion: The Department agrees that requiring recipients to describe the range of supportive measures available to complainants and respondents is an important part of ensuring that the grievance process is transparent to all members of a recipient's educational community. Section 106.45(b)(1)(ix), particularly, notifies both parties of the kind of individualized services that may be available while a party navigates a grievance process, which many commenters asserted is a stressful and difficult process for complainants and respondents.

The Department clarifies that this provision does not require equality or parity in terms of the supportive measures actually available to, or offered to, complainants and respondents generally, or to a complainant or respondent in a particular case. This provision must be understood in conjunction with the obligation of a recipient to offer supportive measures to complainants (including having the Title IX Coordinator engage in an interactive discussion with the complainant to determine appropriate supportive measures), while no such obligation exists with respect to respondents. By defining supportive measures to mean individualized services that cannot unreasonably burden either party, these final regulations incentivize recipients to make supportive measures available to respondents, but these final regulations require recipients to offer supportive measures to complainants. In revised § 106.44(a), and in § 106.45(b)(1)(i) these final regulations reinforce that equitable treatment of complainants and respondents means

providing supportive measures and remedies for complainants, and avoiding disciplinary action against respondents unless the recipient follows the § 106.45 grievance process. The Department does not intend, and the final regulations do not require, to impose a requirement of equality or parity with respect to supportive measures provided to complainants and respondents.

The Department declines to require recipients to disseminate to students the names and contact information for organizations that provide support in these circumstances, including counselors, psychiatrists, law firms, educational advocates, and so forth, or make such a list available to all parties, although nothing in these final regulations precludes a recipient from doing so. The specific resources available in the general community surrounding the recipient's campus may change frequently making it difficult for recipients to accurately list currently available resources. The Department believes that by requiring recipients to describe the range of supportive measures made available by a recipient as part of the recipient's grievance process, and defining "supportive measures" in § 106.30 (which also includes an illustrative list of possible supportive measures), parties will be adequately advised of the types of individualized services available as they navigate a grievance process. A recipient may choose to create and distribute lists of specific resources in addition to complying with § 106.45(b)(1)(ix).

The Department appreciates the commenter's concern that the requirement would be difficult to meet because supportive measures are often determined on an ad hoc basis and vary from investigation to investigation. However, it is for this reason that the Department is only requiring a recipient's grievance process to describe the *range* of supportive measures available rather than a list of supportive measures available. One commenter requested that the Department provide examples of supportive measures. A non-exhaustive list of types of supportive measures is stated in the definition of "supportive measures" in § 106.30. Recipients

retain the flexibility to employ age-appropriate methods, exercise common sense and good judgment, and take into account the needs of the parties involved when determining the type of supportive measures appropriate for a particular party in a particular situation, and this flexibility is not inhibited by the requirement to describe the range of available supportive measures in § 106.45(b)(1)(ix).

Changes: None.

Section 106.45(b)(1)(x) Privileged Information

Comments: As discussed in more detail in the "Hearings" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble, commenters inquired whether the § 106.45 grievance process required cross-examination questions that call for disclosure of attorney-client privileged information to be allowed to be asked during a live hearing held by a postsecondary institution.

Discussion: To ensure that a recipient's grievance process respects information protected by a legally recognized privilege (for example, attorney-client privilege, doctor-patient privilege, spousal privilege, and so forth), the Department has added a provision addressing protection of all privileged information during a grievance process.

Changes: We have added new § 106.45(b)(1)(x) to ensure that information protected by a legally recognized privilege is not used during a grievance process.

Written Notice of Allegations

Section 106.45(b)(2) Written Notice of Allegations

Retaliation

Comments: Many commenters opposed § 106.45(b)(2), arguing that respondents may retaliate against complainants if respondents are given notice of a formal complaint that contains the

complainant's identity. Some commenters cited a study which found that the fear of retaliation by the accused or by peers is a barrier for people to report sexual assault.[1111] These commenters also expressed concern that § 106.45(b)(2) does not require the recipient to assure the complainant that, if retaliation occurs, the recipient would take steps to correct the retaliatory actions. Commenters argued that such a requirement would affirm to complainants that they will be safeguarded by recipients in their complaints, and would help encourage complainants to come forward with reports of sexual harassment or assault. Several commenters argued that, because the Department provides for a warning to complainants against false allegations, the provision should also require recipients to warn respondents against retaliation. One commenter suggested that the provision should identify the types of retaliation prohibited, such as threats of civil litigation against the complainant for defamation, or spreading rumors intended to intimidate the complainant from filing a complaint. Another commenter asserted that the provision should notify the parties of the retaliation prohibition that is included in the Title IX regulation, at 34 CFR 106.71 that currently states that the Title VI regulation at 34 CFR 100.7(e) is incorporated by reference into the Title IX regulations. One commenter asked the Department to create an independent Title IX prohibition against retaliation to protect the complainant. Another commenter stated that the Clery Act requires that recipients' sexual misconduct policies include prohibitions of retaliation. A commenter cited *Jackson v. Birmingham Board of*

[1111] Commenters cited: Shelley Hymel & Susan M. Swearer: *Four Decades of Research on School Bullying: An Introduction*, 70 AM. PSYCHOL. 293, 295 (May-June 2015) (youth "are reluctant to report bullying, given legitimate fears of negative repercussions"); Ganga Vijayasiri, *Reporting Sexual Harassment: The Importance of Organizational Culture and Trust*, 25 GENDER ISSUES 43, 53-54, 56 (2008) ("fear of adverse career consequences, or being blamed for the incident are a major deterrent to reporting" and this includes peer mistreatment or disapproval).

Education, 544 U.S. 167 (2005) for the proposition that civil rights cannot be adequately protected if people can be punished for asserting such rights.

Commenters argued that some allegations of sexual assault involve circumstances so serious that providing respondents notice of a complaint would place the complainant at significant risk of further – and potentially escalating levels of – violence. Other commenters argued that respondents may destroy evidence or create false alibis if recipients give respondents detailed notice of the allegations in a formal complaint.

Other commenters expressed strong support for § 106.45(b)(2), arguing that society cannot purport to deliver justice for victims when extra-governmental institutions are permitted to ignore due process and the rule of law. Some commenters opined that only in the most totalitarian systems are people investigated and adjudicated without knowledge of the specific details of the charges before they are expected to present a defense. A number of commenters shared personal stories about respondents being interviewed multiple times by school officials before they were told what allegations had been made against them. Other commenters shared personal stories about recipients interviewing respondents without informing the respondent what precisely the complainant had alleged or when or where the alleged misconduct had occurred, and then when the respondent expressed uncertainty in recalling certain details in the interview, the recipient later cited the respondent's uncertain memory as evidence of the respondent's guilt. Commenters stated that, in these instances, respondents lost credibility when they were unable to clearly quote facts and events involving unclear allegations on a moment's notice at a surprise interview.

Discussion: The Department is persuaded by commenters' unease over a perceived lack of protection against retaliation and therefore the final regulations add § 106.71, which prohibits

any person from intimidating, threatening, coercing, or discriminating against any individual for the purpose of interfering with any right or privilege secured by Title IX including, among other things, making a report or formal complaint of sexual harassment. Recipients may communicate this protection against retaliation to the parties in any manner the recipient chooses. The Department disagrees that the warning about consequences for making false statements (if such a prohibition exists in the recipient's code of conduct) is directed only to complainants; such a warning is for the benefit of both parties so that if the recipient has chosen to make a prohibition against false statements part of the recipient's code of conduct, both parties are on notice that the § 106.45 grievance process potentially implicates that provision of the recipient's code of conduct. Similarly, § 106.71 protects all parties (and witnesses, and other individuals) from retaliation for exercising rights under Title IX, and is not directed solely toward complainants.

The Department understands that some complainants may fear to report sexual harassment or file a formal complaint alleging sexual harassment, because of the possibility of retaliation, and intends that adding § 106.71 prohibiting retaliation will empower complainants to report and file a formal complaint, if and when the complainant desires to do so. Recipients are obligated to offer supportive measures to a complainant (with or without the filing of a formal complaint) and to engage the complainant in an interactive discussion regarding the complainant's wishes with respect to supportive measures.[1112] Recipients must keep confidential the provision of supportive measures to the extent possible to allow implementation of the supportive measures.[1113] Thus, a complainant may discuss with the Title IX Coordinator the type

[1112] Section 106.44(a).
[1113] Section 106.30 (defining "supportive measures").

of supportive measures that may be appropriate due to a complainant's concerns about retaliation by the respondent (or others), or fears of continuing or escalating violence by the respondent. A recipient's decision about which supportive measures are offered and implemented for a complainant is judged under the deliberate indifference standard, which by definition takes into account the unique, particular circumstances faced by a complainant. For reasons described below in this section of the preamble, the Department has determined that a grievance process cannot proceed, consistent with due process and fundamental fairness, without the respondent being apprised of the identity of the complainant (as well as other sufficient details of the alleged sexual harassment incident). Thus, a complainant's identity cannot be withheld from the respondent once a formal complaint initiates a grievance process, yet this does not obviate a recipient's ability and responsibility to implement supportive measures designed to protect a complainant's safety, deter sexual harassment, and restore or preserve a complainant's equal educational access.[1114]

The Department believes that providing written notice of the allegations to both parties equally benefits complainants; after a recipient receives a formal complaint, a complainant benefits from seeing and understanding how the recipient has framed the allegations so that the complainant can prepare to participate in the grievance process in ways that best advance the complainant's interests in the case. The Department disagrees that providing written notice of allegations increases the risk that a respondent will destroy evidence or concoct alibis, and even

[1114] *Id.* (supportive measures must not be punitive or disciplinary). However, a recipient may warn a respondent that retaliation is prohibited and inform the respondent of the consequences of retaliating against the complainant, as part of a supportive measure provided for a complainant, because such a warning is not a punitive or disciplinary action against the respondent.

if such a risk existed the Department believes that benefit of providing detailed notice of the allegations outweighs such a risk because a party cannot be fairly expected to respond to allegations without the allegations being described prior to the expected response. Further, if a respondent does respond to a notice of allegations by destroying evidence or inventing an alibi, nothing in the final regulations prevents the recipient from taking such inappropriate conduct into account when reaching a determination regarding responsibility, numerous provisions in § 106.45 provide sufficient ways for the recipient (and complainant) to identify ways in which a respondent has fabricated (or invented, or concocted) untrue information, and such actions may also violate non-Title IX provisions of a recipient's code of conduct.

Changes: The final regulations add § 106.71 prohibiting retaliation by any person, against any person exercising rights under Title IX, and specify that complaints of retaliation may be filed with the recipient for handling under the "prompt and equitable" grievance procedures that recipients must adopt and publish for non-sexual harassment sex discrimination complaints by students and employees under § 106.8(c).

Warning Against False Statements

Comments: Several commenters asserted that the requirement in § 106.45(b)(2) that the written notice of allegations sent to both parties must contain information about any prohibition against knowingly submitting false information will chill reports of sexual assault because the provision implies that the Department does not believe allegations of sexual assault. One commenter shared the Department's interest in preserving the truth-seeking nature of the grievance process, but expressed concern that the threat implicit in the proposed admonition will outweigh its value. The commenter asserted that parties' and witnesses' statements rarely neatly align and inconsistencies can stem from passage of time, effects of drugs or alcohol, general unreliability

of human perception and memory, and other factors. The commenter asserted that school officials are rarely so certain a party is lying that they should pursue discipline, yet the admonition in § 106.45(b)(2) suggests otherwise. The commenter warned that the resulting fear is likely to discourage participation in the process and inhibit the candor the Department stated it is seeking, and the commenter believed that parties may interpret the statement as their school's endorsement of harmful stereotypes about the prevalence of false sexual misconduct reports.

Many commenters asserted that most women who choose not to come forward do so because of the fear that people will not believe them. Commenters cited research showing that victims rarely make false allegations, and that only somewhere between two to ten percent of sexual assault allegations are false.[1115] Commenters asserted that men are more likely to be sexually assaulted themselves than to be falsely accused of committing sexual assault.[1116] Commenters argued that because false allegations are so rare, there is no benefit to including a warning against making false statements and the only purpose of such a warning is to deter complainants from reporting or filing formal complaints.

One commenter suggested that § 106.45(b)(2) should state that, if the recipient finds the respondent not responsible at the conclusion of the proceedings, a determination of not responsible will not, based on the finding alone, result in the complainant being deemed to have made false allegations. The commenter further requested that the written notice include a statement that the recipient presumes that the complainant is bringing a truthful complaint.

[1115] Commenters cited: David Lisak *et al.*, *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 12 (2010).
[1116] Commenters cited: Tyler Kingkade, *Males are More Likely to Suffer Sexual Assault Than to be Falsely Accused of it*, THE HUFFINGTON POST (Dec. 8, 2014).

One commenter wanted clarification as to how false accusations would be determined. One commenter wished to know whether false accusations are a Title IX offense, and if so, who is authorized to bring a complaint alleging a false accusation. The commenter also wondered if a complainant can be held accountable for making a false report of sexual harassment if the recipient's code of conduct does not have a provision about submitting false statements during a disciplinary proceeding.

Several commenters who favored § 106.45(b)(2) suggested that the provision should subject students who knowingly made false allegations to disciplinary proceedings. Other commenters asked the Department to explain what minimum consequences will apply to students who make false allegations of sexual assault.

Discussion: The Department first notes that § 106.45(b)(2)(i)(B) will only apply to those situations in which the recipient's code of conduct prohibits students from knowingly making false statements or submitting false information during a disciplinary proceeding. If the recipient's code of conduct is silent on the issue of false statements in the grievance process, then the final regulations do not require recipients to include reference to false statements in the § 106.45(b)(2) written notice. If, on the other hand, a recipient's own code of conduct does reference making false statements during a school disciplinary proceeding then the Department believes that both parties deserve to know that their school, college, or university has such a provision that could subject either party to potential school discipline as a result of participation in the Title IX grievance process. Further, this "warning" about making false statements applies equally to respondents, as to complainants. Respondents should understand how a recipient intends to handle false statements (e.g., in the form of a respondent's denials of allegations) made during the grievance process.

Because the warning about making false statements occurs at a time when the complainants have already filed a formal complaint, the Department does not foresee that a complainant's decision to report sexual harassment (which need not also involve filing a formal complaint) will be affected by the recipient's notice about whether the recipient's code of conduct prohibits making false statements during a grievance process. The warning about false statements is not a requirement that the complainants' statements "neatly align" with the statements of other parties' or witnesses' statements, as one commenter suggested. Nor does the Department agree that the warning enforces harmful stereotypes about the prevalence of false sexual misconduct reports. The warning informs both parties about code of conduct provisions that govern either party's conduct at the grievance process, and only applies if such provisions exist in the recipients' own code of conduct. In response to commenters' concerns and to clarify for recipients, complainants, and respondents that merely making an allegation that a respondent or witness disagrees with (or is otherwise unintentionally inaccurate) constitutes a punishable "false statement," the final regulations include § 106.71 prohibiting retaliation for exercising Title IX rights generally, and specifically stating that while it is not retaliatory when a recipient charges a party with a code of conduct violation for making a bad faith, materially false statement in a Title IX proceeding, such a conclusion cannot be based solely on the determination regarding responsibility. This emphasizes that the mere fact that the outcome was not favorable (which could turn on a decision-maker deciding that the party or a witness was not credible, or did not provide accurate information, or that there was insufficient evidence to meet the recipient's burden of proof) is not sufficient to conclude that the party who "lost" the case made a bad faith, materially false statement warranting punishment.

The Department is sympathetic to the difficulties complainants face in bringing a formal complaint. But recognition of the difficulties faced by complainants navigating the grievance process should not overshadow the fact that the respondent also faces significant consequences in the grievance process, nor lessen the need for both parties to be advised by the recipient of the allegations under investigation. The Department appreciates commenters' assertions regarding the relative infrequency of false allegations; however, § 106.45(b)(2) is intended to emphasize the importance of both parties being truthful during the grievance process by giving both parties information about how a particular recipient addresses false statements in the recipient's own code of conduct. Because the statement about false statements referred to in § 106.45(b)(2) is not a statement about the truthfulness of respondents, the Department declines to require any statement in this provision regarding the truthfulness of complainants. Similarly, the statement in the written notice provision regarding the presumption that a respondent is not responsible is not a statement about the credibility or truthfulness of respondents, [1117] and the Department declines to require any statement in the written notice regarding truthfulness of complainants. Regardless of the frequency or infrequency of false or unfounded allegations, every party involved in a formal complaint of sexual harassment deserves a fair process designed to resolve the truth of the particular allegations at issue, without reference to whether similar allegations are "usually" (based on statistics or generalizations) true or untrue.

[1117] As discussed previously in the "Section 106.45(b)(1)(iv) Presumption of Non-Responsibility" subsection of the "General Requirements for § 106.45 Grievance Process" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble, the presumption of non-responsibility is *not* a presumption of credibility or truthfulness for respondents, and § 106.45(b)(1)(ii) expressly prohibits the recipient from drawing any inferences about credibility based on status as a complainant or respondent.

Any determination that a complainant (or respondent) has violated the recipient's code of conduct with respect to making false statements during a grievance process is a fact-specific determination for the recipient to decide; however, as noted above, the final regulations add § 106.71 advising recipients that it could constitute retaliation to punish a party for false statements if that conclusion is reached solely based on the determination regarding responsibility, thus cautioning recipients to carefully assess whether a particular complainant (or respondent) should face code of conduct charges involving false statements.

The Department declines to follow the recommendations of commenters who argued that § 106.45(b)(2) should include a provision that subjects students who knowingly make false statements to disciplinary proceedings, nor does the Department wish to prescribe what the minimum consequences of making a false statement would be. If the recipient believes that a party violated the recipient's code of conduct during the grievance process, the recipient may investigate the matter under its own code of conduct, but the Department does not require such action.

Changes: The final regulations add § 106.71 prohibiting retaliation for exercising Title IX rights generally, and specifically stating that while it is not retaliatory when a recipient punishes a party for making a bad faith, materially false statement in a Title IX proceeding, such a conclusion cannot be based solely on the determination regarding responsibility.

Investigative Process

Comments: Several commenters with experience conducting criminal investigations asserted that, to get reliable and truthful information, it is important not to warn subjects of a criminal investigation that they are under investigation. The commenters argued that giving parties notice of the details of an alleged incident before the initial interview may give them the ability to affect

the outcome of their case by manipulating their own testimony, tampering with evidence, or intimidating witnesses. Several commenters asked the Department to change the notice requirement to align with standard investigation practices that call for unplanned interviews. These commenters suggested that recipients not be required to give parties notice of allegations until the university has decided to proceed with formal charges. Another commenter stated that, although there is general agreement that providing sufficient notice prior to interviews effectuates the rights to an advisor guaranteed by VAWA Section 304, the industry standard is to provide this notice prior to charging, not prior to interviewing.

One commenter who designs policies to address sexual assault on a university campus pointed out that universities lack the power to subpoena witnesses in its investigations. Since the notice provision in § 106.45(b)(2) gives witnesses ample time to craft their testimony before an initial interview, and as the university already lacks the ability to compel witnesses to hand over evidence, the commenter argued that the notice provision will hamper a recipient's ability to gather accurate testimony. To repair this problem, the commenter suggested that the Department instead require recipients to give notice of allegations to interested parties after the university has completed all initial interviews and has decided to proceed with a formal grievance procedure.

One commenter wanted to know how the provision would affect university police investigative techniques. Specifically, the commenter wondered whether university police would be prohibited from interviewing an accused party in a criminal investigation unless the university provided written notice of the interview. Another commenter requested further guidance from the Department on how schools should handle overlapping enforcement entities, especially regarding the notice requirement and whether an interview with law enforcement would violate

Title IX if the police officer conducted the interview before the Title IX Coordinator was able to provide notice of allegations to the respondent.

Several commenters expressed concern about the notice provision interfering with the ability of campus officials to perform investigations concurrently with police. Commenters warned that an institution may inadvertently interfere with an ongoing law enforcement investigation if the institution contacts a respondent or witnesses before law enforcement has had a chance to do so. One commenter asked the Department to clarify that institutions may allow for a temporary delay of notice to the respondent at the request of law enforcement after receipt of a complaint, but before initiation of grievance proceedings.

Discussion: While the Department appreciates commenters' concerns about best practices in conducting criminal investigations, the Department reiterates that a § 106.45 grievance process occurs independently of any criminal investigation that may occur concurrently, and the recipient's obligation to inform the parties of the allegations under investigation is a necessary procedural benefit for both parties. Precisely because schools, colleges, and universities are not law enforcement entities but rather educational institutions, the Department does not intend to require recipients to adopt best practices from law enforcement. For purposes of a fair, impartial investigation into allegations in a formal complaint, the Department believes that providing written notice of the allegations to both parties at the beginning of the investigation best serves the important goal of fostering reliable outcomes in Title IX grievance processes.

The Department understands commenters' concerns that investigators (whether law enforcement or not) may believe that catching a respondent by surprise gets at the truth better than giving a respondent notice of the allegations with sufficient time for the respondent to prepare a response, including by making it less likely that a respondent has time or opportunity

to destroy evidence or manipulate testimony. However, the Department agrees with commenters supporting § 106.45(b)(2) who asserted that notice of the allegations is an essential feature of a fair process; without knowing the scope and purpose of an interview a respondent will not have a fair opportunity to seek assistance from an advisor of choice and think through the respondent's view of the alleged facts. The Department declines to require written notice only if a recipient decides to proceed with a formal investigation, because the final regulations *require* a recipient to investigate the allegations in a formal complaint.[1118] The § 106.45 grievance process does not recognize, or permit a recipient to recognize, a difference between commencing an investigation upon receipt of a formal complaint, and a separate step of "charging" the respondent that, by commenters' descriptions, sometimes involves a recipient interviewing parties or witnesses before deciding whether to "charge" a respondent and thereby conduct a full investigation. If an investigation reveals facts requiring or permitting dismissal of the formal complaint pursuant to § 106.45(b)(3), the parties have been informed of the formal complaint, the allegations therein, and then the reasons for the dismissal, such that both parties can exercise their right to appeal the dismissal decision.[1119] While a recipient may take steps that the recipient considers part of an "investigation" without having received a formal complaint, the recipient may not impose discipline on a respondent without first complying with a grievance process that complies with § 106.45,[1120] which includes providing a party with written notice of the date, time, location, participants, and purpose of all investigative interviews with a party with sufficient time for the

[1118] Section 106.44(a); § 106.45(b)(3)(i).
[1119] The final regulations revise § 106.45(b)(8) to expressly grant both parties equal right to appeal a recipient's mandatory or discretionary dismissal decisions.
[1120] Section 106.44(a); § 106.45(b)(1)(i).

party to prepare to participate.[1121] Thus, even if a recipient is not in "receipt of a formal complaint" which triggers the recipient's obligation to send the written notice of allegations in § 106.45(b)(2), the recipient cannot impose disciplinary sanctions on a respondent, or take other actions against a respondent that do not fit the definition of "supportive measures" in § 106.30, without following the § 106.45 grievance process.

If a respondent reacts to a notice of allegations by manipulating the respondent's own testimony, or by tampering with evidence, the § 106.45 grievance process provides adequate avenues through which the investigation and adjudication can account for such conduct, so that a respondent's attempt to fabricate or falsify information would be part of the objective evaluation of evidence a decision-maker performs in reaching a determination. For example, if a respondent manufactures a counter-narrative to the allegations, the complainant and the recipient have the opportunity to question the respondent about the respondent's statements and reveal inaccuracies, inconsistencies, or false statements.[1122] Similarly, if a witness crafts or manipulates the witness's own testimony, inaccuracy and untruthfulness can be revealed through questioning of the witness by parties and the recipient. If a respondent reacts to a written notice of allegations by intimidating witnesses, such conduct is prohibited as retaliation under § 106.71.

The Department notes that the § 106.45 grievance process applies only to investigation and adjudication of formal complaints under Title IX, and has no applicability to criminal investigations. Regardless of whether a criminal investigation is conducted by "campus police"

[1121] Section 106.45(b)(5)(v).

[1122] Section 106.45(b)(6)(ii) (providing that whether or not a hearing is held in elementary and secondary schools, the parties have opportunity to submit written questions to the other party, including questions designed to test credibility); § 106.45(b)(6)(i) (providing that during a live hearing held by a postsecondary institution, each party has an opportunity to cross-examine the other party, but only with cross-examination conducted by party advisors).

or other law enforcement officers, the recipient's obligations to comply with § 106.45 apply when a party is interviewed for the purpose of a Title IX grievance process, as opposed to furtherance of a criminal investigation.

The Department recognizes that a recipient's obligation to investigate a formal complaint of sexual harassment may overlap with concurrent law enforcement investigation into the same allegations. Where appropriate, the final regulations acknowledge that potential overlap; for example, by acknowledging concurrent law enforcement activity as "good cause" to temporarily delay the § 106.45 grievance process under § 106.45(b)(1)(v). However, the Department emphasizes that a recipient's obligation to investigate and adjudicate promptly and fairly under § 106.45 exists separate and apart from any concurrent law enforcement proceeding, and the recipient therefore must comply with all provisions in § 106.45, including the written notice provision, regardless of whether law enforcement is conducting a concurrent investigation. The Department notes that § 106.45(b)(1)(v) addressing the recipient's designated, reasonably prompt time frames contemplates good cause temporary delays and limited extensions of time frames only *after* the parties have received the initial written notice of allegations under § 106.45(b)(2), such that concurrent law enforcement activity is not good cause to delay sending the written notice itself.[1123]

Changes: None.

[1123] Section 106.45(b)(1)(v) (specifying that where a recipient delays or extends a time frame for good cause, the recipient must send written notice to the complainant and the respondent of the delay or extension and the reasons for the action).

Administrative Burden on Schools

Comments: Many commenters urged the Department to give recipients more flexibility in determining the appropriate timing for sending the written notice of allegations under § 106.45(b)(2). Commenters argued that many complaints require an initial investigation to confirm the identity of the involved parties, to clarify any missing information, and to determine whether Title IX or the campus policy applies, and requiring written notice to the parties right away does not make sense when many complaints turn out to lack merit or not allege Title IX or policy violations. Several commenters asked the Department to provide that recipients must give respondents "prompt written notice" instead of "upon receipt of a formal complaint," to give recipients a reasonable amount of time before providing the written notice of allegations.

One commenter asked the Department to make the written notice provision more flexible for smaller universities, because college officials often have a close personal connection with students. One commenter argued that the written notice provision would amount to a disturbing constraint on a campus administrator's authority to respond quickly to allegations. The commenter quoted the Department's commentary in the NPRM 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," but the commenter opined that § 106.45(b)(2) runs contrary to this stated intent.

Other commenters noted that many institutions receive more disclosures of inappropriate conduct than formal complaints, and asserted that in many of those cases, the disclosing student is seeking supportive measures and feels satisfied when those personalized supports are put in place (extensions of time, opportunities to change housing, escorts, etc.). Commenters argued

that the written notice provision, by alerting the respondent of a report alleging sexual assault before an investigation has taken place, escalates the matter too early.

Another commenter asserted that, at the onset of an investigation, recipients should have the authority to identify allegations under their policy broadly, and then provide an additional, more specific, notice when the investigation process concludes because the proposed regulations appear to require as many written notices to parties as there are changes to the allegations over the course of an investigation, placing an undue burden on recipients with no clear added value to the transparency of the investigation.

Another commenter argued that § 106.45(b)(2) is burdensome to schools because Title IX already requires schools to file annual proactive notice to parties of the school's grievance procedures. Numerous commenters asserted that the administrative burdens placed on schools by the written notice of allegations provision will incentivize schools to try to avoid legal jeopardy rather than try to achieve school safety.

Discussion: The Department disagrees that § 106.45(b)(2) leaves recipients with insufficient flexibility to respond quickly to allegations or contradicts the intent expressed in the NPRM that recipients should employ age-appropriate methods, exercise common sense and good judgment, and take into account the needs of the parties involved. The Department reiterates that the written notice of allegations provision applies only after a recipient receives a formal complaint; thus, a recipient need not wait until written notice of allegations has been sent in order to, for example,

provide supportive measures to the complainant (or the respondent).[1124] For similar reasons, nothing about § 106.45(b)(2) restricts a recipient's flexibility to implement supportive measures designed to restore or preserve the complainant's equal access to education by taking into account the unique needs of the parties and using common sense and good judgment, and the definition of supportive measures emphasizes that supportive measures are "individualized services" reasonably available "before or after the filing of a formal complaint or where no formal complaint has been filed."[1125] With respect to the written notice itself, nothing in § 106.45(b)(2) prescribes how the information in the written notice is phrased, such that recipients are free to employ age-appropriate methods, common sense, and good judgment in choosing how to convey the information required to be included in the written notice.

The Department agrees with commenters who noted that many complainants report sexual harassment seeking supportive measures rather than a formal grievance process, and the Department reiterates that § 106.45 only applies after a recipient has received a formal complaint; a recipient need not send written notice of allegations based on reports, disclosures, or other forms of "notice" that charges a recipient with actual knowledge that do not consist of receipt of a formal complaint (and a formal complaint may only be filed by a complainant, or signed by the Title IX Coordinator).[1126]

[1124] In fact, revised § 106.44(a) obligates recipients to promptly respond to any notice of Title IX sexual harassment (regardless of whether a complainant or Title IX Coordinator also files a formal complaint) by, among other things, promptly offering the complainant supportive measures. We reiterate that no written or signed document, much less a "formal complaint" as defined in § 106.30, is required in order to trigger the recipient's response obligations. To emphasize this, we have revised § 106.30 defining "actual knowledge" to expressly state that "notice" conveying actual knowledge to the recipient (triggering the recipient's response obligations) includes a report to the Title IX Coordinator as described in § 106.8(a), which in turn states that any person may report sexual harassment to the Title IX Coordinator in person, by mail, phone, or e-mail. Section 106.8(b)(2) also requires the recipient to prominently display that contact information for the Title IX Coordinator on the recipient's website.

[1125] Section 106.30 (defining "supportive measures").

[1126] Section 106.30 (defining "formal complaint").

The Department disagrees that a recipient should have discretion to decide to dismiss formal complaints that are unsubstantiated or otherwise fail to meet some threshold of merit. The Department believes that where a complainant has chosen to file a formal complaint, or the Title IX Coordinator has decided to sign a formal complaint, the recipient *must* investigate those allegations; determinations about the merits of the allegations must be reached only by following the fair, impartial grievance process designed to reach accurate outcomes. As noted above, the final regulations revise § 106.45(b)(3) to provide for discretionary dismissals on specified grounds, but those grounds do not include a recipient's premature determination that allegations lack merit.

Whether or not many recipients currently provide written notice prior to conducting an interview as part of a Title IX grievance process, the Department believes written notice of allegations with adequate time to prepare for an interview constitutes a core procedural protection important to a fair process. A fundamental element of constitutional due process of law is effective notice that enables the person charged to participate in the proceeding.[1127] The final regulations promote clarity as to recipient's legal obligations, and promote respect for each complainant's autonomy, by distinguishing between a complainant's report of sexual harassment, on the one hand, and the filing of a formal complaint that has initiated a grievance process against a respondent, on the other hand. While the complainant and recipient may discuss the complainant's report of sexual harassment without notifying the respondent

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[1127] *Goss v. Lopez*, 419 U.S. 565, 579 (1975) ("At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given *some kind of notice* and afforded some kind of hearing. 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right *they must first be notified*.'") (internal citation omitted) (emphasis added); *id.* at 583 ("On the other hand, requiring *effective notice* and informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action.") (emphasis added).

(including discussion to decide on appropriate supportive measures), when the complainant files a formal complaint, the respondent must be notified that the respondent is under investigation for the serious conduct defined as "sexual harassment" under § 106.30.

The Department understands commenters' assertions that waiting to provide notice of the allegations until after conducting an initial interview prevents a respondent from manipulating the respondent's own statements, and that some recipients' current practices permit the recipient an opportunity to decide after the initial respondent interview whether or not the recipient intends to proceed with the investigation. However, the Department believes that complainants deserve the clarity of knowing that the filing of a formal complaint *obligates* the recipient to investigate the allegations, and once the respondent is under investigation the respondent must be made aware of the allegations with sufficient time to prepare for an initial interview because "effective notice" in time to give the respondent opportunity to tell the respondent's "version of the events" helps prevent erroneous outcomes.[1128]

In response to commenters' concerns that the proposed rules did not provide a recipient sufficient leeway to halt investigations that seemed futile, the final regulations revise § 106.45(b)(3)(ii) to provide that a recipient may (in the recipient's discretion) dismiss a formal complaint, or allegations therein, in certain circumstances including where a complainant requests the dismissal (in writing to the Title IX Coordinator), where the respondent is no longer enrolled or employed by the recipient, or where specific circumstances prevent the recipient from meeting the recipient's burden to collect sufficient evidence (for example, where a postsecondary institution complainant has ceased participating in the investigation and the only inculpatory

[1128] *Goss*, 419 U.S. at 579.

evidence available is the complainant's statement in the formal complaint or as recorded in an interview by the investigator). Similarly, where it turns out that the allegations in a formal complaint do not meet the definition of sexual harassment under § 106.30, or did not occur against a person in the United States, or did not occur in the recipient's education program or activity, § 106.45(b)(3)(i) requires the recipient to dismiss the allegations (though the final regulations clarify that the recipient has discretion to address the allegations through a non-Title IX code of conduct) and notify the parties of the dismissal (which implies that the "parties" have already been informed that they are parties via receiving the § 106.45(b)(2) written notice of allegations). However, the fact that allegations of sexual harassment were raised in a formal complaint warrant notifying the respondent that those allegations had triggered an investigation, even if the allegations are subsequently dismissed, whether the dismissal is mandatory under § 106.45(b)(3)(i) or discretionary under § 106.45(b)(3)(ii). This gives both parties equal opportunity to appeal the recipient's dismissal decision, or to request that dismissed allegations be addressed under non-Title IX codes of conduct.[1129]

The Department believes that requiring subsequent written notice of allegations when the allegations under investigation change appropriately notifies the parties of a change in the scope of the investigation, and does not believe that this benefit would be achieved by only requiring a follow-up written notice after the investigation has concluded. The Department is requiring

[1129] The final regulations revise § 106.45(b)(8) so that parties have the right to appeal any dismissal decision. While some respondents may not desire to appeal a dismissal, other respondents may desire to challenge the recipient's conclusion that, for instance, the conduct alleged did not constitute sexual harassment as defined in § 106.30, because if the conduct constitutes Title IX sexual harassment the recipient is not permitted to discipline the respondent without first following the § 106.45 grievance process, which may provide stronger procedural rights and protections than other disciplinary proceedings a recipient might use if the recipient charges the respondent with a non-Title IX code of conduct violation over the allegations.

recipients to inform the parties of the alleged conduct that potentially constitutes sexual harassment under § 106.30, including certain details about the allegations (to the extent such details are known at the time). Although § 106.45(b)(2) requires subsequent written notice to the parties as the recipient discovers additional potential violations, the Department does not agree with the commenter that this requirement adds "no clear value" to the transparency of the investigation or that the benefits of such subsequent notice to the parties is outweighed by the administrative burden to the recipient of generating and sending such notices.[1130] If the respondent is facing an additional allegation, the respondent has a right to know what allegations have become part of the investigation for the same reasons the initial written notice of allegations is part of a fair process, and the complainant deserves to know whether additional allegations have (or have not) become part of the scope of the investigation. This information allows both parties to meaningfully participate during the investigation, for example by gathering and presenting inculpatory or exculpatory evidence (including fact and expert witnesses) relevant to each allegation under investigation.

The Department does not believe that requiring recipients to send written notice of the allegations under investigation will incentivize recipients to care less about school safety than about legal liability. While the written notice provision constitutes a legal obligation, the purpose

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[1130] Deciding whether additional procedural safeguards are required under constitutional due process of law involves balancing the "private" interests at stake (here, the interests of the parties in a recipient reaching an accurate outcome), the administrative burden and cost to the government (here, the recipient) to provide the additional procedure, and the likelihood that the additional procedure may reduce the risk of erroneous outcome. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). The Department believes that consideration of these factors weighs in favor of requiring subsequent written notices to the parties when the allegations change during an investigation: the outcome of a case poses serious consequences for both parties; recipients are not unaccustomed to sending written notices to students (and parents of minor students) for a wide range of activities; and ensuring that the parties' participation throughout the grievance process focuses on the actual allegations being investigated by the recipient significantly reduces the risk of erroneous outcomes.

of the provision is to ensure that parties have critical information about the recipient's investigation; in that way, the obligation to send written notice of the allegations forms part of the recipient's response demonstrating concern about the safety of the recipient's educational environment, not simply a legalistic obligation. Measures that a recipient should take specifically to protect the safety of a complainant, respondent, or members of the recipient's community are unaffected by the recipient's obligation to send written notice of the allegations to the parties. For example, a recipient's non-deliberately indifferent response under § 106.44(a) includes offering supportive measures to complainants, and supportive measures as defined in § 106.30 may be designed to protect a complainant's safety or deter sexual harassment. Under § 106.44(c), a respondent who poses an immediate threat to the physical health or safety of any student or other individual may be removed from the recipient's education program or activity on an emergency basis, with or without a grievance process pending.

Although the Department understands recipients' desire for as much flexibility as possible to design disciplinary proceedings that best meet the needs of a recipient's unique educational community, for the reasons discussed previously the Department believes that providing written notice of the allegations under investigation is not a procedural right that should be left to a recipient's discretion. The final regulations leave recipients flexibility to select the method of delivery of the written notices required under § 106.45(b)(2) (including the initial notice and any subsequent notices), and while the initial notice must be sent "upon receipt" of a formal complaint, with "sufficient time" for a party to prepare for an initial interview, such provisions do not dictate a specific time frame for sending the notice, leaving recipients flexibility to, for instance, inquire of the complainant details about the allegations that should be included in the written notice that may have been omitted in the formal complaint, and draft the

written notice, while bearing in the mind that the entire grievance process must conclude under the recipient's own designated time frames.

Changes: We have revised § 106.45(b)(3) to provide recipients with the discretion to dismiss a formal complaint, or allegations therein, where the complainant notifies the Title IX Coordinator in writing that the complainant wishes to withdraw the formal complaint or allegations, where the respondent is no longer enrolled or employed by the recipient, or where specific circumstances prevent a recipient from gathering evidence sufficient to reach a determination regarding responsibility.

Elementary and secondary schools

Comments: Several commenters argued that § 106.45(b)(2) would be harmful to students and administrators at elementary and secondary schools because accusations of sexual assault or abuse are often described without specific details or in a way that makes it difficult to determine whether the alleged misconduct falls under Title IX, under the recipient's code of conduct, or neither. Commenters argued that § 106.45(b)(2) would require school administrators to provide multiple written notices, because an initial description of the misconduct might make it seem like the allegations fall under several different codes of conduct. Another commenter stated that requiring that the respondent be given "sufficient time for a response before any initial interview" does not consider the possible threat to the learning environment or the developing nature of a minor's memory. Another commenter asserted that courts do not give elementary and secondary school students due process rights, so the written notice of allegations provision should not apply to elementary and secondary school recipients.

A few commenters advised changing the written notice provision to account for young complainants and respondents, especially students in preschool and elementary and secondary

schools by giving the Title IX Coordinator discretion to communicate to parents or parties over the phone rather than strictly in writing.

Commenters argued that, in elementary and secondary schools addressing peer harassment incidents, the written notice of allegations provision fails to take into account the high volume of low-level incidents schools address and how burdensome and expensive this provision would become for students, parents, and administrators. Commenters argued that this provision would escalate situations from relatively informal to extremely formal, which would be alarming for students and parents. One commenter agreed that the accused student must be afforded due process, including notice of the allegations and an opportunity to respond, but disagreed that the written notice provision should apply to elementary and secondary schools, because it is neither necessary nor reasonable for an elementary and secondary school administrator to send the level of detail required by § 106.45(b)(2) in a written notice for all sexual harassment cases. At least one commenter argued that public elementary and secondary schools in the commenter's State do not have "codes of conduct" and instead have policies approved by a board of education pursuant to the commenter's State education code. The commenter stated that the language of § 106.45(b)(2) does not fit the elementary and secondary school setting.

Discussion: The Department reiterates that the recipient need not provide the written notice of allegations under § 106.45(b)(2) unless a formal complaint has been filed; this should reduce commenters' concerns that elementary and secondary schools will be inundated with the need to generate written notices whenever any conduct termed "sexual harassment" is reported or that elementary and secondary school administrators will need to send out written notices concerning "vague" or "unspecific" reports of conduct that may or may not constitute sexual harassment.

Further, the Department clarifies that when a formal complaint contains allegations of conduct that could constitute not only sexual harassment defined by § 106.30 but also violations of other codes of conduct, the final regulations have revised the language used in § 106.45(b)(2) to remove confusing references to the recipient's code of conduct and focus this provision on the need to send notice of allegations that could constitute sexual harassment as defined in § 106.30. The Department appreciates the opportunity to clarify here that references in the final regulations to a recipient's "code of conduct" refer to any set of policies, rules, or similar codes that purport to govern the conduct or behavior of students or employees, whether such policies, rules, or codes have been crafted by the individual school itself, under mandates from a State or local law, pursuant to school board resolutions, or by other means. Furthermore, § 106.45(b)(2) requires the recipient to include in the written notice "sufficient details *known at the time*" (emphasis added), such that even if a young student describes a sexual harassment incident in a manner that omits precise, specific details, a recipient may still comply with § 106.45(b)(2)(i), and then send subsequent notices as described in § 106.45(b)(2)(ii) as details about allegations may be discovered during the investigation.

The Department notes that § 106.44(c) and § 106.44(d) allow a recipient to remove a respondent from the recipient's education program on an emergency basis, and place a non-student employee on administrative leave during the pendency of an investigation, alleviating commenters' concerns that giving the respondent sufficient time to respond by sending written notice that a grievance process is underway will allow a threat to remain in the educational environment. The recipient is also obligated to offer the complainant supportive measures, including during the pendency of a grievance process, and thus the Department does not believe

that requiring written notice to the parties after a formal complaint has been filed restricts a recipient's ability to provide for the safety of parties and deter sexual harassment.[1131]

The Department agrees with commenters that elementary and secondary school recipients, as well as postsecondary recipients, must appropriately address incidents of sexual harassment in order to avoid subjecting students and employees to sex discrimination in violation of Title IX. The Department notes that the Supreme Court has confirmed that public elementary and secondary school students are entitled to due process under the U.S. Constitution in school disciplinary proceedings.[1132] Although commenters are correct that no Supreme Court decision specifically requires written notice when a formal complaint of sexual misconduct has been filed, the Supreme Court has held that "effective notice" constitutes an essential element of due process because it allows the person accused to make sure that their "version of the events" is heard,[1133] and the Department reasonably has determined that providing written notice of allegations, containing details of the allegations that are known at the time, after a formal complaint has triggered a recipient's obligation to investigate and adjudicate sexual harassment constitutes an important procedural protection for the benefit of all participants in the grievance process, and increases the likelihood that the recipient will reach an accurate determination regarding responsibility, which is necessary to hold recipients accountable for providing remedies to victims of Title IX sexual harassment.

[1131] Section 106.30 (defining "supportive measures" as individualized services designed to, among other things, protect the safety of all parties and/or deter sexual harassment).
[1132] *Goss*, 419 U.S. at 578-79 (holding that in the educational context "the interpretation and application of the Due Process Clause are intensely practical matters" that require at a minimum notice and "opportunity for hearing appropriate to the nature of the case") (internal quotation marks and citations omitted).
[1133] *Goss*, 419 U.S. at 583.

The Department does not believe that the requirement for parties to receive written notice of the allegations needs to be modified when the parties are young. The final regulations revise § 106.8(b) to include parents on the list of persons to whom recipients send notice and information about the recipient's non-discrimination policy and procedures; the final regulations add § 106.6(g) to expressly state that these regulations do not alter the legal right of parents and guardians to exercise rights on behalf of parties; and nothing in the final regulations precludes a Title IX Coordinator from communicating with a young student's parent about the process (including conveying the same information as contained in a written notice) via telephone or in person so long as the written notice meets the requirements of § 106.45(b)(2).

The Department reiterates that the grievance process is initiated (and thus the written notice requirement applies) only when the complainant has filed, or the Title IX Coordinator has signed, a formal complaint. Thus, the written notice requirement does not "escalate" an incident; rather, a complainant's choice (or a Title IX Coordinator's decision) has resulted in a formal complaint triggering a grievance process. Only then is the recipient required to send the written notice of allegations under § 106.45(b)(2). Where no formal complaint has been filed by a complainant or signed by a Title IX Coordinator, the recipient is not obligated to "escalate" the reported incident by, for example, informing the respondent that the respondent has been reported to be a perpetrator of sexual harassment; a recipient is obligated to keep confidential provision of supportive measures to a complainant (which the recipient must offer to complainants), except as necessary to actually implement the supportive measures (for example, the respondent may need to know the identity of a complainant who has reported the respondent to have perpetrated sexual harassment if the appropriate supportive measure is a no-contact order

and the respondent needs to know with whom to avoid communicating under the terms of the order).

Because of the seriousness of the allegations in a formal complaint of sexual harassment, and the access to education that is at stake for both parties in a grievance process addressing those allegations, the Department requires the recipient to allow the parties to meaningfully participate in the grievance process. This participation requires written notice of allegations to both parties where there is a formal complaint, including the details specified in this provision. The Department disagrees that pertinent information such as the identity of the parties involved, location and date of the incident, and the nature of the misconduct that could constitute sexual harassment as defined in § 106.30, with "sufficient details known at the time" (as § 106.45(b)(2) provides) amounts to an unnecessary or unreasonable amount of detail for recipients to include in a written notice of allegations, including in elementary and secondary schools. The provision's use of the phrases "known at the time" and "if known" in this provision indicates that the Department understands that not every significant detail will be known in every situation, yet expects the written notice to provide both parties with key information about the alleged incident so that both parties understand the scope of the investigation and can prepare to meaningfully participate by advancing the party's own interests in the outcome of the case. The final regulations also revise § 106.45(b)(2) so that the written notice of allegations also notifies the parties of each party's right to an advisor of choice, further ensuring that parties are prepared to meaningfully participate in a grievance process.

Changes: We have revised § 106.45(b)(2)(ii) to remove references to a recipient's "code of conduct" and adds reference to sexual harassment "as defined in § 106.30" to reduce confusion among commenters as to whether the written notice requirement applies to allegations that

constitute sexual harassment as defined in § 106.30 or to other violations of a recipient's code of conduct. For the same reason, we have revised § 106.45(b)(2)(i) to reference the grievance process "that complies with § 106.45" to clarify that the written notice pertains to the grievance process a recipient must follow to comply with Title IX. We have revised § 106.8(a) to include parents and legal guardians of elementary and secondary school students on the list of persons to whom recipients send notice and information about the recipient's non-discrimination policy and procedures. We have added § 106.6(g) to state that nothing in the final regulations alters the legal right of parents or guardians to exercise rights on behalf of a party.

Confidentiality and Anonymity for Complainants

Comments: One commenter suggested that written notice of allegations sent to the parties naming the complainant and listing the details of the allegations could be leaked or forwarded to unrelated third parties, which could damage the respondent's reputation, threaten both parties' access to education, and possibly violate State and Federal health care privacy laws regarding the respondent's or complainant's medical history. Some commenters requested that § 106.45(b)(2) be revised to bar both respondents and complainants from disclosing personally identifiable information except as necessary to prepare a response.

Other commenters believed that § 106.45(b)(2), by sending notice of the formal complaint, exposes complainants to increased scrutiny not applied to students reporting other kinds of student misconduct.

Several commenters wanted the Department to give recipients flexibility to allow complainants to stay anonymous in certain circumstances, and to retain the approach under the 2001 Guidance, which advised that an institution may "evaluate the confidentiality request" of a complainant or respondent "in the context of its responsibility to provide a safe and non-

discriminatory environment for all schools,"[1134] considering factors like the severity of the alleged conduct.

One commenter asserted that there is precedent for including only the initials of parties in the pre-investigation stage of the complaint.[1135] Other commenters argued that respondents do not need to know the complainant's identity to meaningfully participate in the recipient's grievance procedure.

Several commenters argued that it is unfair to complainants to expose the complainant's identity, especially because proposed § 106.44(b)(2) required a Title IX Coordinator to file a formal complaint over the wishes of a complainant where multiple reports had been made against the same respondent. Commenters argued that this could significantly chill a complainant's willingness to report sexual misconduct because the complainant's identity could be revealed to the respondent even when the complainant never even wanted to initiate a grievance process. Commenters wondered whether a Title IX Coordinator must deny requests by complainants to remain anonymous if the Title IX Coordinator elects to file a formal complaint.

Commenters argued that, due to a fear of retaliation, many students are unwilling to report an employee or professor if the student cannot remain anonymous. One commenter stated that, for other types of misconduct allegations, such as theft of property, employees are often questioned without being told who reported them.

[1134] Commenters cited: 2001 Guidance at 17.
[1135] Commenter cited: Maricella Miranda, *Victims' names can be withheld in criminal complaints, court rules in Ramsey County case*, PIONEER PRESS (Aug. 18, 2009).

Some commenters suggested modifying § 106.45(b)(2) to expressly bar complainants from maintaining anonymity, or to forbid schools from investigating allegations unless complainant agree to identify themselves.

Commenters suggested that § 106.45(b)(2) should be modified to require schools to give the respondent a copy of the complainant's written formal complaint when sending the written notice of allegations, or if the formal complaint was not written then the recipient should send the respondent a verbatim summary of the oral complaint.

Other commenters supported § 106.45(b)(2) and shared personal stories where, as respondents, the commenters could not understand the allegations without knowing the identity of the complainant. For example, one commenter stated that the recipient attempted to inform the respondent of sexual misconduct allegations while also withholding the identity of the complainant and as a result, the respondent spent much of the investigation believing that the allegations centered around a kiss at a party with one person, only to find out after the identity of the complainant was finally revealed that the allegations were actually made by a different person. Other commenters supported § 106.45(b)(2) because while campus sexual misconduct hearings are not criminal cases, they are proceedings with significant and far-reaching consequences, including possible expulsion making it difficult for a respondent to transfer to any other university, and respondents deserve the basic due process right to know details about the allegations. At least one commenter cited a survey of public perceptions of higher education, including topics such as campus sexual assault and due process; in the survey, 81 percent of people agreed that students accused of sexual assault on college campuses should have the right

to know the charges against them before being called to defend themselves, which the commenters argued should include the identity of the complainant.[1136]

Discussion: The Department clarifies that recipients (and, as applicable, parties) must follow relevant State and Federal health care privacy laws throughout the grievance process. Nothing in the notice should divulge the complainant's (or respondent's) medical information or other sensitive information, nor does § 106.45(b)(2) require disclosure of such information. To further respond to commenters' concerns about disclosure of medical information, the final regulations add to § 106.45(b)(5)(i) a prohibition against a recipient accessing or using for a grievance process the medical, psychological, and similar records of any party without the party's voluntary, written consent.[1137] If the party is not an "eligible student," as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a "parent," as defined in 34 CFR 99.3.[1138] The Department agrees with commenters that it is unacceptable for any person to leak or disseminate information to retaliate against another person, and the final regulations add § 106.71, which prohibits the recipient or any other person from intimidating, threatening, coercing, or discriminating against any individual for the purpose of interfering with any right or privilege secured by Title IX. As discussed in this preamble at § 106.45(b)(5)(iii), the parties have a right to discuss the allegations under investigations, but this right does not preclude a recipient from warning the parties not to discuss or disseminate the allegations in a manner that constitutes retaliation or unlawful tortious conduct.

[1136] Commenters cited: Bucknell Institute for Public Policy, *Perceptions of Higher Education Survey – Topline Results* (2017).
[1137] Section 106.45(b)(5)(i).
[1138] *Id*.

The Department understands commenters' concerns that complaints of other forms of student misconduct may not lead to the same grievance process (for example, the recipient sending a written notice of allegations to both parties) as the process required under these final regulations for Title IX sexual harassment. However, for reasons described above, the Department believes that both parties should have the benefit of understanding how the recipient has framed the scope of a sexual harassment investigation upon receipt of a formal complaint, including sufficient details known at the time, to permit the respondent opportunity to respond to the allegations. The Department disagrees that this results in unwarranted "scrutiny" of a complainant, and reiterates that written notice of allegations is required only after a formal complaint has been filed; thus, complainants need not be identified by name to a respondent upon a report of sexual harassment, including for the purpose of obtaining supportive measures.[1139] However, a formal complaint alleging sexual harassment triggers a grievance process, and in the interest of fairness that process must commence with both parties receiving written notice of the pertinent details of the incident under investigation. We have removed proposed § 106.44(b)(2) from these final regulations, which provision would have required a Title IX Coordinator to file a formal complaint upon receiving multiple reports against the same respondent. Removal of that proposed provision reduces the likelihood that a complainant's desire *not* to file a formal complaint will be overridden by a Title IX Coordinator's decision to sign a formal complaint.

[1139] Under § 106.30 defining "supportive measures" recipients must keep confidential the provision of supportive measures to a complainant or respondent to the extent that maintaining confidentiality does not impair the ability of the recipient to provide the supportive measures. Thus, unless a particular supportive measure affects the respondent in a way that requires the respondent to know the identity of the complainant (for example, a mutual no-contact order), the Title IX Coordinator need not, and should not, disclose the complainant's identity to the respondent during the process of selecting and implementing supportive measures for the complainant.

The Department disagrees that using only the initials of the parties (instead of the full names), or withholding the complainant's identity entirely, or requiring both parties to refrain from disclosing each other's personally identifiable information, sufficiently permits the parties to meaningfully participate in the grievance process. The Department reiterates that the written notice of allegations serves both parties' interests. While complainants may often know the identity of a respondent, in some situations a complainant does not know the respondent's identity, but the written notice of allegations provision ensures that if the recipient knows or discovers the respondent's identity, the complainant is informed of that important fact. Further, the complainant's receipt of written notice under this provision ensures that the complainant understands the way in which the recipient has framed the scope of the investigation so that the complainant can meaningfully participate and advance the complainant's own interests throughout the grievance process.[1140]

The Department notes that the written notice of allegations provision does not require listing personally identifiable information of either party beyond the "identity" of the parties; thus, the written notice need not, and should not, for example, contain other personally identifiable information such as dates of birth, social security numbers, or home addresses, and

[1140] As discussed throughout this preamble, the final regulations: acknowledge the right of parents or guardians to exercise legal rights to act on behalf of a complainant (or respondent) in § 106.6(g); give both parties the right to select an advisor of choice and revise § 106.45(b)(2) to require the initial notice of allegations to advise parties of that right, and to notify the parties of the recipient's grievance process which includes a description of the range of supportive measures available to complainants and respondents; and forbid recipients from restricting the ability of the parties to discuss the allegations under investigation, in § 106.45(b)(5)(iii), including for the purpose of emotional or personal support, advice, or advocacy. Thus, these final regulations acknowledge that participation in a grievance process is often a difficult circumstance for any party and aim to provide numerous avenues by which a party may receive support, assistance, and advice tailored to the party's individual needs and wishes throughout the grievance process.

nothing in the final regulations precludes a recipient from directing parties not to disclose such personally identifiable information.

The Department acknowledges that the final regulations require identification of the parties after a formal complaint has triggered a grievance process, in a way that the 2001 Guidance did not.[1141] The Department does not believe that anonymity during a grievance process can lead to fair, reliable outcomes, and thus requires party identities (to the extent they are known) to be included in the written notice of allegations. As noted above, where a formal complaint has not been filed by a complainant or signed by a Title IX Coordinator, the final regulations do not require a recipient to disclose a complainant's identity to a respondent (unless needed in order to provide a particular supportive measure, such as a mutual no-contact order where a respondent would need to know the identity of the person with whom the respondent's communication is restricted). In situations where a complainant's life is in danger from the respondent, such a situation may present the kind of immediate threat to physical health or safety that justifies an emergency removal of a respondent under § 106.44(c). Further, nothing in the final regulations affects a complainant's ability to seek emergency protective orders from a court of law. The final regulations also expressly prohibit retaliation, in § 106.71, and recipients must

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[1141] 2001 Guidance at 17 ("The school should inform the student that a confidentiality request may limit the school's ability to respond. The school also should tell the student that Title IX prohibits retaliation and that, if he or she is afraid of reprisals from the alleged harasser, the school will take steps to prevent retaliation and will take strong responsive actions if retaliation occurs. If the student continues to ask that his or her name not be revealed, the school should take all reasonable steps to investigate and respond to the complainant consistent with the student's request as long as doing so does not prevent the school from responding effectively to the harassment and preventing harassment of other students."); *cf. id.* (stating that constitutional due process of law requires recipients that are public institutions to disclose the complainant's identity to the respondent and in such a situation the recipient should honor the complainant's desire for confidentiality and not proceed to discipline the alleged harasser.). The final regulations require identification of the name of the complainant where a formal complaint has been filed by a complainant or signed by a Title IX Coordinator, not only with respect public institutions but also as to private institutions, because constitutional due process and fundamental fairness require the respondent to know the identity of the alleged victim in order to meaningfully respond to the allegations.

respond to complaints of retaliation in order to protect complainants whose identity has been disclosed as a result of a formal complaint (or, as also discussed herein, where providing supportive measures to the complainant necessitates the respondent knowing the complainant's identity). Thus, in situations where a complainant fears that disclosure to the respondent of the complainant's identity (or the fact that the complainant has filed a formal complaint) poses a risk of retaliation against the complainant, the Title IX Coordinator must discuss available supportive measures and consider the complainant's wishes regarding supportive measures designed to protect the complainant's safety and deter sexual harassment.

The Department understands commenters' concerns that complainants may not want to report misconduct by an employee if the complainant cannot remain anonymous. The Department reiterates that the written notice of allegations identifying the parties to a sexual harassment incident is required only after a formal complaint has been filed by a complainant or signed by a Title IX Coordinator. Complainants, therefore, need not feel dissuaded from reporting sexual harassment by an employee due to a desire for the complainant's identity to be withheld from the respondent, because unless and until a formal complaint is filed, the final regulations do not require a recipient to disclose the complainant's identity to a respondent, including an employee-respondent (unless the respondent must be informed of the complainant's identity in order for the Title IX Coordinator to effectively implement a particular supportive measure that would necessitate the respondent knowing the complainant's identity, such as a no-contact order). The Department understands that some recipients may choose to question an employee-respondent about misconduct, such as stealing or theft, without disclosing to the employee the identity of the person who reported the theft. The Department notes that the final regulations do not prevent a recipient from questioning an employee-respondent about sexual

harassment allegations without disclosing the complainant's identity,[1142] provided that the recipient does not take disciplinary action against the respondent without first applying the § 106.45 grievance process (or unless emergency removal is warranted under § 106.44(c), or administrative leave is permitted under § 106.44(d)).

For the reasons already mentioned, the Department declines to require recipients to maintain the anonymity of complainants once a formal complaint has been filed. The Department also will not require recipients to give respondents a copy of the formal complaint. The written notice of allegations provision already requires the recipient to provide the date, time, alleged conduct, and identity of the complainant, so the information required by § 106.45(b)(2) provides sufficient opportunity for the respondent to participate in the grievance process while protecting the complainant's privacy rights to the extent that, for example, the complainant alleged facts in the formal complaint that are unrelated to Title IX sexual harassment and thus do not relate to the allegations that a recipient investigates in the grievance process.

While the Department does not decide policy matters based on public opinion polls, the Department agrees with commenters that informing the respondent of the "charges against them" represents a staple of a fair process that increases party and public confidence in the fairness and accuracy of Title IX proceedings, and believes that § 106.45(b)(2) is an important feature of the § 106.45 grievance process.

[1142] The Department notes that a recipient's questioning of a respondent (whether a student or employee) about a reported sexual harassment incident, in the absence of a formal complaint, may not be used as part of an investigation or adjudication if a formal complaint is later filed by the complainant or signed by the Title IX Coordinator, because § 106.45(b)(5)(v) requires that a party be given written notice of any interview or meeting relating to the allegations under investigation, and a recipient is precluded from imposing disciplinary sanctions on a respondent without following the § 106.45 grievance process.

Changes: The final regulations add § 106.71 prohibiting retaliation against any person for exercising rights under Title IX or for participating (or refusing to participate) in a Title IX grievance process, and revise § 106.45(b)(5)(i) to prevent recipients from using a party's treatment records without the party's (or party's parent, if applicable) voluntary, written consent.

General Modification Suggestions

Comments: Because anything a respondent says may be used against the respondent in subsequent proceedings at an interview regarding sexual assault, including criminal proceedings, one commenter recommended that § 106.45(b)(2) include a statement that, when the allegation against the respondent would constitute a felony in the State in which the accusation is made, the respondent's silence may not be construed as evidence of guilt or responsibility for the allegation.

Another commenter asked the Department to require the Title IX Coordinator to e-mail both the complainant and the respondent at least once a week to let them know of progress, changes, and updates on their case.

Discussion: To make clear that respondents may remain silent in circumstances in which answering a question might implicate a respondent's constitutional right to avoid self-incrimination, and to protect other rights of the parties, § 106.6(d)(2) states that nothing in Title IX requires a recipient to 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. The final regulations also add to § 106.45(b)(6)(i) a provision that the decision-maker must not draw inferences about the determination regarding responsibility based on a party's failure or refusal to appear at the hearing or answer cross-examination questions.

The Department declines to follow the commenter's recommendation to require the Title IX Coordinator to e-mail both the complainant and the respondent at least once a week to let them know of progress, changes, and updates on their case. The recipient has discretion to be more responsive than the final regulations require, but the final regulations do not require the recipient to contact the parties at least once a week. The Department notes that the final regulations require the recipient to send notice to the parties regarding essential case developments such as where additional allegations become part of the investigation; where allegations or the entire formal complaint have been dismissed; where any short-term delay or time frame extension has been granted for good cause; and after the determination regarding responsibility has been made.

Changes: The final regulations also add to § 106.45(b)(6)(i) a provision that the decision-maker must not draw inferences about the determination regarding responsibility based on a party's failure or refusal to appear at the hearing or answer cross-examination questions.

General Clarification Requests

Comments: Several commenters requested that the Department clarify what "sufficient time [for the respondent] to prepare a response" means. Likewise, several commenters asked that the Department clarify when a recipient must provide notice of any additional allegations to the parties, asserting that § 106.45(b)(2) does not define "upon receipt," but that if read literally, that phrase could suggest "immediately upon receipt," which is impossible in light of the detailed information that must be provided in the written notice. One commenter suggested a definitive guideline (e.g., at least five workdays after receipt) should be imposed. Commenters asserted that ascertaining what the allegations are or how they should be phrased is not always obvious "upon receipt" of a formal complaint; a degree of fact-finding and/or analysis must be conducted first.

One commenter argued that the provision should set forth a reasonable time frame for institutions to evaluate the information provided in a formal complaint before issuing the notice described in 106.45(b)(2)(i). Another commenter asked the Department to explain the consequences to universities of violating § 106.45(b)(2).

Discussion: The Department understands commenters' concerns that sometimes preparing a written notice of the allegations requires time for the recipient to intake a formal complaint and then compile the details required for a written notice. The Department will not interpret this provision to require notice to be provided "immediately" (and the provision does not use that word), but rather notice must be provided early enough to allow the respondent "sufficient time to prepare a response." The Department also notes that a recipient's discretion in this regard is constrained by a recipient's obligation to conduct a grievance process within the recipient's designated, reasonably prompt time frames, such that waiting to send the written notice of allegations (even without yet conducting initial interviews with parties) could result in the recipient failing to meet time frames applicable to its grievance process. Whether the recipient provided the respondent "sufficient time" under § 106.45(b)(2) is a fact-specific determination. Consequences for failing to comply with the final regulations include enforcement action by the Department requiring the recipient to come into compliance by taking remedial actions the Department deems necessary, consistent with 20 U.S.C. 1682, and potentially placing the recipient's Federal funding at risk.

Changes: None.

Dismissal and Consolidation of Formal Complaints

Section 106.45(b)(3)(i) Mandatory Dismissal of Formal Complaints

Comments: Many commenters supported proposed § 106.45(b)(3) because it obligates recipients to investigate only allegations in a formal complaint, and thus provides the victim with control over whether or not to trigger the formal grievance process by filing a formal complaint. Other commenters appreciated how clear this provision was for recipients to follow. Some commenters sought clarification with respect to the practical application of this provision, such as what standard would schools be held to if they initiate proceedings on their own, but were not required to do so under Title IX. Certain commenters asked whether a respondent could claim that the school failed to comply with the proposed regulations and thus violated respondent's rights if the school used separate proceedings because the respondent's alleged conduct did not satisfy the three requirements in § 106.44(a) and § 106.45(b)(3)(i). Other commenters asked whether a respondent can use the dismissal provision to demand that a school dismiss a complaint against the respondent.

In contrast, several comments recommended that the Department remove any provision requiring dismissal of certain complaints so that recipients retain institutional flexibility to investigate complaints at their own discretion. Many commenters expressed the belief that schools should investigate each and every claim and refrain from making an initial determination (some viewed this initial determination as requiring individuals to make a prima facie case) of whether the alleged conduct satisfied the § 106.30 definition of sexual harassment. At least one commenter believed that schools should not have to dismiss even when a victim is not actually harmed. Another commenter stated that the proposed rules provided no avenue for reviewing or appealing a recipient's determination as to whether the alleged conduct satisfies the definition of

sexual harassment. Commenters asserted that the Department has no authority to forbid or preclude schools from investigating non-Title IV matters that affect their institutions, but only the authority to require schools to respond to sexual harassment. Several commenters also urged the Department to transform the provision from a mandatory provision to a permissive provision by replacing "must" with "may." Many commenters opposed the dismissal provision believing that the provision required institutions to always dismiss or ignore allegations that occurred off-campus. Several commenters cited the concern that dismissing a large number of off-campus complaints will disincentivize reporting by students altogether, forcing students to go to police departments instead.

Combined with urging the Department to expand the definition of sexual harassment in § 106.30 or alter the "education program or activity" jurisdictional requirement in § 106.44(a) for fear that recipients will be required to dismiss too many complaints, many commenters argued that the mandatory dismissal language in § 106.45(b)(3) effectively foreclosed recipients from addressing sexual harassment that harms students at alarming rates (e.g., harassment that is severe but not pervasive, or sexual assaults of students, by other students, that occur outside the recipient's education program or activity) even voluntarily (or under State laws) under a recipient's non-Title IX codes of conduct.

Some commenters argued that the language in § 106.45(b)(3) was inconsistent with the language of § 106.44(a) because proposed § 106.45(b)(3) omitted reference to conduct that occurred "against a person in the United States."

Discussion: We appreciate commenters' support for this provision's requirement that recipients must investigate allegations in a formal complaint, and agree that this provides complainants with autonomy over choosing to file a formal complaint that triggers an investigation. We

acknowledge those comments expressing the concern that as proposed, § 106.45(b)(3) effectively required recipients to make an initial determination as to whether the alleged conduct satisfies the definition of sexual harassment in § 106.30 and whether it occurred within the recipient's education program or activity, and to dismiss complaints based on that initial determination, leaving recipients, complainants, and respondents unclear about whether dismissed allegations could be handled under a recipient's non-Title IX code of conduct. As discussed below, we have revised § 106.45(b)(3)(i) to mirror the conditions listed in § 106.44(a) (by adding "against a person in the United States"), and we have added language to clarify that the mandatory dismissal in this provision is only for Title IX purposes and does not preclude a recipient from responding to allegations under a recipient's non-Title IX codes of conduct.

We are also persuaded by commenters who expressed concern that the proposed rules did not provide an avenue for reviewing or appealing a recipient's initial determination to dismiss allegations under this provision, and we have revised § 106.45(b)(3)(iii) to require the recipient to notify the parties of a dismissal decision, and we have revised § 106.45(b)(8) to give both parties equal right to appeal a dismissal decision.

The § 106.45 grievance process obligates recipients to investigate and adjudicate allegations of sexual harassment for Title IX purposes; the Department does not have authority to require recipients to investigate and adjudicate misconduct that is not covered under Title IX, nor to preclude a recipient from handling misconduct that does not implicate Title IX in the manner the recipient deems fit. In response to commenters' concerns, the final regulations clarify that dismissal is mandatory where the allegations, if true, would not meet the Title IX jurisdictional conditions (i.e., § 106.30 definition of sexual harassment, against a person in the United States, in the recipient's education program or activity), reflecting the same conditions that trigger a

recipient's response under § 106.44(a). The criticism of many commenters was well-taken as to the lack of clarity in the proposed rules regarding a recipient's discretion to address allegations subject to the mandatory dismissal through non-Title IX code of conduct processes. The final regulations therefore revise § 106.45(b)(3)(i) to expressly state (emphasis added) that "the recipient must dismiss the formal complaint with regard to that conduct *for purposes of sexual harassment under title IX or this part; such a dismissal does not preclude action under another provision of the recipient's code of conduct*." The Department notes that recipients retain the flexibility to employ supportive measures in response to allegations of conduct that does not fall under Title IX's purview, as well as to investigate such conduct under the recipient's own code of conduct at the recipient's discretion. This clarifies that the Department does not intend to dictate how a recipient responds with respect to conduct that does not meet the conditions specified in § 106.44(a). For similar reasons, the Department does not believe that it has the authority to make dismissal optional by changing "must dismiss" to "may dismiss" because that change would imply that if a recipient chose not to dismiss allegations about conduct that does not meet the conditions specified in § 106.44(a), the Department would nonetheless hold the recipient accountable for following the prescribed grievance process, but the § 106.45 grievance process is only required for conduct that falls under Title IX. The Department therefore retains the mandatory dismissal language in this provision and adds the clarifying language described above. Thus, these final regulations leave recipients discretion to address allegations of misconduct that do not trigger a recipient's Title IX response obligations due to not meeting the Section 106.30 definition of sexual harassment, not occurring in the recipient's education program or activity, or not occurring against a person in the U.S.

Changes: We are revising § 106.45(b)(3)(i) to add "against a person in the United States" to align this provision with the conditions stated in § 106.44(a). We are also revising § 106.45(b)(3)(i) to clarify that a mandatory dismissal under this provision is a dismissal for purposes of Title IX and does not preclude action under another provision of the recipient's code of conduct. We add § 106.45(b)(3)(iii) to require recipients to send the parties written notice of any dismissal decision, and we have revised § 106.45(b)(8) to give both parties equal rights to appeal a recipient's dismissal decisions.

Section 106.45(b)(3)(ii)-(iii) Discretionary Dismissals / Notice of Dismissal

Comments: Some commenters suggested that the Department provide greater flexibility to institutions to decide whether or not a full investigation is merited. For instance, some commenters suggested that in circumstances involving a frivolous accusation, a matter that has already been investigated, complaints by multiple complainants none of whom are willing to participate in the grievance process, or when there has been an unreasonable delay in filing that could prejudice the respondent, the Department should grant institutions greater flexibility to determine whether or not to start or continue a formal investigation. At least one commenter suggested that, if greater flexibility were provided, institutions should also be required to document why they did not choose to conduct a formal investigation. Other commenters requested that the Department expand victims' options for institutional responses to include non-adversarial choices.

Discussion: We are persuaded by the commenters urging the Department to grant recipients greater discretion and flexibility to dismiss formal complaints under certain circumstances. Accordingly, we are revising § 106.45(b)(3) to permit discretionary dismissals. Specifically, the Department is adding § 106.45(b)(3)(ii), which allows (but does not require) recipients to

dismiss formal complaints in three specified circumstances: where a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; where the respondent is no longer enrolled or employed by the recipient; or where specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the allegations contained in the formal complaint.

The Department believes that § 106.45(b)(3)(ii) reaffirms the autonomy of complainants and their ability to choose to remove themselves from the formal grievance process at any point, while granting recipients the discretion to proceed with an investigation against a respondent even where the complainant has requested that the formal complaint or allegations be withdrawn (for example, where the recipient has gathered evidence apart from the complainant's statements and desires to reach a determination regarding the respondent's responsibility). By granting recipients the discretion to dismiss in situations where the respondent is no longer a student or employee of the recipient, the Department believes this provision appropriately permits a recipient to make a dismissal decision based on reasons that may include whether a respondent poses an ongoing risk to the recipient's community, whether a determination regarding responsibility provides a benefit to the complainant even where the recipient lacks control over the respondent and would be unable to issue disciplinary sanctions, or other reasons.[1143] The final category of discretionary dismissals addresses situations where specific circumstances prevent a recipient from meeting the recipient's burden to collect evidence sufficient to reach a

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[1143] The Department notes that the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the Every Student Succeeds Act (ESSA), may require a recipient subject to ESEA to take certain steps with respect to an employee who has been accused of sexual misconduct and that continuing a Title IX sexual harassment investigation even when the accused employee has left the recipient's employ may assist the recipient in knowing whether the recipient does, or does not, have probable cause to believe the employee engaged in sexual misconduct. *E.g.*, https://www2.ed.gov/policy/elsec/leg/essa/section8546dearcolleagueletter.pdf.

determination regarding responsibility; for example, where a complainant refuses to participate in the grievance process (but also has not decided to send written notice stating that the complainant wishes to withdraw the formal complaint), or where the respondent is not under the authority of the recipient (for instance because the respondent is a non-student, non-employee individual who came onto campus and allegedly sexually harassed a complaint), and the recipient has no way to gather evidence sufficient to make a determination, this provision permits dismissal. The Department wishes to emphasize that this provision is *not* the equivalent of a recipient deciding that the evidence gathered has not met a probable or reasonable cause threshold or other measure of the quality or weight of the evidence, but rather is intended to apply narrowly to situations where specific circumstances prevent the recipient from meeting its burden in § 106.45(b)(5)(i) to gather sufficient evidence to reach a determination. Accordingly, a recipient should not apply a discretionary dismissal in situations where the recipient does not know whether it can meet the *burden of proof* under § 106.45(b)(5)(i). Decisions about whether the recipient's burden of proof has been carried must be made in accordance with §§ 106.45(b)(6)-(7) – not prematurely made by persons other than the decision-maker, without following those adjudication and written determination requirements.

The Department declines to authorize a discretionary dismissal for "frivolous" or "meritless" allegations because many commenters have expressed to the Department well-founded concerns that complainants have faced disbelief or skepticism when reporting sexual harassment, and the Department believes that where a complainant has filed a formal complaint, the recipient must be required to investigate the allegations without dismissing based on a conclusion that the allegations are frivolous, meritless, or otherwise unfounded, because the point of the § 106.45 grievance process is to require the recipient to gather and objectively

evaluate relevant evidence before reaching conclusions about the merits of the allegations. In making the revisions to § 106.45(b)(3)(ii) authorizing three grounds for a discretionary dismissal of a formal complaint (or allegations therein), the Department believes it is reaching a fair balance between obligating the recipient to fully investigate all allegations that a complainant has presented in a formal complaint, with the recognition that certain circumstances render completion of an investigation futile. Because these three grounds for dismissal are discretionary rather than mandatory, the recipient retains discretion to take into account the unique facts and circumstances of each case before reaching a dismissal decision.

Finally, we are also persuaded by commenters' recommendations that the Department offer the parties an appeal from a recipient's dismissal decisions. The final regulations add § 106.45(b)(3)(iii) requiring that the recipient promptly send the parties written notice so that the parties know when a formal complaint (or allegations therein) has been dismissed (whether under mandatory dismissal, or discretionary dismissal), including the reason for the dismissal. This requirement promotes a fair process by informing both parties of recipient's actions during the grievance process particularly as to a matter as significant as a dismissal of a formal complaint (or allegations therein). Including an explicit notice requirement under this provision is also consistent with the Department's goal of providing greater clarity and transparency as to a recipient's obligations and what the parties to a formal grievance process can expect. The final regulations also revise the appeals provision at § 106.45(b)(8) to allow the parties equal opportunity to appeal any dismissal decision of the recipient.

Changes: The Department is adding § 106.45(b)(3)(ii) to specify three situations where a recipient is permitted but not required to dismiss a formal complaint: where a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the

formal complaint or any allegations therein; where the respondent is no longer enrolled or employed by the recipient; or where specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the allegations contained in the formal complaint. The Department is also adding § 106.45(b)(3)(iii) to require a recipient to notify the parties, in writing, as to any mandatory or discretionary dismissal and reasons for the dismissal. We also revise the appeals provision at § 106.45(b)(8) to allow the parties equal opportunity to appeal any dismissal decision of the recipient.

Section 106.45(b)(4) Consolidation of Formal Complaints

Comments: One commenter suggested revising references to "both parties" to "all parties" to account for incidents that involve more than two parties. One commenter criticized the proposed rules for seeming to contemplate that sexual harassment incidents only involve a single victim and a single perpetrator and failing to acknowledge that the process may involve multiple groups of people on either side. Another commenter asked the Department to explain how a single incident involving multiple parties would be handled. A few commenters asserted that some recipients have a practice of not allowing a respondent to pursue a counter-complaint against an original complainant, resulting in what one commenter characterized as an unfair rule that amounts to "first to file, wins."

Discussion: In response to commenters' concerns that the proposed rules did not sufficiently provide clarity about situations involving multiple parties, and in response to commenters who asserted that recipients have not always understood how to handle a complaint filed by one party against the other party, the Department adds § 106.45(b)(4), addressing consolidation of formal complaints. The Department believes that recipients and parties will benefit from knowing that recipients have discretion to consolidate formal complaints in situations that arise out of the same

facts or circumstances and involve more than one complainant, more than one respondent, or what amount to counter-complaints by one party against the other. Section 106.45(b)(4) further clarifies that where a grievance process involves more than one complainant or respondent, references to the singular "party," "complainant" or "respondent" include the plural.

Changes: The final regulations add § 106.45(b)(4) to give recipients discretion to consolidate formal complaints of sexual harassment where the allegations of sexual harassment arise out of the same facts or circumstances. Where a grievance process involves more than one complainant or more than one respondent, references in § 106.45 to the singular "party," "complainant," or "respondent" include the plural, as applicable.

Investigation

Section 106.45(b)(5)(i) Burdens of Proof and Gathering Evidence Rest on the Recipient

Comments: Some commenters supported this provision based on personal stories involving the recipient placing the burden of proof on a party when the party had no rights to interview witnesses or inspect locations involved in the incident. One commenter supported this provision because it is entirely appropriate that complainants not be assigned the burden of proof or burden of producing evidence since they are seeking equal access to education and it is the school that should provide equal access, and removing these burdens from the shoulders of the respondent is also an important part of the accused's presumption of innocence. One commenter supported placing the burden of proof on the recipient because it is always the school's responsibility to ensure compliance with Title IX.

Some commenters believe that placing the burden of proof on the recipient is tantamount to putting it on the survivor(s) to prove all the elements of the assault, which is an impossible burden and which will deter survivor(s) from reporting and recovering from the assault. One

commenter supported placing the burden of gathering evidence on the recipient but not the burden of proof because the recipient is not a party to the proceeding. Some commenters expressed concern that this provision of the final regulations will cause instability in the system because placing the burden of gathering evidence on the recipient suggests an adversarial rather than educational process and opens recipients up to charges that the recipient failed to do enough to gather evidence. Various commenters also contended that this provision of the final regulations is too strict and demanding. Some commenters suggested that Title IX requires only that an institution demonstrate that it did not act with deliberate indifference when it had actual knowledge of sexual harassment or sexual assault – not proving whether each factual allegation in a complaint has merit – and that requiring a recipient to prove each allegation is a burden that Title IX itself has not imposed on recipients.

Some commenters suggested explaining what the recipient can and cannot do in pursuit of gathering evidence, or limiting the recipient's burden to gathering evidence "reasonably available." Other commenters suggested requiring the recipient to investigate all reasonable leads and interview all witnesses identified by the parties.

Discussion: The Department appreciates commenters' support for § 106.45(b)(5)(i). The Department agrees with commenters who asserted that the recipient is responsible for ensuring equal access to education programs and activities and should not place the burden of gathering relevant evidence, or meeting a burden of proof, on either party; Title IX obligates recipients to operate education programs and activities free from sex discrimination, and does not place burdens on students or employees who are seeking to maintain the equal educational access that recipients are obligated to provide. The Department believes that § 106.45(b)(5)(i) is important to providing a fair process to both parties by taking the burden of factually determining which

situations require redress of sexual harassment off the shoulders of the parties. At the same time, the final regulations ensure that parties may participate fully and robustly in the investigation process, by gathering evidence, presenting fact and expert witnesses, reviewing the evidence gathered, responding to the investigative report that summarizes relevant evidence, and asking questions of other parties and witnesses before a decision-maker has reached a determination regarding responsibility.

The Department disagrees that § 106.45(b)(5)(i) places a *de facto* burden of proof on the complainant to prove the elements of an alleged assault, and disagrees that this provision is likely to chill reporting. To the contrary, this provision clearly prevents a recipient from placing that burden on a complainant (or a respondent). The Department disagrees that the recipient should bear the burden of producing evidence yet not bear the burden of proof at the adjudication; the Department recognizes that the recipient is not a party to the proceeding, but this does not prevent the recipient from presenting evidence to the decision-maker, who must then objectively evaluate relevant evidence (both inculpatory and exculpatory) and reach a determination regarding responsibility. Nothing about having to carry the burden of proof suggests that the recipient must desire or advocate for meeting (or not meeting) the burden of proof; to the contrary, the final regulations contemplate that the recipient remains objective and impartial throughout the grievance process, as emphasized by requiring a recipient's Title IX personnel involved in a grievance process to serve free from bias and conflicts of interest and to be trained in how to serve impartially and how to conduct a grievance process.[1144] Whether the evidence gathered and presented by the recipient (i.e., gathered by the investigator and with respect to

[1144] Section 106.45(b)(1)(iii).

relevant evidence, summarized in an investigative report) does or does not meet the burden of proof, the recipient's obligation is the same: to respond to the determination regarding responsibility by complying with § 106.45 (including effectively implementing remedies for the complainant if the respondent is determined to be responsible).[1145]

The Department recognizes that bearing the burden of proof may seem uncomfortable for recipients who do not wish to place themselves "between" two members of their community or be viewed as prosecutors adversarial to the respondent. The Department does not believe that this provision makes Title IX proceedings more adversarial; rather, these proceedings are inherently adversarial, often involving competing plausible narratives and high stakes for both parties, and recipients are obligated to identify and address sexual harassment that occurs in the recipient's education program or activity. The final regulations do not require a recipient to take an adversarial posture with respect to either party, and in fact require impartiality. Ultimately, however, the recipient itself must take action in response to the determination regarding responsibility that directly affects both parties, and it is the recipient's burden to impartially gather evidence and present it so that the decision-maker can determine whether the recipient (not either party) has shown that the weight of the evidence reaches or falls short of the standard of evidence selected by the recipient for making determinations. The Department is aware that the final regulations contemplate a recipient fulfilling many obligations that, while performed by several different individuals, are legally attributable to the recipient itself. However, this does not mean that the recipient, having appropriately designated individuals to perform certain roles in fulfillment of the recipient's obligations, cannot meet a burden to gather and collect evidence,

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[1145] Section 106.45(b)(1)(i); § 106.45(b)(7)(iv).

present the evidence to a decision-maker, and reach a fair and accurate determination. Thus, the Department disagrees that this provision is too strict or demanding.

The Department agrees that the Supreme Court framework for private Title IX litigation applies a deliberate indifference standard to known sexual harassment (including reports or allegations of sexual harassment). As explained in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, the Department intentionally adopts that framework, and adapts it for administrative enforcement purposes so that these final regulations hold a recipient liable not only when the recipient may be deemed to have intentionally committed sex discrimination (i.e., by being deliberately indifferent to actual knowledge of actionable sexual harassment) but also when a recipient has violated regulatory obligations that, while they may not purport to represent definitions of sex discrimination are required in order to further Title IX's non-discrimination mandate. One of the ways in which the Department adapts that framework is concluding that where a complainant wants a recipient to investigate allegations, the recipient must conduct an investigation and adjudication, and provide remedies to that complainant if the respondent is found responsible. While this response may or may not be required in private Title IX lawsuits, the Department has determined that a consistent, fair grievance process to resolve sexual harassment allegations, under the conditions prescribed in the final regulations, effectuates the purpose of Title IX to provide individuals with effective protections against discriminatory practices.

The Department appreciates commenters' suggestions that this provision be narrowed (e.g., to state that the burden is to gather evidence "reasonably available") or broadened (e.g., to require investigation of "all" leads or interviews of all witnesses), or to further specify steps a recipient must take to gather evidence. The Department believes that the scope of §

106.45(b)(5)(i) appropriately obligates a recipient to undertake a thorough search for relevant facts and evidence pertaining to a particular case, while operating under the constraints of conducting and concluding the investigation under designated, reasonably prompt time frames and without powers of subpoena. Such conditions limit the extensiveness or comprehensiveness of a recipient's efforts to gather evidence while reasonably expecting the recipient to gather evidence that is available.

Changes: None.

Section 106.45(b)(5)(ii) Equal Opportunity to Present Witnesses and Other Inculpatory/Exculpatory Evidence

Comments: Many commenters supported § 106.45(b)(5)(ii), asserting that it will provide equal opportunity for the parties to present witnesses and other evidence. Commenters stated that this provision will make the grievance process clearer, provide more reliable outcomes, and afford participants important due process protections. One commenter asserted that this provision will create greater uniformity between Title IX regulations and other justice systems in the U.S. designed to deal with similar issues. This commenter also asserted that this provision will reduce the risk of a false positive guilty finding for an innocent student accused of sexual harassment.

At the same time, one commenter expressed concerns that allowing respondents to hear the complainant's evidence and learn the identity of the complainants' witnesses will enable the respondent to intimidate the complainant, intimidate the complainant's witnesses, or spread lies about the complainant. Another commenter argued that previous guidance and regulations already allowed for schools to give each party a chance to present evidence, so the proposed rules are superfluous.

Several commenters recounted personal stories about Title IX Coordinators failing to consider a respondent's exculpatory evidence, including refusing to ask questions the respondent wished to ask the complainant or the complainant's witnesses, and refusing to speak with the respondent's witnesses. One commenter submitted a personal story about the recipient never providing the respondent with the complainant's evidence, which the commenter contended severely hindered the respondent's ability to defend against the complainant's allegations.

One commenter stated approvingly that a provision similar to § 106.45(b)(5)(ii) also appears in the Harvard Law School Sexual and Gender-Based Harassment Policy, under which all parties are afforded due process protections, including the right to present evidence and witnesses at a live hearing before an impartial decision maker. Another commenter suggested that § 106.45(b)(5)(ii) should give the parties an equal opportunity to identify witnesses.

One commenter believed that the provision is consistent with the Sixth Amendment right to confront adverse witnesses, call favorable witnesses, as well as the right to effective assistance of counsel. The commenter argued that some universities have a practice refusing respondents the assistance of counsel, which meant that a young person must defend against trained, seasoned Title IX Coordinators who often serve as the investigator (and sometimes also the decision-maker) in a case. The commenter also cited numerous situations of students being prevented from introducing exculpatory evidence ostensibly on the basis of the complex rules of evidence applied in courtrooms that universities purport to apply to Title IX proceedings, yet universities selectively apply court-based evidentiary rules in ways designed to disadvantage respondents. Commenters asserted that universities allow hearsay and other evidence into Title IX proceedings under the argument that the hearings are an "informal" or an "educational" process where more relaxed rules are applied, yet do not carefully apply all the court evidentiary rules

that ensure hearsay evidence is reliable before being admissible, and at the same time refuse to allow respondents to cross-examine witnesses who are making non-hearsay statements at a hearing.

One commenter asked the Department to require recipients to provide training materials to parties upon request. The commenter requested that the training materials must explain what evidence may or may not be considered in light of what the commenter believed is bias that most Title IX Coordinators hold in favor of victims.

Discussion: The Department agrees with commenters who asserted that § 106.45(b)(5)(ii) will improve the grievance process for all parties, and appreciates references to the beneficial impact of other laws and policies (including Department guidance) that include similar provisions.[1146] The Department acknowledges the personal experiences shared by commenters describing instances in which recipients have ignored, discounted, or denied opportunities to introduce exculpatory evidence, and the Department also acknowledges that other commenters recounted personal experiences involving recipients ignoring, discounting, or denying opportunity to introduce inculpatory evidence (by, for example, showing evidence to a respondent or respondent's attorney without showing it to the complainant). The Department appreciates that many recipients already require Title IX personnel to allow both parties equal opportunity to present evidence and witnesses, but in light of commenters' anecdotal evidence and for reasons

[1146] As discussed throughout this preamble, including in the "Support and Opposition for the Grievance Process in the § 106.45 Grievance Process" and the "Role of Due Process in the Grievance Process" sections of this preamble, the Department has considered grievance procedures in use by particular recipients, prescribed under various State and other Federal laws, recommended by advocacy organizations, and from other sources, and has intentionally crafted the § 106.45 grievance process to contain those procedural rights and protections that best serve Title IX's non-discrimination mandate, comport with constitutional due process and fundamental fairness, and may reasonably be implemented in the context of an educational institution as opposed to courts of law.

discussed in the "Role of Due Process in the Grievance Process" section of this preamble, the reality and perception is that too many recipients fail to consider inculpatory or exculpatory evidence resulting in real and perceived injustices for complainants and respondents. Equal opportunity to present inculpatory evidence and exculpatory evidence, including fact witnesses and expert witnesses, is an important procedural right and protection for both parties, and will improve the reliability and legitimacy of the outcomes recipients reach in Title IX sexual harassment grievance processes.

The Department received numerous comments expressing concern about the potential for retaliation and recounting experiences of retaliation suffered by complainants and respondents. The Department has added § 106.71 in these final regulations, explicitly prohibiting any person from intimidating, threatening, coercing, or discriminating against another individual for the purpose of interfering with any right or privilege secured by Title IX. The retaliation provision also requires that the identities of complainants, respondents, and witnesses must be kept confidential, except as permitted by FERPA, required by law, or to the extent necessary to carry out a Title IX grievance process. Section 106.71 also authorizes parties to file complaints alleging retaliation under § 106.8(c) which requires recipients to adopt and publish grievance procedures that provide for the prompt and equitable resolution of complaints of sex discrimination. The Department believes that this provision will deter retaliation, as well as afford parties and the recipient the opportunity promptly to redress retaliation that does occur.

In response to commenters who asserted that recipients should specify in their materials used to train Title IX personnel what evidence is relevant or admissible, we have revised § 106.45(b)(1)(iii) to require a recipient's investigators and decision-makers to receive training on

issues of relevance,[1147] including for a decision-maker training on when questions about a complainant's prior sexual history are deemed "not relevant" under § 106.45(b)(6). Section 106.45(b)(1)(iii) continues to require training on how to conduct an investigation and grievance process, such that each aspect of a recipient's procedural rules (including evidentiary rules) that a recipient must adopt in order to comply with these regulations, and any additional rules that are consistent with these final regulations,[1148] must be included in the training for a recipient's Title IX personnel. Further, if a recipient trains Title IX personnel to evaluate, credit, or assign weight to types of relevant, admissible evidence, that topic will be reflected in the recipient's training materials. The Department agrees with commenters who urged the Department to require that the recipients publicize their training materials, because such a requirement will improve the transparency of a recipient's grievance process. Accordingly, the Department requires recipients to make materials used to train a recipient's Title IX personnel publicly available on recipients' websites, under § 106.45(b)(10).

Changes: We are revising § 106.45(b)(5)(ii) to require recipients to provide an equal opportunity for all parties to present both fact and expert witnesses. We are also revising § 106.45(b)(10) to require recipients to make the materials used to train Title IX personnel publicly available on recipients' websites or, if a recipient does not have a website, available upon request for

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[1147] For discussion of these final regulations' requirement that relevant evidence, and only relevant evidence, must be objectively evaluated to reach a determination regarding responsibility, and the specific types of evidence that these final regulations deem irrelevant or excluded from consideration in a grievance process (e.g., a complainant's prior sexual history, any party's medical, psychological, and similar records, any information protected by a legally recognized privilege, and (as to adjudications by postsecondary institutions), party or witness statements that have not been subjected to cross-examination at a live hearing, see the "Hearings" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble.

[1148] The revised introductory sentence of § 106.45(b) expressly allows recipients to adopt rules that apply to the recipient's grievance process, other than those required under § 106.45, so long as such additional rules apply equally to both parties. For example, a postsecondary institution recipient may adopt reasonable rules of order and decorum to govern the conduct of live hearings.

inspection by members of the public. We have also added § 106.71 to the final regulations to expressly prohibit retaliating against any individual for exercising rights under Title IX.

Comments: One commenter requested the Department to modify § 106.45(b)(5)(ii) to expressly allow a party's mental health history to be introduced as evidence. One commenter argued that the respondent should be permitted to admit as evidence instances where the complainant had accused other students of sexual misconduct in the past. One commenter argued that complainants often receive the benefit of certain types of evidence, such as hearsay and victim impact statements, while respondents are denied the use of the same evidence and arguments. The commenter asked the Department to level the playing field by allowing respondents to write their own impact statement and present evidence such as the results of lie detector tests if the hearing allows complainants the use of similar evidence. Another commenter asked the Department to direct recipients to exclude irrelevant evidence.

One commenter suggested that, at the initial complaint stage, complainants should be able to present additional evidence to prevent the recipient from quickly dismissing the complainant's complaint and if the complainant can provide sufficient evidence, then the commenter asked the Department to require the recipient to open a case and investigate the allegations. A few commenters asked the Department to afford both parties the right to present evidence, not just at the investigation stage, but also during the hearings themselves and during the appeal process. One commenter suggested that the Department should require recipients to consider new evidence at the hearing, including evidence of retaliation or additional harassment by the respondent.

Discussion: A recipient's grievance process must objectively evaluate all *relevant* evidence (§ 106.45(b)(1)(ii)). Section 106.45(b)(5)(iii) of these final regulations requires the recipients to

refrain from restricting the ability of either party to gather and present *relevant* evidence. Section 106.45(b)(5)(vi) permits both parties equal opportunity to inspect and review all evidence directly related to the allegations. Section 106.45(b)(6)(i)-(ii) directs the decision-maker to allow parties to ask witnesses all *relevant* questions and follow-up questions, and § 106.45(b)(6)(i) expressly states that only *relevant* cross-examination questions may be asked at a live hearing. The requirement for recipients to summarize and evaluate relevant evidence, and specification of certain types of evidence that must be deemed not relevant or are otherwise inadmissible in a grievance process pursuant to § 106.45, appropriately directs recipients to focus investigations and adjudications on evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true (i.e., on what is relevant). At the same time, § 106.45 deems certain evidence and information not relevant or otherwise not subject to use in a grievance process: information protected by a legally recognized privilege;[1149] evidence about a complainant's prior sexual history;[1150] any party's medical, psychological, and similar records unless the party has given voluntary, written consent;[1151] and (as to adjudications by postsecondary institutions), party or witness statements that have not been subjected to cross-examination at a live hearing.[1152]

These final regulations require objective evaluation of relevant evidence, and contain several provisions specifying types of evidence deemed irrelevant or excluded from consideration in a grievance process; a recipient may not adopt evidentiary rules of admissibility

[1149] Section 106.45(b)(1)(x).
[1150] Section 106.45(b)(6)(i)-(ii).
[1151] Section 106.45(b)(5)(i).
[1152] Section 106.45(b)(6)(i).

that contravene those evidentiary requirements prescribed under § 106.45. For example, a recipient may not adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice; although such a rule is part of the Federal Rules of Evidence, the Federal Rules of Evidence constitute a complex, comprehensive set of evidentiary rules and exceptions designed to be applied by judges and lawyers, while Title IX grievance processes are not court trials and are expected to be overseen by layperson officials of a school, college, or university rather than by a judge or lawyer. Similarly, a recipient may not adopt rules excluding certain types of relevant evidence (e.g., lie detector test results, or rape kits) where the type of evidence is not either deemed "not relevant" (as is, for instance, evidence concerning a complainant's prior sexual history[1153]) or otherwise barred from use under § 106.45 (as is, for instance, information protected by a legally recognized privilege[1154]). However, the § 106.45 grievance process does not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by a recipient's decision-maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with § 106.45 and apply equally to both parties.[1155] In response to commenters' concerns that the final regulations do not specify rules about evaluation of evidence, and recognizing that recipients therefore have discretion to adopt rules not otherwise prohibited under § 106.45, the final regulations acknowledge this reality by adding language to the introductory sentence of § 106.45(b): "Any provisions, rules, or practices other than those required by § 106.45 that a recipient adopts as part of its grievance process for handling formal complaints of sexual

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[1153] Section 106.45(b)(6)(i)-(ii).
[1154] Section 106.45(b)(1)(x).
[1155] Section 106.45(b) (introductory sentence).

harassment, as defined in § 106.30, must apply equally to both parties." A recipient may, for example, adopt a rule regarding the weight or credibility (but not the admissibility) that a decision-maker should assign to evidence of a party's prior bad acts, so long as such a rule applied equally to the prior bad acts of complainants and the prior bad acts of respondents. Because a recipient's investigators and decision-makers must be trained specifically with respect to "issues of relevance,"[1156] any rules adopted by a recipient in this regard should be reflected in the recipient's training materials, which must be publicly available.[1157]

As to a commenter's request that the Department require the recipient to investigate a complaint of sexual harassment or assault if the complainant can supply enough evidence to overcome the recipient's dismissal, the final regulations address mandatory and discretionary dismissals, including expressly giving both parties the right to appeal a recipient's dismissal decision, and one basis of appeal expressly includes where newly discovered evidence may affect the outcome.[1158] Thus, if a recipient dismisses a formal complaint under § 106.45(b)(3)(i) because, for instance, the recipient concludes that the misconduct alleged does not meet the definition of sexual harassment in § 106.30, the complainant can appeal that dismissal, for example by asserting that newly discovered evidence demonstrates that the misconduct in fact does meet the § 106.30 definition of sexual harassment, or alternatively by asserting procedural irregularity on the basis that the alleged conduct in fact does meet the definition of § 106.30 sexual harassment and thus mandatory dismissal was inappropriate under § 106.45(b)(3)(i).

[1156] Section 106.45(b)(1)(iii).
[1157] Section 106.45(b)(10)(i)(D).
[1158] Section 106.45(b)(8).

As to commenters' request to allow both parties to introduce new evidence at every stage, including the hearing and on appeal, the final regulations require recipients to allow both parties equally to appeal on certain bases including newly discovered evidence that may affect the outcome of the matter (as well as on the basis of procedural irregularity, or conflict of interest of bias, that may have affected the outcome).[1159] For reasons discussed above, the Department declines to be more prescriptive than the Department believes is necessary to ensure a consistent, fair grievance process, and thus leaves decisions about other circumstances under which a party may offer or present evidence in the recipient's discretion, so long as a recipient's rules in this regard comply with § 106.45(b)(5)(ii) by giving "equal opportunity" to both parties to present witnesses (including fact witnesses and expert witnesses) and other evidence (including inculpatory and exculpatory evidence).

Changes: The Department is revising § 106.45(b)(5)(ii) to add the phrase "including fact and expert witnesses" to clarify that the equal opportunity to present witnesses must apply to experts. The final regulations also add language to the introductory sentence of § 106.45(b) stating that rules adopted by a recipient for use in the grievance process must apply equally to both parties. We have also added § 106.45(b)(1)(x) prohibiting use of information protected by a legally recognized privilege. We have also revised § 106.45(b)(5)(i) prohibiting use of a party's medical, psychological, and other treatment records without the party's voluntary, written consent.

[1159] *Id.*

Section 106.45(b)(5)(iii) Recipients Must Not Restrict Ability of Either Party to Discuss Allegations or Gather and Present Relevant Evidence

Comments: Some commenters expressed support for § 106.45(b)(5)(iii), noting that First Amendment free speech issues are implicated when schools impose "gag orders" on parties' ability to speak about a Title IX situation. A few commenters noted that recipients' application of gag orders ends up preventing parties from collecting evidence by preventing them from talking to possible witnesses, and even from calling parents or friends for support.

Many commenters argued that this provision will harm survivors and chill reporting because survivors often feel severe distress when other students know of the survivor's report, or experience stigma and backlash when other students find out the survivor made a formal complaint, which deters reporting.[1160] Other commenters argued that a provision that permits sensitive information to be disseminated and even published on social media or campus newspapers results in loss of privacy and anonymity that betrays already-traumatized survivors. Other commenters opposed this provision fearing it will negatively affect both parties by leading to gossip, shaming, retaliation, and defamation. Other commenters believed this provision opens the door to witness or evidence tampering and intimidation and/or interference with the investigation. Other commenters asserted that the final regulations should permit each party to identify witnesses but then permit only the recipient to discuss the allegations with the witnesses, because witnesses might be more forthcoming with an investigator than with a party.

[1160] Commenters cited: Alan M. Gross *et al.*, *An examination of sexual violence against college women*, 12 VIOLENCE AGAINST WOMEN 3 (2006).

Some commenters believed that with regard to elementary and secondary schools, the final regulations should clarify the extent to which this provision applies because common sense suggests that a school administrator, such as a principal, should be able to restrict a student from randomly or maliciously discussing allegations of sexual harassment without impeding the student's ability to participate in the formal complaint process.

Several commenters urged the Department to modify this provision in one or more of the following ways: the parties must be permitted to discuss allegations only with those who have a need to know those allegations; the recipient may limit any communication to solely neutral communication specifically intended to gather witnesses and evidence or participate in the grievance process; the recipient may limit the parties' communication or contact with each other during the investigation and prohibit disparaging communications, if those limits apply equally to both parties; recipients must be permitted to restrict the discussion or dissemination of materials marked as confidential; while parties should be allowed to discuss the general nature of the allegations under investigation, recipients should have the authority to limit parties from discussing specific evidence provided under §106.45(b)(5)(vi) with anyone other than their advisor; the evidence discussed should be limited to that which is made accessible to the decision-maker(s), which mirrors the requirements in VAWA; the final regulations should provide an initial warning that neither party is to aggravate the problem in any manner; the final regulations should include language permitting the issuance of "no contact" orders as a supportive measure; the final regulations should prohibit parties from engaging in retaliatory conduct in violation of institutional policies.

Discussion: The Department appreciates commenters' support for § 106.45(b)(5)(iii). The Department acknowledges the concerns expressed by other commenters concerned about

confidentiality and retaliation problems that may arise from application of this provision. This provision contains two related requirements: that a recipient not restrict a party's ability to (i) discuss the allegations under investigation or (ii) gather and present evidence. The two requirements overlap somewhat but serve distinct purposes.

As to this provision's requirement that a recipient not restrict a party's ability to discuss the allegations under investigation, the Department believes that a recipient should not, under the guise of confidentiality concerns, impose prior restraints on students' and employees' ability to discuss (i.e., speak or write about) the allegations under investigation, for example with a parent, friend, or other source of emotional support, or with an advocacy organization. Many commenters have observed that the grievance process is stressful, difficult to navigate, and distressing for both parties, many of whom in the postsecondary institution context are young adults "on their own" for the first time, and many of whom in the elementary and secondary school context are minors. The Department does not believe recipients should render parties feeling isolated or alone through the grievance process by restricting parties' ability to seek advice and support outside the recipient's provision of supportive measures. Nor should a party face prior restraint on the party's ability to discuss the allegations under investigation where the party intends to, for example, criticize the recipient's handling of the investigation or approach to Title IX generally. The Department notes that student activism, and employee publication of articles and essays, has spurred many recipients to change or improve Title IX procedures, and often such activism and publications have included discussion by parties to a Title IX grievance process of perceived flaws in the recipient's Title IX policies and procedures. The Department further notes that § 106.45(b)(5)(iii) is not unlimited in scope; by its terms, this provision stops a recipient from restricting parties' ability to discuss "the allegations under investigation." This

provision does not, therefore, apply to discussion of information that does not consist of "the allegations under investigation" (for example, evidence related to the allegations that has been collected and exchanged between the parties and their advisors during the investigation under § 106.45(b)(5)(vi), or the investigative report summarizing relevant evidence sent to the parties and their advisors under § 106.45(b)(5)(vii)).

As to the requirement in § 106.45(b)(5)(iii) that recipients must not restrict parties' ability "to gather and present evidence," the purpose of this provision is to ensure that parties have equal opportunity to participate in serving their own respective interests in affecting the outcome of the case. This provision helps ensure that other procedural rights under § 106.45 are meaningful to the parties; for example, while the parties have equal opportunity to inspect and review evidence gathered by the recipient under § 106.45(b)(5)(vi), this provision helps make that right meaningful by ensuring that no party's ability to gather evidence (e.g., by contacting a potential witness, or taking photographs of the location where the incident occurred) is hampered by the recipient.

Finally, the two requirements of this provision sometimes overlap, such as where a party's ability to "discuss the allegations under investigation" is necessary precisely so that the party can "gather and present evidence," for example to seek advice from an advocacy organization or explain to campus security the need to access a building to inspect the location of an alleged incident.

The Department appreciates the opportunity to clarify that this provision in no way immunizes a party from abusing the right to "discuss the allegations under investigation" by, for example, discussing those allegations in a manner that exposes the party to liability for defamation or related privacy torts, or in a manner that constitutes unlawful retaliation. In

response to many commenters concerned that the proposed rules did not address retaliation, the final regulations add § 106.71 prohibiting retaliation and stating in relevant part (emphasis added): "No recipient *or other person* may *intimidate, threaten, coerce,* or discriminate against *any individual for the purpose of interfering with any right or privilege* secured by title IX or this part[.]"[1161] The Department thus believes that § 106.45(b)(5)(iii) – permitting the parties to discuss the allegations under investigation, and to gather and present evidence – furthers the Department's interest in promoting a fair investigation that gives both parties meaningful opportunity to participate in advancing the party's own interests in case, while abuses of a party's ability to discuss the allegations can be addressed through tort law and retaliation prohibitions.

The Department recognizes commenters' concerns that some discussion about the allegations under investigation may fall short of retaliation or tortious conduct, yet still cause harmful effects. For example, discussion and gossip about the allegations may negatively impact a party's social relationships. For the above reasons, the Department believes that the benefits of § 106.45(b)(5)(iii), for both parties, outweigh the harm that could result from this provision. This provision, by its terms, applies only to discussion of "the allegations under investigation," which means that where a complainant reports sexual harassment but no formal complaint is filed, § 106.45(b)(5)(iii) does not apply, leaving recipients discretion to impose non-disclosure or confidentiality requirements on complainants and respondents. Thus, reporting should not be

[1161] As discussed in the "Retaliation" section of this preamble, § 106.71 takes care to protect the constitutional free speech rights of students and employees at public institutions that must protect constitutional rights. Nonetheless, abuse of speech unprotected by the First Amendment, when such speech amounts to intimidation, threats, or coercion for the purpose of chilling exercise of a person's Title IX rights, is prohibited retaliation.

chilled by this provision because it does not apply to a report of sexual harassment but only where a formal complaint is filed. One reason why the final regulations take great care to preserve a complainant's autonomy to file or not file a formal complaint (yet still receive supportive measures either way) is because participating in a grievance process is a weighty and serious matter, and each complainant should have control over whether or not to undertake that process.[1162] Once allegations are made in a formal complaint, a fair grievance process requires that both parties have every opportunity to fully, meaningfully participate by locating evidence that furthers the party's interests and by confiding in others to receive emotional support and for other personally expressive purposes. The Department believes that this provision, by its plain language, limits the scope of what can be discussed, and laws prohibiting tortious speech and invasion of privacy, and retaliation prohibitions, protect all parties against abusive "discussion" otherwise permitted by this provision.

The Department has considered carefully the concerns of several commenters who believe this provision will lead to witness tampering or intimidation, or otherwise interfere with a proper investigation. As to witness intimidation, such conduct is prohibited under § 106.71(a). As to whether a party approaching or speaking to a witness could constitute "tampering," the Department believes that generally, a party's communication with a witness or potential witness must be considered part of a party's right to meaningfully participate in furthering the party's interests in the case, and not an "interference" with the investigation. However, where a party's

[1162] As discussed elsewhere in the preamble, including in the "Formal Complaint" subsection of the "Section 106.30 Definitions" section, the decision to initiate a grievance process against the wishes of a complainant is one that must be undertaken only when the Title IX Coordinator determines that signing a formal complaint initiating a grievance process against a respondent is not clearly unreasonable in light of the known circumstances.

conduct toward a witness might constitute "tampering" (for instance, by attempting to alter or prevent a witness's testimony), such conduct also is prohibited under § 106.71(a). Some commenters were particularly concerned that a party's communication with a witness could result in the witness telling a different story to the party than the witness is willing to tell an investigator; any such inconsistencies or discrepancies would be taken into account by the parties, investigator, and decision-maker but do not necessarily constitute "interference" with the investigation by the party who spoke with the witness. Furthermore, in some situations, a party may not know the identity of witnesses until discussing the situation with others (for example, asking a roommate who was at the party at which the alleged incident occurred so as to discover whether any party attendees witnessed relevant events); thus, the Department declines to require that only recipients (or their investigators) may communicate with witnesses or potential witnesses.

With respect to commenters concerned about applying this provision in elementary and secondary schools, the Department disagrees that this provision forbids a school principal from warning students not to speak "maliciously" since malicious discussion intended to interfere with the other party's Title IX rights would constitute prohibited retaliation.

For the reasons discussed above, the Department declines to narrow or modify this provision per commenters' various suggestions. The Department believes that parties, not recipients, should determine who has a "need to know" about the allegations in order to provide advice, support, or assistance to a party during a grievance process; for similar reasons, recipients should not determine what information to label "confidential." Limiting a party's discussions to "neutral" communications, or to communications solely for the purpose of gathering evidence, would deprive the parties of the benefits discussed above, such as seeking

emotional support and using the party's experience to express viewpoints on the larger issues of sexual violence or Title IX policies and procedures; for the same reasons the Department declines to narrow this provision to allow discussion only with advisors or to require a warning to parties that neither party should "aggravate the problem." This provision does not affect a recipient's discretion to restrict parties from contact or communication with each other through, e.g., mutual no-contact orders that meet the definition of supportive measures in § 106.30. Where "disparaging communications" are unprotected under the Constitution and violate tort laws or constitute retaliation, such communications may be prohibited without violating this provision. This provision applies to discussion of "the allegations under investigation" and not to the evidence subject to the parties' inspection and review under § 106.45(b)(5)(vi).

Changes: The final regulations add § 106.71 prohibiting retaliation.

Section 106.45(b)(5)(iv) Advisors of Choice

Supporting Presence and Participation of Advisors

Comments: Some commenters supported allowing parties to have an advisor present because of the severe nature of Title IX charges and the potentially life-altering consequences. Commenters argued the proposed regulations would promote due process and give students more control over the proceedings. Other commenters supported allowing students to have an advisor because it will reduce the risk of false findings by allowing students to avail themselves of an advisor's expertise. Some commenters supported this provision believing the proposed regulations will reconcile Title IX proceedings with protections that are offered in analogous proceedings, such as criminal trials.

Discussion: The Department appreciates the general support from commenters regarding § 106.45(b)(5)(iv), which requires recipients to provide all parties with the same opportunities to

have advisors present in Title IX proceedings and to also have advisors participate in Title IX proceedings, subject to equal restrictions on advisors' participation, in recipients' discretion. We share commenters' beliefs that this provision will make the grievance process substantially more thorough and fairer and that the resulting outcomes will be more reliable. The Department recognizes the high stakes for all parties involved in sexual misconduct proceedings under Title IX, and that the outcomes of these cases can carry potentially life-altering consequences, and thus believes every party should have the right to seek advice and assistance from an advisor of the party's choice. However, providing parties the right to select an advisor of choice does not align with the constitutional right of criminal defendants to be provided with effective representation. The more rigorous constitutional protection provided to criminal defendants is not necessary or appropriate in the context of administrative proceedings held by an educational institution rather than by a criminal court. To better clarify that parties' right to an advisor of choice differs from the right to legal representation in a criminal proceeding, the final regulations revise § 106.45(b)(5)(iv) to specify that the advisor of choice may be, but is not required to be, an attorney.

Changes: To clarify that a recipient may not limit the choice or presence of an advisor we have added "or presence" to § 106.45(b)(5)(iv), and we have added language in this section to clarify that a party's advisor may be, but is not required to be, an attorney.

Fairness Considerations

Comments: Some commenters argued that § 106.45(b)(5)(iv) is not survivor-centered and will tip the scales in favor of wealthy students who can afford counsel.

Discussion: The Department believes that by permitting both parties to receive guidance from an advisor of their choice throughout the Title IX proceedings, the process will be substantially

more thorough and fairer and the resulting outcomes will be more reliable. In response to commenters' concerns, the final regulations revise § 106.45(b)(5)(iv) to specify that a party's chosen advisor may be, but is not required to be, an attorney. The Department acknowledges that a party's choice of advisor may be limited by whether the party can afford to hire an advisor or must rely on an advisor to assist the party without fee or charge. The Department wishes to emphasize that the status of any party's advisor (i.e., whether a party's advisor is an attorney or not), the financial resources of any party, and the potential of any party to yield financial benefits to a recipient, must not affect the recipient's compliance with § 106.45. The Department believes that the clear procedural rights provided to both parties during the grievance process give both parties opportunity to advance each party's respective interests in the case, regardless of financial ability. Further, while the final regulations do not require the recipient to pay for parties' advisors, nothing the in the final regulations precludes a recipient from choosing to do so.

Changes: We have added language in § 106.45(b)(5)(iv) to clarify that a party's advisor may be, but is not required to be, an attorney.

Conflicts of Interest, Confidentiality, and Union Issues

Comments: Commenters argued that student-picked advisors will have a conflict of interest and will raise confidentiality issues. Other commenters expressed concern that § 106.45(b)(5)(iv) may conflict with a union's duty of providing fair representation in the grievance process. One commenter stated that Federal labor law and many State labor laws already provide that an employee subject to investigatory interviews may have a union representative present for a meeting that might lead to discipline.

Discussion: The Department acknowledges the concerns raised by commenters regarding potential conflicts of interest and confidentiality issues arising from permitting the presence or

participation of advisors of a party's choice in Title IX proceedings, and potential conflict with labor union duties in grievance processes. With respect to potential conflicts of interest, we believe that parties are in the best position to decide which individuals should serve as their advisors. Advisors, for example, may be friends, family members, attorneys, or other individuals with whom the party has a trusted relationship. The Department believes it would be inappropriate for it to second guess this important decision.

With respect to confidentiality, the Department notes that commenters who raised this issue did not explain exactly how parties' confidentiality interests would be compromised by permitting them to have an advisor of choice to attend or participate in Title IX proceedings. As explained more fully in the "Section 106.6(e) FERPA" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble, we note that § 106.6(e) of the final regulations makes it clear that the final regulations should be interpreted to be consistent with a recipient's obligations under FERPA. Recipients may require advisors to use the evidence received for inspection and review under § 106.45(b)(5)(vi) as well as the investigative report under § 106.45(b)(5)(vii) only for purposes of the grievance process under § 106.45 and require them not to further disseminate or disclose these materials. Additionally, these final regulations do not prohibit a recipient from using a non-disclosure agreement that complies with these final regulations and other applicable laws.

Lastly, it is not the intent of the Department to undermine the important role that union advisors may play in grievance proceedings. However, we wish to clarify that in the event of an actual conflict between a union contract or practice and the final regulations, then the final

regulations would have preemptive effect.[1163] We note that the final regulations do not preclude a union lawyer from serving as an advisor to a party in a proceeding.

Changes: None.

Modification Requests

Comments: Some commenters argued that § 106.45(b)(5)(iv) conflicts with past guidance from the Department. Other commenters argued that advisors should not be allowed so students can learn to speak for themselves. Some commenters opposed this provision because they believe there should be no limits on attorney participation in grievance procedures. Some commenters argued that recipients should provide each party with an advisor to assist them throughout the grievance process. Some commenters expressed concern that the presence of advisors could complicate the proceedings, for instance, if the advisor was needed to also serve as a witness, if the advisor did not wish to take part in cross-examinations, if taking part in cross-examinations would adversely affect a teacher-student relationship, or if the advisor had limited availability to attend hearings and meetings. Other commenters suggested there should be no limits placed on who can serve as an advisor and that advisors should be allowed to be fully active participants, especially on behalf of students with disabilities or international students who may need active representation by counsel. Other commenters suggested that advisors should be required to be attorneys in order to avoid unauthorized practice of law.

Discussion: With respect to allowing advisors of choice, who may be attorneys, and the participation of such advisors in grievance procedures, these final regulations take a similar

[1163] For further discussion see the "Section 106.6(h) Preemptive Effect" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble.

approach to Department guidance, with two significant differences. The withdrawn 2011 Dear Colleague Letter stated that recipients could "choose" to allow students to be represented by lawyers during grievance procedures and directed that any rules about a lawyer's appearance or participation must apply equally to both parties.[1164] These final regulations better align the Department's approach to advisors of choice for Title IX purposes with the Clery Act as amended by VAWA,[1165] clarifying that in a Title IX grievance process recipients *must* allow parties to select advisors of the parties' choice, who may be, but need not be, attorneys, while continuing to insist that any restrictions on the active participation of advisors during the grievance process must apply equally to both parties. Unlike Department guidance or Clery Act regulations, these final regulations implementing Title IX specify that when live hearings are held by postsecondary institutions, the recipient must permit a party's advisor to conduct cross-examination on behalf of a party.[1166] The Department believes that requiring recipients to allow both parties to have an advisor of their own choosing accompany them throughout the Title IX grievance process, and also to participate within limits set by recipients, is important to ensure fairness for all parties. For discussion of the reasons why cross-examination at a live hearing must be conducted by a party's advisor rather than by parties personally, see the "Hearings" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble. As discussed above, the Department believes that § 106.45(b)(5)(iv) will help to make

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[1164] *E.g.*, 2011 Dear Colleague Letter at 11 ("While OCR does not require schools to permit parties to have lawyers at any stage of the proceedings, if a school chooses to allow the parties to have their lawyers participate in the proceedings, it must do so equally for both parties. Additionally, any school-imposed restrictions on the ability of lawyers to speak or otherwise participate in the proceedings should apply equally.").
[1165] For discussion of the Clery Act and these final regulations, see the "Clery Act" subsection of the "Miscellaneous" section of this preamble.
[1166] Section 106.45(b)(6)(i).

the grievance process substantially more thorough and fairer, and the resulting outcomes more reliable. While nothing in the final regulations discourages parties from speaking for themselves during the proceedings, the Department believes it is important that each party have the right to receive advice and assistance navigating the grievance process. As such, we decline to forbid parties from obtaining advisors of choice. Section 106.45(b)(5)(iv) (allowing recipients to place restrictions on active participation by party advisors) and the revised introductory sentence to § 106.45(b) (requiring any rules a recipient adopts for its grievance process other than rules required under § 106.45 to apply equally to both parties) would, for example, permit a recipient to require parties personally to answer questions posed by an investigator during an interview, or personally to make any opening or closing statements the recipient allows at a live hearing, so long as such rules apply equally to both parties. We do not believe that specifying what restrictions on advisor participation may be appropriate is necessary, and we decline to remove the discretion of a recipient to restrict an advisor's participation so as not to unnecessarily limit a recipient's flexibility to conduct a grievance process that both complies with § 106.45 and, in the recipient's judgment, best serves the needs and interests of the recipient and its educational community. The Department therefore disagrees that the final regulations should prohibit recipients from imposing any restrictions on the participation of advisors, including attorneys, in the Title IX grievance process.[1167] These final regulations ensure that a party's advisor of choice must be included in the party's receipt of, for instance, evidence subject to party inspection and

[1167] As discussed in the "Section 106.45(b)(6)(i) Postsecondary Institution Recipients Must Provide Live Hearing with Cross-Examination" subsection of the "Hearings" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble, the final regulations make one exception to the provision in § 106.45(b)(5)(iv) that recipients have discretion to restrict the extent to which party advisors may actively participate in the grievance process: where a postsecondary institution must hold a live hearing with cross-examination, such cross-examination must be conducted by party advisors.

review,[1168] and the investigative report,[1169] so that a party's advisor of choice is fully informed throughout the investigation in order to advise and assist the party.

The Department understands the concerns of commenters who raised the question of whether acting as a party's advisor of choice could constitute the practice of law such that parties will feel obligated to hire licensed attorneys as advisors of choice, to avoid placing non-attorney advisors (such as a professor, friend, or advocacy organization volunteer) in the untenable position of potentially violating State laws that prohibit the unauthorized practice of law.[1170] While the issues raised by allegations of sexual misconduct may make it preferable or advisable for one or both parties to receive legal advice or obtain legal representation, the Department recognizes school disciplinary proceedings, including the grievance process required under these final regulations, as an administrative setting that does not require either party to be represented by an attorney. The Department believes that the § 106.45 grievance process sets forth clear, transparent procedural rules that enable parties and non-lawyer party advisors effectively to navigate the grievance process. Because the grievance process occurs in an educational setting and does not require court appearances or detailed legal knowledge, the Department believes that assisting a party to a grievance process is best viewed not as practicing law, but rather as

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[1168] Section 106.45(b)(5)(vi) (evidence subject to inspection and review must be sent electronically or in hard copy to each party and the party's advisor of choice).

[1169] Section 106.45(b)(5)(vii) (a copy of the investigative report must be sent electronically or in hard copy to each party and the party's advisor of choice).

[1170] *E.g.*, Michelle Cotton, *Experiment, Interrupted: Unauthorized Practice of Law Versus Access to Justice*, 5 DEPAUL J. FOR SOCIAL JUSTICE 179, 188-89 (2012) ("Most States continue to have broad definitions of the practice of law and broad concepts of [unauthorized practice of law] UPL that prevent or inhibit the involvement of nonlawyers in providing assistance to unrepresented persons."); Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581, 2585-88 (1999) (noting that in every state, nonlawyers are generally prohibited from practicing law, that the definition of unauthorized practice of law (UPL) varies widely from jurisdiction to jurisdiction, and that exceptions to what constitutes UPL often include appearing in administrative proceedings).

providing advocacy services to a complainant or respondent. The Department concludes that with respect to Title IX proceedings the line between assisting a party, and providing legal representation to the party, is a line that has been and will continue to be, an issue taken into consideration by students, recipients, and advocates pursuant to the variety of State unauthorized practice of law statutes.

The Department notes that some commenters argued that the grievance process is complex and frequently intersects with legal proceedings (for example, when a complainant sues the respondent for civil assault or battery, or files a police report that results in a criminal proceeding against the respondent), and that legal representation would benefit both parties to a Title IX proceeding.[1171] The Department leaves recipients flexibility and discretion to determine whether a recipient wishes to provide legal representation to parties in a grievance process, but the final regulations do not restrict the right of each party to select an advisor with whom the party feels most comfortable and believes will best assist the party, and thus clarifies in this provision that the party's advisor of choice may be, but is not required to be, an attorney.

The Department acknowledges commenters' concerns that advisors may also serve as witnesses in Title IX proceedings, or may not wish to conduct cross-examination for a party whom the advisor would otherwise be willing to advise, or may be unavailable to attend all hearings and meetings. Notwithstanding these potential complications that could arise in particular cases, the Department believes it would be inappropriate to restrict the parties'

[1171] *E.g.*, Merle H. Weiner, *Legal Counsel for Survivors of Campus Sexual Violence*, 29 YALE J. OF L. & FEMINISM 123 (2017) (arguing that campuses should provide student survivors with legal representation, and noting that providing accused students with legal representation is also beneficial).

selection of advisors by requiring advisors to be chosen by the recipient, or by precluding a party from selecting an advisor who may also be a witness. The Department notes that the § 106.45(b)(1)(iii) prohibition of Title IX personnel having conflicts of interest or bias does *not* apply to party advisors (including advisors provided to a party by a postsecondary institution as required under § 106.45(b)(6)(i)), and thus, the existence of a possible conflict of interest where an advisor is assisting one party and also expected to give a statement as a witness does not violate the final regulations. Rather, the perceived "conflict of interest" created under that situation would be taken into account by the decision-maker in weighing the credibility and persuasiveness of the advisor-witness's testimony. We further note that live hearings with cross-examination conducted by party advisors is required only for postsecondary institutions, and the requirement for a party's advisor to conduct cross-examination on a party's behalf need not be more extensive than simply relaying the party's desired questions to be asked of other parties and witnesses.[1172]

Changes: We have added language in § 106.45(b)(5)(iv) to clarify that a party's advisor may be, but is not required to be, an attorney.

Section 106.45(b)(5)(v) Written Notice of Hearings, Meetings, and Interviews

Comments: Several commenters supported § 106.45(b)(5)(v) because it will promote fairness, due process, and increase the likelihood of reaching an accurate result. One commenter shared a personal story of a family member with a disability who was not allowed to prepare a defense after being accused of sexual harassment. Other commenters supported this provision believing it

[1172] For further discussion see the "Hearings" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble.

offers the same protections that would be offered in a criminal trial. Other commenters supported this provision believing it will limit the abuse of power that can be wielded under Title IX investigations.

Discussion: The Department agrees with commenters who supported this provision on the grounds that it will promote fairness, provides both parties with due process protections, and increase the likelihood of reaching an accurate result. The Department believes that written notice of investigative interviews, meetings, and hearings, with time to prepare, permits both parties meaningfully to advance their respective interests during the grievance process, which helps ensure that relevant evidence is gathered and considered in investigating and adjudicating allegations of sexual harassment.

Changes: None.

Comments: Several commenters argued that the proposed regulations, including § 106.45(b)(5)(v), would be burdensome by requiring recipients to provide written notice, placing them under time constraints, adding administrative layers, and that these burdens would be particularly difficult for elementary and secondary schools.

Discussion: The Department acknowledges the concern of commenters that § 106.45(b)(5)(v) will place a burden on recipients, including elementary and secondary schools, but believes the burden associated with providing this notice is outweighed by the due process protections such notice provides. Because the stakes are high for both parties in a grievance process, both parties should receive notice with sufficient time to prepare before participating in interviews, meetings, or hearings associated with the grievance process, and written notice is better calculated to effectively ensure that parties are apprised of the date, time, and nature of interviews, meetings, and hearings than relying solely on notice in the form of oral communications. For example, if a

party receives written notice of the date of an interview, and needs to request rescheduling of the date or time of the interview due to a conflict with the party's class schedule, the recipient and parties benefit from having had the originally-scheduled notice confirmed in writing so that any rescheduled date or time is measured accurately against the original schedule. We note that nothing in these final regulations precludes a recipient from also conveying notice via in-person, telephonic, or other means of conveying the notice, in addition to complying with § 106.45(b)(5)(v) by sending written notice.

Changes: We have made non-substantive revisions to § 106.45(b)(5)(v), such as changing "the" to "a" in the opening clause "Provide to a party" and adding a comma after "invited or expected," for clarity.

Comments: Some commenters argued that the procedures required by the proposed regulations are not suited to the campus environment where proceedings should not be adversarial, where notice of hearings might allow accused students time to destroy evidence and prepare alibis, and where it will contribute to underreporting as complainants will feel a loss of control or bullied because the proposed regulations are not informed by a victim-centered perspective.

Discussion: The Department disagrees that § 106.45(b)(5)(v), or the final regulations overall, increase the adversarial nature of sexual misconduct proceedings or incentivize any party to fabricate or destroy evidence. Allegations of sexual harassment often present an inherently adversarial situation, where parties have different recollections and perspectives about the incident at issue. The final regulations do not increase the adversarial nature of such a situation, but the § 106.45 grievance process (including this provision requiring written notice to both parties with time to prepare to participate in interviews and hearings) helps ensure that the adversarial nature of sexual harassment allegations are investigated and adjudicated impartially

by the recipient with meaningful participation by the parties whose interests are adverse to each other.[1173] Accordingly, the final regulations require schools to investigate and adjudicate formal complaints of sexual harassment, and to give complainants and respondents a meaningful opportunity to participate in the investigation that increases the likelihood that the recipient will reach an accurate, reliable determination regarding the respondent's responsibility.

The Department does not agree that providing the parties with advance notice of investigative interviews, meetings, and hearings increases the likelihood that any party will concoct alibis or destroy evidence. The final regulations contain provisions that help ensure that false statements (e.g., making up an alibi) or destruction of evidence will be revealed during the investigation and taken into account in reaching a determination. For example, § 106.45(b)(2) requires the initial written notice to the parties to include a statement about whether the recipient's code of conduct prohibits false statements, and § 106.45(b)(5)(vi) gives both parties equal opportunity to inspect and review all evidence gathered by the recipient that is directly related to the allegations, such that if relevant evidence seems to be missing, a party can point that out to the investigator, and if it turns out that relevant evidence was destroyed by a party, the decision-maker can take that into account in assessing the credibility of parties, and the weight of evidence in the case.

The Department disagrees that § 106.45(b)(5)(v) will contribute to underreporting because complainants will feel a loss of control or bullied, or feel chilled from reporting, or that

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[1173] *E.g.*, *Pennsylvania v. Finley*, 481 U.S. 551, 568 (1987) ("The very premise of our adversarial system . . . is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.") (internal quotation marks and citation omitted); *see also Tolan v. Cotton*, 572 U.S. 650, 660 (2014) ("The witnesses on both sides come to this case with their own perceptions, recollections, and even potential biases. It is in part for that reason that genuine disputes are generally resolved by juries in our adversarial system.").

this provision is not informed by a victim-centered perspective. The Department believes this provision provides a fundamental and essential due process protection that equally benefits complainants and respondents by giving both parties advance notice of interviews, meetings, and hearings so that each party can meaningfully participate and assert their respective positions and viewpoints through the grievance process.[1174] This is an important part of ensuring that the grievance process reaches accurate determinations, which in turn ensures that schools, colleges, and universities know when and how to provide remedies to victims of sex discrimination in the form of sexual harassment.

Changes: None.

Comments: Some commenters suggested that recipients should only be required to give respondents notice of charges, not necessarily of interviews, in order to reflect the standards set by VAWA. Some commenters suggested that the final regulations should require an advisor be copied on all correspondence between the institutions and the parties.

Discussion: The Department disagrees with the commenters who suggested that recipients should only be required to give respondents notice of charges, not necessarily of interviews, in order to reflect the standards set by Section 304 of VAWA. The commenter offered no rationale for why the approach under VAWA is superior to the § 106.45(b)(5)(v) requirements in this regard, and the Department believes that parties are entitled to notice of interviews, meetings, and hearings where the party's participation is expected or invited; otherwise, a party may miss critical opportunities to advance the party's interests during the grievance process. To clarify that

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[1174] *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'") (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

this provision intends for notice to be given only to the party whose participation is invited or expected, we have made non-substantive revisions to the language of this provision to better convey that intent. Because this provision is consistent with the VAWA provision cited by commenters, even though this provision requires more notice than the VAWA provision, the Department sees no conflict raised for recipients who must comply with both VAWA and Title IX.

We note that the final regulations do require that copies of the evidence subject to the parties' inspection and review, and a copy of the investigative report, must be sent (electronically or in hard copy) to the parties and to the parties' advisors, if any. The Department appreciates commenters' request that advisors be copied on all correspondence between recipients and the parties, but declines to impose such a rule in order to preserve a recipient's discretion under § 106.45(b)(5)(iv) to limit the participation of party advisors, and to preserve a party's right to decide whether or not, for what purposes, and at what times, the party wishes for an advisor of choice to participate with the party. Nothing in the final regulations precludes a recipient from adopting a practice of copying party advisors on all notices sent under § 106.45(b)(5)(v), so long as the recipient complies with the revised introductory sentence of § 106.45(b) by ensuring that such a practice applies equally with respect to both parties.

Changes: We have revised the language in § 106.45(b)(5)(v) to more clearly convey that notice must be sent to a party when that party's participation is invited or expected with respect to any meeting, interview, or hearing during the grievance process, by changing "the" to "a" in the clause "Provide to a party" in this provision.

Section 106.45(b)(5)(vi) Inspection and Review of Evidence Directly Related to the Allegations, and Directed Question 7

Comments: Many commenters expressed support for § 106.45(b)(5)(vi) and asserted that the proposed regulations seek the equal treatment of complainants and respondents. One commenter asserted that the proposed regulations would remedy sex-biased investigations and included citations to circuit court cases involving male students challenging the Title IX processes at institutions that suspended or expelled the male students for sexual misconduct. A different commenter stated that the proposed regulations would restore fairness and provide full disclosure to both parties so that they can adequately prepare defenses and present additional facts and witnesses. Another commenter concluded that the proposed regulations would ensure justice for complainants and protection for those falsely accused.

A number of commenters shared stories of their personal experiences with recipients withholding information from parties in a Title IX proceeding.

One commenter concluded that both parties having access to all of the evidence will ensure a fair process for both parties. Many commenters remarked that a Title IX investigator should not have unilateral authority to deem certain evidence "irrelevant." Another commenter stated that schools should not hinder evidence reviews with short or limited time windows. One commenter stated that all evidence collected, including evidence collected by law enforcement, should be made available to the respondent.

Some commenters concluded that the electronic view-only format is unreasonable. Other commenters stated that all of the evidence should be provided to the parties to download and review on their own. The commenters remarked that this was necessary, especially in complex cases where review of the evidence would take a significant period of time. Some of these

commenters also argued that any effort on the part of a recipient to limit a party's access to the evidence should be viewed as a bad faith effort to negatively impact the proceeding.

While generally supportive of the provision, one commenter argued that the final regulations should require that the investigator incorporate the parties' responses into the final investigative report. Another generally supportive commenter proposed the inclusion of a party's right to call an external investigator. A different commenter supported the adoption of a special master to oversee the adjudicative process.

Some commenters agreed with the ten-day review and comment requirement, determining that it is an appropriate period for allowing the parties to read and provide written responses. Another commenter stated that the exchange of information between the parties will result in expedited hearings.

One supporter of the provision requested that the Department include a provision that would inform the parties of the consequences of submitting false information to the investigator.

A number of commenters opposed § 106.45(b)(5)(vi). One commenter concluded that the proposed regulations, including this provision, were antithetical to the purpose of Title IX. Another commenter called this provision a blunt solution to a nuanced problem that attempts to solve the "canard" of false allegations. The commenter added that the Department fails to see the issue through a victim-centered lens, pointing out that the term "trauma" is used only once in the NPRM. The same commenter stated that this provision is not informed by best practices for working with trauma survivors.

One commenter argued that the proposed regulations would lead to retaliation and witness tampering. Another commenter stated that § 106.45(b)(5)(vi) would "revictimize" complainants. Many commenters stated that this provision will hamstring and compromise

investigations, would likely chill the reporting process, is part of the administration's indifference to sexual violence, and will have negative effects on safety and fairness. One commenter concluded that the proposed rules would allow institutions to turn a "blind eye" to sexual violence on campus.

One commenter wrote that this provision "fails to adequately acknowledge the seriousness and complexity of sexual misconduct on college campuses" and called for a simpler, fairer, and more responsive approach. A different commenter argued that § 106.45(b)(5)(vi) would deter reporting, create difficulties in maintaining student privacy, and make Title IX cases more time-consuming and expensive. According to this commenter, this provision did not account for the potential for reputational damage and that it eliminates key aspects of the discretion that enables institutions to act in the "best interests of all parties." Another commenter concluded that this provision is "unhelpful and hurtful" to victims, which, the commenter opined, may be the purpose of the provision.

One commenter stated that the provision allows evidence of past sexual conduct to be presented in an investigation and that such history would be raised to shame complainants.

Another commenter concluded that this provision would result in the respondent being able to coerce new witnesses because the "regulations allow that." The same commenter also stated that the Department's focus on due process is misplaced because there is no due process problem until corrective action is proposed. A different commenter concluded that the provision is a barrier to effective investigation and resolution of Title IX grievances, calling it an "unacceptable" and "untimely" step. The same commenter proposed eliminating the ten-day period for review of the collected evidence or, conversely, the inclusion of a requirement that

each party must have a reasonable opportunity to review the evidence and provide feedback while the investigation is ongoing, but without a set timeline.

One commenter stated that fair notice and an opportunity to respond does not require discovery of all evidence "directly related" to the allegations, where the evidence will not be relied upon in making a responsibility determination. Similarly, the commenter argued that requiring recipients to turn over all evidence directly related to the allegations was overbroad and may result, ultimately, in less information being shared by parties during the investigation. Another commenter argued that no rational basis exists for requiring the disclosure of evidence not relied upon in reaching a determination. The commenter added that the provision is extremely confusing and benefits no one.

Many commenters questioned why the Department would allow parties to review evidence upon which the decision-maker does not intend to rely upon in adjudicating the claim. These commenters agreed that only relevant information should be shared with the parties. One of these commenters concluded that the provision "further legalizes" the process.

Another commenter argued that, under current judicial precedent, no formal right to discovery exists in a student disciplinary hearing.

One commenter argued in favor of the recipient only sharing information with the parties, allowing them to determine whether the information should be shared with their advisor.

Many commenters supported limitations on the information being shared, including the exclusion or redaction of medical, psychological, financial, sexual history, or other personal and private information that has "no bearing" on the investigative report. One commenter argued in favor of permitting schools to release information to the parties based upon the individual circumstances of the case. The commenter stated that this information would unnecessarily

violate the privacy of the disclosing parties and would prevent investigators from gathering evidence out of fear that personal information would need to be revealed. The commenter concluded that the result would be "truly harmful and possibly destructive to anyone who would engage in the formal Title IX process." A different commenter concluded that there is no purpose to sharing this information except to intrude into the privacy of the parties. Commenters stated that the final regulations would allow the improper, and potentially widespread, sharing of confidential information and incentivize respondents to "slip in" prejudicial information to undermine the process.

A number of commenters concluded that students would be less likely to report sexual harassment and sexual violence if investigations are not conducted properly because there is no incentive for schools to actually investigate. The commenter stated that, if enacted, the proposed rules would harm many students who "face these problems every day."

A number of commenters concluded that schools should not be required to disclose irrelevant information and that institutions should be allowed to place "reasonable restrictions" on records. Some stated that an exception could be provided for a "showing of particularized relevance." One commenter proposed that schools should not allow access to information they themselves cannot use. Calling the provision "utterly illogical," one commenter stated that sharing irrelevant information would lead to extreme disparity of potential outcomes.

Many commenters opposed the electronic sharing of evidence with the parties. They argued that no system currently exists that limits the user's ability to take pictures of the information on the screen. One commenter was concerned that the proposed regulations do not include a requirement that the viewing of the relevant evidence be supervised and suggested the inclusion of such a provision. Some commenters argued that sharing records electronically could

exacerbate gender and socioeconomic inequality and put some students at a disadvantage if they do not have access to a private computer.

A number of commenters proposed sharing the evidence file in hard copy format. Some of these commenters argued in favor of the supervised viewing of evidence files, to protect the party's confidentiality and to prevent parties from taking photographs of the evidence, while others argued for investigators to use their discretion in redacting certain information from the files before sharing with the parties. Some commenters supported redactions for information deemed more prejudicial than probative and for "inflammatory" evidence. Many of these commenters expressed concern that the parties should not be allowed to take physical possession of the evidence files. Commenters who favored redactions, also argued that the final regulations unreasonably limit the discretion of investigators. These commenters argued that recipients should have the right to reasonably redact confidential and private information, including the identity of the complainant, if the recipient deems it necessary to do so. One commenter, who favored the hard copy format, argued that students with disabilities may have a difficult time reviewing the files if not submitted in hard copy.

Some commenters remarked that electronic file sharing programs are cost prohibitive, leading some to conclude that such cost would prohibit institutions from paying for advisors for the parties.

Many commenters asserted that the provision could run afoul of State laws, including laws regarding student privacy and the sharing of confidential information, as well as potentially violate State rape shield laws. Some commenters were also concerned about the effect of open-records statutes as a means to publicize investigative files to embarrass the opposing party.

A commenter stated that the proposed regulations fail to state that the report should include all exculpatory and inculpatory evidence, which could prevent an adequate record, jeopardize the parties' ability to make a defense, might diminish the thoroughness with which facts are considered, and unduly raise the risk of bias. Another commenter agreed that crafting a full report before sharing it with the parties is premature and could lead to errors, dissatisfaction, and the appearance of bias.

A number of commenters pointed out that the proposed provision would require recipients to change their current processes, causing a disruption in how they handle Title IX cases on their campuses.

One commenter pointed out that student conduct processes at institutions of higher education are not criminal processes and should not be expected to mirror them. The commenter stated that colleges and universities are not making criminal law decisions, but rather a policy violation determination. In addition, the commenter believed that the best policy would allow students to provide information, respond to information, and ask questions, but in a manner that is appropriate to limit creating an adversarial environment. Similarly, one commenter concluded that the final regulations place a greater burden on recipients than on a criminal prosecutor.

Some commenters opposed enacting a ten-day requirement for review and responses. One commenter suggested that the ten-day timeline was an "overregulation" of institutions, suggesting instead that institutions should set their own time frames, so long as they are equitable. A number of commenters argued that institutions should be able to determine appropriate timelines for their own processes. Many commenters questioned whether the Department meant ten calendar days or ten business days. Another commenter suggested shortening the review period from ten to five days. A different commenter stated that the

Department should not mandate any time period as, in their opinion, a uniform rule does not fit every circumstance at every school.

One commenter wrote that the final regulation's timeline is more rigid than a similar proceeding in a courtroom, where courts often expedite hearings when time is of the essence.

A commenter asked for clarification as to whether the proposed regulations would require an extra ten days for re-inspection of the supplemented investigative file. The same commenter also asked what, if any, guidelines should be put in place regarding supplementing the record at each stage of the adjudicative process.

One commenter proposed including a non-disclosure agreement as part of the adjudicative process. Another commenter requested that the final regulations should include a provision to punish institutions that have committed "wrongs" against respondents in the past.

One commenter requested a regulatory provision that would provide meaningful consequences for violations of confidentiality, including punishment for recipients that do not implement reasonable privacy safeguards or do not permit reasonable redaction policies.

One commenter requested clarification on how long institutions would be required to retain records associated with a Title IX proceeding. Another commenter requested that the Department provide an electronic platform for the storing of data associated with Title IX investigations.

A number of commenters raised issues with the implementation of the final regulations in the K-12 context. Commenters stated that the majority of changes in the proposed rules were not written with a clear understanding of their application to the K-12 environment and that the proposed rules may actually hamper a school district's ability to maintain a safe school environment. For example, the commenter stated that the extension of the timeline (for example,

by imposing a ten-day period for review of evidence) impairs a K-12 recipient's ability to effectuate meaningful change to a student's behavior. In addition, the commenter wrote that a "battle of responses" will foster more hostility, not less, where there is a high likelihood that the parties will remain within the same school district. The same commenter suggested that the Department should look to provide, and detail, restorative justice options that align with best practices for effective responses to incidents of sexual harassment and sexual violence. One commenter concluded that sharing the evidence file may be appropriate at the postsecondary level, but is inappropriate at the K-12 level. Another commenter called § 106.45(b)(5)(vi) "overkill" in the K-12 context. A different commenter supported leaving the issue of evidence review to local school officials. One commenter stated that the ten days to review and respond was unnecessary and would needlessly lengthen K-12 investigations.

Many commenters raised concerns over the burden caused by the proposed regulations on small institutions. Those commenters pointed out that sharing evidence with parties, waiting the required time period, and creating the investigative report and the parties' responses to it is onerous, has limited benefits as a truth-seeking process, and is too burdensome for institutions with only one staff member in charge of all of these responsibilities. Another commenter similarly asserted that small institutions do not currently have staff capacity to comply with § 106.45(b)(5)(vi)-(vii). A different commenter argued that continuous updates to the parties is "completely impractical" and "unduly burdensome" on the investigator, especially at small colleges.

Discussion: The Department appreciates commenters' support of § 106.45(b)(5)(vi). We believe that this provision provides complainants and respondents an equal opportunity to inspect and review evidence and provides transparent disclosure of the universe of relevant and potentially

relevant evidence, with sufficient time for both parties to meaningfully prepare arguments based on the evidence that further each party's view of the case, or present additional relevant facts and witnesses that the decision-maker should objectively evaluate before reaching a determination regarding responsibility, including the right to contest the relevance of evidence.

The Department is sensitive to commenters' concerns regarding the parties sharing irrelevant information, as well as relevant information that is relevant but also highly sensitive and personal, as part of the investigative process. This concern, however, must be weighed against the demands of due process and fundamental fairness, which require procedures designed to promote accuracy through meaningful participation of the parties. The Department believes that the right to inspect all evidence directly related to the allegations is an important procedural right for both parties, in order for a respondent to present a defense and for a complainant to present reasons why the respondent should be found responsible. This approach balances the recipient's obligation to impartially gather and objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence, with the parties' equal right to participate in furthering each party's own interests by identifying evidence overlooked by the investigator and evidence the investigator erroneously deemed relevant or irrelevant and making arguments to the decision-maker regarding the relevance of evidence and the weight or credibility of relevant evidence. In response to commenters' suggestions, we have added phrasing in § 106.45(b)(5)(vi) to emphasize that the evidence gathered and sent to the parties for inspection and review is evidence "directly related to the allegations" which must specifically include "inculpatory or exculpatory evidence whether obtained from a party or other source." Such inculpatory or exculpatory evidence (related to the allegations) may, therefore, be gathered by the investigator

from, for example, law enforcement where a criminal investigation is occurring concurrently with the recipient's Title IX grievance process.

While it may be true in some respects that this provision affords parties greater protection than some courts have determined is required under constitutional due process or concepts of fundamental fairness, that does not necessarily mean that protections such as those contained in § 106.45 are not desirable features of a consistent, transparent grievance process that enhances the fairness and truth-seeking function of the process.[1175] In response to commenters' concerns about disclosure of private medical, psychological, and similar treatment records, these final regulations provide in § 106.45(b)(5)(i) that a recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains the party's voluntary, written consent to do so for a grievance process under § 106.45. If the party is not an "eligible student," as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a "parent," as defined in 34 CFR 99.3.[1176] Accordingly, a recipient will not access, consider, disclose, or otherwise use some of the most sensitive documents about a party without the party's (or the parent of the party's) voluntary, written consent, regardless of whether the recipient already has possession of such treatment records, even if the records are relevant.

[1175] For further discussion see the "Role of Due Process in the Grievance Process" section of this preamble.
[1176] 34 CFR 99.3 is part of regulations implementing FERPA; for further discussion of the intersection between FERPA and these final regulations, see the "Section 106.6(e) FERPA" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble.

This provision adequately addresses commenter's concerns about sensitive information that may be shared with the other party pursuant to § 106.45(b)(5)(vi). Non-treatment records and information, such as a party's financial or sexual history, must be directly related to the allegations at issue in order to be reviewed by the other party under § 106.45(b)(5)(vi), and all evidence summarized in the investigative report under § 106.45(b)(5)(vii) must be "relevant" such that evidence about a complainant's sexual predisposition would never be included in the investigative report and evidence about a complainant's prior sexual behavior would only be included if it meets one of the two narrow exceptions stated in § 106.45(b)(6)(i)-(ii) (deeming all questions and evidence about a complainant's sexual predisposition "not relevant," and all questions and evidence about a complainant's prior sexual behavior "not relevant" with two limited exceptions).

The Department declines to define certain terms in this provision such as "upon request," "relevant," or "evidence directly related to the allegations," as these terms should be interpreted using their plain and ordinary meaning. We note that "directly related" in § 106.45(b)(5)(vi) aligns with requirements in FERPA, 20 U.S.C. 1232g(a)(4)(A)(i).[1177] We also acknowledge that "directly related" may sometimes encompass a broader universe of evidence than evidence that is "relevant." However, the § 106.45 grievance process is geared toward reaching reliable, accurate outcomes in a manner that keeps the burden of collecting and evaluating relevant evidence on the recipient while giving both parties equally strong, meaningful opportunities to present, point out, and contribute relevant evidence, so that ultimately the decision-maker

[1177] For further discussion see the "Section 106.6(e) FERPA" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble.

objectively evaluates relevant evidence and understands the parties' respective views and arguments about how and why evidence is persuasive or should lead to the outcome desired by the party. The Department therefore believes it is important that at the phase of the investigation where the parties have the opportunity to review and respond to evidence, the universe of that exchanged evidence should include all evidence (inculpatory and exculpatory) that relates to the allegations under investigation, without the investigator having screened out evidence related to the allegations that the investigator does not believe is relevant. The parties should have the opportunity to argue that evidence directly related to the allegations is in fact relevant (and not otherwise barred from use under § 106.45), and parties will not have a robust opportunity to do this if evidence related to the allegations is withheld from the parties by the investigator. For example, an investigator may discover during the investigation that evidence exists in the form of communications between a party and a third party (such as the party's friend or roommate) wherein the party characterizes the incident under investigation. If the investigator decides that such evidence is irrelevant (perhaps from a belief that communications before or after an incident do not make the facts of the incident itself more or less likely to be true), the other party should be entitled to know of the existence of that evidence so as to argue about whether it is relevant. The investigator would then consider the parties' viewpoints about whether such evidence (directly related to the allegations) is also relevant, and on that basis decide whether to summarize that evidence in the investigative report. A party who believes the investigator reached the wrong conclusion about the relevance of the evidence may argue again to the decision-maker (i.e., as part of the party's response to the investigative report, and/or at a live hearing) about whether the evidence is actually relevant, but the parties would not have that opportunity if the evidence had been screened out by the investigator (that is, deemed irrelevant)

without the parties having inspected and reviewed it as part of the exchange of evidence under § 106.45(b)(5)(vi).

In response to commenters' concerns that proposed § 106.45(b)(5)(vi) unduly imposed costly or burdensome restrictions by specifying that the evidence sent to the parties must be "in an electronic format, such as a file sharing platform, that restricts the parties and advisors from downloading or copying the evidence," we have removed reference to a file-sharing platform and revised this provision to state that recipients must send the evidence subject to inspection and review to each party, and the party's advisor (if any), in electronic format or hard copy. Under the final regulations, therefore, recipients are neither required nor prohibited from using a file sharing platform that restricts parties and advisors from downloading or copying the evidence. Recipients may require parties and advisors to refrain from disseminating the evidence (for instance, by requiring parties and advisors to sign a non-disclosure agreement that permits review and use of the evidence only for purposes of the Title IX grievance process), thus providing recipients with discretion as to how to provide evidence to the parties that directly relates to the allegations raised in the formal complaint.

With regard to the sharing of confidential information, a recipient may permit or require the investigator to redact information that is not directly related to the allegations (or that is otherwise barred from use under § 106.45, such as information protected by a legally recognized privilege, or a party's treatment records if the party has not given written consent) contained within documents or other evidence that are directly related to the allegations, before sending the evidence to the parties for inspection and review. Further, as noted above, recipients may impose on the parties and party advisors restrictions or require a non-disclosure agreement not to disseminate any of the evidence subject to inspection and review or use such evidence for any

purpose unrelated to the Title IX grievance process, as long as doing so does not violate these final regulations or other applicable laws. We reiterate that redacting "confidential" information is not the same as redacting information that is not "directly related to the allegations" because information that is confidential, sensitive, or private may still be "directly related to the allegations" and thus subject to review by both parties. Similarly, a recipient may permit or require the investigator to redact from the investigative report information that is not relevant, which is contained in documents or evidence that is relevant, because § 106.45(b)(5)(vii) requires the investigative report to summarize only "relevant evidence."

Section 106.45(b)(5)(vi) is not a "blunt solution" as a commenter suggested. The Department recognizes that Title IX enforcement is, in fact, a nuanced problem, and this recognition has informed the policy formation as well as the drafting and revising of this particular provision. We do not believe, as the commenter thinks, that a concern over false allegations is a "canard," nor does the number of times that a particular word is used in the NPRM suggest that the Department is uninterested in, or unmoved by, best practices in the field. We disagree that § 106.45(b)(5)(vi) fails to acknowledge the "complexity" of sexual misconduct on college campuses, because this provision is part of a carefully prescribed grievance process that aims to ensure that the parties have meaningful opportunities to participate in advancing each party's interests in these high-stakes cases. The provision proposed in the NPRM, and revised in these final regulations, not only takes into account the complexity of sexual misconduct on college campuses, but considers, as fundamental fairness demands, the experiences and challenges faced by both complainants and respondents.

The Department is sensitive to commenters' concerns over whether the final regulations might deter the reporting of sexual harassment. The § 106.45 grievance process is designed to

improve the reliability and legitimacy of recipients' investigations and adjudications of Title IX sexual harassment allegations, and we believe that providing the parties with strong, clear procedural rights improves the fairness and legitimacy of the grievance process. We recognize that a formal grievance process is challenging, difficult, and stressful to navigate, for both complainants and respondents. It is for this reason that these final regulations ensure that parties are not inhibited from seeking support and assistance from any source (see § 106.45(b)(5)(iii)) and that parties have the right to select an advisor of choice to advise and accompany a party throughout the grievance process (see § 106.45(b)(5)(iv)). More broadly, the Department is persuaded by some commenters' concerns that if a complainant is forced to undergo a grievance process whenever a complainant reports sexual harassment, complainants may decide not to report at all, and by other commenters' concerns that without strong, clear procedural rights, recipients' grievance processes will not reach reliable outcomes in which parties and public have confidence. The final regulations therefore increase the obligations on recipients to respond promptly and supportively to every complainant when the recipient receives notice that the complainant has allegedly been victimized by sexual harassment (without requiring any proof or evidence supporting the allegations) irrespective of the existence of a grievance process, promote respect for a complainant's autonomy over whether or not to file a formal complaint that initiates a grievance process, and protect complainants from retaliation for refusing to participate in a grievance process. We have revised § 106.8, § 106.30, and § 106.44 significantly to achieve these aims and have added § 106.71. For example, § 106.8 emphasizes the need for every complainant and all third parties to have clear, accessible options for how to report sexual harassment to the Title IX Coordinator; the definitions of "complainant" and "formal complaint" in § 106.30 have been revised to clarify that the choice to initiate a grievance process must

remain within the control of a complainant unless the Title IX Coordinator has specific reasons justifying the filing of a formal complaint over the wishes of a complainant; § 106.44(a) now requires a recipient to offer supportive measures to a complainant with or without a formal complaint being filed using an interactive process whereby the Title IX Coordinator must discuss and take into account the complainant's wishes regarding the supportive measures to be provided and explain to the complainant the option of filing a formal complaint; and § 106.71 protects the right of any individual to choose not to participate in a grievance process without facing retaliation. The Department intends for these final regulations to assure complainants that complainants may report sexual harassment and receive supportive measures whether or not the complainant also participates in a grievance process, and to assure complainants and respondents that a grievance process will be fair, consistent with constitutional due process, and give both parties meaningful opportunity to advance the party's own interests regarding the case outcome, in an investigation and adjudication overseen by impartial, unbiased Title IX personnel who do not prejudge the facts at issue and objectively evaluate inculpatory and exculpatory evidence before reaching determinations regarding responsibility.

The Department disagrees with commenters' assertions that the final regulations would allow the recipient (or the respondent) to coerce witnesses, turn a "blind eye" to sexual violence, or "revictimize" complainants. As discussed above, § 106.71 prohibits retaliation (which includes coercion) against any person for participating *or refusing to participate* in a Title IX proceeding and § 106.44(a) requires recipients to respond to every complainant by offering supportive measures; these requirements ensure that no recipient may turn a blind eye to reported sexual violence. The § 106.45 grievance process, including allowing both parties the opportunity to inspect and review evidence directly related to the allegations, benefits complainants as much

as respondents by ensuring that each party is aware of evidence and may then make arguments that further the party's own interests based on the evidence.[1178]

The Department disagrees that due process is not implicated until corrective action is proposed. Due process is not only a concern after corrective or punitive action is taken, but throughout the entire process leading to a recipient's decision to impose corrective or disciplinary action.[1179]

The Department disagrees that § 106.45(b)(5)(vi)-(vii) are a barrier to effective investigations and case resolutions, and believes that to the contrary, these provisions work to guarantee effective investigations and resolutions by allowing the parties full access to the evidence gathered, and to the investigative report that summarizes relevant evidence, so the parties may make corrections, provide appropriate context, and prepare their responses and defenses before a decision-maker reaches a determination regarding responsibility.

We appreciate the commenters who stated that the ten-day time frame provision is appropriate for the parties to review and respond to the evidence directly related to the allegations. We agree that the result of this provision will be expedited hearings because the parties will have had the opportunity to see, review, and consider their responses to evidence prior to showing up at a hearing. However, this provision's purpose is not solely to speed up the

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[1178] *E.g.*, Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAPMAN L. REV. 57, 57 (1998) ("In its simplest terms, an adversary system *resolves disputes by presenting conflicting views of fact and law to an impartial and relatively passive arbiter, who decides which side wins what*. . . . Thus, the adversary system represents far more than a simple model for resolving disputes. Rather, it consists of a core of basic rights that recognize and protect the dignity of the individual in a free society.") (emphasis added); *see also* David L. Kirn, *Proceduralism and Bureaucracy: Due Process in the School Setting*, 28 STANFORD L. REV. 841, 847-48 (1976) (due process includes the right of parties to participate in the presentation of evidence, which serves the dual interest of improving the reliability of outcomes and the parties' sense of fairness of the proceeding).

[1179] For further discussion see the "Role of Due Process in the Grievance Process" section of this preamble.

process. The Department believes that this provision, in conjunction with the other provisions in § 106.45, balances the need for reasonably prompt resolution of Title IX grievance processes with the need to ensure that these grievance processes are thorough and fair.

The Department understands commenters' concerns that a ten-day time period for the parties to inspect and review evidence (and then a ten-day time period to review and respond to the investigative report) is too long a timeline, but we do not agree that this timeline is an "overregulation" or that it is more rigid than a similar proceeding in a criminal court. Instead, the Department finds that the time frame is appropriate for the parties to read and respond to the evidence subject to inspection and review, and then to the investigative report. Recipients may choose whether the ten days should be business days or calendar days (or may use a different calculation of "days" that works with the recipient's administrative operations, such as "school days.") Although the recipient is required to provide at least ten days for inspection and review, the recipient may give the parties more than ten days to respond, bearing in mind that the recipient must conclude the grievance process within the reasonably prompt time frames to which the recipient must commit under § 106.45(b)(1)(v).

Section 106.45(b)(5)(vi)-(vii) concerning inspection and review of evidence, and review of the investigative report, are not overbroad or likely to lead to information withholding, and do not force the parties to share irrelevant information. These provisions appropriately focus the investigation on evidence "directly related to the allegations" and to "relevant" evidence in furtherance of each party's interest in permitting pertinent evidence to come to light so that any misunderstandings, confusions, and contradictions can be clarified. As discussed above, the Department has revised § 106.45 to expressly forbid a recipient from using a party's medical, psychological, and similar records without the party's voluntary, written consent, and from using

information protected by a legally recognized privilege, and deems "not relevant" questions and evidence about a complainant's prior sexual behavior (with two limited exceptions).

We appreciate the commenters' suggestions regarding the inclusion of: a requirement that the viewing of the relevant evidence be supervised; the appointment of a special master; and a provision informing parties of the consequences of submitting false information. Commenters have noted that recipients' restrictions on a party's ability to view the evidence gathered in a case (for example, by requiring the party to sit in a certain room in the recipient's facility, for only a certain length of time, with or without the ability to take notes while reviewing the evidence, and perhaps while supervised by a recipient administrator) have reduced the meaningfulness of the party's opportunity to review evidence and use that review to further the party's interests. We believe it is important for the parties to receive a copy of the evidence subject to inspection and review so that the parties and their advisors may, over the course of a ten-day period, carefully consider the evidence directly related to the allegations, prepare arguments about whether all of that evidence is relevant and whether relevant evidence has been omitted, and consider how the party intends to respond to the evidence. On the other hand, we do not believe that the purposes of the parties' right to inspect and review evidence necessitates or justifies the Department requiring recipient to appoint a "special master" to oversee the exchange of evidence. The recipient's investigator will be well-trained in how to conduct an investigation and grievance process and in issues of relevance, under § 106.45(b)(1)(iii). We address warnings about making false statements during a grievance process in § 106.45(b)(2), which requires the written notice of allegations that a recipient sends to both parties upon receipt of a formal complaint to contain a statement about whether the recipient's code of conduct contains a prohibition against making false statements during a grievance process. We do not believe that a further statement about

false statements accompanying sending the evidence to the parties under § 106.45(b)(5)(vi) serves a necessary purpose and decline to require it.

We decline to change the requirement that recipients send the evidence to a party's advisor (if the party has one).[1180] If a party has exercised the party's right to select an advisor of the party's choice, it is for the purpose of receiving that advisor's assistance during the grievance process, and we do not believe that a party's ten-day window to review and respond to the evidence should be narrowed by placing the burden on the party to receive the evidence from the recipient and then send the evidence to the party's advisor. However, nothing in these final regulations precludes a party from requesting that the recipient not send the evidence subject to inspection and review to the party's advisor. Similarly, the final regulations do not preclude the recipient from asking the parties to confirm whether or not the party has an advisor prior to sending the evidence under § 106.45(b)(5)(vi).

The Department disagrees that sending the evidence, or investigative report, to the parties (and their advisors, if any) will lead to an "extreme disparity of potential outcomes." The provisions in § 106.45(b)(5)(vi)-(vii) are focused on providing precisely the opposite of the commenter's conclusion: predictable procedural requirements that respondents and complainants can rely upon to afford them a predictable, fair process.

The Department does not agree that § 106.45(b)(5)(vi)-(vii), or the § 106.45 grievance process as a whole, creates the same rights to discovery afforded to civil litigation parties or criminal defendants. For example, parties to a Title IX grievance process are not granted the

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[1180] We have revised § 106.45(b)(5)(vii) to require the investigative report to be sent to the parties and their advisors (if any), for the same reasons that we decline to remove the requirement to send the evidence subject to inspect and review to the parties and their advisors.

right to depose parties or witnesses, nor to invoke a court system's subpoena powers to compel parties or witnesses to appear at hearings, which are common features of procedural rules governing litigation and criminal proceedings. Recognizing that schools, colleges, and universities are educational institutions and not courts of law, the Department has prescribed a grievance process that incorporates procedures rooted in principles of due process and fundamental fairness, to give parties clear, meaningful opportunities to participate in influencing the case outcome that advances each party's interests, without imposing on recipients the expectation that recipients should function as *de facto* courts.

Similarly, the Department does not agree that § 106.45(b)(5)(vi)-(vii) will prolong proceedings, create ancillary disputes, or invade the privacy of parties and witnesses. As various courts have held,[1181] parties are entitled to constitutional due process from public institutions and a fair process from private institutions during Title IX grievance proceedings. In these final regulations, the Department has prescribed a process that provides sufficient due process protections to resolve allegations of sexual harassment in a recipient's education program or activity, in a manner that permits (and requires) a recipient to conclude its grievance process within designated, reasonably prompt time frames, and has taken care to protect party privacy while ensuring that the parties have access to information that may affect the outcome of the case.

We appreciate the concerns of many commenters about the burden and costs that § 106.45(b)(5)(vi)-(vii) may impose upon recipients. The Department understands that these

[1181] *E.g.*, *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 69 (1st Cir. 2019); *Doe v. Purdue Univ. et al.*, 928 F.3d 652 (7th Cir. 2019); *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018).

provisions have the potential to generate modest burden and costs, but believes that the financial costs and administrative burdens resulting from the provisions are far outweighed by the due process protections ensured by these provisions. We disagree with the assertion that "sharing evidence with parties" results in unacceptable burdens on recipients, because reviewing the universe of evidence that is, or may be, relevant represents a critical part of enabling parties to have a meaningful opportunity to be heard, which is an essential component of due process and fundamental fairness. The Department appreciates that many recipients' Title IX offices are inundated and over-worked, but sacrificing procedures important to concepts of due process and fundamental fairness is not an acceptable means of alleviating administrative burdens. We reiterate that where reasonable, we have revised § 106.45(b)(5)(vi)-(vii) to alleviate unnecessary administrative burdens on recipients, for example by removing reference to a file sharing platform and allowing the recipient to send the evidence and investigative report electronically or by hard copy.

The Department also understands that a potentially different set of issues regarding § 106.45(b)(5)(vi)-(vii) may occur where there are multiple formal complaints arising out of a single incident. To expressly authorize recipients to handle cases that arise out of the same incident of sexual harassment involving multiple complainants, multiple respondents, or both, we have added § 106.45(b)(4) to expressly grant discretion to recipients to consolidate formal complaints involving more than one complainant or more than one respondent, where the allegations of sexual harassment arise out of the same facts or circumstances. The Department also provides in § 106.45(b)(4) that where a grievance process involves more than one complainant or more than one respondent, references in § 106.45 to the singular "party," "complainant," or "respondent" must include the plural, as applicable. These revisions help

clarify that a single grievance process might involve multiple complainants or multiple respondents; we emphasize that in such a situation, each individual party has each right granted to a party under § 106.45 and these final regulations. For example, in a case involving multiple complainants, a recipient would not be permitted to designate one complainant as a "lead complainant" and use such a designation to, for instance, only send the evidence to the "lead complainant" instead of to each complainant individually.

Parties have the opportunity to provide additional information or context in their written response after reviewing the evidence under § 106.45(b)(5)(vi). The final regulations do not directly address an extension of the timeline for responses, should the parties present additional information after reviewing the evidence. These final regulations provide that the parties must have at least ten days to submit a written response after review and inspection of the evidence directly related to the allegations raised in a formal complaint. A recipient may require all parties to submit any evidence that they would like the investigator to consider prior to when the parties' time to inspect and review evidence begins. Alternatively, a recipient may choose to allow both parties to provide additional evidence in response to their inspection and review of the evidence under § 106.45(b)(5)(vi) and also an opportunity to respond to the other party's additional evidence. Similarly, a recipient has discretion to choose whether to provide a copy of each party's written response to the other party to ensure a fair and transparent process and to allow the parties to adequately prepare for any hearing that is required or provided under the grievance process. A recipient's rules or practices other than those required by § 106.45 that a recipient adopts must apply equally to both parties as required by § 106.45(b). If a recipient chooses not to allow the parties to respond to additional evidence provided by a party in these circumstances, the parties will still receive the investigative report that fairly summarizes relevant evidence

under § 106.45(b)(5)(vii) and will receive an opportunity to inspect and review all relevant evidence at any hearing and to refer to such evidence during the hearing, including for purposes of cross-examination at live hearings under § 106.45(b)(5)(vi). If a recipient allows parties to provide additional evidence after reviewing the evidence under § 106.45(b)(5)(vi), any such additional evidence that is summarized in the investigative report will not qualify as new evidence that was reasonably available at the time the determination regarding responsibility was made for purposes of an appeal under § 106.45(b)(8).

The Department agrees with the commenter's concern that the investigative report should contain relevant evidence including exculpatory and inculpatory evidence. Section 106.45(b)(1)(ii) makes clear that the recipient must evaluate relevant evidence including inculpatory and exculpatory evidence. The final regulations add the phrase "and inculpatory or exculpatory evidence whether obtained from a party or other source" to § 106.45(b)(5)(vi) with respect to the evidence sent to the parties for inspection and review. Thus, where § 106.45(b)(5)(vii) requires the investigative report to fairly summarize all the relevant evidence, the final regulations make clear that evidence may be relevant whether it is inculpatory or exculpatory.

We do not agree that sharing the investigative report prior to its finalization would lead to errors, dissatisfaction, and the appearance of bias. In fact, those are the very potential problems that sharing the report with the parties seeks to avoid. The parties' responses may address perceived errors that may be corrected, so that the parties have an opportunity to express and note their contentions for or against the investigative report, and sharing the investigative report at the same time, to both parties, helps avoid any appearance of bias.

We appreciate the commenter's questions regarding how the evidence and the investigative report should be shared with the parties. The final regulations revise § 106.45(b)(5)(vi) to state that "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 or a hard copy." Similar language is used in § 106.45(b)(5)(vii) regarding sending the parties, and their advisors, copies of the investigative report, electronically or in hard copy format. The Department reminds recipients that these provisions contain baseline requirements, and additional practices to address privacy concerns, such as digital encryption, that do not run afoul of § 106.45(b)(5)(vi)-(vii), or any other provision of the final regulations, are not precluded by these final regulations. The final regulations do not require recipients to provide individual laptops to parties to review the evidence or investigative report, but a recipient may do so at the recipient's discretion, and the option to send parties hard copies under these provisions gives recipients the flexibility to respond to a party's inability to access digital or electronic copies.

The Department does not wish to prohibit the investigator from including recommended findings or conclusions in the investigative report. However, the decision-maker is under an independent obligation to objectively evaluate relevant evidence, and thus cannot simply defer to recommendations made by the investigator in the investigative report. As explained in the "Section 106.45(b)(7)(i) Single Investigator Model Prohibited" subsection of the "Determinations Regarding Responsibility" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble, the decision-maker cannot be the same person as the Title IX Coordinator or the investigator and must issue a written determination regarding responsibility, and one of the purposes of that requirement is to ensure

that independent evaluation of the evidence gathered is made prior to reaching the determination regarding responsibility.

The Department appreciates commenters' concerns and requests for clarification regarding the application of the final regulations to the elementary and secondary school environment. We disagree that the grievance process timeline impairs an elementary and secondary school recipient's ability to effectuate meaningful change to a student's behavior. There are many actions a recipient may take with respect to a respondent that constitute permissible supportive measures as defined in § 106.30, which may correct or modify a respondent's behavior without being punitive or disciplinary. Educational conversations with students, for example, and impressing on a student the recipient's anti-sexual harassment policy and code of conduct expectations, need not constitute punitive or disciplinary actions that a school is precluded from taking without following a § 106.45 grievance process. Similarly, we disagree that § 106.45 generally, or § 106.45(b)(5)(vi)-(vii) in particular, foster hostility or hamper a school district's ability to maintain a safe school environment. Providing a predictable, fair grievance process before imposing discipline on students may help reduce hostility and tensions in a school environment, and recipients have many options under the § 106.30 definition of supportive measures for taking action to protect party safety and deter sexual harassment before or during any grievance process and regardless of whether a grievance process is ever initiated. We also remind recipients that § 106.44(c) allows a respondent to be removed from education programs or activities on an emergency basis, without pre-removal notice or hearing, and regardless of whether a grievance process is pending regarding the sexual harassment allegations from which the imminent threat posed by the respondent has arisen.

With regard to records retention, the Department addresses this issue under §106.45(b)(10). We have revised that provision, including by extending the record retention period from three years as proposed in the NPRM, to seven years under these final regulations.

The Department appreciates the commenter's responses to Directed Question 7. After considering the many public comments responsive to this directed question posed in the NPRM, the Department finds that it would be inappropriate to dilute the requirement that there be a direct relationship between the evidence in question and the allegations under investigation. For reasons discussed above, the final regulations require inspection and review of evidence that is directly related to the allegations, including inculpatory and exculpatory evidence obtained from a party or any other source, and require the investigative report to summarize only relevant evidence.

Changes: The Department makes the following changes to 106.45(b)(5)(vi). First, the phrase "and inculpatory or exculpatory evidence whether obtained from a party or other source," is added. Second, we have added "or a hard copy" as an option for sending to the parties and their advisors the evidence subject to inspection and review. Lastly, we have removed the phrase "such as a file sharing platform, that restricts the parties and advisors from downloading or copying the evidence."

Section 106.45(b)(5)(vii) An Investigative Report that Fairly Summarizes Relevant Evidence

Comments: Many commenters expressed support for § 106.45(b)(5)(vii) and asserted that the provision would work to restore fairness and due process for complainants and respondents. A number of commenters stated that, in their experience, the ten-day period response period is a reasonable and appropriate time frame. One commenter characterized the NPRM as a long

overdue correction to the withdrawn 2011 Dear Colleague Letter, which the commenter called a "wrongful repudiation" of due process. The commenter also argued for the Department to adopt a particular recipient's policy as a model for procedures that other recipients should employ in addressing inappropriate sexual activity while simultaneously assuring due process protections.

A number of commenters opposed the provision. Many commenters expressed concern over the mandated ten-day period. Commenters asserted that recipients should determine the appropriate timelines for their process, rather than the Department prescribing this timeline. Similarly, another commenter asserted that "rigid time frames" substantially lengthen investigation and adjudication processes. One commenter requested clarification as to why the investigative report must be completed and made available ten days prior to a hearing. The commenter was concerned that such a requirement results in an overly burdensome process with negligible benefits. A different commenter expressed concern that if new information arises during the review of the report, the timeline should be extended to avoid exploitative efforts by either party. One commenter questioned how institutions should respond when a party requests additional time to review the report before the hearing.

One commenter requested clarification over when the parties' written responses to the investigative report are due and what the investigator is supposed to do with the parties' responses.

Some commenters argued that the proposed provision is unnecessary because the parties could address and respond to evidence during a hearing. Many commenters stated that sharing the investigative report is burdensome and could obstruct the investigation. A number of commenters pointed out that the proposed provision would require them to change processes, causing a disruption in how they handle Title IX enforcement on their campus. Citing the

addition of significant time and resource requirements to their institution's current procedures, one commenter argued that small institutions lack the capacity right now to comply with this requirement. A different commenter concluded that this provision will impose "shadow costs" on institutions.

Another commenter proposed deleting § 106.45(b)(5)(vii) entirely because of concerns over what should be included in the investigative report, the potential for one of the parties to demand a time extension if the report contains a recommendation of responsibility, and the issues raised in multiple complainant proceedings. The same commenter recommended that the investigative report include facts, interview statements from the parties, a preliminary credibility analysis, and the policy applied to the analysis of the alleged behavior. A different commenter suggested that the report only include facts, with no recommended findings or conclusions, stating that summaries can be fraught with "asymmetrical information delivery" and may not provide a means for any party to submit corrections. One commenter proposed removing the mandate to share the investigative report with the student's advisor and allowing the student to choose whether they want their advisor to see the report.

One commenter expressed concern that the provision is too vague and leaves many unanswered questions, such as what the final regulations would allow if the parties need to make changes following their review or if additional evidence is located.

A commenter requested a clarification of, or a change to, the language in § 106.45(b)(5)(vi), which refers to "directly related to the evidence," and § 106.45(b)(5)(vii), which refers to "relevant evidence."

A commenter stated that, as written, this provision would allow institutions to implement access controls that could limit or deny due process, such as declaring that the report is the

property of the institution or creating time limits on viewings. The commenter proposed that the provision should be revised to allow the parties easy access to the report until the final determination is made.

A commenter concluded that provision goes beyond any due process requirement, that they are aware of, to have information in the evidentiary file synthesized into a summary report ten days before the hearing. The commenter also requested clarification as to how the recipient must amend its investigative report in light of the parties' responses.

Many commenters questioned whether the Department meant ten calendar days or ten business days.

Discussion: The Department appreciates commenters' support of § 106.45(b)(5)(vii). We agree that the final regulations seek to provide strong, clear procedural protections to complainants and respondents, including apprising both parties of the evidence the investigator has determined to be relevant, in order to adequately prepare for a hearing (if one is required or otherwise provided) and to submit responses about the investigative report for the decision-maker to consider even where a hearing is not required or otherwise provided.

We appreciate the commenter's proposal to follow policies in place at a particular institution. We acknowledge the efforts of particular institutions and have considered policies in place at various individual institutions, but for reasons described in the "Role of Due Process in the Grievance Process" section and throughout this preamble, we do not adopt any particular institution's policies or procedures wholesale. We believe that the provisions outlined in these final regulations provide necessary and appropriate due process and fundamental fairness protections to complainants and respondents.

As some commenters have noted, § 106.45(b)(5)(vii) aligns with the practice of many recipients who have become accustomed to conducting investigations in Title IX sexual harassment proceedings and create an investigative report as part of such an investigation. We believe that a standardized provision regarding an investigative report is important in the context of Title IX proceedings even though such a step may not be required in civil litigation or criminal proceedings and even though specific parts of this provision may differ from recipients' current practices (i.e., ensuring that parties are sent a copy of the investigative report ten days prior to the time that a determination regarding responsibility will be made). The Department believes that the purpose of § 106.45(b)(5)(vii) and the specific requirements in this provision are appropriate because a Title IX grievance process occurs in an educational institution (not in a court of law) and because a recipient of Federal funds agrees, under Title IX, to operate education programs or activities free from sex discrimination. It is thus appropriate to obligate the recipient (and not the parties to disputed sexual harassment allegations) to take reasonable steps calculated to ensure that the burden of gathering evidence remains on the recipient, yet to also ensure that the recipient gives the parties meaningful opportunity to understand what evidence the recipient collects and believes is relevant, so the parties can advance their own interests for consideration by the decision-maker. A valuable part of this process is giving the parties (and advisors who are providing assistance and advice to the parties) adequate time to review, assess, and respond to the investigative report in order to fairly prepare for the live hearing or submit arguments to a decision-maker where a hearing is not required or otherwise provided. Without advance knowledge of the investigative report, the parties will be unable to effectively provide context to the evidence included in the report.

While we are sensitive to recipients' concerns regarding burden, cost, and capacity, the Department believes that the required process in § 106.45(b)(5)(vii) does not present onerous demands on recipients. Concerns over burden and capacity should be weighed, not only against fundamental fairness and due process, but in the context of the phase of an investigation when this requirement is in place: during the period when the investigative report should be compiled anyway (that is, after evidence has been gathered and before a determination will be made). In the context of a grievance process that involves multiple complainants, multiple respondents, or both, a recipient may issue a single investigative report. We have added § 106.45(b)(4) to expressly authorize a recipient, in the recipient's discretion, to consolidate formal complaints when allegations all arise out of the same facts or circumstances.

Section 106.45(b)(5)(vii) is important for fairness as well as efficiency purposes; it assures that the investigative report is completed in an expeditious manner, provides the opportunity to the parties to prepare their arguments and defenses, and serves the goal of ensuring constructive, meaningful, and effective hearings (where required, or otherwise provided) and informed determinations regarding responsibility even where the determination is reached without a hearing. Section 106.45(b)(5)(vii) presents no obstacle to an effective investigation and reliable resolution because it comes after an investigation has finished gathering evidence.

The Department shares commenters' concerns about recipient practices that limit access to the investigative report. Practices or rules that limit a party's (or party's advisor's) access to the investigative report violate § 106.45(b)(5)(vii) because under this provision recipients must send a copy of the investigative report electronically or by hard copy to each party and the party's advisor, if any. While this provision does not require a recipient to use a file sharing

platform that restricts the parties and advisors from downloading or copying the evidence, recipients may choose to use a file sharing platform that restricts the parties and advisors from downloading or copying the investigative report under § 106.45(b)(5)(vii) and this would constitute sending the parties a copy "in an electronic format," meeting the requirements of this provision.

The Department appreciates commenters' suggestions as to what elements recipients should include in their investigative reports. The Department takes no position here on such elements beyond what is required in these final regulations; namely, that the investigative report must fairly summarize relevant evidence. We note that the decision-maker must prepare a written determination regarding responsibility that must contain certain specific elements (for instance, a description of procedural steps taken during the investigation)[1182] and so a recipient may wish to instruct the investigator to include such matters in the investigative report, but these final regulations do not prescribe the contents of the investigative report other than specifying its core purpose of summarizing relevant evidence.

The Department does not adopt commenters' suggestions to allow institutions to set their own timelines with respect to the parties' window of time to review the investigative report, but the Department has intentionally given recipients flexibility to designate the recipient's own "reasonably prompt time frames" for the conclusion of each phase of the grievance process (including appeals and any informal resolution processes) pursuant to § 106.45(b)(1)(v). While we understand from commenters that some recipients may desire to conclude their grievance process in fewer than 20 days (i.e., the two ten-day timelines prescribed in § 106.45 which, in

[1182] Section 106.45(b)(7)(ii).

combination, preclude a recipient from designating a time frame for conclusion of an entire grievance process in fewer than 20 days), the Department believes that 20 or fewer days has not been widely viewed as a reasonable time frame for conducting and concluding a truly fair investigation and adjudication of allegations that carry such high stakes for all parties involved. This belief is buttressed by commenters who appreciated that the Department has withdrawn the expectation set forth in the withdrawn 2011 Dear Colleague Letter for recipients to conclude a grievance process within 60 calendar days.[1183] We reiterate that a formal complaint of Title IX sexual harassment alleges serious misconduct that has jeopardized a person's equal educational access, and the determination regarding responsibility carries grave consequences for each party; the purpose of the § 106.45 grievance process is to reduce the likelihood of positive or negative erroneous outcomes (i.e., inaccurate findings of responsibility and inaccurate findings of non-responsibility). Ensuring that each party, in each case, receives effective notice and meaningful opportunity to be heard necessitates some procedures that involve some passage of time (e.g., time for parties and their advisors to review evidence, and to review the investigator's summary of relevant evidence). The § 106.45 grievance process aims to balance the need for a thorough, fair investigation that permits the parties' meaningful participation, with the need to conclude a grievance process promptly to bring resolution to situations that are difficult for both parties to navigate.

We appreciate the commenter's suggestion that the student should get to choose what the student's advisor can see in the investigative report. We do not believe that this issue requires

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[1183] 2011 Dear Colleague Letter at 12 ("Based on OCR experience, a typical investigation takes approximately 60 calendar days following receipt of the complaint."). The Department's experience, therefore, has long been that an adequate investigation into sexual harassment allegations typically takes longer than 20 days.

regulation and we do not wish to create unnecessary complexity in the recipient's obligations with respect to sending the investigative report. A party may always request that the recipient not send the investigative report to the party's advisor, but if the party has already indicated that the party has selected an advisor of choice then we believe the better default practice is for the party's advisor to be sent the investigative report, so that the burden of receiving the report, then forwarding it to the party's advisor, does not rest on the party, which would also result in a *de facto* shortening of the ten-day window in which a party – with assistance from an advisor – may review and prepare responses to the investigator's summary of relevant evidence.

The Department acknowledges the difference between the use of "directly related to the allegations" in § 106.45(b)(5)(vi) and "relevant evidence" in § 106.45(b)(5)(vii). As discussed above, in the "Section 106.45(b)(5)(vi) Inspection and Review of Evidence Directly Related to the Allegations, and Directed Question 7" subsection of the "Investigation" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble, we acknowledge that "directly related to the allegations" may encompass a broader universe of evidence than evidence that is "relevant," and believe that it is most beneficial for the parties' access to evidence to be limited by what is directly related to the allegations, but for the investigator to determine what is relevant after the parties have reviewed that evidence.

Independent of whether this provision would be required to satisfy constitutional due process of law, § 106.45(b)(5)(vii) (giving the parties copies of the investigative report prior to the live hearing or other time of determination) serves an important function in a Title IX grievance process, placing the parties on level footing with regard to accessing information to allow the parties to serve as a check on any decisions that the recipient makes regarding the relevance of evidence and omission of relevant evidence. Allowing the parties to review and

respond to the investigative report is important to providing the parties with notice of the evidence the recipient intends to rely on in deciding whether the evidence supports the allegations under investigation. The parties cannot meaningfully respond and put forward their perspectives about the case when they do not know what evidence the investigator considers relevant to the allegations at issue.

These final regulations do not prescribe a process for the inclusion of additional information or for amending or supplementing the investigative report in light of the parties' responses after reviewing the report. However, we are confident that even without explicit regulatory requirements, best practices and respect for fundamental fairness will inform recipients' choices and practices with regard to amending and supplementing the report. Recipients enjoy discretion with respect to whether and how to amend and supplement the investigative report as long as any such rules and practices apply equally to both parties, under the revised introductory sentence of § 106.45(b).

A recipient may give the parties the opportunity to provide additional information or context in their written response to the investigative report, as provided in § 106.45(b)(5)(vii), to remedy any "asymmetrical information delivery," but the Department believes that in combination, § 106.45(b)(5)(vi)-(vii) reduce the likelihood of asymmetrical information delivery because the parties each will have the opportunity to review all the evidence related to the allegations and then all the evidence the investigator decides is relevant. A recipient may require all parties to submit any evidence that they would like the investigator to consider prior to the finalization of the investigative report thereby allowing each party to respond to the evidence in the investigative report sent to the parties under § 106.45(b)(5)(vii). A recipient also may provide both parties with an opportunity to respond to any additional evidence the other party proposes

after reviewing the investigative report. If a recipient allows parties to provide additional evidence in response to the investigative report, any such additional evidence will not qualify as new evidence that was reasonably available at the time the determination regarding responsibility was made for purposes of an appeal under § 106.45(b)(8)(i)(B). Similarly, a recipient has discretion to choose whether to provide a copy of each party's written response to the other party as an additional measure to allow the parties to prepare for the hearing (or to be heard prior to the determination regarding responsibility being made, if no hearing is required or provided). As noted above, any rules or practices other than those required by § 106.45 that a recipient adopts must apply equally to both parties, and a recipient must be mindful that rules it chooses to adopt that extend time frames must take into account the recipient's obligation to conclude the entire grievance process within the recipient's own designated time frame, under § 106.45(b)(1)(v).

To conform with the changes we made to §106.45(b)(5)(vi), we have revised § 106.45(b)(5)(vii) to include a provision that requires the investigative report to be sent to each party and the party's advisor, if any, in an electronic format or a hard copy. As stated elsewhere in this preamble, the final regulations do not require a specific method for calculating "days." Recipients retain flexibility to adopt the method that best works for the recipient's operations, including calculating "days" using calendar days, business days, school days, or so forth.

Changes: The Department has revised § 106.45(b)(5)(vii) by changing the parenthetical to refer to "this section" instead of "§ 106.45" and adding "or otherwise provided" after "if a hearing is required by this section," by requiring the investigative report to be sent to parties and their advisors, if any, and by adding the option of sending a copy in electronic format or hard copy.

Hearings

Cross-Examination Generally

Support for Cross-Examination

Comments: Some commenters expressed support for the proposed rules' requirement in § 106.45(b)(6)(i) that postsecondary institutions allow cross-examination at a live hearing because in a college or university setting, where participants are usually adults, cross-examination is an essential pillar of fair process, and where cases turn exclusively or largely on witness testimony as is often the case in peer-on-peer grievances, cross-examination is especially critical to resolve factual disputes between the parties and give each side the opportunity to test the credibility of adverse witnesses, serving the goal of reaching legitimate and fair results.[1184]

Some commenters supported § 106.45(b)(6)(i) because live hearings with cross-examination are consistent with Supreme Court cases interpreting due process of law,[1185] as well as recent case law in which courts have held that cross-examination must be provided in higher education disciplinary proceedings, particularly when credibility is at issue, to meet standards of fundamental fairness and constitutional due process.[1186] Commenters relied on Sixth Circuit cases in particular[1187] to assert that high-stakes cases involving competing narratives require a mutual test of credibility, and to argue that the cost to a university of providing a live hearing

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[1184] Commenters cited: American Bar Association, 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* 9 (2017).
[1185] Commenters cited: *Goss v. Lopez*, 419 U.S. 565 (1975); *Mathews v. Eldridge*, 424 U.S. 319 (1976).
[1186] Commenters cited: *Doe v. Baum* [University of Michigan], 903 F.3d 575, 578 (6th Cir. 2018) ("[t]he ability to cross-examine is most critical when the issue is the credibility of the accuser."); *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 401 (6th Cir. 2017) ("In the case of competing narratives, 'cross-examination has always been considered a most effective way to ascertain truth.'") (internal citations omitted); *Doe v. Alger* [James Madison University], 228 F. Supp. 3d 713, 730 (W.D. Va. 2016); *Doe v. Claremont McKenna Coll.*, 25 Cal. App. 5th 1055, 1070 (2018).
[1187] Commenters cited: *Baum*, 903 F.3d at 581; *Univ. of Cincinnati*, 872 F.3d at 403.

with cross-examination is far outweighed by the benefit of reducing the risk of an erroneous finding of responsibility. Some commenters also pointed to a California appellate court decision[1188] where the court found it ironic that an institution of higher learning, where American history and government are taught, should stray so far from the principles that underlie our democracy, and two other California appellate court decisions[1189] that one commenter characterized together as representing unanimous rulings by nine appellate judges that public and private colleges and universities owe basic due process protections to students in Title IX proceedings. Several commenters argued that the recent Sixth Circuit and California appellate decisions illustrate a trend, or growing judicial consensus, that some kind of cross-examination should be permitted in serious student misconduct cases that turn on credibility.[1190] A few commenters argued that under many State APAs (Administrative Procedure Acts) students in serious misconduct cases have a right to cross-examine an accuser and cited cases from Washington and Oregon as examples.[1191]

Commenters opined that requiring a live hearing with cross-examination for postsecondary institutions is perhaps the single most important change in the proposed rules to ensure that determinations are fair. Commenters referred to cross-examination as a "game-

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[1188] Commenters cited: *Doe v. Regents of Univ. of Cal.*, 28 Cal. App. 5th 44, 61 (2018) (university failed to provide a fair hearing by selectively applying rules of evidence, refusing to show respondent all the evidence against him, and refusing to consider respondent's proffered evidence, and the lack of due process protections resulted in neither the respondent nor the complainant receiving a fair hearing).

[1189] Commenters cited: *Doe v. Allee* [University of Southern California], 30 Cal. App. 5th 1036 (2019); *Doe v. Claremont McKenna Coll.*, 25 Cal. App. 5th 1055 (2018).

[1190] *Cf. Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 70 (1st Cir. 2019) (declining to require the same opportunity for cross-examination as required by the Sixth Circuit but holding that due process of law was satisfied if the university conducted "reasonably adequate questioning" designed to ferret out the truth, if the university declined to grant students the right to cross-examine parties and witnesses at a hearing).

[1191] Commenters cited: *Arishi v. Wash. State Univ.*, 196 Wash. App. 878, 908 (2016); *Liu v. Portland State Univ.*, 281 Or. App. 294, 307 (2016).

changer" because currently many college and university processes require parties to submit written questions in advance, to be asked by a school official, which may or may not occur at a live hearing. Commenters asserted that in numerous instances, college and university administrators have refused to ask some or all of a party's submitted questions, reworded a party's questions in ways that undermined the question's effectiveness, ignored follow-up questions, and simply refused to ask "hard questions" of parties even when evidence such as text messages appeared to contradict a party's testimony. Commenters argued that written questions are not an effective substitute for live cross-examination because credibility can be determined only when questions are asked in real time in the presence of parties and decision-makers who can listen and observe how a witness answers questions, and when immediate follow-up questions are permitted. Commenters argued that cross-examination is necessary to allow the decision-maker to observe each witness answering questions that can bring out contradictions and improbabilities in the witness's testimony. Commenters cited Supreme Court criminal law cases discussing the symbolic and practical value of cross-examination in the context of the Sixth Amendment's Confrontation Clause.[1192]

Some commenters argued that despite other commenters' assumptions that the proposed rules would allow a complainant to be aggressively or abusively questioned by a respondent's advisor, it is unlikely that campus officials will permit an advisor to question a party in an

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[1192] Commenters cited: *Coy v. Iowa*, 487 U.S. 1012, 1017 (1988) (stating that cross-examination has symbolic importance because "there is something deep in human nature that regards face-to-face confrontation between accused and accuser as essential to a fair trial in a criminal prosecution") (internal quotation marks and citation omitted); *id.* at 1019 (noting the practical importance of cross-examination because it "is always more difficult to tell a lie about a person to his [or her] face than behind his [or her] back") (internal quotation marks and citation omitted); *Mattox v. United States*, 156 U.S. 237, 242-43 (1895) (cross-examination provides the trier-of-fact opportunity to judge by the witness's demeanor on the stand and "the manner in which he gives his testimony whether he is worthy of belief.").

inappropriate manner; for example, commenters asserted, under current policies most universities only allow lawyers or other advisors to be "potted plants" in hearings and school officials enforce that potted-plant policy, demonstrating that recipients are capable of controlling advisors. One commenter asserted that universities, which are dedicated to the free flow of information, will figure out an acceptable way for cross-examination to occur so that campus adjudications can meet generally accepted standards of due process. Several commenters asserted that recipients should, and under the proposed rules would be allowed to, adopt measures to prevent irrelevant, badgering questions and ensure respectful treatment of parties and witnesses. Commenters supported requiring cross-examination to be conducted by party advisors because this will mean that the questioning will be left to professionals, or at least to adults better attuned to the nuances of these cases. Commenters asserted that concerns about aggressive attorneys berating complainants are overblown, because attorneys and even non-attorney advisors know better than to alienate the fact-finder, which is what berating a complainant would do. Commenters asserted that the proposed rules reach a balanced solution by allowing cross-examination to determine credibility while disallowing direct student-to-student questioning and permitting questioning to occur with the parties in separate rooms.

Some commenters supported the cross-examination requirement based on belief that confronting an accuser is a part of the fundamental concept of the rule of law that should apply on college campuses. Some commenters believed that cross-examination will change the "kangaroo court" nature of campus Title IX proceedings that lacked basic due process protections, and that asking complainants questions about the allegations does not revictimize a complainant. Several commenters expressed support for cross-examination in the context of belief that the withdrawn 2011 Dear Colleague Letter, and/or the #MeToo movement, have tilted

too many colleges and universities to be predisposed to believing young men guilty of sexual assault.

Many commenters supported cross-examination because of personal experiences being accused of a Title IX violation without any opportunity to confront the complainant, asserting that lack of cross-examination allowed a complainant's version of events to go unchallenged.

Many commenters supported cross-examination as an important part of the proposed rules' restoration of due process and fairness that distinguishes the United States from dictatorial regimes where to be accused is the same as being proved guilty. Several commenters argued that cross-examination is vital for finding the truth, which should be the goal of any investigation, because cross-examination reveals a witness's faulty memory or false testimony. Commenters asserted that cross-examination allows the parties to make a searching inquiry to uncover facts that may have been omitted, confused, or overstated.

Some commenters believed that cross-examination will reduce the likelihood of false allegations being made or succeeding. One commenter argued that regardless of whether false allegations happen infrequently or frequently, every case must be considered individually using a proper investigation process with cross-examination. One commenter opposed the proposed rules as problematic and offensive to victims, but supported the cross-examination provision because due process is an inherent right in the United States. This commenter also supported cross-examination because victims going through a criminal trial get cross-examined, and even though false allegations are rare, where there is one, it should be taken care of in accordance with due process.

A few commenters supported the cross-examination requirement because full and fair adversarial procedures are likely to reduce bias in decision making. One commenter quoted

Supreme Court criminal law decisions for the proposition that the adversarial "system is premised on the well-tested principle that truth – as well as fairness – is 'best discovered by powerful statements on both sides of the question.'"[1193] Another commenter asserted that nothing can completely eliminate sex or racial bias in a system but bias can be reduced by expanding the evidence considered by decision-makers, such as by requiring a full investigation and cross-examination.[1194] One commenter asserted that it is within the Department's jurisdiction to create regulations about cross-examination and other procedures that reduce impermissible implicit bias on the basis of sex stereotypes and unconscious sex-bias.[1195]

A few commenters supported cross-examination because both parties need due process including the right to use cross-examination to establish credibility so that each party has their stated facts scrutinized to find the truth. Some commenters asserted that cross-examination ensures a level of fairness that benefits all parties involved in Title IX cases. A few commenters believed the proposed rules, including the cross-examination requirement, provide a fair and equal opportunity for both sides. One commenter argued that cross-examination holds a great benefit to both parties and allows the investigator and other staff on the case to hear both sides of

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[1193] Commenters cited: *Penson v. Ohio*, 488 U.S. 75, 84 (1988) (quoting Irving R. Kaufman, *Does the Judge Have a Right to Qualified Counsel?*, 61 AM. BAR. ASS'N J. 569, 569 (1975)); *United States v. Cronic*, 466 U.S. 648, 656 (1984) (describing the "crucible of meaningful adversarial testing"); *Cal. v. Green*, 399 U.S. 149, 158 (1970) (describing cross-examination as the "greatest legal engine ever invented for the discovery of truth") (internal quotation marks and citations omitted). Several commenters paraphrased the "greatest legal engine ever invented for discovery of truth" passage without citing to the Supreme Court case or the Wigmore treatise from which it originates.

[1194] Commenters cited: Stephen P. Klein *et al.*, *Race and Imprisonment Decisions in California*, 24 SCIENCE 812 (1990) (for the proposition that most decisions after a full trial are not based on using race as a proxy, but rather on evidence at trial, resulting in racially fair decisions).

[1195] Commenters cited: *Maryland v. Craig*, 497 U.S. 836, 846 (1990) (quoting *Cal. v. Green*, 399 U.S. 149, 158 (1970)) for the proposition that when procedures typical to our adjudicative processes, such as cross-examination, are introduced into university grievance proceedings such procedures allow for the "discovery of the truth" in a manner that reduces stereotyping.

the story; another commenter stated there are two sides to every issue and both sides must be questioned. One commenter supported the cross-examination requirement and stated that current, unfair procedures harm respondents who are women, and who are gay or lesbian, as well as respondents who are men, giving examples such as a young woman the commenter represented who was so drunk she could not have consented to sex and yet was expelled because the male filed with the Title IX office first. Several commenters asserted that cross-examination is as beneficial for the recipient as for the parties because the decision-maker has the opportunity to observe and judge the credibility of parties and witnesses, thereby serving the recipient's interest in reaching accurate determinations.

Another commenter argued that the opportunity to cross-examine witnesses is a procedural protection that should not be controversial given it is a bedrock principle of the American criminal justice system designed to create a more reliable fact finding process. The commenter believed that a reliable process is in the interest of all parties including recipients, because greater reliability will lead to greater acceptance of the legitimacy of the decisions. This commenter also asserted that institutional opposition to basic notions of due process has led to widespread mistrust of the decision-making processes of Title IX offices, evidenced by the prevalence of Federal lawsuits challenging Title IX decisions made by institutions. The commenter argued that institutions must conform their Title IX procedures to basic notions of due process to establish the legitimacy of their decisions.

One commenter argued that it is unfair to a complainant not to be able to cross-examine a respondent or witnesses. At least one commenter argued that cross-examination will provide greater reliability, which should encourage complainants to report harassment and further support Title IX's objective of protecting the educational environment. One commenter argued

that giving respondents a full hearing with cross-examination means that victims of "contemptible rapists" can exact justice, and that even if answering questions about painful memories is difficult it is worth it to make sure that rape accusations are not approached lightly. Another commenter asserted that claiming that having an accusation examined is too traumatic for a complainant infantilizes complainants. Several commenters argued that even though testifying about traumatic events is difficult and uncomfortable, testimony from any party that is never questioned cannot be evaluated for truthfulness.

Some commenters supported the proposed rules, and cross-examination as the opportunity to test the credibility of claims, because, commenters asserted, women reject the trampling of constitutional rights in the name of women's rights. One commenter supported live hearings and cross-examination conducted through advisors, including attorneys, because students will have an opportunity to learn about how misconduct allegations are factually examined and determined.

Some commenters supported § 106.45(b)(6)(i) but requested that the provision be expanded to expressly give parties the right to also cross-examine any investigator or preparer of an investigative report, because the entire grievance procedure is often based on the findings in the investigative report and it is thus essential that the parties be able to cross-examine the individuals who prepared the report to probe how conclusions were reached and whether the report is credible.

Discussion: The Department appreciates commenters' support for the requirement in § 106.45(b)(6)(i) that postsecondary institutions must hold live hearings with cross-examination conducted by party advisors. The Department agrees with commenters who observed that several appellate courts over the last few years have carefully considered the value of cross-examination

in high-stakes student misconduct proceedings in colleges and universities and concluded that part of a meaningful opportunity to be heard includes the ability to challenge the testimony of parties and witnesses. The Department agrees with commenters who noted that this conclusion has been reached by courts both in the context of constitutional due process in public institutions and a fair process in private institutions. The Department agrees with commenters who observed that some States already provide rights to a robust hearing and cross-examination under State APA laws, demonstrating that the notion of live hearings and cross-examination is not new or foreign to many postsecondary institutions. The Department is aware that many postsecondary institutions have created disciplinary systems for sexual misconduct issues that intentionally avoid live hearings and cross-examination, due to concern about retraumatizing sexual assault victims; however, the Department agrees with commenters that in too many instances recipients who have refused to permit parties or their advisors to conduct cross-examination and instead allowed questions to be posed through hearing panels have stifled the value of cross-examination by, for example, refusing to ask relevant questions posed by a party, changing the wording of a party's question, or refusing to allow follow-up questions.

The Department agrees with commenters that cross-examination serves the interests of complainants, respondents, and recipients, by giving the decision-maker the opportunity to observe parties and witnesses answer questions, including those challenging credibility, thus serving the truth-seeking purpose of an adjudication. The Department acknowledges that Title IX grievance processes are not criminal proceedings and thus constitutional protections available to criminal defendants (such as the right to confront one's accuser under the Sixth Amendment) do not apply in the educational context; however, the Department agrees with commenters that cross-examination is a valuable tool for resolving the truth of serious allegations such as those

presented in a formal complaint of sexual harassment. The Department emphasizes that cross-examination that may reveal faulty memory, mistaken beliefs, or inaccurate facts about allegations does *not* mean that the party answering questions is necessarily lying or making intentionally false statements. The Department's belief that cross-examination serves a valuable purpose in resolving factual allegations does not reflect a belief that false accusations occur with any particular frequency in the context of sexual misconduct proceedings. However, the degree to which any inaccuracy, inconsistency, or implausibility in a narrative provided by a party or witness should affect a determination regarding responsibility is a matter to be decided by the decision-maker, after having the opportunity to ask questions of parties and witnesses, and to observe how parties and witnesses answer the questions posed by the other party.

The Department agrees with commenters that the truth-seeking function of cross-examination can be achieved while mitigating any re-traumatization of complainants because under the final regulations: cross-examination is only conducted by party advisors and not directly or personally by the parties themselves; upon any party's request the entire live hearing, including cross-examination, must occur with the parties in separate rooms; questions about a complainant's prior sexual behavior are barred subject to two limited exceptions; a party's medical or psychological records can only be used with the party's voluntary consent;[1196] recipients are instructed that only relevant questions must be answered and the decision-maker must determine relevance prior to a party or witness answering a cross-examination question;

[1196] Section 106.45(b)(5)(i) (providing that a party's treatment records can only be used in a grievance process with that party's voluntary, written consent).

and recipients can oversee cross-examination in a manner that avoids aggressive, abusive questioning of any party or witness.[1197]

The Department agrees with commenters that sex bias is a unique risk in the context of sexual harassment allegations, where the case often turns on plausible, competing factual narratives of an incident involving sexual or sex-based interactions, and application of sex stereotypes and biases may too easily become a part of the decision-making process. The Department agrees with commenters that ensuring fair adversarial procedures lies within the Department's authority to effectuate the purpose of Title IX because such procedures will prevent and reduce sex bias in Title IX grievance processes and better ensure that recipients provide remedies to victims of sexual harassment.

The Department agrees with commenters that cross-examination equally benefits complainants and respondents, and that both parties in a high-stakes proceeding raising contested factual issues deserve equal rights to fully participate in the proceeding. This ensures that the decision-maker observes each party's view, perspective, opinion, belief, and recollection about the incident raised in the formal complaint of sexual harassment. The Department agrees with commenters who note that any person can be a complainant, and any person can be a respondent, regardless of a person's race, sexual orientation, gender identity, or other personal characteristic, and each party, in every case, deserves the opportunity to promote and advocate for the party's unique interests.

[1197] Section 106.45(b) (introductory sentence as revised in the final regulations provides that any provisions, rules, or practices other than those required by § 106.45 that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in § 106.30, must apply equally to both parties).

The Department agrees with commenters that postsecondary-level adjudications with live hearings and cross-examination will increase the reality and perception by parties and the public that Title IX grievance processes are reaching fair, accurate determinations, and that robust adversarial procedures improve the legitimacy and credibility of a recipient's process, making it more likely that no group of complainants or respondents will experience unfair treatment or unjust outcomes in Title IX proceedings (for example, where formal complaints involve people of color, LGBTQ students, star athletes, renowned faculty, etc.).

The Department agrees with commenters that cross-examination is as powerful a tool for complainants seeking to hold a respondent responsible as it is for a respondent, and that a determination of responsibility reached after a robust hearing benefits victims by removing opportunity for the respondent, the recipient, or the public to doubt the legitimacy of that determination. The Department agrees with commenters that there is no tension between providing strong procedural protections aimed at discovering the truth about allegations in each particular case, and upholding the rights of women (and every person) to participate in education programs or activities free from sex discrimination. The Department appreciates a commenter's belief that observing a live hearing with cross-examination may provide students with opportunity to learn about adjudicatory processes, though the Department notes that the purpose of the § 106.45 grievance process is to reach factually reliable determinations so that sex discrimination in the form of sexual harassment is appropriately remedied by recipients so that no student's educational opportunities are denied due to sex discrimination.

The Department understands commenters' point that often a case is shaped and directed by the evidence gathered and summarized by the investigator in the investigative report, including the investigator's findings, conclusions, and recommendations. The Department

emphasizes that the decision-maker must not only be a separate person from any investigator, but the decision-maker is under an obligation to objectively evaluate all relevant evidence both inculpatory and exculpatory, and must therefore independently reach a determination regarding responsibility without giving deference to the investigative report. The Department further notes that § 106.45(b)(6)(i) already contemplates parties' equal right to cross-examine any witness, which could include an investigator, and § 106.45(b)(1)(ii) grants parties equal opportunity to present witnesses including fact and expert witnesses, which may include investigators.

Changes: None.

Retraumatizing Complainants

Comments: Many commenters opposed § 106.45(b)(6)(i) requiring postsecondary institutions to hold live hearings with cross-examination conducted by the parties' advisors. Commenters argued that cross-examination is an adversarial, contentious procedure that will revictimize, retraumatize, and scar survivors of sexual harassment; that cross-examination will exacerbate survivors' PTSD (post-traumatic stress disorder),[1198] RTS (rape trauma syndrome), anxiety, and depression; and cross-examination will interrogate victims like they are the criminals, rub salt in

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[1198] Commenters cited: Anke Ehlers & David M. Clark, *A Cognitive Model of Posttraumatic Stress Disorder*, 38 BEHAVIOR RESEARCH & THERAPY 4 (2000); Mary P. Koss, *Blame, Shame, and Community: Justice Responses to Violence Against Women*, 55 AM. PSYCHOL. 11 (2000); Sue Lees, *Carnal Knowledge: Rape on Trial* (Hamish Hamilton 2002); Sue Lees & Jeanne Gregory, *Attrition in Rape and Sexual Assault Cases*, 36 BRITISH J. OF CRIMINOLOGY 1 (1996); Amanda Konradi, *"I Don't Have To Be Afraid of You": Rape Survivors' Emotion Management in Court*, 22 SYMBOLIC INTERACTION 1 (1999); Venezia Kingi & Jan Jordan, *Responding to Sexual Violence: Pathways to Recovery*, Wellington: Ministry of Women's Affairs (2009); Mary P. Koss *et al.*, *Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance*, 15 TRAUMA VIOLENCE & ABUSE 3 (2014); Fiona Mason & Zoe Lodrick, *Psychological Consequences of Sexual Assault*, 27 BEST PRACTICE & RESEARCH CLINICAL OBSTETRICS & GYNECOLOGY 1 (2013); National Center on Domestic Violence, Trauma & Mental Health, *Representing Domestic Violence Survivors Who Are Experiencing Trauma and Other Mental Health Challenges: A Handbook for Attorneys* (2011); Kaitlin Chivers-Wilson, *Sexual Assault and Posttraumatic Stress Disorder: A Review of The Biological, Psychological and Sociological Factors and Treatments*, 9 MCGILL J. OF MED.: MJM: AN INT'L FORUM FOR THE ADVANCEMENT OF MEDICAL SCIENCES BY STUDENTS 2 (2006).

victims' wounds, put rape victims through a second rape, and essentially place the victim on trial when victims are already trying to heal from a horrific experience. Commenters argued that no other form of misconduct gives respondents the right to "put on trial" the person accusing the respondent of wrongdoing; one commenter argued that for instance, professors accusing a student of cheating are not "put on trial," a student accusing another student of vandalism is not "put on trial," so singling out sexual misconduct complainants for a procedure designed to intimidate and undermine the complainant's credibility heightens the misperception that the credibility of sexual assault complainants is uniquely suspect. Other commenters acknowledged that some recipients do use cross-examination in non-sexual misconduct hearings because cross-examination can be helpful in getting to the heart of the allegations; these commenters asserted that Title IX hearings are different due to the subject matter and relationships between the parties and cross-examination is inappropriate in sexual misconduct proceedings.

Commenters argued that fear of undergoing such a retraumatizing experience will chill reporting of sexual harassment and cause more victims to stay in the shadows because survivors will have no non-traumatic options in the wake of sexual violence.[1199] Commenters asserted that coming forward is hard enough for victims because often the trauma has resulted in nightmares, intrusive thoughts, inability to concentrate, and hypervigilance, and the prospect of facing

[1199] Many commenters cited to information regarding low rates of reporting of sexual harassment such as the data noted in the "Reporting Data" subsection of the "General Support and Opposition" section of this preamble, in support of arguments that cross-examination will further reduce rates of reporting. Commenters also cited: Joanne Belknap, *Rape: Too Hard to Report and Too Easy to Discredit Victims*, 16 VIOLENCE AGAINST WOMEN 12 (2010); Suzanne B. Goldberg, *Keep Cross-examination Out of College Sexual-Assault Cases*, CHRONICLE OF HIGHER EDUCATION (Jan. 10, 2019).

grueling, retraumatizing cross-examination will result in even fewer students coming forward.[1200] Commenters argued that reporting will be especially chilled with respect to claims against faculty members, where a power differential already exists.

Commenters believed cross-examination creates secondary victimization, which commenters referred to as a result of interacting with community service providers who engage in victim-blaming attitudes.[1201] Some commenters believed it is cruel to let victims be cross-examined by the person who committed the assault, or to force a victim to be face-to-face with the perpetrator. Some commenters believed that a public hearing where a victim must be cross-examined would be severely traumatizing.

Commenters asserted that anyone taken advantage of by sexual harassment should be able to voice that experience without fear of a traumatizing court case. Commenters argued that subjecting a victim courageous enough to come forward to the re-traumatization of cross-examination is an invasion of the victim's right to privacy and safety. Commenters asserted that as survivors, they have experienced stress, anxiety, nausea, and fear simply from passing by their attackers, and the thought of being cross-examined near their attacker makes these commenters believe they would not be able to speak at all due to fear, would feel permanently traumatized,

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[1200] Commenters cited: Judith Lewis Herman, *Justice From the Victim's Perspective*, 11 VIOLENCE AGAINST WOMEN 5 (2005) for the proposition that cross-examination is inherently retraumatizing and can trigger vivid memories forming one of the "psychological barriers that discourage victim participation[.]" Commenters also cited: Gregory Matoesian, *Reproducing Rape: Domination through Talk in the Courtroom* (Univ. of Chicago Press 1993); Michelle J. Anderson, *Women Do Not Report the Violence They Suffer: Violence Against Women and the State Action Doctrine*, 46 VILL. L. REV. 907, 932, 936-37 (2001); Tom Lininger, *Bearing the Cross*, 74 FORDHAM L. REV. 1353, 1357 (2005); Anoosha Rouhanian, *A Call for Change: The Detrimental Impacts of Crawford v. Washington on Domestic Violence and Rape Prosecutions*, 37 BOSTON COLL. J. OF L. & SOCIAL JUSTICE 1 (2017).

[1201] Commenters cited to information regarding secondary victimization and institutional betrayal such as the data noted in the "Commonly Cited Sources" subsection of the "General Support and Opposition" section of this preamble, including, for example, Rebecca Campbell, *Survivors' Help-Seeking Experiences With the Legal and Medical Systems*, 20 VIOLENCE & VICTIMS 1 (2005). Commenters also cited: Jim Parsons & Tiffany Bergin, *The Impact of Criminal Justice Involvement on Victims Mental Health*, 23 JOURNAL OF TRAUMATIC STRESS 2 (2010).

would drop out of school, or would even contemplate suicide.[1202] Commenters shared personal experiences feeling traumatized by cross-examination in Title IX proceedings, stating that even where a complainant won the case, the experience of cross-examination was so mentally and emotionally taxing that complainants suffered years of mental health treatment, felt unable to perform academically, or dropped out of school.

Some commenters supported reform of school discipline procedures and agreed that complainants and respondents should be treated the same when it comes to procedural rights including a right of cross-examination, but argued that recipients should be allowed discretion to decide whether, or how, to incorporate cross-examination into Title IX grievance processes so long as the decision applies equally to both parties, and that it is intrusive and myopic for the Department to unilaterally impose procedures onto sexual misconduct processes, especially in a way that, in the commenters' views, tilts the system against victims of sexual harassment.

Discussion: The Department believes that cross-examination as required under § 106.45(b)(6)(i) is a necessary part of a fair, truth-seeking grievance process in postsecondary institutions, and that these final regulations apply safeguards that minimize the traumatic effect on complainants. We have revised § 106.45(b)(6)(i) to clearly state that the entire live hearing (and not only cross-examination) must occur with the parties in separate rooms, at the request of any party; that cross-examination must never be conducted by a party personally; and that only relevant cross-examination questions must be answered and the decision-maker must determine the relevance of a cross-examination question before a party or witness answers. Recipients may adopt rules

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[1202] Commenters cited: Amelia Gentleman, *Prosecuting Sexual Assault: "Raped All Over Again,"* THE GUARDIAN (Apr. 13, 2013) for the story of a woman who committed suicide shortly after being cross-examined in a criminal trial in England.

that govern the conduct and decorum of participants at live hearings so long as such rules comply with these final regulations and apply equally to both parties.[1203] We understand that cross-examination is a difficult and potentially traumatizing experience for any person, perhaps especially a complainant who must answer questions about sexual assault allegations. These final regulations aim to ensure that the truth-seeking value and function of cross-examination applies for the benefit of both parties while minimizing the discomfort or traumatic impact of answering questions about sexual harassment.

While the Department acknowledges that complainants may find a cross-examination procedure emotionally difficult, the Department believes that a complainant can equally benefit from the opportunity to challenge a respondent's consistency, accuracy, memory, and credibility so that the decision-maker can better assess whether a respondent's narrative should be believed. The complainant's advisor will conduct the cross-examination of the respondent and, thus, the complainant will not be retraumatized by having to personally question the respondent. The Department disagrees that cross-examination places a victim (or any party or witness) "on trial" or constitutes an interrogation; rather, cross-examination properly conducted simply constitutes a procedure by which each party and witness answers questions posed from a party's unique perspective in an effort to advance the asking party's own interests. The Department disagrees that cross-examination implies that sexual assault complainants are uniquely unreliable; rather, to the extent that cross-examination implies anything about credibility, the Department notes that by giving both parties *equal* cross-examination rights, the final regulations contemplate that a

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[1203] As revised, the introductory sentence of § 106.45(b) provides: "Any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in § 106.30, must apply equally to both parties."

complainant's allegations, and a respondent's denials, equally warrant probes for credibility and truthfulness.

The Department appreciates commenters' observations that some recipients do not use live hearings or cross-examination for any form of misconduct charges while other recipients use hearings and cross-examination for some types of misconduct but not for sexual misconduct. The Department does not opine through these final regulations as to whether cross-examination is beneficial for non-sexual harassment misconduct allegations because the Department's focus in these final regulations are the procedures most likely to reach reliable outcomes in the context of Title IX sexual harassment. The Department agrees with commenters who note that sexual harassment allegations present unique circumstances, but disagrees that the subject matter or relationships between parties involved in sexual harassment allegations make cross-examination less useful than for other types of misconduct allegations. Rather, the Department believes that precisely because the subject matter involves sensitive, personal matters presenting high stakes and long-lasting consequences for both parties, robust procedural rights for both parties are all the more important so that each party may fully, meaningfully put forward the party's viewpoints and beliefs about the allegations and the case outcome.

The Department acknowledges that predictions of harsh, aggressive, victim-blaming cross-examination may dissuade complainants from pursuing a formal complaint out of fear of undergoing questioning that could be perceived as an interrogation. However, recipients retain discretion under the final regulations to educate a recipient's community about what cross-examination during a Title IX grievance process will look like, including developing rules and

practices (that apply equally to both parties)[1204] to oversee cross-examination to ensure that questioning is relevant, respectful, and non-abusive. We have revised § 106.45(b)(6)(i) to specifically state that only relevant cross-examination questions must be answered and the decision-maker must determine the relevance of a cross-examination question before the party of witness answers. We have revised § 106.45(b)(1)(iii) to specifically require decision-makers to be trained on conducting live hearings and determining relevance (including the non-relevance of questions and evidence about a complainant's prior sexual history). The Department also notes that recipients must comply with obligations under applicable disability laws, and that the final regulations contemplate that disability accommodations (e.g., a short-term postponement of a hearing date due to a party's need to seek medical treatment for anxiety or depression) may be good cause for a limited extension of the recipient's designated, reasonably prompt time frame for the grievance process.[1205]

The Department understands that victims of sexual violence often experience PTSD and other significant negative impacts, and that participating in a grievance process may exacerbate these impacts. The Department believes that the final regulations appropriately provide a framework under which a recipient must offer supportive measures to each complainant (without waiting for a factual adjudication of the complainant's allegations),[1206] and provide remedies for a complainant where the respondent is found responsible following a fair grievance process.[1207]

[1204] The introductory sentence of § 106.45(b) expressly permits recipients to adopt rules for the Title IX grievance process so long as such rules are applied equally to both parties.
[1205] Section 106.45(b)(1)(v).
[1206] Section 106.44(a) (recipients must offer supportive measures to a complainant, and the Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint).
[1207] Section 106.45(b)(1)(i).

Complainants can receive supportive measures from a recipient, and each complainant can decide whether, in addition to supportive measures, participating in a grievance process is a step the complainant wants to take.[1208] In this manner, these final regulations respect the complainant's autonomy. The Department therefore disagrees with commenters who asserted that under the final regulations complainants will have "no non-traumatic options" and will feel deterred from reporting; complainants can report sexual harassment and receive supportive measures without even filing a formal complaint, much less participating in a grievance process or undergoing cross-examination. This option for reporting exists regardless of the identity of the respondent (e.g., whether the respondent is an employee, faculty member, or student), and therefore all complainants have the same non-traumatic reporting option regardless of any real or perceived power differential between the complainant and respondent.

The Department disagrees that including cross-examination as a procedure in the grievance process constitutes institutional betrayal. Cross-examination does not inherently involve victim-blaming attitudes, and as noted above, recipients retain wide discretion under the final regulations to adopt rules and practices designed to ensure that cross-examination occurs in a respectful, non-abusive manner. Further, the reason cross-examination must be conducted by a party's advisor, and not by the decision-maker or other neutral official, is so that the recipient remains truly neutral throughout the grievance process. To the extent that a party wants the other party questioned in an adversarial manner in order to further the asking party's views and interests, that questioning is conducted by the party's own advisor, and not by the recipient.

[1208] Section 106.71 (prohibiting retaliation for exercise of rights under Title IX and specifically protecting any individual's right to not participate in a grievance process).

Thus, no complainant (or respondent) need feel as though the recipient is "taking sides" or otherwise engaging in cross-examination to make a complainant feel as though the recipient is blaming or disbelieving the complainant.

The Department appreciates the opportunity to clarify that contrary to the fears of some commenters, § 106.45(b)(6)(i) prohibits any complainant from being questioned directly by the respondent; rather, only party *advisors* can conduct cross-examination. We have revised § 106.45(b)(6)(i) specifically to state that cross-examination must occur "directly, orally, and in real-time" by the party's advisor and "never by a party personally." Similarly, § 106.45(b)(6)(i) is revised to require recipients to hold the entire live hearing (and not just cross-examination) with the parties in separate rooms (facilitated by technology) so that the parties need never be face-to-face, upon a party's request. Similarly, the Department notes that the live hearing is not a "public" hearing, and the final regulations add § 106.71 that requires recipients to keep party and witness identities confidential except as permitted by law and as needed to conduct an investigation or hearing.

The Department understands commenters' concerns that sexual harassment victims have already suffered the underlying conduct and that participating in a grievance process may be difficult for victims. However, before allegations may be treated as fact (i.e., before a complainant can be deemed a victim of particular conduct by a particular respondent), a fair process must reach an accurate outcome, and in situations that involve contested allegations, procedures designed to discover the truth by permitting opposing parties each to advocate for their own viewpoints and interests are most likely to reach accurate outcomes based on facts and evidence rather than assumptions and bias.

The Department disagrees that adjudication via a live hearing with cross-examination invades a complainant's privacy or risks a complainant's safety. The final regulations revise § 106.45(b)(5) to ensure that recipients do not access or use any party's treatment records without obtaining the party's written consent, thus limiting the type of sensitive, private information that becomes part of a § 106.45 grievance process without a party's consent. Further, § 106.45(b)(5)(vi) limits the exchange of evidence from an investigation only to evidence directly related to the allegations in the formal complaint. Additionally, § 106.45(b)(6)(i) deems questions and evidence regarding a complainant's prior sexual behavior or sexual predisposition to be irrelevant, with specified exceptions, to further protect complainants' privacy, and upon a party's request the entire live hearing must be held with the parties located in separate rooms. The Department disagrees that an adjudication process that includes a live hearing with cross-examination jeopardizes any party's safety, particularly with the privacy and anti-retaliation provisions referenced above, and the Department further notes that safety-related measures remain available under the final regulations including the ability for a recipient to impose no-contact orders on the parties under § 106.30 defining "supportive measures," or to remove a respondent on an emergency basis under § 106.44(c). Further, a complainant also retains the ability to obtain an order of protection (e.g., a restraining order) from a court of law.

The Department understands commenters' concerns about the prospect of cross-examination, and appreciates commenters' personal experiences with the difficulties of cross-examination, but reiterates that cross-examination essentially consists of questions posed from one party's perspective to advance the asking party's views about the allegations at issue, that recipients retain discretion to control the conduct of cross-examination in a manner that ensures that no party is treated abusively or disrespectfully, that only relevant cross-examination

questions must be answered, and that either party may demand that the live hearing occur with the parties in separate rooms. Based on comments from many recipients, the Department believes that recipients desire to treat all their students and employees with dignity and respect, and that recipients will therefore conduct hearings in a manner that keeps the focus on respectful questioning regarding the allegations at issue while permitting each party (through advisors) to advocate for the party's own interests before the decision-maker.

The Department appreciates commenters' support for ensuring that both parties have equal rights with respect to cross-examination, but disagrees that § 106.45(b)(6)(i) is intrusive or myopic because, for reasons explained throughout this preamble, the Department has determined that in the context of resolution of Title IX sexual harassment allegations the procedures in § 106.45 constitute those procedures necessary to ensure consistent, predictable application of Title IX rights, and does not believe that cross-examination in the postsecondary context tilts the system against sexual harassment victims. An equal right of cross-examination benefits complainants as well as respondents, by permitting complainants to participate in advocating for their own view of the case so that a decision-maker is more likely to reach an accurate determination, and where a respondent is found responsible the victim will receive remedies designed to restore or preserve equal access to education.

Changes: We have revised § 106.45(b)(6)(i) to state that cross-examination must occur "directly, orally, and in real-time" by a party's advisor "and never by a party personally" and that upon a party's request the entire live hearing (not only cross-examination) must occur with the parties located in separate rooms (with technology enabling participants to see and hear each other). We have further revised § 106.45(b)(6)(i) to state that only relevant cross-examination questions must be answered, and the decision-maker must determine the relevance of a cross-examination

or other question before the party or witness answers the question (and explain any decision to exclude a question as not relevant). The final regulations add § 106.71 prohibiting retaliation and providing in relevant part that the recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute or regulations, as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

Reducing Truth-Seeking

Comments: Many commenters asserted that cross-examination would mean that complainants are questioned via verbal attacks on the complainant's character rather than sensitively in a respectful manner designed to aid the fact-finding process.[1209] Commenters argued that in criminal cases, it is accepted that the defense counsel's job to put the prosecutor's case in the worst possible light regardless of the truth and to impeach an adverse witness even if the defense attorney believes the witness is telling the truth.[1210]

[1209] Commenters cited: Abbe Smith, *Representing Rapists: The Cruelty of Cross-Examination and Other Challenges for a Feminist Criminal Defense Lawyer*, 53 AM. CRIM. L. REV. 255, 290 (2016) (noting that a defense attorney recently acknowledged, "Especially when the defense is fabrication or consent – as it often is in adult rape cases – you have to go *at* the witness. There is no way around this fact. Effective cross-examination means exploiting every uncertainty, inconsistency, and implausibility. More, it means attacking the witness's very character.") (emphasis in original).

[1210] Commenters cited: *United States v. Wade*, 388 U.S. 218, 257-58 (1967) (White, J., dissenting in part and concurring in part) for the proposition that Justice Byron White explained five years before Title IX was enacted that cross-examination "in many instances has little, if any, relation to the search for the truth." Instead, at least in criminal cases, it is accepted that defense counsel's job is "to put the State's case in the worst possible light,

Commenters argued that cross-examinations are just emotional beatings to twist survivors' perception and memory and lead them to mistakenly admit to or believe in false information, make the survivor feel insecure about what really happened, challenge the legitimacy of the survivor's experience, and therefore lead to an unjust outcome. Commenters argued that cross-examination took the place of torture in our legal system and remains a brutal exercise.[1211] Commenters stated that when working with victims as clients, victims' number one fear is often cross-examination whether in a civil court or criminal court; while they do not fear the truth, they fear defense lawyers' attempts to confuse them and blame them for not remembering every single part of the story even when it was drug or alcohol induced, and they fear telling their story to near strangers and still not getting the justice and safety they need. Commenters argued that cross-examination is designed to engage in DARVO (deny, attack, reverse victim/offender) strategies that harm victims. Commenters argued that even cases that seem to be "he said/she said" often involve more evidence than just the parties' statements,[1212] so

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regardless of what he thinks or knows to be the truth" and to "cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth." *Id.* Commenters also cited: Louise Ellison, *The Mosaic Art: Cross-Examination and the Vulnerable Witness*, 21 LEGAL STUDIES 353, 366, 368-369, 373-375 (2001); John Spencer, "Conclusions," *in Children and Cross-Examination: Time to Change the Rules?* 189 (John Spencer & Michael Lamb eds., Hart Publishing 2012).

[1211] Commenters cited: David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004, 1027-28 (1990) (examining the legal ethics of cross-examinations in rape cases, even with rape shield laws in place) ("To make it seem plausible that the victim consented and then turned around and charged rape, the lawyer must play to the jurors' deeply rooted cultural fantasies about feminine sexual voracity and vengefulness. All the while, without seeming like a bully, the advocate must humiliate and browbeat the prosecutrix, knowing that if she blows up she will seem less sympathetic, while if she pulls inside herself emotionally she loses credibility as a victim. Let us abbreviate all of this simply as 'brutal cross-examination.'"). Commenters also cited: 5 John Henry Wigmore, *Evidence in Trials at Common Law* § 1367 (James H. Chabourn ed., Little Brown 1974) (Wigmore explained that "in more than one sense" cross-examination took "the place in our system which torture occupied in the medieval system of the civilians.").

[1212] Commenters cited: Eliza Lehner, *Rape Process Templates: A Hidden Cause of the Underreporting of Rape*, 29 YALE J. OF L. & FEMINISM 1 (2018).

cross-examination is unnecessary and may disincentivize recipients from conducting a full investigation that uncovers relevant evidence.

Many commenters believed the negative results of cross-examination would be heightened by the proposed rules' requirement that cross-examination be conducted by a party's advisor, who could be a respondent's angry parent, fraternity brother, roommate, or other person untrained in conducting cross-examination and holding severe bias against the complainant. Some commenters asserted that cross-examination by advisors would turn misconduct hearings into unregulated kangaroo courts where untrained, unskilled non-attorney advisors are "playing attorney" yet eliciting little or no useful information. Commenters argued that in court trials, the parties themselves feel constrained to come across to judges and juries as nice, earnest, and sympathetic, while attorneys feel free to "take the gloves off" when cross-examining the opposing party and the same dynamic would prevail in college disciplinary hearings.

Some commenters asserted that telling complainants that they will be cross-examined by a lawyer or a respondent's parent, roommate, or fraternity brother will make the complainant feel as though the university the complainant should be able to trust is throwing the complainant to proverbial wolves. One commenter recounted being questioned by a respondent's advisor of choice and asserted that the advisor spoke to the commenter in a disempowering, blaming, and condescending way, fueling the commenter's feelings of being traumatized and harming the commenter's ability to function as a student. Some commenters asserted that allowing questioning to take place through an advisor removes accountability students should have for their own actions and will result in students blaming their advisors for poor conduct during a hearing.

Many commenters opposed the cross-examination requirement because the proposed rules do not guarantee procedural protections that accompany cross-examination in criminal or civil trials, such as the right to representation by counsel, rules of evidence,[1213] and a judge ruling on objections. Commenters argued that cross-examination is only potentially useful for discovering the truth when used by skilled lawyers in courtrooms overseen by experienced judges, and that in the hands of untrained, inexperienced advisors will be only a tool to trap, harass, and blame complainants rather than discern truth about allegations.[1214] Commenters asserted that colleges will not adequately protect parties from inappropriate or irrelevant questions, so that cross-examination will intrude into irrelevant details about victims' private lives, reputations, and trustworthiness. Commenters argued that institutions have no power to hold an attorney in contempt, and attorneys are trained to be very aggressive, and thus institutions will not be able to control overly hostile, abusive party advisors who are attorneys. Commenters stated that school administrators are ill equipped to make nuanced legal determinations about the relevant scope of questions and answers, and that schools will be too nervous to act to control lawyers, who will run the show and not respect even the few limits placed on cross-examination.

Commenters asserted that even in court where judges oversee defense attorneys, survivors describe cross-examination as the most distressing part of their experience within the

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[1213] Commenters cited: *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 635 (6th Cir. 2005) for the proposition that Federal or State rules of evidence do not apply to college disciplinary proceedings.

[1214] Commenters cited: Francis P. Karam, *The Truth Engine: Cross-Examination Outside the Box* (Themistocles Books 2018) (describing cross-examination as a tool requiring great skill and experience for lawyers to utilize well); Association of Title IX Administrators (ATIXA), *ATIXA Position Statement on Cross-Examining: The Urge to Transform College Conduct Proceedings into Courtrooms* 1 (Oct. 5, 2018) (without the complex procedural and evidentiary rules that apply to cross-examination in courtrooms, in a college setting "emotional or verbal meltdown is considerably more likely than effective probing for truth").

criminal justice system even when the survivors report feeling reasonably able to give accurate evidence.[1215] Commenters asserted that most rape victims face defense lawyer tactics like interrupting, asking for only yes-no answers, asking illogical questions, grilling on minute details of the incident, and asking irrelevant personal questions.[1216] Commenters argued that cross-examination outside a controlled courtroom setting will subject victims to intrusive, retraumatizing questions designed to humiliate, intimidate, and blame them, with no recourse as a victim would have being questioned in front of a judge, thereby weaponizing university proceedings against victims. At least one commenter argued that even in criminal settings, in-person cross-examination is not always required; under some laws vulnerable witnesses such as children are allowed to pre-record evidence in advance rather than testify live.[1217]

Discussion: The Department is aware that the perception, and in some circumstances the reality, of cross-examination in sexual assault cases has felt to victims like an emotional beating under which a skilled defense lawyer tries to twist a survivor's words, question the survivor's experience, or convince a fact-finder to find the defense lawyer's client is innocent by blaming the victim for the sexual assault or discrediting the victim with irrelevant character aspersions.

[1215] Commenters cited: Mark R. Kebbell *et al.*, *Rape Victims' Experiences of Giving Evidence in English Courts: A Survey*, 14 PSYCHIATRY, PSYCHOL. & L. 1 (2007); Shana L. Maier, *I Have Heard Horrible Stories . . . : Rape Victim Advocates' Perceptions of the Revictimization of Rape Victims by the Police and Medical System*, 14 VIOLENCE AGAINST WOMEN 7 (2008) for the proposition that rape victims are often traumatized by seeking help from the health care system too, but traumatic processes should only be used when necessary – e.g., when medical care is needed, or when a criminal trial requires cross-examination.

[1216] Commenters cited: Amanda Konradi, *Taking the Stand: Rape Survivors and the Prosecution of Rapists* (Praeger Publishers(2007); American Bar Association Center of Children and the Law, *Handbook On Questioning Children – A Linguistic Perspective* 48-49 (2d ed. 1999); Annie Cossins, *Cross-examination in Child Sexual Assault Trials: Evidentiary Safeguard or Opportunity to Confuse*, 33 MELBOURNE L. REV. 1, 78-79 (2009) (quoting and summarizing Mark Brennan, *The Discourse of Denial: Cross-examining Child Victim Witnesses*, 23 JOURNAL OF PRAGMATICS 1 (1995)).

[1217] Commenters cited: Elizabeth McDonald & Yvette Tinsley, *Use of Alternative Ways of Giving Evidence by Vulnerable Witnesses: Current Proposals, Issues and Challenges*, VICTORIA UNIV. OF WELLINGTON L. REV. (July 2, 2012) (forthcoming Victoria University of Wellington Legal Research Paper No. 2/2011).

The Department reiterates, however, that the essential function of cross-examination is not to embarrass, blame, humiliate, or emotionally berate a party, but rather to ask questions that probe a party's narrative in order to give the decision-maker the fullest view possible of the evidence relevant to the allegations at issue. The Department disagrees with commenters' assertion that cross-examination is the equivalent of torture; while commenters noted Wigmore's observation that cross-examination has taken the place that torture historically occupied in civil law systems (as opposed to our common law system), such an observation implies that cross-examination differs from torture and is the enlightened, humane manner of testing a witness's testimony. The Department purposefully designed these final regulations to allow recipients to retain flexibility to adopt rules of decorum that prohibit any party advisor or decision-maker from questioning witnesses in an abusive, intimidating, or disrespectful manner.

While the Department understands commenters' concerns that cross-examination has in some situations utilized DARVO strategies, cross-examination does not inherently rely on or necessitate DARVO techniques, and recipients retain discretion to apply rules designed to ensure that cross-examination remains focused on relevant topics conducted in a respectful manner. Recipients are in a better position than the Department to craft rules of decorum best suited to their educational environment. To emphasize that cross-examination must focus only on questions that are relevant to the allegations in dispute, we have revised § 106.45(b)(6)(i) to state that only relevant cross-examination or other questions may be asked of a party or witness, and before a party or witness answers a cross-examination question the decision-maker must

determine whether the question is relevant (and explain a decision to exclude a question as not relevant).[1218]

The Department further reiterates that the tool of cross-examination is equally as valuable for complainants as for respondents, because questioning that challenges a respondent's narrative may be as useful for a decision-maker to reach an accurate determination as questioning that challenges a complainant's narrative. The Department agrees with commenters that even so-called "he said/she said" cases often involve evidence in addition to the parties' respective narratives, and the § 106.45 grievance process obligates recipients to bear the burden of gathering evidence and to objectively evaluate all relevant evidence, both inculpatory and exculpatory, including the parties' own statements as well as other evidence. The Department disagrees that cross-examination disincentivizes recipients from conducting a full investigation that uncovers all relevant evidence, in part because § 106.45 obligates recipients to gather relevant evidence, and in part because cross-examination occurs at the end of the grievance process such that the parties have already had an opportunity to inspect and review the evidence collected by the recipient.

The Department acknowledges commenters' concerns that under § 106.45(b)(6)(i) cross-examination is conducted by party advisors, and the final regulations do not require a party's advisor of choice to be an attorney, nor may a recipient restrict a party's choice of advisor, resulting in scenarios where a party's advisor may be the party's friend or relative or other person who may not be trained or experienced in conducting cross-examination. Regardless of

[1218] We have also revised § 106.45(b)(1)(iii) to specifically require that decision-makers are trained on issues of relevance, including application of the "rape shield" protections in § 106.45(b)(6).

the identity, status, or profession of a party's advisor of choice, a recipient retains discretion under the final regulations to apply rules at a live hearing that require participants to refrain from engaging in abusive, aggressive behavior. Further, regardless of who serves as a party's advisor, recipients are responsible for ensuring that only relevant cross-examination and other questions are asked, and decision-makers must determine the relevance of each cross-examination question before a party or witness answers. Thus, recipients retain the ability and responsibility to ensure that hearings in a § 106.45 grievance process are in no way "kangaroo courts" and instead function as truth-seeking processes.

The Department recognizes that party advisors may be, but are not required to be, attorneys and thus in some proceedings cross-examination on behalf of one or both parties will be conducted by non-lawyers who may be emotionally attached to the party whom they are advising. However, the Department believes that requiring cross-examination to be conducted by party advisors is superior to allowing parties to conduct cross-examination themselves; with respect to complainants and respondents in the context of sexual harassment allegations in an education program or activity, the strictures of the Sixth Amendment do not apply. The Department believes that having advisors as buffers appropriately prevents personal confrontation between the parties while accomplishing the goal of a fair, truth-seeking process. Precisely because a Title IX grievance process is neither a civil nor criminal proceeding in a court of law, the Department clarifies here that conducting cross-examination consists simply of posing questions intended to advance the asking party's perspective with respect to the specific allegations at issue; no legal or other training or expertise can or should be required to ask factual questions in the context of a Title IX grievance process. Thus, the Department disagrees that non-lawyer party advisors will be "playing attorney." The Department notes that a recipient is

free to explain to complainants (and respondents) that the recipient is required by these Title IX regulations to provide cross-examination opportunities. The final regulations do not prevent a recipient from adopting rules of decorum for a hearing to ensure respectful questioning, and thus recipients may re-assure parties that the recipient is not throwing a party to the proverbial wolves by conducting a hearing designed to resolve the allegations at issue.

The Department appreciates commenters who described experiences being questioned by party advisors as feeling like the advisor asked questions in a disempowering, blaming, and condescending way; however, the Department notes that such questioning may feel that way to the person being questioned by virtue of the fact that cross-examination is intended to promote the perspective of the opposing party, and this does not necessarily mean that the questioning was irrelevant or abusive. The Department disagrees that allowing questioning to take place through an advisor removes accountability students should have for their own actions. Under the final regulations, the parties themselves retain significant control and responsibility for their own decisions; the role of an advisor is to assist and advise the party. The Department does not agree that the final regulations encourage students to blame their advisors for poor conduct during a hearing; the final regulations do not preclude a recipient from enforcing rules of decorum that ensure all participants, including parties and advisors, participate respectfully and non-abusively during a hearing. If a party's advisor of choice refuses to comply with a recipient's rules of decorum (for example, by insisting on yelling at the other party), the recipient may require the party to use a different advisor. Similarly, if an advisor that the recipient provides refuses to comply with a recipient's rules of decorum, the recipient may provide that party with a different advisor to conduct cross-examination on behalf of that party. This incentivizes a party to work with an advisor of choice in a manner that complies with a recipient's rules that govern the

conduct of a hearing, and incentivizes recipients to appoint advisors who also will comply with such rules, so that hearings are conducted with respect for all participants.

The Department understands that cross-examination in a Title IX grievance process is not the same as cross-examination in a civil or criminal court, that a § 106.45 grievance process need not be overseen by a judge, and that party advisors need not be attorneys. However, the Department believes that recipients are equipped to oversee and implement a hearing process focused on the relevant facts at issue, including relevant cross-examination questions, without converting classrooms into courtrooms or necessitating that participants be attorneys or judges. To ensure that recipients understand that the individuals serving as a recipient's decision-maker(s) must understand how to conduct a live hearing and how to address relevance issues, we have revised § 106.45(b)(1)(iii) to require decision-makers to receive such training.

The Department agrees with commenters who asserted that postsecondary institutions have already become familiar with the concept of party advisors of choice, that many postsecondary institutions routinely enforce a rule that forbids party advisors from speaking during proceedings (often referred to as a "potted plant" rule), and that this practice demonstrates that postsecondary institutions are capable of appropriately controlling party advisors even without the power to hold attorneys in contempt of court. The Department does not believe that determinations about whether certain questions or evidence are relevant or directly related to the allegations at issue requires legal training and that such factual determinations reasonably can be made by layperson recipient officials impartially applying logic and common sense. The Department believes that recipients are capable of, and committed to, controlling a hearing environment to keep the proceeding focused on relevant evidence and ensuring that participants are treated respectfully, such that a recipient's Title IX grievance process will not be

"weaponized" for or against any party. The Department notes that in criminal proceedings, defendants have a right to self-representation raising the potential for a party to personally conduct cross-examination of witnesses, whereas the final regulations do not grant a right of self-representation and thus avoid the risks of ineffectiveness and trauma for complainants that may arise where a perpetrator personally cross-examines a victim.

The Department acknowledges that even in criminal settings, in-person cross-examination is not always required, and § 106.45(b)(6)(i) has adapted the procedure of cross-examination in a way that avoids importation of criminal law standards, for example by requiring the parties to be in separate rooms (upon either party's request), and disallowing a right of self-representation even if a party would otherwise wish to be self-represented. The Department disagrees, however, that allowing pre-recorded testimony in lieu of answering of questions during a live hearing would sufficiently accomplish the function of cross-examination in the postsecondary context, where the parties' and decision-maker's ability to hear parties' and witness's answers to questions and immediate follow-up questions is the better method of "airing out" all viewpoints about the allegations at issue. Pre-recorded testimony does not, for example, allow a party to challenge in real time any inconsistencies and inaccuracies in the other party's testimony by posing follow-up questions.

Changes: None.

Demeanor Evaluation is Unreliable

Comments: Commenters argued that cross-examination is an opportunity to evaluate the body language and demeanor of a party under questioning for the purpose of assessing credibility[1219] but that while credibility is typically based on a number of factors such as sufficient specific detail, inherent plausibility, internal consistency, corroborative evidence, and demeanor, the most unreliable factor is demeanor. Commenters asserted that research shows how people interpret another person's demeanor is easily misconstrued, what people "read" in facial expression and body language is "highly ambiguous and cannot be interpreted without reference to pre-existing schemas and assumptions,"[1220] a person's ability to judge truthfulness is not better than 50 percent accuracy, and what people often mistake for signs of deception are often actually indicators of stress-coping mechanisms.[1221] Commenters argued that research shows that cross-examination does not accurately assess credibility or yield accurate testimony, especially for vulnerable witnesses such as sexual abuse victims, individuals with intellectual disabilities, or children, and accuracy of children's testimony may be affected by a child's self-esteem, confidence, and the presence of parents during testimony.[1222] Commenters argued that decisions

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[1219] Commenters cited: H. Hunter Bruton, *Cross-Examination, College Sexual-Assault Adjudications, and the Opportunity for Tuning up the Greatest Legal Engine Ever Invented*, 27 CORNELL J. OF L. & PUB. POL'Y 145 (2017).
[1220] Commenters cited: Susan A. Bandes, *Remorse, Demeanor, and the Consequences of Misinterpretation: The Limits of Law as a Window into the Soul*, 3 JOURNAL OF L., RELIGION & ST. 170, 179 (2014).
[1221] Commenters cited: Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1080 (1991) for the proposition that when interviewees are questioned by "suspicious interviewers, subjects tend to view their responses as deceptive even when they are honest" in part because the interrogation places the interviewee under stress, which induces behavior likely to be interpreted as deceptive.
[1222] Commenters cited: Mark W. Bennett, *Unspringing the Witness Memory and Demeanor Trap: What Every Judge and Juror Needs to Know About Cognitive Psychology and Witness Credibility*, 64 AM. UNIV. L. REV. 1331 (2015); Megan Reidy, *Comment: The Impact of Media Coverage on Rape Shield Laws in High-Profile Cases: Is the Victim Receiving a "Fair Trial",* 54 CATH. UNIV. L. REV. 297, 308 (2005); Jules Epstein, *The Great Engine That Couldn't:*

based on observing demeanor could lead to erroneous findings of responsibility when facts do not warrant that outcome, that decision-makers may be more likely to find a respondent responsible after watching an emotional complainant describe an alleged assault, or unfairly view a respondent as not credible just because the respondent seems nervous when the nervousness is due to the serious potential consequences of the hearing. Thus, commenters argued, injecting cross-examination into a Title IX campus adjudication that likely depends on under-trained volunteers to assess credibility, will not improve accuracy of outcomes or increase

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Science, Mistaken Identifications, and the Limits of Cross-Examination, 36 STETSON L. REV. 3 (2007); Tim Valentine & Katie Maras, *The Effect of Cross-Examination on the Accuracy of Adult Eyewitness Testimony*, 25 APPLIED COGNITIVE PSYCHOL. 4 (2011); Jacqueline Wheatcroft & Louise Ellison, *Evidence in Court: Witness Preparation and Cross-Examination Style Effects on Adult Witness Accuracy*, 30 BEHAVIORAL SCI. & THE L. 6 (2012); Rachel Zajac & Harlene Hayne, *I Don't Think That's What Really Happened: The Effect of Cross-examination on the Accuracy' of Children's Reports*, 9 JOURNAL OF EXPERIMENTAL PSYCHOL.: APPLIED 3 (2003); Fiona Jack & Rachel Zajac, *The Effect of Age and Reminders on Witnesses' Responses to Cross-Examination-Style Questioning*, 3 JOURNAL OF APPLIED RESEARCH IN MEMORY & COGNITION 1 (2014); Saskia Righarts *et al.*, *Addressing the Negative Effect of Cross-examination Questioning on Children's Accuracy: Can We Intervene?*, 37 LAW & HUM. BEHAVIOR 5 (2013); Lauren R. Shapiro, *Eyewitness Memory for a Simulated Misdemeanor Crime: The Role of Age and Temperament in Suggestibility*, 19 APPLIED COGNITIVE PSYCHOL. 3 (2005); Emily Henderson, *Bigger Fish to Fry: Should the Reform of Cross-examination Be Expanded Beyond Vulnerable Witnesses*, 19 INT'L J. OF EVIDENCE & PROOF 2 (2015); Rachel Zajac *et al.*, *Disorder in the Courtroom: Child Witnesses Under Cross-examination*, 32 DEVELOPMENTAL REV. 3, 198 (2012); "Cross-examination: Impact on Testimony," *Wiley Encyclopedia of Forensic Science* 656 (Allan Jamieson & Andre Moenssens eds., 2009); Caroline Bettenay *et al.*, *Cross-examination: The Testimony of Children With and Without Intellectual Disabilities*, 28 APPLIED COGNITIVE PSYCHOL. 2 (2014); Joyce Plotnikoff & Richard Woolfson, "'Kicking and Screaming': The Slow Road to Best Evidence," *in Children and Cross-examination: Time to Change the Rules?* 28 (John Spencer & Michael Lamb eds., 2012); Rhiannon Fogliati & Kay Bussey, *The Effects of Cross-examination on Children's Coached Reports*, 21 PSYCHOL., PUB. POL'Y, & L. 1 (2015); Saskia Righarts *et al.*, *Young Children's Responses to Cross-examination Style Questioning: The Effects of Delay and Subsequent Questioning*, 21 PSYCHOL., CRIME & L. 3 (2015); Rhiannon Fogliati & Kay Bussey, *The Effects of Cross-examination on Children's Reports of Neutral and Transgressive Events*, 19 LEGAL & CRIM. PSYCHOL. 2 (2014); Rachel Zajac & Harlene Hayne, *The Negative Effect of Cross-examination Style Questioning on Children's Accuracy: Older Children are Not Immune*, 20 APPLIED COGNITIVE PSYCHOL. 3 (2006); Rachel Zajac *et al.*, *Asked and Answered: Questioning Children in the Courtroom*, 10 PSYCHIATRY, PSYCHOL., & L 1 (2003); Rachel Zajac *et al.*, *The Diagnostic Value of Children's Responses to Cross-examination Questioning*, 34 BEHAVIORAL SCI. & THE L. 1 (2016); John E.B. Myers, *The Child Witness: Techniques for Direct Examination, Cross-examination, and Impeachment*, 18 PACIFIC L. REV. 801, 882, 886, 887, 890, 891 (1987); Gail S. Goodman *et al.*, *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims*, MONOGRAPHS OF THE SOCIETY FOR RESEARCH IN CHILD DEVELOPMENT, Serial no. 229, Vol. 57, No. 5, at p. 85 (1992); Richard S. Ofshe & Richard A. Leo, *The Decision to Confess Falsely, Rational Choice and Irrational Action,* 74 DENV. UNIV. L. REV. 979, 985 (1997); Thomas J. Berndt, *Developmental Changes in Conformity to Peers and Parents*, 15 DEVELOPMENTAL PSYCHOL. 608, 615 (1979).

fairness over the status quo but will make survivors reticent even to report sex discrimination.[1223] Commenters asked what the Department's data-driven basis is for concluding that cross-examination is the most effective procedure for determining truth and credibility. Commenters argued that cross-examination will take an emotional toll on all participants[1224] and that complainants, respondents, and witnesses will all be unwilling to endure it, including because cross-examination could compromise their position in criminal and civil proceedings.

Some commenters argued that cross-examination contemplates a decision-maker observing witnesses to assess credibility based on a witness's demeanor, which increases the danger of racial bias and stereotypes infecting the decision-making process. Commenters argued that Black female students are disadvantaged by cross-examination due to negative, unsupportable stereotypes that Black females are aggressive and sexually promiscuous, and that these students are more likely to be falsely seen as the initiator of sexual harassment or abuse upon cross-examination. Commenters asserted that cross-examination will make male victims scared to report sexual assault perpetrated by a male, for fear of facing a skilled cross-examiner whose aim will be to discredit the male survivor by painting him as an instigator or as having consented to gay sexual activity.

A few commenters argued that cross-examination contradicts the concept of an impartial hearing.

[1223] Commenters cited: Kathryn M. Stanchi, *The Paradox of the Fresh Complaint Rule*, 37 BOSTON COLL. L. REV. 146 (1996); Kathryn M. Stanchi, *Dealing with Hate in the Feminist Classroom*, 11 MICH. J. OF GENDER & L. 173 (2005); Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1014 (1991).

[1224] Commenters cited: Eleanor W. Myers & Edward D. Ohlbaum, *Discrediting the Truthful Witness: Demonstrating the Reality of Adversary Advocacy*, 69 FORDHAM L. REV. 1055 (2000).

Discussion: The Department agrees with commenters who asserted that cross-examination provides opportunity for a decision-maker to assess credibility based on a number of factors, including evaluation of body language and demeanor, specific details, inherent plausibility, internal consistency, and corroborative evidence. Even if commenters correctly characterize research that casts doubt on the human ability to discern truthfulness by observing body language and demeanor, with respect to determining the credibility of a narrative or statement, as commenters acknowledged, such credibility determinations are not based solely on observing demeanor, but also are based on other factors (e.g., specific details, inherent plausibility, internal consistency, corroborative evidence). Cross-examination brings those important factors to a decision-maker's attention in a way that no other procedural device does; furthermore, while social science research demonstrates the limitations of demeanor as a criterion for judging deception, studies demonstrate that inconsistency is correlated with deception.[1225] Thus, cross-examination remains an important part of truth-seeking in adjudicative proceedings, partly because of the live, in-the-moment nature of the questions and answers, and partly because cross-examination by definition is conducted by someone whose very purpose is to advance one side's perspective. When that happens on behalf of each side, the decision-maker is more likely to see and hear relevant evidence from all viewpoints and have more information with which to reach a

[1225] *E.g.*, H. Hunter Bruton, *Cross-Examination, College Sexual-Assault Adjudications, and the Opportunity for Tuning up the Greatest Legal Engine Ever Invented*, 27 CORNELL J. OF L. & PUB. POL'Y, 145, 161 (2017) ("While not all inconsistencies arise from deceit, studies have reliably established a link between consistency in testimony and truth telling. And in general, deceitful witnesses have a harder time maintaining consistency under questioning that builds upon their previous answers.") (internal citations omitted).

determination that better reflects the truth of the allegations.[1226] While commenters contended that some studies cast doubt on the effectiveness of cross-examination in eliciting accurate information, many such studies focus on cross-examination of child victims as opposed to adult victims[1227] and in any event that literature has not persuaded U.S. legal systems to abandon cross-examination, particularly with respect to adults, as the most effective – even if imperfect – tool for pursuing reliable outcomes through exposure of inaccuracy or lack of candor on the part of parties and witnesses.

The Department notes that to the extent that commenters correctly characterize research as indicating that what decision-makers may interpret as signs of deception may in fact be signs of stress, many commenters have pointed out that a grievance process is stressful for both complainants and respondents, and therefore that concern exists for both parties. However, it does not negate the value of cross-examination in bringing to light factors other than demeanor that bear on credibility (such as plausibility and consistency). The final regulations require

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[1226] *Id.* at 158-59 ("Cross-examination highlights the errors of well-intentioned and deceptive witnesses alike. Witnesses can neglect to explain their account fully or make mistakes. When a witness first testifies, her words are 'a selective presentation of aspects of what the witness remembers, organized in a willful or at least a purposeful manner.' Cross-examination breaks down carefully curated narratives: '[it] places in the hands of the cross-examiner some of the means to show the gaps between the truth and the telling of it.' What witnesses think they know may in fact be an illusion constructed by the unholy union between the human's brain fallible nature and outside influences. Probing questioning elicits details that did not appear in the witness's first account. As the witness adds details, his story may change or completely contradict original assertions. Each new detail or differing characterization represents information the fact-finder would not have otherwise received. In so doing, adversarial questioning exposes witness error, or at least the source of possible error. The shortcomings of perception and memory are among the errors that remain hidden without cross-examination. Cross-examination reminds fact-finders that the limitations of perception and memory affect the verisimilitude of all testimony. Without this reminder, fact-finders may place undue weight on witness testimony.") (internal citations omitted).

[1227] *Id.* at 164-65 ("Experimental studies suggest that cross-examination can mislead witnesses and cause them to change accurate answers to inaccurate answers. Admittedly, there are more studies documenting how cross-examination negatively affects the accuracy of child-victims' testimony, but the literature suggesting similar results for adult victims continues to grow. A number of factors contribute to the likelihood that a witness will revise what was at first accurate testimony. . . . Put simply, in many cases, 'honest witnesses can be misled by cross-examination.'") (internal citations omitted).

decision-makers to explain in writing the reasons for determinations regarding responsibility;[1228] if a decision-maker inappropriately applies pre-existing assumptions that amount to bias in the process of evaluating credibility, such bias may provide a basis for a party to appeal.[1229] The Department expects that decision-makers will be well-trained in how to serve impartially, including how to avoid prejudgment of the facts at issue and avoid bias,[1230] and the Department notes that judging credibility is traditionally left in the hands of non-lawyers without specialized training, in the form of jurors who serve as fact-finders in civil and criminal jury trials, because assessing credibility based on factors such as witness demeanor, plausibility, and consistency are functions of common sense rather than legal expertise.

The Department acknowledges that cross-examination may be emotionally difficult for parties and witnesses, especially when the facts at issue concern sensitive, distressing incidents involving sexual conduct. The Department recognizes that not every party or witness will wish to participate, and that recipients have no ability to compel a party or witness to participate. The final regulations protect every individual's right to choose whether to participate by including § 106.71, which expressly forbids retaliating against any person for exercising rights under Title IX including participation or refusal to participate in a Title IX proceeding. Further, § 106.45(b)(6)(i) includes language that directs a decision-maker to reach the determination regarding responsibility based on the evidence remaining even if a party or witness refuses to undergo cross-examination, so that even though the refusing party's statement cannot be considered, the decision-maker may reach a determination based on the remaining evidence so

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[1228] Section 106.45(b)(7).
[1229] Section 106.45(b)(8).
[1230] Section 106.45(b)(1)(iii).

long as no inference is drawn based on the party or witness's absence from the hearing or refusal to answer cross-examination (or other) questions. Thus, even if a party chooses not to appear at the hearing or answer cross-examination questions (whether out of concern about the party's position in a concurrent or potential civil lawsuit or criminal proceeding, or for any other reason), the party's mere absence from the hearing or refusal to answer questions does not affect the determination regarding responsibility in the Title IX grievance process.

The Department acknowledges that in any situation where a complainant has alleged sexual misconduct without the complainant's consent, the possibility exists that the respondent will contend that the sexual conduct was in fact consensual, and that cross-examination in those situations might include questions concerning whether consent was present, resulting in discomfort for complainants in such cases, including for complainants alleging male-on-male sexual violence. However, where a sexual offense turns on the existence of consent and that issue is contested, evidence of consent is relevant and each party's advisor can respectfully ask relevant cross-examination questions about the presence or absence of consent.

The Department disagrees that the cross-examination procedure described in § 106.45(b)(6)(i) contradicts the concept of impartiality of the § 106.45 grievance process. Because these final regulations require each party's advisor, and not the recipient (as the investigator, decision-maker, or other recipient official), to conduct cross-examination, the recipient remains impartial and neutral toward both parties throughout the entirety of the grievance process. By contrast, the parties (through their advisors) are not impartial, are not neutral, and are not objective. Rather, the parties involved in a formal complaint of sexual harassment each have their own viewpoints, beliefs, interests, and desires about the outcome of the grievance process and their participation in the process is for the purpose of furthering their

own viewpoints. Cross-examination is conducted by the parties' advisors, who have no obligation to be neutral, while the recipient remains impartial and neutral with respect to both parties by observing the parties' respective advocacy of their own perspectives and interests and reaching a determination regarding responsibility based on objective evaluation of the evidence. Thus, the grievance process remains impartial, even though the parties and their advisors are, by definition, not impartial.

Changes: The final regulations add language to § 106.45(b)(6)(i) stating that 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; provided, however, that the decision-maker cannot draw any inference about the determination regarding responsibility based solely on a party's or witness's absence from the hearing or refusal to answer cross-examination or other questions. The final regulations also add § 106.71 prohibiting retaliation and providing in relevant part that no recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or part 106 of the Department's regulations, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part.

Trauma Responses

Comments: Some commenters argued that cross-examination is inherently unfair for survivors because any adversarial questioning may trigger a trauma response (manifesting as panic attacks, flashbacks, painful memories, dissociation, or even suicidal ideation) and instead survivors must be able to recount their experience in a non-stressful environment where they feel safe, without the stress and pressure of cross-examination that can result in a survivor not being able to give a

correct account of what happened or mixing up important facts that can affect the outcome of the case. Commenters argued that trauma shapes memory patterns making details of sexual violence difficult to remember, such that traditional cross-examination may lead to a mistaken conclusion that a trauma victim is lying when in reality the victim is being truthful but is unable to recall or answer questions about events in a detailed, linear, or consistent manner. Commenters argued that cross-examination is designed to point out inconsistencies in a person's testimony often by asking confusing, complex, or leading questions,[1231] and neurobiological effects of trauma affect the brain resulting in fragmented or blocked memories of details of the traumatic event.[1232]

Commenters argued that counterintuitive responses to rape, sexual assault, and other forms of sexual violence are common because trauma impacts the body and brain in ways that impact a person's affect, emotions, behaviors, and memory recall, such that these normal responses to abnormal circumstances can seem perplexing to individuals untrained in sexual violence dynamics and research about the neurobiology of trauma, leading people to unfairly undermine a victim's credibility. Commenters argued that research shows that trauma-informed questioning results in potentially more valuable, reliable information than traditional cross-examination.[1233] Commenters asserted that yelling at someone to recall a specific sequence of

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[1231] Commenters cited: Rachel Zajac & Paula Cannan, *Cross-Examination of Sexual Assault Complainants: A Developmental Comparison*, 16 PSYCHIATRY, PSYCHOL. & L. (sup.1) 36 (2009).

[1232] Many commenters cited to information regarding the impact of trauma, such as the data noted in the "Commonly Cited Sources" subsection of the "General Support and Opposition" section of this preamble, in support of arguments that cross-examination may trigger a trauma response and that trauma victims are often unable to recall the traumatic events in a detailed, linear fashion. Commenters also cited: Substance Abuse and Mental Health Services Administration, Center for Substance Abuse Treatment, *Trauma-Informed Care in Behavioral Health Services* (2014); Massachusetts Advocates for Children: Trauma and Learning Policy Initiative, *Helping Traumatized Children Learn: Supportive School Environments for Children Traumatized by Family Violence* (2005).

[1233] Commenters cited: Sara F. Dudley, *Paved with Good Intentions: Title IX Campus Sexual Assault Proceedings and the Creation of Admissible Victim Statements*, 46 GOLDEN GATE UNIV. L. REV. 117 (2016).

events they experienced under traumatic conditions decreases the accuracy of the recall provided.

Commenters asserted that because rape is about power and control, giving a perpetrator more power and control via cross-examination will only intimidate and hurt a victim more.[1234] Commenters argued that while cross-examination is uncomfortable for most people, it can have severe impacts on survivors' mental health[1235] and therefore also on their academic performance. One commenter argued that we would never require our military veterans suffering from PTSD to return from war and sit in a room listening to exploding bombs, so why would we require a rape victim to face interrogation in front of the source of their trauma immediately after the trauma occurred?

Discussion: The Department understands commenters' concerns that survivors of sexual harassment may face trauma-related challenges to answering cross-examination questions about the underlying allegations. The Department is aware that the neurobiology of trauma and the impact of trauma on a survivor's neurobiological functioning is a developing field of study with application to the way in which investigators of sexual violence offenses interact with victims in criminal justice systems and campus sexual misconduct proceedings. Under these final regulations, recipients have discretion to include trauma-informed approaches in the training provided to Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolutions so long as the training complies with the requirements of § 106.45(b)(1)(iii)

[1234] Commenters cited: Ryan M. Walsh & Steven E. Bruce, *The Relationships Between Perceived Levels of Control, Psychological Distress, and Legal System Variables in a Sample of Sexual Assault Survivors*, 17 VIOLENCE AGAINST WOMEN 5 (2011).

[1235] Commenters cited: Jacqueline M. Wheatcroft *et al.*, *Revictimizing the Victim? How Rape Victims Experience the UK Legal System*, 4 VICTIMS & OFFENDERS 3 (2009); Mark Littleton, "Sexual Harassment of Students by Faculty Members," *in Encyclopedia of Law and Higher Education* 411-12 (Charles J. Russo ed., 2010).

and other requirements in § 106.45, and nothing in the final regulations impedes a recipient's ability to disseminate educational information about trauma to students and employees. As attorneys and consultants with expertise in Title IX grievance proceedings have noted, trauma-informed practices can be implemented as part of an impartial, unbiased system that does not rely on sex stereotypes, but doing so requires taking care not to permit general information about the neurobiology of trauma to lead Title IX personnel to apply generalizations to allegations in specific cases.[1236] Because cross-examination occurs only after the recipient has conducted a thorough investigation, trauma-informed questioning can occur by a recipient's investigator giving the parties opportunity to make statements under trauma-informed approaches prior to being cross-examined by the opposing party's advisor.

With respect to cross-examination, the Department notes that the final regulations do not prevent a recipient from granting breaks during a live hearing to permit a party to recover from a panic attack or flashback, nor do the final regulations require answers to cross-examinations to be in linear or sequential formats. The final regulations do not require that any party, including a

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[1236] *See, e.g.*, Jeffrey J. Nolan, *Fair, Equitable Trauma-Informed Investigation Training* (Holland & Knight updated July 19, 2019) (white paper summarizing trauma-informed approaches to sexual misconduct investigations, identifying scientific and media support and opposition to such approaches, and cautioning institutions to apply trauma-informed approaches carefully to ensure impartial investigations); "Recommendations of the Post-SB 169 Working Group," 3 (Nov. 14, 2018) (report by a task force convened by former Governor of California Jerry Brown to make recommendations about how California institutions of higher education should address allegations of sexual misconduct) (trauma-informed "approaches have different meanings in different contexts. Trauma-informed training should be provided to investigators so 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."). Because of the lack of a singular definition of "trauma-informed" approaches, and the variety of contexts that such approaches might be applied, the Department does not mandate "trauma-informed" approaches but recipients have flexibility to employ trauma-informed approaches so long as the recipient also complies with all requirements in these final regulations.

complainant, must recall details with certain levels of specificity; rather, a party's answers to cross-examination questions can and should be evaluated by a decision-maker in context, including taking into account that a party may experience stress while trying to answer questions. Because decision-makers must be trained to serve impartially without prejudging the facts at issue, the final regulations protect against a party being unfairly judged due to inability to recount each specific detail of an incident in sequence, whether such inability is due to trauma, the effects of drugs or alcohol, or simple fallibility of human memory. We have also revised § 106.45(b)(6)(i) in a manner that builds in a "pause" to the cross-examination process; before a party or witness answers a cross-examination question, the decision-maker must determine if the question is relevant. This helps ensure that content of cross-examination remains focused only on relevant questions and that the pace of cross-examination does not place undue pressure on a party or witness to answer immediately.

The Department reiterates that recipients retain the discretion to control the live hearing environment to ensure that no party is "yelled" at or asked questions in an abusive or intimidating manner. The Department further reiterates that cross-examination is as valuable a tool for complainants to challenge a respondent's version of events as it is for a respondent to challenge a complainant's narrative. Because cross-examination is conducted only through party advisors, we believe that the cross-examination procedure helps to equalize power and control, because both parties have equal opportunity to ask questions that advocate the party's own perspectives and beliefs about the underlying incident regardless of any power, control, or authority differential that exists between the parties.

The Department agrees that cross-examination is likely an uncomfortable experience for most people, including complainants and respondents; numerous commenters have informed the

Department that navigating a grievance process as a complainant or as a respondent has caused individuals to feel stressed, have difficulty focusing on academic performance, and feel anxious and depressed. The final regulations offer both parties protection against feeling forced to participate in a grievance process and equal procedural protections when an individual does participate. To that end, the final regulations require recipients to offer complainants supportive measures regardless of whether a formal complaint is filed[1237] (and encourage supportive measures for respondents as well),[1238] and where a party does participate in a grievance process the party has the right to an advisor of choice.[1239] Additionally, the final regulations add § 106.71 prohibiting retaliation and specifically protecting an individual's right to participate or not participate in a grievance process.

The Department appreciates a commenter's analogy to a military veteran experiencing PTSD; however, the we believe that § 106.45(b)(6)(i) anticipates the potential for re-traumatization of sexual assault victims and mitigates such an effect by ensuring that a complainant (or respondent) can request being in separate rooms for the entire live hearing (including during cross-examination) so that the parties never have to face each other in person, by leaving recipients flexibility to design rules (applied equally to both parties) that ensure that no party is questioned in an abusive or intimidating manner, and by requiring the decision-maker to determine the relevance of each cross-examination question before a party or witness answers. Further, the Department notes that there is no statute of limitations setting a time frame for filing

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[1237] Section 106.44(a).
[1238] Section 106.30 (defining "supportive measures" and expressly indicating that such individualized services may be provided to complainants or respondents); § 106.45(b)(1)(ix) (requiring a recipient's grievance process to describe the range of supportive measures available to complainants and to respondents).
[1239] Section 106.45(b)(5)(iv).

a formal complaint,[1240] and that completing the investigation under § 106.45 requires a reasonable amount of time (for example, the parties must be given an initial written notice of the allegations, the recipient must gather evidence, give the parties ten days to review the evidence, prepare an investigative report, and give the parties ten days to review the investigative report)[1241], and therefore it is unlikely that a complainant would ever be required to "immediately" undergo cross-examination following a sexual assault covered by Title IX.

Changes: None.

Reliance on Rape Myths

Comments: Many commenters cited an article[1242] by Sarah Zydervelt *et al.*, (herein, "Zydervelt 2016") describing cross-examination of rape victims as often involving detailed, personal, humiliating questions rooted in sex stereotypes and rape myths that tend to blame victims for incidents of sexual violence.[1243] Commenters argued that because cross-examination relies on rape myths, requiring cross-examination contradicts § 106.45(b)(1)(iii) which forbids training materials for Title IX personnel from relying on sex stereotypes.

Commenters argued that the Department's insistence on cross-examination for rape victims when victims of non-sexual crimes do not have to undergo cross-examination

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[1240] Section 106.30 (defining "formal complaint" and providing that a complainant must be "participating or attempting to participate" in the recipient's education program or activity at the time of filing a formal complaint). Even a complainant who has graduated may, for instance, be "attempting to participate" in the recipient's education program or activity by, for example, desiring to apply to a graduate program with the recipient, or desiring to remain involved alumni events and organizations.

[1241] *E.g.*, § 106.45(b)(2); § 106.45(b)(5)(i); § 106.45(b)(5)(vi); § 106.45(b)(5)(vii).

[1242] Commenters cited: Sarah Zydervelt, *et al.*, *Lawyers' Strategies for Cross-examining Rape Complainants: Have we Moved Beyond the 1950s?*, 57 BRITISH J. OF CRIMINOLOGY 3 (2016); Olivia Smith & Tina Skinner, *How Rape Myths Are Used and Challenged in Rape and Sexual Assault Trials*, 26 SOCIAL & LEGAL STUDIES 4 (2017).

[1243] Many commenters cited to information regarding negative impacts of sexual harassment and harmful effects of institutional betrayal, such as the data noted in the "Impact Data" and "Commonly Cited Sources" subsections of the "General Support and Opposition" section of this preamble, in support of arguments that cross-examination will further reduce rates of reporting.

demonstrates "rape exceptionalism," an unfounded notion that sexual assault and rape are different kinds of cases because rape victims lie more than victims of other crimes.[1244]

Discussion: The study cited most often by commenters for the proposition that cross-examination relies on questions rooted in sex stereotypes and rape myths, Zydervelt 2016, is a research study in which the authors compared strategies and tactics employed by defense attorneys in criminal trials in Australia and New Zealand during two time periods (from 1950-1959, and from 1996-2011) to analyze whether the strategies and tactics differed in those time periods (the earlier time period representing pre-legal reforms in the area of rape law, and the later time period representing contemporary legal reforms such as defining rape to include marital rape, eliminating the requirement of corroborating evidence and the requirement that the victim showed physical resistance to the sexual attack, and imposing rape shield protections limiting questions about a victim's sexual history and sexual behavior).[1245] Zydervelt 2016 identified four strategies employed by defense attorneys to challenge a rape victim's testimony: questions designed to challenge plausibility, consistency, credibility, and reliability. Zydervelt 2016 further

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[1244] Commenters cited: Naomi Mann, *Taming Title IX Tensions*, 20 UNIV. PA. J. OF CONSTITUTIONAL L. 631, 666 (2018); Michelle Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L. J. 1940, 2000 (2016) (Title IX is a civil rights mechanism about institutional accountability for providing equal education); *id.* at 1943, 1946-50 (the tendency to treat rape victims as distinct from other crime victims has roots in criminal justice and civil litigation where rules have required victim testimony to be corroborated and victims have carried extra burdens to show they resisted rape); *cf.* Donald Dripps, *After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?*, 41 AKRON L. REV. 957, 957 (2008) ("Rape is an exceptional area of law.").

[1245] Sarah Zydervelt *et al.*, *Lawyers' Strategies for Cross-examining Rape Complainants: Have we Moved Beyond the 1950s?*, 57 BRITISH J. OF CRIMINOLOGY 3 (2016), at 2. Page numbers referenced in this section are to the version of this article located at: https://www researchgate net/profile/Sarah_Zydervelt/publication/295084744_Lawyers%27_Strategies_for_Cross-Examining_Rape_Complainants_Have_we_Moved_Beyond_the_1950s/links/56f35e4208ae95e8b6cb4ceb/Lawyers-Strategies-for-Cross-Examining-Rape-Complainants-Have-we-Moved-Beyond-the-1950s.pdf?origin=publication_detail, pp. 1-19.

identified tactics used to further each of those four strategies;[1246] for example, the most common strategy identified in the study was challenging plausibility, and the most common tactic used in that strategy involved questions about the complainant's behavior immediately before or after the alleged attack.[1247]

Zydervelt 2016 defined "rape myths" as "beliefs about rape that serve to deny, downplay or justify sexually aggressive behavior that men commit against women" which "can be descriptive, reflecting how people believe instances of sexual assault typically unfold, or they can be prescriptive, reflecting beliefs about how a victim of sexual assault should react" and further identified common rape myths as "the belief that victims invite sexual assault by the way that they dress, their consumption of alcohol, their sexual history or their association with males with whom they are not in a relationship; the belief that many women make false allegations of rape; the belief that genuine assault would be reported to authorities immediately; and the belief that victims would fight back—and therefore sustain injury or damage to clothing—during an assault."[1248] Zydervelt 2016 concluded that historically and contemporarily, defense attorneys employ similar strategies and tactics when cross-examining rape victims in criminal trials, and that rape victims still report cross-examination as a distressing and demeaning experience.[1249]

[1246] *Id.* at 8-10. For the strategy of challenging plausibility, the study identified the following tactics used by defense attorneys during cross-examination questions: defendant's good character; lack of injury or clothing damage; complainant's behavior immediately before and after offense; lack of resistance; delayed report; continued relationship. For the strategy of challenging credibility, the study identified the following tactics used by defense attorneys during cross-examination questions: prior relationship with the defendant; sexual history; personal traits; previous sexual assault complaint; ulterior motive. For the strategy of challenging reliability, the study identified the following tactics used by defense attorneys during cross-examination questions: alcohol/drug intoxication; barriers to perception; memory fallibility. For the strategy of challenging consistency, the study identified the following tactics used by defense attorneys during cross-examination questions: inconsistency with complainant's own account, with defendant's account, with another witness's account, and with physical evidence.

[1247] *Id.* at 11.

[1248] *Id.* at 3-4 (internal quotation marks and citations omitted).

[1249] *Id.* at 15.

Zydervelt 2016 concluded that leveraging rape myths was a common tactic when cross-examining rape victims,[1250] for example, asking questions suggesting that willingly accompanying a defendant alone to a room implied consent to a sexual act, or that a "real" victim would not have returned to a party with a defendant if they had just been sexually assaulted.

The authors of Zydervelt 2016 opined in conclusion that the extent to which misconceptions about rape shape cross-examination questions in rape cases likely reflects the extent to which society adheres to particular beliefs about rape.[1251] The study's authors also noted that more research is required to assist policy makers to make informed decisions about how best to address these issues,[1252] and further surmised that because the strategies and tactics used in cross-examination during rape cases remained similar over time, investigators, prosecutors, and advocates could preemptively assist rape victims who need to testify by better preparing the victim to anticipate the kinds of questions that commonly arise during rape cross-examinations.[1253]

The Department understands commenters' concerns that Zydervelt 2016 indicates that misconceptions about rape and sexual assault victims permeate cross-examination strategies and tactics in the criminal justice system. However, this study indicates that to the extent that misconceptions or negative stereotypes about sexual assault affect cross-examination in rape

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[1250] *Id.*

[1251] *Id.* at 16-17 ("The root of the problem with cross-examination likely lies in the combative nature of proceedings" where it is a defense lawyer's job "to create reasonable doubt. . . . Perhaps, then, cross-examination will not change until social beliefs about rape do. . . . Judges and juries are not imbued with a special ability to determine the truth; instead, their rely on their understanding of human nature and common sense. . . . To the extent that putting these myths in front of the jury has a good chance of creating reasonable doubt, it is likely that lawyers will continue to use them.") (internal citations omitted).

[1252] *Id.* at 17.

[1253] *Id.* at 16.

cases, the problem lies with societal beliefs about sexual assault and not with cross-examination as a tool for resolving competing narratives in sexual assault cases. The final regulations require recipients to ensure that decision-makers are well-trained in conducting a grievance process and serving impartially, using materials that avoid sex stereotypes, and specifically on issues of relevance including application of the rape shield protections in § 106.45(b)(6). Further, as noted above, nothing in the final regulations precludes a recipient from including in that training information about the impact of trauma on victims or other aspects of sexual violence dynamics, so long as any such training promotes impartiality and avoidance of prejudgment of the facts at issue, bias, conflicts of interest, and sex stereotypes. Thus, unlike a civil or criminal court system, where jurors who act as fact-finders are not trained, the § 106.45 grievance process requires recipients to use decision-makers who have been trained to avoid bias and sex stereotypes and to focus proceedings on relevant questions and evidence, such that even if a cross-examination question impermissibly relies on bias or sex stereotypes while attempting to challenge a party's plausibility, credibility, reliability, or consistency, it is the trained decision-maker, and not the party advisor asking a question, who determines whether the question is relevant and if it is relevant, then evaluates the question and any resulting testimony in order to reach a determination regarding responsibility. For the same reasons, the Department disagrees that cross-examination violates or contradicts § 106.45(b)(1)(iii), which forbids training materials for Title IX personnel from relying on sex stereotypes; the latter provision serves precisely to ensure that decision-makers do *not* allow sex stereotypes to influence the decision-maker's determination regarding responsibility.

The Department disagrees that the § 106.45 grievance process, including cross-examination at live hearings in postsecondary institutions, reflects adherence to rape

exceptionalism or any belief that women (or complainants generally) tend to lie about rape more than other offenses. The Department believes that cross-examination as a tool for testing competing narratives serves an important truth-seeking function in a variety of types of misconduct allegations; these final regulations focus on the procedures designed to prescribe a consistent framework for recipients' handling of formal complaints of sexual harassment so that a determination is likely to be accurate in each particular case, regardless of how infrequently false allegations are made. The Department reiterates that cross-examination provides complainants with the same opportunity through an advisor to question and expose inconsistencies in the respondent's testimony and to reveal any ulterior motives. In this manner, cross-examination levels the playing field by giving a complainant as much procedural control as a respondent, regardless of the fact that exertion of power and control is often a dynamic present in perpetration of sexual assault.

Changes: None.

Cross-Examination as a Due Process Requirement

Comments: Commenters argued that cross-examination is not necessary because neither the Constitution, nor other Federal law, requires cross-examination in school conduct proceedings.[1254] Commenters characterized recent Sixth Circuit cases, holding that cross-examination must be provided, as anomalous rather than indicative of a judicial trend favoring

[1254] Commenters cited: *Goss v. Lopez*, 419 U.S. 565, 583 (1975) (holding that a ten-day suspension imposed on high school students by a public school district required due process of law under the U.S. Constitution, including notice and opportunity to be heard, but did not require opportunity to cross-examine witnesses); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Dixon v. Ala. St. Bd. of Educ.*, 294 F.2d 150, 158 (5th Cir. 1961); *Osteen v. Henley*, 13 F.3d 221, 225 (7th Cir. 1993) (holding no violation of constitutional due process where college student was expelled without a right of cross-examination); *Fellheimer v. Middlebury Coll.*, 869 F. Supp. 238, 247 (D. Vt. 1994); *Coplin v. Conejo Valley Unified Sch. Dist.*, 903 F. Supp. 1377, 1383 (C.D. Cal. 1995).

live cross-examination in college disciplinary proceedings.[1255] Commenters asserted that the Department's cross-examination requirement does not contain the limitations that the Sixth Circuit delineated in *Baum*; namely, that cross-examination is required only for public colleges, in situations where credibility is in dispute and material to the outcome, where potential sanctions are suspension or expulsion, and where the burden on the university is minimal because the university already holds hearings for some types of misconduct.

Commenters argued that Federal case law shows a split in how courts view cross-examination in college disciplinary proceedings with the weight of Federal case law favoring significant limits on cross-examination by requiring, at most, questioning through a panel or submission of written questions rather than traditional, adversarial cross-examination, for both public and private institutions.[1256] Commenters argued that colleges and universities should not be required to ignore judicial precedent simply because the Department currently finds a recent

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[1255] Commenters cited: Joanna L. Grossman & Deborah L. Brake, *A Sharp Backward Turn: Department of Education Proposes to Protect Schools, Not Students, in Cases of Sexual Violence*, VERDICT (Nov. 29, 2018) (arguing that *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018) is anomalous); William J. Migler, *Comment: An Accused Student's Right to Cross-Examination in University Sexual Assault Adjudicatory Proceedings*, 20 CHAP. L. REV. 357, 380 (2017) ("Lower federal courts and state courts have applied both *Goss* and *Eldridge* (or similar reasoning behind these cases) to the question of whether cross-examination is a due process requirement in university disciplinary proceedings, resulting in a split amongst the jurisdictions. Among the states that have directly decided on the issue, courts in eleven states have held that an accused student has the right to some form of cross-examination of witnesses. Likewise, the Ninth Circuit and district courts in the First, Second, Third, and Eighth Circuits have held accused students have the right to some form of cross-examination. Conversely, courts in sixteen states, the First, Second, Fourth, Fifth, Sixth, Tenth, and Eleventh Circuits, and district courts in the Seventh and Eighth Circuits, have found that cross-examination is not required to protect a student's Due Process rights in a disciplinary proceeding.") (internal citations omitted); *cf. Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018).

[1256] Commenters cited: Sara O'Toole, *Campus Sexual Assault Adjudication, Student Due Process, and a Bar on Direct Cross-Examination*, 79 UNIV. OF PITT. L. REV. 511 (2018) (examining due process cases law in educational settings and arguing that parties directing questions to each other through a hearing panel is constitutionally sufficient); commenters also cited, *e.g., Dixon v. Ala. St. Bd. of Educ.,* 294 F.2d 150, 159 (5th Cir. 1961); *Winnick v. Manning,* 460 F.2d 545, 549 (2d Cir.1972); *Boykins v. Fairfield Bd. of Edu.*, 492 F.2d 697, 701 (5th Cir. 1974); *Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987); *Gorman v. Univ. of Rhode Island*, 837 F.2d 7, 16 (1st Cir. 1988); *Donohue v. Baker*, 976 F. Supp. 136, 147 (N.D.N.Y. 1997); *Schaer v. Brandeis Univ.*, 432 Mass. 474, 482 (2000).

two-to-one decision from the Sixth Circuit (i.e., *Baum*) more persuasive than the many other Federal court decisions that do not require live cross-examination as part of constitutional due process or fundamental fairness, and that principles of federalism, administrative law, and general rule of law demand that the Department refrain from overreaching by imposing this requirement.

Several commenters argued that regardless of how cross-examination is viewed under a constitutional right to due process, private colleges and universities owe contractual obligations to their students and employees, not constitutional ones, and requiring live hearings and cross-examination marks a substantial governmental intrusion into the relationship between private institutions and their students. Several commenters asserted that private institutions should remain free to craft their own adjudication rules so long as such rules are fair and equitable.

Commenters argued that unless lawmakers specifically direct universities to grant cross-examination rights, or the right to counsel, in civil or administrative hearings,[1257] such elevated procedures cannot be expected of universities.

Commenters argued that cross-examination by skilled defense counsel is the most aggressive means of testing a witness's credibility and, by requiring this, the proposed rules seem based on a premise that a complainant's credibility is highly suspect. Commenters asserted that because a university Title IX grievance process is neither a civil lawsuit (where a plaintiff seeks money damages against the defendant) or a criminal trial (where a criminal defendant faces loss of liberty), the highest degree of credibility-testing is neither necessary nor reasonable.

[1257] Commenters cited: North Carolina Gen. Stat. § 116-40.11 (student's right to be represented by counsel, at student's expense, in campus disciplinary hearings); Mass. Gen. c.71 § 37H-3/4 (student facing expulsion or suspension longer than ten days for bullying has right to cross-examination and right to counsel).

Commenters argued that State laws restricting Sixth Amendment rights to confront accusers can be constitutionally permissible due to policy concerns for protecting sexual assault victims from suffering further psychological harms,[1258] and thus similar or greater restrictions can be part of a noncriminal proceeding like a Title IX process.

Commenters argued that fairness, including testing credibility, can be fully achieved without live, adversarial cross-examination, through questioning by a neutral college administrator,[1259] referred to by some commenters as "indirect cross-examination." Commenters similarly argued that allowing parties to submit questions to be asked by a hearing officer or panel is sufficiently reliable without causing trauma to any involved party,[1260] a practice commenters asserted should be adopted from the withdrawn 2011 Dear Colleague Letter. Commenters asserted that this method allows the parties and decision-maker to hear parties and witnesses answer questions in "real time" but without the adversarial purpose and tone of cross-examination. Commenters asserted a similar version of this practice, used by Harvard Law School and endorsed by the American Bar Association Criminal Justice Section, and by the University of California Post SB 169 Working Group, should be called "submitted questions" instead of "cross-examination" and would invite both parties to submit questions to the presiding

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[1258] Commenters cited: Linda Mohammadian, *Sexual Assault Victims v. Pro Se Defendants*, 22 CORNELL J. OF L. & PUB. POL'Y 491 (2012) (arguing that a Washington State law providing that sexual assault victims in criminal trials may receive court-appointed "standby" counsel and use closed-circuit television to testify is constitutionally adequate under Sixth Amendment case law).

[1259] Commenters cited: Sara O'Toole, *Campus Sexual Assault Adjudication, Student Due Process, and a Bar On Direct Cross-Examination*, 79 UNIV. OF PITT. L. REV. 511, 511-14 (2018) (review of relevant case law demonstrates that live cross-examination is not a due process requirement in the university setting and questioning through a hearing panel is constitutionally sufficient) (finding "the appropriate balance" between rights for complainants and for accused students "is essential to the goal of creating a more equal and safe educational environment, as moving too far in one direction may lead to a detrimental backlash and thus prevent effective solutions").

[1260] Commenters cited: The Association of Title IX Administrators (ATIXA), *The 7 Deadly Sins of Title IX Investigations: The 2016 White Paper* (2016).

decision-maker who must then ask all the questions unless the questions are irrelevant, excluded by a rule clearly adopted in advance, harassing, or duplicative.

Commenters argued that indirect cross-examination, or submitted questions, is sufficient to meet constitutional due process requirements under the Supreme Court's *Mathews v. Eldridge* balancing test[1261] and avoids risks inherent to cross-examination in an educational rather than courtroom setting, namely, that outside a courtroom lawyers or other advisors could engage in hurtful, harmful techniques that may impede educational access for the parties. Commenters argued that a trained fact-finder listening to party advisors ask questions and introduce evidence is a reactionary approach and a proactive approach is preferable, whereby the trained decision-maker elicits appropriate, relevant information from the parties and witnesses. Commenters argued that most postsecondary institutions currently use a trauma-informed method of questioning such as indirect cross-examination or submitted questions,[1262] and that such practices have been upheld by nearly all Federal court decisions considering them.

Commenters argued that because credibility is determined by the decision-maker, and not by parties or witnesses, there should be no right for parties to directly question the other party or witnesses. Commenters stated that if the Department's assumption that live cross-examination is better than submission of questions through a neutral hearing officer rests on concern that the

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[1261] Commenters cited: *Mathews v. Eldridge*, 424 U.S. 319, 321 (1976) (setting forth a three-part balancing test for evaluating the sufficiency of due process procedures – the private interest being affected, the risk of erroneous deprivation of that interest through the procedures at issue, and the government's interest, including financial and administrative burden that additional procedures would entail).

[1262] Commenters cited: Tamara Rice Lave, *A Critical Look at How Top Colleges and Universities are Adjudicating Sexual Assault*, 71 UNIV. OF MIAMI L. REV. 377, 396 (2017) (survey of 35 highly-ranked colleges and universities determined that only six percent of surveyed institutions permitted traditional cross-examination, while 50 percent permitted questioning through the hearing panel and 30 percent did not allow a respondent to ask questions of the complainant in any capacity).

hearing officer might unfairly refuse to ask a party's questions, the proposed rules address that concern by requiring the decision-maker to explain the reasons for exclusion of any questions, so live cross-examination is not a necessity on that basis. One commenter argued that although cross-examination may be the greatest legal engine ever invented for discovery of truth, engines come in different shapes and sizes for a reason, and the effective, appropriate version of the engine of cross-examination in the Title IX context is questioning by neutral hearing officers.

Some commenters proposed that the decision-maker act as a liaison between the parties, such that each party's advisor would ask a question one at a time, live and in full hearing of the other party, and the decision-maker would then decide whether the other party should or should not answer the question; commenters asserted that this version of live cross-examination would better filter out abusive, irrelevant questions while preserving the opportunity of party advisors to ask the cross-examination questions. Commenters argued that some States such as New York have better embodied the settled state of the law by requiring a fair campus adjudicatory process that does not include cross-examination. Commenters asserted that the final regulations should follow the process used by the U.S. Senate during the confirmation hearings for the Honorable Brett Kavanaugh, Associate Justice, Supreme Court of the United States, which process was described by commenters as disallowing any interaction between the accuser and accused, while conducting questioning of each party separately by the Senators and a designated neutral questioner.

Discussion: The Department acknowledges that the Supreme Court has not ruled on what procedures satisfy due process of law under the U.S. Constitution in the specific context of a Title IX sexual harassment grievance process held by a postsecondary institution, and that Federal appellate courts that have considered this particular issue in recent years have taken

different approaches. The Department, as an agency of the Federal government, is subject to the U.S. Constitution, including the Fifth Amendment, and cannot interpret Title IX to compel a recipient, whether public or private, to deprive a person of due process rights.[1263] Procedural due process requires, at a minimum, notice and a meaningful opportunity to be heard.[1264] Due process "'is flexible and calls for such procedural protections as the particular situation demands.'"[1265] "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[1266]

The Department has determined that the procedures contained in § 106.45 of these final regulations best achieve the purposes of (1) effectuating Title IX's non-discrimination mandate by ensuring fair, reliable outcomes viewed as legitimate in resolution of formal complaints of sexual harassment so that victims receive remedies, (2) reducing and preventing sex bias from affecting outcomes, and (3) ensuring that Title IX regulations are consistent with constitutional due process and fundamental fairness. The procedures in § 106.45 are consistent with constitutional requirements and best serve the foregoing purposes, including the right for both parties to meaningfully be heard by advocating for their own narratives regarding the allegations in a formal complaint of sexual harassment. In recognition that what is a meaningful opportunity to be heard may depend on particular circumstances, the final regulations apply different procedures in different contexts; for example, where an emergency situation presents a threat to physical health or safety, § 106.44(c) permits emergency removal with an opportunity to be

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[1263] *E.g.*, *Peterson v. City of Greenville*, 373 U.S. 244 (1963); *Truax v. Raich*, 239 U.S. 33, 38 (1915).
[1264] *Goss v. Lopez*, 419 U.S. 565, 580 (1975) ("At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing."); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).
[1265] *Id*. at 334 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).
[1266] *Id.* at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

heard that occurs after removal. Where a grievance process is initiated to adjudicate the respondent's responsibility for sexual harassment, a live hearing with cross-examination is required in the postsecondary context but not in elementary and secondary schools. These differences appropriately acknowledge that different types of process may be required in different circumstances while prescribing a consistent framework in similar circumstances so that Title IX as a Federal civil rights law protects every person in an education program or activity.

As commenters supportive of cross-examination pointed out, and as commenters opposed to cross-examination acknowledge, the Sixth Circuit has held that cross-examination, at least conducted through a party's advisor, is necessary to satisfy due process in sexual misconduct cases that turn on party credibility. "Due process requires cross-examination in circumstances like these because it is the greatest legal engine ever invented for uncovering the truth."[1267] The Sixth Circuit reasoned, "Cross-examination is essential in cases like Doe's because it does *more* than uncover inconsistencies – it takes aim at credibility like no other procedural device."[1268] The Sixth Circuit in *Baum* disagreed with the institution's argument that written statements could substitute for cross-examination, explaining that "[w]ithout the back-and-forth of adversarial questioning, the accused cannot probe the witness's story to test her memory, intelligence, or potential ulterior motives. . . . Nor can the fact-finder observe the witness's demeanor under that questioning. . . . For that reason, written statements cannot substitute for cross-examination. . . . Instead, the university must allow for some form of *live* questioning *in front of* the fact-finder,"

[1267] *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018) (internal quotation marks and citations omitted).
[1268] *Id.* at 582 (internal quotation marks and citations omitted) (emphasis in original); *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 401 (6th Cir. 2017) ("Few procedures safeguard accuracy better than adversarial questioning.").

though this requirement can be facilitated through modern technology, for example by allowing a witness to be questioned via Skype.[1269] The Sixth Circuit carefully distinguished this cross-examination requirement from the Sixth Amendment right of a criminal defendant to confront witnesses, reasoning that administrative proceedings need not contain the same protections accorded to the accused in criminal proceedings.[1270] The Sixth Circuit further reasoned that "[u]niversities have a legitimate interest in avoiding procedures that may subject an alleged victim to further harm or harassment . . . [but] 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."[1271]

The Department agrees with the Sixth Circuit's reasoning that a Title IX grievance process should strike an appropriate balance between avoiding retraumatizing procedures, and ensuring both parties have the right to question each other in a manner that captures the real-time, adversarial benefits of cross-examination to a truth-seeking process. Section 106.45(b)(6)(i) follows the Sixth Circuit's reasoning by requiring recipients to give both parties opportunity for cross-examination, allowing either party to request that cross-examination (and the entire live hearing) be conducted with the parties in separate rooms, ensuring that only party advisors conduct cross-examination and expressly forbidding personal confrontation between

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[1269] *Baum*, 903 F.3d at 582-83 (internal citations omitted) (emphasis in original).
[1270] *See id.* at 583.
[1271] *Id.*

parties, and requiring the decision-maker to determine the relevance of a cross-examination question before a party or witness answers.

Commenters correctly note that the Sixth Circuit's rationale in *Baum* rested on certain limitations or circumstances that justified requiring cross-examination: the *Baum* opinion was in the context of a public university that owes constitutional due process of law to students and employees; cross-examination is of greatest benefit where a sexual misconduct case turns on credibility and involves serious consequences; and a university that already provided hearings for other types of misconduct could not argue that it faced more than a minimal burden to provide a live hearing for sexual misconduct cases. As explained in the "Role of Due Process in the Grievance Process" section of this preamble, the Department understands that some recipients are public institutions that owe constitutional protections to students and employees while other recipients are private institutions that do not owe constitutional protections. However, consistent application of a grievance process to accurately resolve allegations of sexual harassment under Title IX is as important in private institutions as public ones, and the Department therefore adopts a § 106.45 grievance process that results in fair, reliable outcomes in all postsecondary institutions with procedures that, while likely to satisfy constitutional due process requirements, remain independent of constitutional requirements.

The Department notes that while commenters are correct that not every formal complaint of sexual harassment subject to § 106.45 turns on party or witness credibility, other commenters noted that most of these complaints do involve plausible, competing narratives of the alleged incident, making party participation in the process vital for a thorough evaluation of the

available, relevant evidence.[1272] The final regulations revise § 106.45(b)(6)(i) to clarify that where a party or witness does not appear at a live hearing or refuses to answer cross-examination questions, the decision-maker must disregard statements of that party or witness but must reach a determination without drawing any inferences about the determination regarding responsibility based on the party or witness's failure or refusal to appear or answer questions. Thus, for example, where a complainant refuses to answer cross-examination questions but video evidence exists showing the underlying incident, a decision-maker may still consider the available evidence and make a determination. The Department thus disagrees with commenters who argued that the proposed rules force a party to undergo cross-examination even where the case does not turn on credibility; if the case does not depend on party's or witness's statements but rather on other evidence (e.g., video evidence that does not consist of "statements" or to the extent that the video contains non-statement evidence) the decision-maker can still consider that other evidence and reach a determination, and must do so without drawing any inference about the determination based on lack of party or witness testimony. This result thus comports with the Sixth Circuit's rationale in *Baum* that cross-examination is most needed in cases that involve the need to evaluate credibility of parties as opposed to evaluation of non-statement evidence.[1273]

[1272] *See* H. Hunter Bruton, *Cross-Examination, College Sexual-Assault Adjudications, and the Opportunity for Tuning up the Greatest Legal Engine Ever Invented*, 27 CORNELL J. OF L. & PUB. POL'Y, 145, 180-81 (2017) ("Participation in these cases becomes all the more necessary because the hearing's resolution often depends on weighing the victim's credibility against the accused's credibility. In the vast majority of cases, no one else witnesses the act and no other evidence exists.") (internal citations omitted).

[1273] *See Baum*, 903 F.3d at 583-84 (despite the university's contention that prior Sixth Circuit precedent, in *Univ. of Cincinnati*, 872 F.3d at 395, 402, meant that a respondent is not entitled to cross-examination where the university's decision did not depend *entirely* on a credibility contest between Roe and Doe, the *Baum* Court clarified that *University of Cincinnati* merely held that cross-examination was unnecessary when the university's decision did not rely on *any testimonial evidence at all* but that case, and Baum, stand for the proposition that if "credibility is in dispute and material to the outcome, due process requires cross-examination."); § 106.45(b)(6)(i) is consistent with this *Baum* holding inasmuch as the provision bars reliance on statements from witnesses who do not submit to cross-examination, leaving a decision-maker able to consider non-statement evidence that may exist in a particular case.

Furthermore, § 106.45(b)(9) permits recipients to facilitate informal resolution processes (thus avoiding the need to hold a live hearing with cross-examination), which may be particularly desirable by the parties and the recipient in situations where the facts about the underlying incident are not contested by the parties and thus resolution does not turn on resolving competing factual narratives.

With respect to the other limitations commenters asserted that the Sixth Circuit noted in its rationale requiring cross-examination (i.e., that it is a procedure justified where serious consequences such as suspension or expulsion are at issue, and where the burden on a university is minimal), the Department notes that the *Baum* Court did not rest its rationale on situations where only suspension or expulsion was at issue, but rather the Sixth Circuit observed that "[b]eing labeled a sex offender by a university has both an immediate and lasting impact on a student's life" whereby the student "may be forced to withdraw from his classes and move out of his university housing. His personal relationships might suffer. . . . And he could face difficulty obtaining educational and employment opportunities down the road, *especially if he is expelled*."[1274] The Sixth Circuit thus recognized the high stakes involved with sexual misconduct allegations regardless of whether the sanction is expulsion. Further, the Department doubts that recipients are likely to determine that the type of conduct captured under the § 106.30 definition of sexual harassment would not potentially warrant suspension or expulsion. Additionally, the final regulations revise § 106.45(b)(6)(i) to permit a recipient to hold live hearings virtually, using technology, to ameliorate the administrative burden on colleges and universities that do not already conduct hearings for any type of misconduct allegation.

[1274] *Baum*, 903 F.3d at 582 (internal citations omitted) (emphasis added).

The Department is aware that after the public comment period on the NPRM closed, the First Circuit decided a Title IX sexual misconduct case in which the First Circuit disagreed with the Sixth Circuit's holding regarding cross-examination.[1275] In *Haidak*, the First Circuit held that a university could satisfy due process requirements by using an inquisitorial rather than adversarial method of cross-examination, by having a neutral school official pose probing questions of parties and witnesses in real-time, designed to ferret out the truth about the allegations at issue.[1276] The First Circuit reasoned that "[c]onsiderable anecdotal experience suggests that cross-examination in the hands of an experienced trial lawyer is an effective tool" but cross-examination performed by the respondent personally might devolve into "acrimony" rather than a truth-seeking tool that reduces the risk of erroneous outcomes, while cross-examination conducted by lawyers risks university proceedings mimicking court trials.[1277] Also after the public comment period on the NPRM closed, the First Circuit decided a case[1278] under Massachusetts State law involving discipline of a student by a private college for sexual misconduct, in which the student argued that failure of the recipient to provide any form of "real-time" cross-examination violated the recipient's contractual obligation of "basic fairness" but the First Circuit held that the private college owed no constitutional due process to the student and that State law did not require any form of real-time cross-examination as part of contractual basic fairness.[1279] As noted elsewhere throughout this preamble, while private colleges do not owe

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[1275] *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 68-70 (1st Cir. 2019) ("[D]ue process in the university disciplinary setting requires some opportunity for real-time cross-examination, even if only through a hearing panel.").
[1276] *Id.* at 69-70.
[1277] *Id.*
[1278] *Doe v. Trustees of Boston Coll.*, 942 F.3d 527 (1st Cir. 2019).
[1279] *Id.*

constitutional protections to students or employees, the Department is obligated to interpret Title IX consistent with constitutional guarantees, including the Fifth and Fourteenth Amendment guarantees of due process of law, and the Department believes that § 106.45(b)(6)(i) comports with constitutional due process and notions of fundamental fairness while effectuating the non-discrimination mandate of Title IX, even if State laws or a recipient's contract with its students would not impose the same requirements on private colleges.

The Department understands the concerns expressed by commenters, and echoed in the reasoning of the First Circuit in *Haidak*, that cross-examination conducted personally by students may not effectively contribute to the truth-seeking purpose of a live hearing. Thus, the Department has crafted § 106.45(b)(6)(i) to require postsecondary institution recipients to provide parties with an advisor for the purpose of conducting cross-examination, if a party does not have an advisor of choice at the hearing. This provision avoids the possibility of self-representation where a party personally conducts cross-examination of the opposing party and witnesses, and as commenters supporting cross-examination pointed out, this provision ensures that advisors conducting cross-examination will be either professionals (e.g., attorneys or experienced advocates) or at least adults capable of understanding the purpose and scope of cross-examination. Although no Federal circuit court has interpreted constitutional due process to require recipients to provide counsel to parties in a disciplinary proceeding, the Department has the authority to effectuate the purposes of Title IX by prescribing administrative requirements even when those requirements do not purport to represent a definition of discrimination under the Title IX statute. The Department has determined that requiring postsecondary institutions to provide advisors to parties for the purpose of conducting cross-examination best serves Title IX's non-discrimination mandate by ensuring that adversarial

cross-examination occurs, thereby ferreting out the truth of sexual harassment allegations, while protecting sexual harassment victims from personal confrontation with a perpetrator. At the same time, these final regulations expressly state that no party's advisor of choice, and no advisor provided to a party by a recipient, needs to be an attorney, furthering the Department's intent that the § 106.45 grievance process is suitable for implementation in an educational institution without trying to mimic a court trial.

The Department agrees with commenters that Federal case law is split on the specific issue of whether constitutional due process, or basic fairness under a contract theory between a private college and student, requires live cross-examination in sexual misconduct proceedings. The Department disagrees that § 106.45(b)(6)(i) represents overreach, violations of federalism, administrative law, or rule of law, and contends instead that the final regulations prescribe a grievance process carefully tailored to be no more prescriptive than necessary to (1) be consistent with constitutional due process and fundamental fairness, even if § 106.45 includes procedures that exceed minimal guarantees, and (2) address the challenges inherent in resolving sexual harassment allegations so that recipients are effectively held responsible for redressing sex discrimination in the form of sexual harassment in recipients' education programs or activities. As noted elsewhere in this preamble, when a recipient draws conclusions about whether sexual harassment occurred in its education program or activity, the recipient is not merely making an internal, private decision about its own affairs; rather, the recipient is making determinations that implicate the recipient's obligation to comply with a Federal civil rights law that requires a recipient to operate education programs or activities free from sex discrimination. The Department therefore has regulatory authority to prescribe a framework for consistent, reliable determinations regarding responsibility for sexual harassment under Title IX.

The Department appreciates that some State laws already require universities to grant cross-examination rights in administrative hearings that apply to students or employees, but the Department disagrees that a university may be required to utilize the cross-examination procedure only if a State law has specifically directed that result. The fact that some States already require public universities to allow cross-examination demonstrates that the concept is familiar to many recipients. The Department is regulating only as far as necessary to enforce the Federal civil rights law at issue; the final regulations govern only student and employee misconduct that constitutes sex discrimination in the form of sexual harassment under Title IX, and does not purport to require postsecondary institutions to utilize cross-examination in non-Title IX matters. The procedures in § 106.45 are consistent with constitutional requirements and best further the purposes of Title IX, including the right for both parties to meaningfully be heard by advocating for the party's own narratives regarding the allegations in a formal complaint of sexual harassment.

A cross-examination procedure does not imply that the credibility of sexual assault complainants is particularly suspect; rather, wherever allegations of serious misconduct involve contested facts, cross-examination is one of the time-tested procedural devices recognized throughout the U.S. legal system as effective in reaching accurate determinations resolving competing versions of events. The Department notes that § 106.45(b)(6)(i) grants the right of cross-examination equally to complainants and respondents, and cross-examination is as useful and powerful a truth-seeking tool for a complainant's benefit as for a respondent, so that a complainant may direct the decision-maker's attention to implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility in the respondent's statements. While the purpose of the Sixth Amendment's right to confront accusers via cross-examination in a criminal

proceeding may be to protect the criminal defendant from deprivation of liberty unless guilt is certain beyond a reasonable doubt,[1280] the Department recognizes, and the final regulations reflect, that the purpose of a Title IX grievance process differs from that of a criminal proceeding. Under § 106.45, cross-examination is not for the protection only of respondents, but is rather a device for the benefit of the recipient and both parties, by assisting the decision-maker in reaching a factually accurate determination regarding responsibility so that deprivations of a Federal civil right may be appropriately remedied.

The Department disagrees with commenters who argued that indirect cross-examination conducted by a neutral college administrator, or a submitted questions procedure, which is permissible for elementary and secondary schools under these final regulations,[1281] can adequately ensure a fair process and reliable outcome in postsecondary institutions. Whether or not such a practice would meet constitutional due process requirements, the Department believes that § 106.45 appropriately and reasonably balances the truth-seeking function of live, real-time, adversarial cross-examination in the postsecondary institution context with protections against personal confrontation between the parties. Thus, regardless of whether the provisions in § 106.45(b)(6)(i) are required under constitutional due process of law, the Department believes that these procedures meet or exceed the due process required under *Mathews*,[1282] and the Department

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[1280] *E.g.*, Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1, 14 (2006) ("The body of criminal due process precedents is highly protective of defendants in many regards.").
[1281] Section 106.45(b)(6)(ii) (expressly providing that recipients that are not postsecondary institutions need not hold a hearing (live or otherwise) but must provide the parties equal opportunity to submit written questions to be asked of the other party and witnesses).
[1282] *Mathews v. Eldridge*, 424 U.S. 319, 321 (1976) (setting forth a three-part balancing test for evaluating the sufficiency of due process procedures – the private interest being affected, the risk of erroneous deprivation of that interest through the procedures at issue, and the government's interest, including financial and administrative burden that additional procedures would entail).

is exercising its regulatory authority under Title IX to adopt measures that the Department has determined best effectuate the purpose of Title IX.[1283] The § 106.45 grievance process requires recipients to remain neutral and impartial throughout the grievance process, including during investigation and adjudication. To require a recipient to step into the shoes of an advocate by asking each party cross-examination questions designed to challenge that party's plausibility, credibility, reliability, motives, and consistency would place the recipient in the untenable position of acting partially (rather than impartially) toward the parties,[1284] or else failing to fully probe the parties' statements for flaws that reflect on the veracity of the party's statements. The Department does not believe that it is acceptable or necessary to place recipients in such a position, because as the Sixth Circuit has outlined, there is an alternative approach that balances the need for adversarial testing of testimony with protection against personal confrontation between the parties. Therefore, § 106.45(b)(6)(i) respects and reinforces the impartiality of the recipient by requiring adversarial questioning to be conducted by party advisors (who by definition need not be impartial because their role is to assist one party and not the other). Precisely because the recipient must provide a neutral, impartial decision-maker, the function of adversarial questioning must be undertaken by persons who owe no duty of impartiality to the parties. Rather, the impartial decision-maker benefits from observing the questions and answers

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[1283] *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979) (noting that the primary congressional purposes behind Title IX were "to avoid the use of Federal resources to support discriminatory practices" and to "provide individual citizens effective protection against those practices."); s*ee also Gebser*, 524 U.S. at 291-92 (refusing to allow plaintiff to pursue a claim under Title IX based on the school's failure to comply with the Department's regulatory requirement to adopt and publish prompt and equitable grievance procedures, stating "And in any event, the failure to promulgate a grievance procedure does not itself constitute 'discrimination' under Title IX. Of course, the Department of Education could enforce the requirement administratively: Agencies generally have authority to promulgate and enforce requirements that effectuate the statute's non-discrimination mandate, 20 U.S.C. 1682, even if those requirements do not purport to represent a definition of discrimination under the statute.").

[1284] *Doe v. Miami Univ.*, 882 F.3d 579, 601 (6th Cir. 2018) ("School officials responsible for deciding to exclude a student from school must be impartial.") (internal quotation marks and citation omitted).

of each party and witness posed by a party's advisor advocating for that party's particular interests in the case. The Department believes that § 106.45(b)(6)(i) prescribes an approach that is both proactive and reactive, for the benefit of the recipient and both parties; that is, the decision-maker has the right and responsibility to ask questions and elicit information from parties and witnesses on the decision-maker's own initiative to aid the decision-maker in obtaining relevant evidence both inculpatory and exculpatory, and the parties also have equal rights to present evidence in front of the decision-maker so the decision-maker has the benefit of perceiving each party's unique perspectives about the evidence.

The Department notes, with respect to commenters' arguments in favor of the Harvard Law School's submitted questions model, that a decision-maker must exclude irrelevant questions, and nothing in the final regulations precludes a recipient from adopting and enforcing (so long as it is applied clearly, consistently, and equally to the parties[1285]) a rule that deems duplicative questions to be irrelevant, or to impose rules of decorum that require questions to be asked in a respectful manner; however, any such rules adopted by a recipient must ensure that all *relevant* questions and evidence are admitted and considered (though varying weight or credibility may of course be given to particular evidence by the decision-maker). Thus, for example, where the substance of a question is relevant, but the manner in which an advisor attempts to ask the question is harassing, intimidating, or abusive (for example, the advisor yells, screams, or physically "leans in" to the witness's personal space), the recipient may

[1285] The introductory sentence to § 106.45(b) provides that any rules a recipient adopts to use in the grievance process, other than those necessary to comply with § 106.45, must apply equally to both parties.

appropriately, evenhandedly enforce rules of decorum that require relevant questions to be asked in a respectful, non-abusive manner.

The Department disagrees that the provision in § 106.45(b)(6)(i) requiring the decision-maker to explain any decision that a cross-examination question is irrelevant means that submission of written questions adequately substitutes for real-time, adversarial questioning. For the reasons explained by the Sixth Circuit, written submission of questions is no substitute for live cross-examination.[1286] The Department agrees with the commenter who argued that engines come in different shapes and sizes, so that the engine of cross-examination may appropriately look different in a Title IX grievance process than in a criminal proceeding. In recognition of these different purposes and contexts, § 106.45 does not attempt to incorporate protections constitutionally guaranteed to criminal defendants such as the Sixth Amendment right to confront accusers face to face, the right of self-representation, or the right to effective assistance of counsel.

The Department appreciates commenters' proposal to modify the real-time cross-examination requirement by requiring party advisors to ask questions one at a time, in full hearing of the other party, while the decision-maker decides whether or not the question should be answered, to better screen out irrelevant or abusive questions. We have revised § 106.45(b)(6)(i) to reflect the commenters' suggestion; this provision now provides that "Only

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[1286] *E.g.*, *Doe v. Baum*, 903 F.3d 575, 582-83 (6th Cir. 2018) ("Without the back-and-forth of adversarial questioning, the accused cannot probe the witness's story to test her memory, intelligence, or potential ulterior motives. . . . Nor can the fact-finder observe the witness's demeanor under that questioning. . . . For that reason, written statements cannot substitute for cross-examination. . . . Instead, the university must allow for some form of *live* questioning *in front of* the fact-finder" though this requirement can be facilitated through modern technology, for example by allowing a witness to be questioned via Skype.") (internal quotation marks and citations omitted; emphasis in original).

relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination question, the decision-maker must first determine whether the question is relevant and explain any decision to exclude a question as not relevant." We agree that such a provision better ensures that cross-examination in the out-of-court setting of a campus Title IX proceeding remains focused only on relevant questions and answers.

The Department appreciates commenters' descriptions of State laws that have prescribed grievance procedures for campus sexual misconduct allegations, and of the process utilized by the U.S. Senate during the confirmation hearings for Justice Kavanaugh. The Department has considered sexual misconduct disciplinary proceeding models in use by various individual recipients, prescribed under State laws, used by the U.S. Senate, and suggested by advocacy organizations, and for the reasons previously stated, the Department has carefully selected those procedures in § 106.45 as procedures rooted in principles of due process and appropriately adapted for application when a formal complaint of sexual harassment requires reaching accurate outcomes in education programs or activities.

Changes: We have revised § 106.45(b)(6)(i) to provide that only relevant cross-examination and other questions may be asked of a party or witness, and before a complainant, respondent, or witness answers a cross-examination question, the decision-maker must first determine whether the question is relevant and explain to the party's advisor asking cross-examination questions any decision to exclude a question as not relevant.

Discourages Participation

Comments: Commenters argued that any process that requires cross-examination will discourage many students, including complainants, respondents, and witnesses, from participating in a Title

IX grievance process.[1287] Commenters similarly argued that overseeing cross-examination will discourage recipients' employees, staff, and volunteers from serving as decision-makers or party advisors. At least one commenter argued that undocumented students, and LGBTQ students, will be particularly deterred from reporting sexual assault because cross-examination will make Title IX proceedings more legalistic and undocumented students, and LGBTQ students, are already wary of the criminal justice system.

Discussion: The Department understands commenters' concerns that participation in a formal grievance process may be difficult for participants, including students and employees. The final regulations require recipients to notify students and employees of the recipient's grievance process,[1288] and to train personnel whom the recipient designates to serve as a Title IX Coordinator, investigator, decision-maker, or person who facilitates an informal resolution.[1289] The final regulations require recipients to allow each party involved in a grievance process to select an advisor of the party's choice, for the purpose of accompanying, advising, and assisting the party with navigating the grievance process. The Department recognizes that the § 106.45 grievance process, including live hearings and cross-examination at postsecondary institutions, constitutes a serious, formal process, and these final regulations ensure that a recipient's educational community is aware of that process and, when involved in the process, each party

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[1287] Commenters cited to information regarding reasons for not reporting such as the data noted in the "Reporting Data" subsection of the "General Support and Opposition" section of this preamble, in support of arguments that fear of the ordeal of a potential trial already discourages many sexual assault victims from reporting to law enforcement, and making Title IX grievance processes more court-like by requiring cross-examination will have a similar chilling effect on reporting sexual assault to universities.

[1288] Section 106.8(c) (requiring recipients to adopt and publish, and send notice of, the recipient's grievance procedures for complaints of sex discrimination and grievance process for formal complaints of sexual harassment); § 106.45(b)(2) (requiring recipients to send written notice to parties involved in a formal complaint of sexual harassment notice of the recipient's grievance process).

[1289] Section 106.45(b)(1)(iii).

has the right to assistance from an attorney or non-attorney advisor throughout the process. The final regulations also protect an individual's right to decide not to participate in a grievance process, by including § 106.71 that prohibits retaliation against any person for exercising rights under Title IX, whether by participating or refusing to participate in a Title IX grievance process. While participation in a formal process may be difficult or challenging for a participant, the Department believes that sex discrimination in the form of sexual harassment is a serious matter that warrants a predictable, fair grievance process with strong procedural protections for both parties so that reliable determinations regarding responsibility are reached by the recipient.

While the formality of the § 106.45 grievance process may seem "legalistic," the process is very different from a civil lawsuit or criminal proceeding, such that Title IX grievance processes retain their character as administrative proceedings in an educational environment, focused on resolving allegations that a respondent committed sex discrimination in the form of sexual harassment against a complainant. Recipients retain discretion to communicate with their students and employees (including undocumented students and others who may be wary of the criminal justice system) about the nature of the § 106.45 grievance process and the differences between that process and the criminal justice system, including for example, that the § 106.45 grievance process in a postsecondary institution involves cross-examination by a party's advisor overseen by a trained decision-maker with authority to control the live hearing environment to prevent abusive questioning and make determinations free from bias or sex stereotypes that may constitute evidence of sex discrimination. To make it easier for participants to participate in a live hearing, the final regulations expressly authorize a recipient, in the recipient's discretion, to allow any or all participants to participate in the live hearing virtually.

Changes: The final regulations revise § 106.45(b)(6)(i) to expressly allow a recipient to hold the live hearing virtually, with technology enabling participants to see and hear each other.

Financial Inequities

Comments: Many commenters argued that requiring cross-examination will lead to sharp inequities between parties who can afford to hire an attorney and those who cannot afford an attorney, and the credibility of a victim's case will be contingent on the effectiveness of the advisor doing the cross-examination rather than on the merits of the case. Some commenters asserted that this disparity will disfavor complainants because if there is a pending criminal case, a respondent likely will have a court-appointed attorney while a victim is likely to be left without an attorney. At least one commenter pointed to a study showing that only three percent of universities provide victims with legal support.[1290] Commenters asserted that often it is respondents who bring lawyers while complainants more often bring non-lawyer advocates, so requiring advisors to cross-examine will disadvantage complainants.[1291] Commenters argued that the financial disparity will fall hardest on students of color including children of immigrants, international students, and first-generation students, as they are more likely to come from an economically disadvantaged background and cannot afford expensive lawyers. Commenters expressed concern that LGBTQ students will be at greater financial disadvantage than other students.

[1290] Commenters cited: Kristen N. Jozkowski & Jacquelyn D. Wiersma-Mosley, *The Greek System: How Gender Inequality and Class Privilege Perpetuate Rape Culture*, 66 FAMILY RELATIONS 1 (2017).
[1291] Commenters cited: Sarah Jane Brubaker, *Campus-Based Sexual Assault Victim Advocacy and Title IX: Revisiting Tensions Between Grassroots Activism and the Criminal Justice System*, 14 FEMINIST CRIMINOLOGY 3 (2018).

Discussion: The Department disagrees that the final regulations create inequity between parties based on the financial ability to hire a lawyer as a party's advisor of choice. The final regulations clarify that a party's advisor may be, but is not required to be, an attorney,[1292] and clarify that where a recipient must provide a party with an advisor to conduct cross-examination at a live hearing that advisor may be of the recipient's choice, must be provided without fee or charge to the party, and may be, but is not required to be, an attorney.[1293] The Department understands that complainants and respondents may believe that hiring an attorney as an advisor may be beneficial for the party and that parties often will have different financial means, but the § 106.45 grievance process is designed to permit both parties to navigate the process with assistance from any advisor of choice. The Department disagrees that cross-examination at a live hearing means that a complainant's case will be contingent on the effectiveness of the complainant's advisor. Because cross-examination questions and answers, as well all relevant evidence, is evaluated by a decision-maker trained to be impartial, the professional qualifications of a party's advisor do not determine the outcome. The Department wishes to emphasize that the status of any party's advisor (i.e., whether a party's advisor is an attorney or not) must not affect the recipient's compliance with § 106.45, including the obligation to objectively evaluate relevant evidence. Thus, determinations regarding responsibility will turn on the merits of each case, and not on the professional qualifications of a party's advisor. Regardless of whether certain demographic groups are more or less financially disadvantaged and thus more or less likely to hire an attorney as an advisor of choice, decision-makers in each case must reach determinations based on the

[1292] Section 106.45(b)(5)(iv).
[1293] Section 106.45(b)(6)(i).

evidence and not solely based on the skill of a party's advisor in conducting cross-examination. The Department also notes that the final regulations require a trained investigator to prepare an investigative report summarizing relevant evidence, and permit the decision-maker on the decision-maker's own initiative to ask questions and elicit testimony from parties and witnesses, as part of the recipient's burden to reach a determination regarding responsibility based on objective evaluation of all relevant evidence including inculpatory and exculpatory evidence. Thus, the skill of a party's advisor is not the only factor in bringing evidence to light for a decision-maker's consideration.

The Department disagrees that respondents are advantaged due to having a court-appointed lawyer for a concurrent criminal case, because a Title IX grievance process is independent from a criminal case and a court-appointed lawyer in a criminal matter would not be court-appointed to represent the criminal defendant in a recipient's Title IX grievance process.

The Department disagrees that LGBTQ students are necessarily at a greater financial disadvantage than other students; however, the final regulations ensure that all students, including LGBTQ students, have an equal opportunity to select an advisor of choice.

Changes: The final regulations revise § 106.45(b)(6)(i) to specify that where a recipient must provide a party with an advisor to conduct cross-examination at a live hearing, that advisor may be of the recipient's choice, must be provided without fee or charge to the party, and may be, but is not required to be, an attorney.

Changes the Nature of the Grievance Process

Comments: Some commenters asserted that cross-examination shifts the burden of adjudication from the recipient onto the parties. Many commenters asserted that extensive training will be necessary for hearing panelists and advisors conducting cross-examination, and recipients will

not have the resources, time, and money to make cross-examination workable, leading to chaos.[1294]

Many commenters argued that requiring adversarial cross-examination will fundamentally change the nature of educational disciplinary proceedings, converting them into quasi-legal trials. Commenters argued that requiring postsecondary institutions to hold live hearings with cross-examination deprives institutions of the freedom to structure their processes according to their individual needs, resources, and educational communities and compels institutions to abandon alternative models they have carefully developed over many years, constituting an overly prescriptive mandate that fails to defer to school officials' expertise in developing adjudication models that are fair, humane, in alignment with State and Federal laws, and address a recipient's unique circumstances. Other commenters argued that requiring live hearings with cross-examination fails to recognize Federal court admonitions that universities are ill-equipped to handle the formalities and procedural complexities common to criminal trials, that education is a university's first priority with adjudication of student disputes "at best, a distant second,"[1295] and due process does not require a university to "transform its classrooms into courtrooms."[1296]

One commenter argued that the cross-examination requirement could violate court-issued restraining orders prohibiting contact between the parties.

[1294] Commenters cited: Naomi Mann, *Taming Title IX Tensions*, 20 UNIV. OF PA. J. OF CONSTITUTIONAL L. 631, 657 (2018), for the propositions that requiring mandatory counsel would "complicate the proceedings by importing outside legal rules based on adversarial systems" such that institutions would need to "learn to navigate and utilize these foreign systems" and that the "use of counsel would shift the burden of investigating and proving allegations from the educational institution to the students[.]"
[1295] Commenters cited: *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 400 (6th Cir. 2017).
[1296] Commenters cited: *Id*; *Doe v. Cummins*, 662 F. App'x 437, 448-49 (6th Cir. 2016); *Doe v. Univ. of Ky.,* 860 F.3d 365, 370 (6th Cir. 2017); *Newsome v. Batavia Local Sch. Dist.*, 842 F.2d 920, 925-26 (6th Cir. 1988).

Discussion: The final regulations ensure that the burden of gathering evidence, and the burden of proof, remain on the recipient, not on either party.[1297] While the parties have strong procedural rights to participate and advocate for their own position throughout the § 106.45 grievance process, the right to meaningfully participate does not shift the burden away from the recipient or onto the parties. The Department notes that while decision-makers must be trained to serve impartially and avoid prejudgment of the facts at issue, bias, and conflicts of interest, the final regulations do not require training for advisors of choice. This is because the recipient is responsible for reaching an accurate determination regarding responsibility while remaining impartial, yet a party's ability to rely on assistance from an advisor should not be limited by imposing training requirements on advisors, who by definition need not be impartial because their function is to assist one particular party. While the Department understands that recipients will need to dedicate resources to train Title IX personnel, including decision-makers overseeing live hearings, the benefits of a fair grievance process for resolving formal complaints of sexual harassment under Title IX outweigh the costs of training personnel to implement that fair grievance process. For similar reasons, the benefits of a consistent, predictable grievance process outweigh commenters' concerns that the § 106.45 grievance process leaves too little flexibility for recipients to craft their own processes. As noted elsewhere in this preamble, when resolving factual allegations of sexual harassment under Title IX, recipients are not simply applying a recipient's own code of conduct; rather, recipients are reaching determinations affecting rights of students and employees under a Federal civil rights law. Far from turning classrooms into courtrooms, the § 106.45 grievance process incorporates procedures the Department has

[1297] Section 106.45(b)(5)(i).

determined are most needed in the Title IX sexual harassment context to result in reliable outcomes viewed as legitimate by the parties and the public. Cross-examination in the postsecondary institution context is widely viewed as a critical part of a fair process, and as such giving both parties the right to cross-examination improves the reality and perception that recipients' Title IX grievance processes are fair and legitimate.[1298] Each aspect of the grievance process, while rooted in principles of due process, is adapted for implementation by recipients in the context of education programs or activities, thereby acknowledging that schools, colleges, and universities exist first and foremost to educate, and not to mirror courts of law. Thus, for the benefit of all students including those who are wary of the criminal justice system, a Title IX grievance process remains a separate, distinct forum.

The Department disagrees that the final regulations require recipients to violate court-issued restraining orders. Section 106.45(b)(6)(i) requires recipients to conduct the entire live hearing (not only cross-examination) with the parties located in separate rooms, upon any party's request, and cross-examination must be conducted by a party's advisor and never by the party personally. Further, the final regulations revise § 106.45(b)(6)(i) to expressly allow a recipient to hold the live hearing virtually (including for witness participation), with technology enabling participants to see and hear each other. Thus, where a court-issued restraining order prohibits

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[1298] *See* H. Hunter Bruton, *Cross-Examination, College Sexual-Assault Adjudications, and the Opportunity for Tuning up the Greatest Legal Engine Ever Invented*, 27 CORNELL J. OF L. & PUB. POL'Y 145, 172 (2017) ("[O]ur judicial system and constitutional law jurisprudence have selected cross-examination as the best legal innovation for approximating perfect procedural parity. The ability of the accused to participate in the proceedings against him prevents the accused from becoming merely the subject of a trial where inquisitors determine his fate. Similarly, endeavoring for procedural parity between adversaries increases institutional legitimacy in the eyes of the accused and society, which some maintain is a value in and of itself.") (internal citations omitted); *id.* at 173 (cross-examination contributes to both the fairness and accuracy of a hearing because of its "ability to expose errors and contextualize evidence").

contact between the parties, the final regulations do not require any in-person proximity between the parties, or any direct communication between the parties (even virtually, using technology).

Changes: None.

Section 106.45(b)(6)(ii) Should Apply to Postsecondary Institutions

Comments: Several commenters argued that because the Department permits written questioning in elementary and secondary schools, there is no reason to believe that the same process would not be equally effective in postsecondary institutions, especially when students of the same age could be subjected to the two different processes (e.g., a 17 year old high school student, versus a 17 year old college student). One commenter argued that cross-examination is either important in a quest for truth or it is not, and that if elementary and secondary schools have discretion to decide whether cross-examination is beneficial, postsecondary institutions should have the same discretion. One commenter stated that community colleges often enroll high school students in dual enrollment programs, and under the proposed rules a high school student would face a different process depending on whether a sexual assault occurred at their high school or at the community college where they are taking classes.

Commenters argued that the same "sensitivities associated with age and developmental ability" relied on by the Department to justify not requiring live hearings and cross-examination in elementary and secondary schools[1299] remain a consideration with young adults in college, especially in cases about personal, intimate details of a sexual nature. Commenters argued that modern neuroscience has established that adolescence, in terms of brain development, extends well beyond the teenage years, and the prefrontal cortex – the part of the brain primarily

[1299] Commenters cited: 83 FR 61476.

responsible for executive functioning – typically does not fully develop until the early to mid-twenties,[1300] when many students have already graduated from college and thus until approximately age 25 students do not function as rational adults and rely heavily on their emotions when making decisions.[1301]

Commenters argued that when OCR conducts an investigation into violations of Title IX, schools have no right to question witnesses (or even to know who the witnesses are), and because the Department nevertheless presumably believes the procedures set out in its OCR Case Processing Manual are fair and produce reliable results there is no reason why a recipient needs to include cross-examination of parties and witnesses in a sexual misconduct case in order to have a fair process that reaches reliable results.

Commenters noted that Title IX and student conduct experts oppose the proposed rules' cross-examination requirement and instead favor submission of written questions or asking questions posed by a neutral school official, referencing publications from organizations such as the Association of Title IX Administrators (ATIXA), the Association for Student Conduct Administration (ASCA), and the American Bar Association (ABA) Criminal Justice Section. One commenter described a survey the commenter distributed regarding the proposed rules and stated that out of the 597 people surveyed, 81 percent disapproved of the proposed rules' cross-examination requirement. Another commenter pointed to a different public opinion poll that

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[1300] Commenters cited: Heidi Ledford, *Who Exactly Counts as an Adolescent?*, NATURE (Feb. 21, 2018); Mariam Arain *et al.*, *Maturation of the Adolescent Brain*, 9 NEUROPSYCHIATRIC DISEASE & TREATMENT 449, 451 (2013); Lucy Wallis, *Is 25 the New Cut-Off Point for Adulthood?*, BBC.com (September 23, 2013).

[1301] Commenters cited: University of Rochester Medical Center, *Understanding the Teen Brain*, https://www.urmc.rochester.edu/encyclopedia/content.aspx?ContentTypeID=1&ContentID=3051.

indicated that 61 percent of those surveyed agreed that students accused of sexual assault on college campuses should have the right to cross-examine their accuser.

One commenter suggested that the final regulations should require the recipient to provide a neutral person to conduct cross-examination of parties and witnesses. One commenter asked whether parties' submission of questions to be asked through a hearing board chair fulfills the proposed rules' cross-examination requirement; whether students may choose to conduct the cross-examination themselves instead of through an advisor; and whether a Title IX Coordinator who filed a formal complaint must then be cross-examined at the hearing.

Discussion: The Department appreciates commenters' support for § 106.45(b)(6)(ii) making hearings optional and requiring submission of written questions by parties directed to other parties and witnesses, in the elementary and secondary school context, and understands commenters' arguments that the same procedures should apply in postsecondary institutions. The Department acknowledges that there is no clear line between the ages of students in elementary and secondary schools versus in postsecondary institutions (e.g., a 17 year old might be in high school, or might be in college, or might be dually enrolled). As discussed in the "Directed Questions" section of this preamble, the Department appreciates commenters' arguments for and against differences in provisions based on the age of a student versus differentiating between elementary and secondary schools on the one hand, and postsecondary institutions on the other hand. The Department believes that it is desirable, to the extent feasible, to achieve consistency in application of Title IX rights across all recipients, because all students participating in education programs or activities regardless of age deserve the protections of Title IX's non-discrimination mandate. The Department also believes that with respect to the unique circumstances presented by sex discrimination in the form of sexual harassment, a consistent,

predictable framework can be prescribed while also adapting certain procedures for elementary and secondary schools so that the general framework is more reasonable and effective for students in elementary and secondary schools, who tend to be younger than the average college student. Thus, for example, the final regulations revise the definition of actual knowledge to include notice of sexual harassment to any employee in the elementary and secondary school context,[1302] and revise § 106.45(b)(6)(ii) to more clearly state that elementary and secondary school recipients do not need to use a hearing model to adjudicate formal complaints of sexual harassment.

Similarly, with respect to cross-examination, the Department has concluded that the approach utilized for postsecondary institutions, whereby party advisors conduct cross-examination during a live hearing, is not necessarily effective in elementary and secondary schools where most students tend to be under the age of majority and where (especially for very young students) parents or guardians would likely exercise a party's rights.[1303] Therefore, for example, a parent writing out answers to questions about a sexual harassment incident on behalf of a second-grade student is likely to be a more reasonable procedure than expecting the second-grader to answer questions in real-time during a hearing. Conversely, in the postsecondary institution context where students generally are young adults, such a party can reasonably be expected to answer questions during a live hearing and to benefit from the procedural right to question the other party (through the asking party's advisor). The Department's cross-

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[1302] Section 106.30 (defining "Actual knowledge").

[1303] We have added § 106.6(g) to expressly acknowledge the legal rights of parents and guardians to act on behalf of complainants, respondents, and other individuals with respect to exercise of Title IX rights, including but not limited to the filing of a formal complaint. The legal right of a parent or guardian to act on a party's behalf extends throughout the grievance process.

examination requirement in postsecondary institutions is based on a practical determination that cross-examination is a valuable procedural tool benefiting both parties, whereas in the elementary and secondary school context the parties are likely to be under the age of majority and would not necessarily benefit from cross-examination as a procedural device. The Department notes that current regulations and guidance do not require consistency between the procedures applied in a high school, and in a college, such that a 17 year old in high school, or in college, would face potentially different grievance procedures in these situations; the final regulations do not increase that discrepancy.

The Department acknowledges the research pointed to by commenters indicating that the brains of young adults are still developing until a person is in their early or even mid-twenties. However, the laws of nearly every State recognize a person age 18 or older as capable of legally acting on the person's own behalf[1304] (for example, by entering into binding contracts), and the Department maintains that individuals developmentally capable enough to enroll in college are also capable enough to make decisions about and participate in a grievance process designed to advance the person's rights.[1305]

[1304] *E.g.*, LawServer.com, "Age of Majority," https://www.lawserver.com/law/articles/age-of-majority ("The age of majority is the legal age established by state law at which a person is no longer considered a child. In most states, a person has reached the age of majority at 18. Two states (Alabama and Nebraska) set the age of majority to be 19 and one, Mississippi, sets the age of majority at 21."). The legal voting age in the U.S. is age 18. USA.Gov, "Voter Registration Age Requirements By State," https://www.usa.gov/voter-registration-age-requirements. The age of consent to sexual activity varies across States, from age 16 to age 18. *See* https://www.ageofconsent.net/states. The ages of licensing privileges varies across States, for example with respect to driver's licenses where the age for an unrestricted license ranges from age 16 to age 18. Very Well Family, "Driving Age By State," https://www.verywellfamily.com/driving-age-by-state-2611172#driving-age-by-state. Similarly, regarding marriage licenses, the age for marrying without parental consent is age 18 in all states except Mississippi and Nebraska, where the age is 19, and 21, respectively. FindLaw.com, "State-By-State Marriage 'Age Of Consent' Laws," https://family findlaw.com/marriage/state-by-state-marriage-age-of-consent-laws.html.

[1305] For example, when a student is 18 years of age or attends an institution of postsecondary education, the rights accorded to, and consent required of, parents under FERPA and its implementing regulations transfer from the parents to the student. 20 U.S.C. 1232g(d); 34 CFR 99.3; 34 CFR 99.5(a)(1).

The Department reiterates that in recognition that young adults may find navigating a grievance process challenging, the final regulations preserve each party's right to select an advisor of choice to assist the party. The Department's concern for each party's ability to receive emotional and personal support though a grievance process is also discussed in this preamble under § 106.45(b)(5)(iii), providing that a recipient cannot restrict a party's ability to discuss the allegations; this applies to a young adult's desire to discuss the allegations with a parent, friend, or advocate to receive emotional, practical, or strategic advice and support, as well as the right to discuss the allegations with a professional (such as a lawyer). The Department believes that a young adult in college is capable of participating in a grievance process, including answering questions at a live hearing, even if the young adult's frontal cortex is still developing, and the Department respects the legal and policy determinations of the vast majority of States that have granted legal rights and responsibilities to young adults age 18 or older. In recognition that sexual misconduct matters involve sensitive, often traumatic issues for victims of any age, the final regulations ensure that any complainant regardless of age can insist that cross-examination (and the entire live hearing) occur with the parties in separate rooms, and revise § 106.45(b)(6)(i) further to grant recipients the discretion to hold the entire live hearing virtually with use of technology so that witnesses also may appear virtually.

The Department appreciates commenters' observations that the Department's OCR investigations utilize procedures that do not include allowing a recipient under investigation for Title IX violations to cross-examine witnesses interviewed by OCR. For the reasons discussed in the "Role of Due Process in the Grievance Process" section of this preamble, the Department has determined that the procedures reflected in § 106.45 represent those procedures most likely to result in fair, reliable outcomes in the particular context of a recipient's need to accurately

resolve sexual harassment allegations in order to provide remedies to sexual harassment victims – a context and purpose that differs from that of the Department's investigation into a recipient's compliance with Title IX.

The Department acknowledges that various experts in Title IX matters support a process of posing questions through a hearing officer or neutral school official, and that public opinion surveys may show various levels of support or opposition to the idea of cross-examination in college disciplinary proceedings. However, for the reasons discussed above, the Department has determined that in the postsecondary institution context, the tool of cross-examination benefits both parties and contributes to the truth-seeking purpose of the § 106.45 grievance process. The Department appreciates commenters' proposed revision that recipients simply be directed to give the parties opportunity to challenge credibility and require the decision-maker to "reasonably assess credibility." The Department believes that the final regulations accomplish that directive, by giving the parties equal opportunity to challenge credibility (through written questions for non-postsecondary institutions, and through cross-examination for postsecondary institutions) and by obligating the decision-maker to reach a determination regarding responsibility by objectively evaluating all relevant evidence. The Department appreciates a commenter's suggestion that recipients be required to provide a neutral person to conduct cross-examination on behalf of both parties. However, for the reasons discussed above, the Department does not believe that the benefits of adversarial cross-examination can be achieved when conducted by a person ostensibly designated as a "neutral" official. This is because the function of cross-examination is precisely *not* to be neutral but rather to point out in front of the neutral decision-maker each party's unique perspective about relevant evidence and desire regarding the outcome of the case.

In response to a commenter's question as to whether requiring written submission of questions at a live hearing would fulfill the cross-examination requirement described in § 106.45(b)(6)(i), the final regulations revise that provision to add the phrase "directly, orally, and in real time" to describe how cross-examination must be conducted, to clarify that submission of written questions, even during a live hearing, is not compliant with § 106.45(b)(6)(i). In answer to a commenter's further question, the Department has revised § 106.45(b)(6)(i) to expressly preclude a party from conducting cross-examination personally; the only method for conducting cross-examination is by a party's advisor.

In response to a commenter's question about whether a Title IX Coordinator must be cross-examined in situations where the Title IX Coordinator filed the formal complaint that triggered the grievance process, the final regulations revise § 106.30 defining "formal complaint" to clarify that where a formal complaint is signed by a Title IX Coordinator, the Title IX Coordinator does not become a party and must comply with all provisions in § 106.45, including the training requirement and the avoidance of bias and conflict of interest. Thus, where the Title IX Coordinator signed the formal complaint that initiated the grievance process, neither § 106.45(b)(6)(i) nor other provisions in § 106.45 treat the Title IX Coordinator as a party. Even where the Title IX Coordinator testifies as a witness, the Title IX Coordinator is still expected to serve impartially without prejudgment of the facts at issue. The Department notes that the recipient would not be obligated to provide the Title IX Coordinator with an advisor because that obligation attaches only where *a party* does not have an advisor of choice at a hearing.

Changes: The final regulations add to § 106.45(b)(6)(i) that cross-examination at a live hearing must be conducted directly, orally, and in real time by the party's advisor of choice, notwithstanding the discretion paragraph (b)(5)(iv) to otherwise restrict the extent to which

advisors may participate in the proceedings. The final regulations further revise § 106.45(b)(6)(i) to provide that recipients may hold the live hearing virtually, with technology enabling participants to see and hear each other. The final regulations revise the definition of "formal complaint" in § 106.30 to clarify that even where a Title IX Coordinator signs a formal complaint, this does not make the Title IX Coordinator a "party" in the grievance process.

False Accusations Occur Infrequently

Commenters: Many commenters argued that because false allegations occur infrequently,[1306] it is unnecessary to give the accused extra protections like cross-examination; commenters urged the Department to replace cross-examination with submission of written questions, or asking questions through a neutral school official, to better protect survivors instead of protecting a minority of falsely-accused students. Commenters argued that an adequate regulatory provision would simply say "The recipient's grievance procedure must include an opportunity for parties to challenge the credibility of witnesses and the other party. The decision-maker must reasonably assess credibility of witnesses and parties" thus leaving recipients discretion to decide how to meet those requirements.

Discussion: The Department disagrees that cross-examination in the Title IX grievance process is intended only to protect respondents against false allegations; rather, as discussed above, cross-examination in the § 106.45 grievance process is intended to give both parties equal opportunity to meaningfully challenge the plausibility, reliability, credibility, and consistency of the other party and witnesses so that the outcome of each individual case is more likely to be factually

[1306] Commenters cited to information regarding infrequency of false allegations such as the data noted in the "False Allegations" subsection of the "General Support and Opposition" section of this preamble.

accurate, reducing the likelihood of either type of erroneous outcome (i.e., inaccurately finding a respondent to be responsible, or inaccurately finding a respondent to be non-responsible). For that reason, we do not believe the alternate regulatory language suggested by the commenters is sufficient. Despite commenters' assertions, the Department has not designed these final regulations to specifically address false allegations, or in response to any preconceived notions about the frequency of false allegations.

Changes: None.

Excluding Cross-Examination Questions

Comments: Commenters noted that the proposed regulations impose a duty on recipients to objectively evaluate relevant evidence, and deem questions about a complainant's prior sexual behavior to be irrelevant (with two exceptions), but commenters argued that the proposed rules failed to clarify whether recipients have discretion to exclude relevant cross-examination questions on other public policy grounds on which rules of evidence in civil and criminal matters often exclude evidence, for example, party statements made during mediation discussions, out of court statements that constitute hearsay, evidence of a party's general character or prior bad acts, or evidence that is cumulative, duplicative, or unduly prejudicial. Commenters argued that the final regulations should either identify admissibility rules in addition to relevance, or clarify whether decision-makers have the authority to exclude relevant evidence for these kinds of policy reasons (or because State law requires exclusion of types of evidence). Commenters wondered what standards the Department would apply to review whether the recipient's evidentiary rules comply with these final regulations, if recipients do have authority to promulgate rules excluding certain types of evidence. Commenters argued that if relevance is the only allowable admissibility rule then hearings will become even more protracted and unwieldy

and decision-makers should thus have discretion to identify appropriate grounds, other than relevance, for excluding evidence.

Discussion: Commenters correctly observed that the proposed rules impose a duty on recipients to objectively evaluate all relevant evidence including inculpatory and exculpatory evidence.[1307] The final regulations revise the language in § 106.45(b)(6)(i)-(ii) to state more clearly that (subject to the two exceptions in those provisions[1308]) questions and evidence about a complainant's prior sexual behavior or predisposition are not relevant, bar the use of information protected by any legally recognized privilege,[1309] and provide that a recipient cannot use a party's treatment records without the party's voluntary, written consent.[1310] (Pursuant to § 106.45(b)(5)(i), if the party is not an "eligible student," as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a "parent," as defined in 34 CFR 99.3.) The Department appreciates the opportunity to clarify here that the final regulations do not allow a recipient to impose rules of evidence that result in exclusion of relevant evidence; the decision-maker must consider relevant evidence and must not consider irrelevant evidence.

[1307] Section 106.45(b)(1)(ii).

[1308] As discussed below, the rape shield language in § 106.45(b)(6)(i)-(ii) bars questions or evidence about a complainant's sexual predisposition (with no exceptions) and about a complainant's prior sexual behavior subject to two exceptions: if offered to prove that someone other than the respondent committed the alleged sexual harassment, or if the question or evidence concerns sexual behavior between the complainant and the respondent and is offered to prove consent.

[1309] Section 106.45(b)(1)(x) (protecting any legally recognized privileged information from disclosure or use during a grievance process). This provision would therefore prohibit cross-examination (or other) questions that seek disclosure of, for example, information protected by attorney-client privilege.

[1310] Section 106.45(b)(5)(i) (stating that the recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for a grievance process. If the party is not an "eligible student," as defined in 34 CFR 99.3 (i.e., FERPA regulations), then the recipient must obtain the voluntary, written consent of a "parent," as defined in 34 CFR 99.3.).

The Department appreciates commenters' concerns that comprehensive rules of evidence adopted in civil and criminal courts throughout the U.S. legal system apply detailed, complex rules to certain types of evidence resulting in exclusion of evidence that is otherwise relevant to further certain public policy values (e.g., exclusion of statements made during settlement negotiations, exclusion of hearsay subject to specifically-defined exceptions, exclusion of character or prior bad act evidence subject to certain exceptions, exclusion of relevant evidence when its probative value is substantially outweighed by risk of prejudice, and other admissibility rules). The Department desires to prescribe a grievance process adapted for an educational environment rather than a courtroom, and declines to impose a comprehensive, detailed set of evidentiary rules for resolution of contested allegations of sexual harassment under Title IX. Rather, the Department has carefully considered the procedures most needed to result in fair, accurate, and legitimate outcomes in Title IX grievance processes. To that end, the Department has determined that recipients must consider relevant evidence with the following conditions: a complainant's prior sexual behavior is irrelevant (unless questions or evidence about prior sexual behavior meet one of two exceptions, as noted above); information protected by any legally recognized privilege cannot be used; no party's treatment records may be used without that party's voluntary, written consent;[1311] and statements not subject to cross-examination in postsecondary institutions cannot be relied on by the decision-maker. The Department notes that where evidence is duplicative of other evidence, a recipient may deem the evidence not relevant.

[1311] Pursuant to § 106.45(b)(5)(i), if the party is not an "eligible student," as defined in 34 CFR 99.3 (i.e., FERPA regulations), then the recipient must obtain the voluntary, written consent of a "parent," as defined in 34 CFR 99.3.

The Department does not believe that requiring recipients to evaluate relevant evidence results in unfairness or inaccuracy. Unlike court trials where often the trier of fact consists of a jury of laypersons untrained in evidentiary matters, the final regulations require decision-makers to be trained in how to conduct a grievance process and how to serve impartially, and specifically including training in how to determine what questions and evidence are relevant. The fact that decision-makers in a Title IX grievance process must be trained to perform that role means that the same well-trained decision-maker will determine the weight or credibility to be given to each piece of evidence, and the training required under § 106.45(b)(1)(iii) allows recipients flexibility to include substantive training about how to assign weight or credibility to certain types or categories of evidence, so long as any such training promotes impartiality and treats complainants and respondents equally. Thus, for example, where a cross-examination question or piece of evidence is relevant, but concerns a party's character or prior bad acts, under the final regulations the decision-maker cannot exclude or refuse to consider the relevant evidence, but may proceed to objectively evaluate that relevant evidence by analyzing whether that evidence warrants a high or low level of weight or credibility, so long as the decision-maker's evaluation treats both parties equally[1312] by not, for instance, automatically assigning higher weight to exculpatory character evidence than to inculpatory character evidence. While the Department will enforce these final regulations to ensure that recipients comply with the § 106.45 grievance process, including accurately determining whether evidence is relevant, the Department notes that § 106.44(b)(2) assures recipients that, when enforcing these final

[1312] The final regulations revise the introductory sentence of § 106.45(b) to provide: "Any provisions, rules, or practices other than those required by § 106.45 that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in § 106.30, must apply equally to both parties."

regulations, the Department will refrain from second guessing a recipient's determination regarding responsibility based solely on whether the Department would have *weighed* the evidence differently. That provision therefore reinforces the approach to the grievance process throughout § 106.45 under which a recipient must objectively evaluate all relevant evidence (inculpatory and exculpatory) but retains discretion, to which the Department will defer, with respect to how persuasive a decision-maker finds particular evidence to be.

Changes: The final regulations revise § 106.45(b)(6)(i)-(ii) to clarify questions and evidence about the complainant's sexual predisposition is never relevant and about a complainant's prior sexual behavior are not relevant with two exceptions: where the question or evidence about sexual behavior is offered to prove that someone other than the respondent committed the alleged misconduct, or where the question or evidence relates to sexual behavior between the complainant and respondent and is offered to prove consent. The final regulations add § 106.45(b)(1)(x) to prevent disclosure or use during a grievance process of information protected by a legally recognized privilege. The final regulations revise § 106.45(b)(5)(i) to bar a recipient from using a party's treatment records without the party's voluntary, written consent. The final regulations also revise the introductory sentence of § 106.45(b) to provide that any provisions, rules, or practices other than those required by § 106.45 that a recipient adopts as part of its grievance process must apply equally to both parties.

Section 106.45(b)(6)(i) Postsecondary Institution Recipients Must Provide Live Hearing with Cross-Examination

Self-Representation Versus Cross-Examination Conducted by Advisors

Comments: Some commenters opposed § 106.45(b)(6)(i) because that provision restricts cross-examination to being conducted by a party's advisor, foreclosing the option for a respondent (or

complainant) to be self-represented and conduct cross-examination personally. Commenters argued that the right of self-representation has a long history under U.S. constitutional law, and that the Supreme Court has held that States cannot force an attorney on an unwilling criminal defendant,[1313] that the Sixth Amendment's right to confront witnesses applies to the accused, not to lawyers,[1314] and that representing oneself affirms the dignity and autonomy of the accused.[1315] Commenters asserted that the final regulations should be modified so that "in the event that the advisor assigned by a recipient is unacceptable to the respondent, the respondent must have the right to self-represent in all cross-examinations."

Some commenters suggested that this provision should be modified to allow students to confer with their advisors and for advisors to actively represent the student during any part of a live hearing. At least one commenter argued that students should be allowed to have a confidential advisor, or confidential advocate, allowed to accompany the party to the hearing, in addition to an advisor of choice or assigned advisor for cross-examination purposes.

Some commenters supported the proposed rules' requirement that if a party does not have an advisor of choice at a hearing, the recipient would be required to provide an advisor "aligned with that party" to ensure that each party's interest is represented during the hearing. At least one commenter urged the Department to require that such an appointed advisor be "genuinely aligned" with the party, because recipient employees appointed as advisors may be loyal to the

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[1313] Commenters cited: *Faretta v. Cal.*, 422 U.S. 806, 816 (1974) (the right to represent oneself stems in part from the premise that the defense may be made easier if the accused is permitted to bypass lawyers and conduct the trial himself); *id.* at 834 (even if a lawyer could more aptly represent an accused, the advantage of a lawyer's training and experience can be realized only with the accused's cooperation).

[1314] Commenters cited: *id.* at 819-20.

[1315] Commenters cited: *McKaskle v. Wiggins*, 465 U.S. 168, 176-77 (1984).

institution and not to the party, or may hold ideological beliefs that align with complainants or respondents.

Many commenters opposed the provision in § 106.45(b)(6)(i) that requires recipients to provide a party with an advisor to conduct cross-examination if a party does not have an advisor at a live hearing. Commenters particularly objected to the language in the NPRM requiring a recipient-provided advisor to be "aligned with that party" because: recipients will find it impossible to ensure parity between the parties; recipients will face additional litigation risks stemming from the recipient's provision of advisors for parties (such as claims by parties that the recipient provided an incompetent advisor, an advisor not sufficiently "aligned with the party," or ineffective assistance of counsel); the NPRM provided no guidance about how a recipient should determine whether an advisor is "aligned with" a party; especially in smaller institutions, a recipient's obligation to appoint an advisor who must conduct cross-examination adverse to another student or employee presents potential conflicts of interest (particularly because appointed advisors are likely to be administrators, professors, or other recipient staff who interact with both parties outside the grievance process) and pitting a recipient's employee against a recipient's student is antithetical to recipients' educational mission.[1316] Commenters argued that requiring recipients to appoint party-aligned advisors contradicts the expectation that the

[1316] Commenters cited studies for the proposition that frequent, positive interactions with faculty and staff not only strongly influence academic achievement and scholastic self-concept, but motivation, institutional retention, and persistence towards a degree as well, particularly for students of color; commenters cited, e.g., Meera Komarraju *et al.*, *Role of Student-Faculty Interactions in Developing College Students' Academic Self-Concept, Motivation, and Achievement*, 51 JOURNAL OF COLL. STUDENT DEVELOPMENT 3 (2010). Commenters cited studies for the proposition that negative interactions between faculty and students significantly damage students' self-esteem, academic performance, mental health, and ultimately, retention and persistence; commenters cited, e.g., Kevin A. Nadal *et al.*, *The Adverse Impact of Racial Microaggressions on College Students' Self-esteem*, 55 JOURNAL OF COLL. STUDENT DEVELOPMENT 5 (2014).

recipient is neutral and impartial toward the parties, and that educational disciplinary processes are not about building a case for or against a party but simply gathering as much information as possible; these commenters stated that § 106.45(b)(6)(i) abandons institutions' processes that are "built to assemble the voices and experiences of the parties involved, not the voices of third-party advisors."

Commenters asserted that many recipient employees will not wish to be viewed as providing support or advocacy to one party over another, including in instances where the advisor believes the party to whom the advisor is assigned is lying. Commenters asserted that currently, many recipients provide advisors to parties but such advisors are neutral, advising a party about the grievance process itself but not advocating on behalf of the party or serving as a party's proxy, and commenters argued that instead of requiring assigned advisors to be "aligned with" the party the provision should require that assigned advisors be knowledgeable about university processes and able to give neutral advice to the party. Other commenters asserted that this provision should require recipients to give parties advice about selecting advisors but not require recipients to provide advisors to parties. Commenters argued that the final regulations should state that a party's advisor cannot be a person who exercises any administrative or academic authority over the other party. Commenters asserted that party advisors should be required to agree to a code of conduct prohibiting hostile, abusive, or irrelevant questioning.

Some commenters argued that it is vital that both parties have advisors of equal competency during the hearing and thus requested that the final regulations require recipients to

appoint attorneys for both parties, or wherever one party has hired an attorney,[1317] or upon the request of a party. Commenters suggested that this provision be modified to allow any party without an advisor of choice at a hearing to select an advisor of the party's choice from a panel of advisors whom the recipient has trained to be familiar with the recipient's grievance process.

Other commenters expressed concern that the requirement for advisors to conduct cross-examination and for recipients to provide advisors for parties who do not have one risks a *de facto* "arms race" whereby if a respondent hires an attorney, recipients will feel pressured to hire an attorney for the complainant to ensure equity, and this will be too costly for many recipients. Commenters similarly asserted that recipients will feel compelled to ensure that assigned advisors are attorneys because it will be crucial that a party and an assigned advisor communicate candidly which requires attorney-client privilege so that conversations are non-discoverable in subsequent civil or criminal matters. Commenters argued that it is likely that State bar associations will find that conducting cross-examination constitutes practice of law and thus recipients will end up being required to hire attorneys for parties, and not simply assign non-attorney advisors.[1318] Commenters argued that this amounts to a costly, unfunded mandate that will create a niche market for litigation-attorney advisors.

[1317] Commenters cited: Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUM. L. REV. 289, 341 (1999) (discussing the right to counsel in cases involving academic wrongdoing).

[1318] Commenters asserted that, for example, in Ohio where the Sixth Circuit's *Baum* decision applies, rape crisis advocate centers who typically have provided *pro bono* advocates to serve as advisors of choice for complainants have, because of *Baum*, forbidden staff to serve as advisors of choice to prevent claims of unauthorized practice of law, based on opinions of the Ohio Bar Association and the American Bar Association. These commenters asserted that the NPRM would make this result widespread and cut off an avenue of consistent, informed support that should be available to complainants.

Commenters argued that a party disappointed about the outcome of the hearing should not be allowed to challenge the adequacy of the advisor provided by the university, either on appeal or in subsequent litigation.

Commenters argued that the Department lacks statutory authorization under Title IX to require recipients to provide advisors to students, and that such a requirement does not serve to further Title IX's non-discrimination mandate.

Commenters requested clarification of this provision to answer questions such as: who may determine whether an assigned advisor is aligned with the party, and what factors should be used in making that determination? Is the assigned advisor expected to assume the party's version of events is accurate? If one party hires an attorney as an advisor of choice and the recipient must provide an advisor for the other party, must the recipient assign that party an attorney? Can recipients limit the participation of advisors in a hearing, other than conducting cross-examination? May a recipient impose cost or fee limitations on attorneys chosen by parties to make equity and parity more likely? Could a school allow advisors of choice but appoint separate advisors to conduct cross-examination? If a party shows up at a hearing without an advisor, must the recipient stop the hearing to appoint an advisor for the party? May a decision-maker punish a party if the party's advisor breaks rules during the hearing? Can a party decide during a hearing to "fire" the assigned advisor? Can a party delay a hearing by refusing to accept a recipient's assigned advisor perhaps by arguing that the advisor is not "aligned with" the party? May the party advisors also conduct direct examination of the party they are advising, or only cross-examination of the other parties and witnesses? Must a recipient provide an advisor for a party who is also an employee of the recipient, including at-will employees? May a recipient require certain training and competency assessments for assigned advisors? Some commenters

asserted that the final regulations should require training for appointed advisors, including at a minimum how to conduct cross-examination and how to respond to cross-examination conducted by an attorney, so that parties feel adequately represented.

Discussion: The Department understands commenters who argued for a right of self-representation, but the Department has concluded that self-representation by parties in a live hearing in the context of a Title IX adjudication presents substantial risk of diminishing the effectiveness and benefits of cross-examination while increasing the probability that parties will feel traumatized by the prospect and reality of personal confrontation. As explained above, the Department believes that cross-examination is a valuable tool serving the truth-seeking function of a Title IX grievance process. However, the right to cross-examination is not unfettered and the effectiveness of cross-examination depends on the circumstances presented in many Title IX sexual harassment cases whereby a complainant and respondent have alleged and denied commission of traumatic, violative acts. To retain the benefits of cross-examination in this sensitive, high-stakes context, the Department has concluded that restrictions on the right of cross-examination best serve the purposes of a Title IX adjudication.

The context and purpose of a Title IX adjudication differ significantly from that of a criminal trial. The Sixth Amendment rights guaranteed to a criminal defendant are not constitutionally guaranteed to a respondent in a Title IX adjudication,[1319] and the Department does not believe that a right of self-representation would best effectuate the purposes of Title IX. The Department believes that the final regulations appropriately give respondents and

[1319] *E.g.*, *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing.").

complainants equal and meaningful opportunity to select their own advisors of choice and to thereby direct and control the manner by which a party exercises a right of cross-examination. The final regulations thus do not "force an attorney" onto a respondent (or complainant). Rather, the final regulations provide as a back-stop that if a party does not (or cannot) take the opportunity to select an advisor of choice, rather than conducting cross-examination personally the recipient will provide the party an advisor for that purpose. A party always retains the right not to participate in a grievance process, but where the party does wish to participate and advance the party's interests in the case outcome, with respect to testing the credibility of testimony via cross-examination, the party must do this by selecting an advisor of choice, or else working with an advisor provided to the party (without fee or charge) by the recipient. The Department notes that the final regulations, § 106.45(b)(5)(iv) and § 106.45(b)(6)(i), make clear that the choice or presence of a party's advisor cannot be limited by the recipient. To meet this obligation a recipient also cannot forbid a party from conferring with the party's advisor, although a recipient has discretion to adopt rules governing the conduct of hearings that could, for example, include rules about the timing and length of breaks requested by parties or advisors and rules forbidding participants from disturbing the hearing by loudly conferring with each other.

With respect to allowing parties to be accompanied by a confidential advisor or advocate in addition to a party's chosen or assigned advisor, the Department notes that § 106.71 states "The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be

permitted by the FERPA statute or regulations, 20 U.S.C. 1232g and 34 CFR part 99, or as required by law, or to carry out the purposes of [34 CFR part 106], including the conduct of any investigation, hearing, or judicial proceeding arising thereunder" and this restriction may limit a recipient's ability to authorize the parties to be accompanied at the hearing by persons other than advisors. For example, a person assisting a party with a disability, or a language interpreter, may accompany a party to the hearing without violating § 106.71(a) because such a person's presence at the hearing is required by law and/or necessary to conduct the hearing. The sensitivity and high stakes of a Title IX sexual harassment grievance process weigh in favor of protecting the confidentiality of the identity and parties to the extent feasible (unless otherwise required by law), and the Department thus declines to authorize that parties may be accompanied to a live hearing by persons other than the parties' advisors, or other persons for reasons "required by law" as described above.

The Department is persuaded by commenters' concerns that the "aligned with that party" language in this provision posed unnecessary confusion and potential problems. As a result, the Department has removed that language from § 106.45(b)(6)(i). Accordingly, the Department declines to adopt a commenter's suggestion to specify that the assigned advisor must be "genuinely aligned" with the party. The Department does not believe it is feasible, necessary, or appropriate to ask recipients to screen potential assigned advisors' ideological beliefs or ties of loyalty to the recipient. The Department is persuaded by commenters' concerns that a condition of "alignment" with a party exposes recipients to claims by parties that, in the party's subjective view, an assigned advisor was not sufficiently "aligned with" the party, and this open-ended potential to accuse recipients of violating these regulations does not serve the Department's interest in prescribing a predictable framework under which recipients understand and comply

with their legal obligations. We have revised § 106.45(b)(6)(i) to state: "If a party does not have an advisor present at the hearing, the recipient must provide without fee or charge to that party an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party." This directive addresses many of the commenters' concerns about providing an advisor. By explicitly acknowledging that advisors provided by a recipient may be – but need not be – attorneys, expressly stating that the provided advisor is "of the recipient's choice," and limiting the role of provided advisors to conducting cross-examination on behalf of a party, the final regulations convey the Department's intent that a recipient enjoys wide latitude to fulfill this requirement. Claims by a party, for instance, that a recipient failed to provide "effective assistance of counsel" would not be entertained by the Department because this provision does not require that advisors be lawyers providing legal counsel nor does this provision impose an expectation of skill, qualifications, or competence. An advisor's cross-examination "on behalf of that party" is satisfied where the advisor poses questions on a party's behalf, which means that an assigned advisor could relay a party's own questions to the other party or witness, and no particular skill or qualification is needed to perform that role. These changes in the final regulations similarly address commenters' concerns that the assigned advisors need be "adverse" to or "pitted against" members of the recipient's community. While an assigned advisor may have a personal or professional belief in, or dedication to, the position of the party on whose behalf the advisor conducts cross-examination, such a belief or dedication is not a requirement to function as the assigned advisor. Whether a party's cross-examination is conducted by a party's advisor of choice or by the advisor provided to that party by the recipient, the recipient itself remains neutral, including the decision-maker's obligation to serve impartially and objectively evaluate relevant evidence. The Department

emphasizes that advisors of choice, and advisors provided to a party by the recipient, are not subject to the requirements of § 106.45(b)(1)(iii) which obligates Title IX personnel (Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolutions) to serve impartially without conflicts of interest or bias for or against complainants or respondents generally, or for or against an individual complainant or respondent.

The Department understands commenters' point that educational processes have been designed to let the voices and perspectives of the parties be heard, and not the voices and perspectives of third-party advisors. For reasons described above and in § 106.45(b)(5)(iv), the Department believes that giving each party the opportunity to be assisted and supported by an advisor of choice yields important benefits to both parties participating in a grievance process. The final regulations carefully balance the right of parties to rely on and be assisted by advisors with the interest of an educational institution in focusing the institution's process on the institution's own students and employees rather than on third parties. The final regulations allow recipients to limit the active participation of advisors, with the one exception in § 106.45(b)(6)(i) that an advisor must conduct cross-examination on behalf of a party. As noted above, the Department believes that the risks of allowing personal confrontation between parties in sexual harassment cases outweigh the downsides of allowing advisors to actively participate in the limited role of conducting cross-examination.

The Department understands commenters' assertions that many recipient's employees will not wish to serve as party advisors because they do not want to be viewed as supporting or assisting one party over the other. The Department notes that § 106.45(b)(6)(i) applies only to postsecondary institutions, and institutions of higher education that receive Federal student aid under Title IV of the Higher Education Act of 1965, as amended, already must comply with the

Clery Act, which permits parties to have advisors of choice, and commenters have noted that many recipients' practice is to allow parties to choose advisors from among recipient employees, and that some recipients already provide advisors to parties. For the reasons explained above, these final regulations do not change that landscape qualitatively, because even conducting cross-examination "on behalf of a party" need not mean more than relaying that party's questions to the other parties and witnesses. That function could therefore equate to serving as a party's proxy, or advocating for a party, or neutrally relaying the party's desired questions; this provision leaves recipients and assigned advisors wide latitude in deciding how to fulfill the role of serving as an assigned advisor. For the same reason, the Department does not believe it is necessary to forbid assigned advisors from being persons who exercise any administrative or academic authority over the other party; assigned advisors are not obligated to avoid conflicts of interest and can fulfill the limited role described in § 106.45(b)(6)(i) regardless of the scope of the advisor's other duties as a recipient's employee.

For reasons described above, the Department retains the requirement for recipients to provide parties with an advisor to conduct cross-examination, instead of merely requiring recipients to advise a party about how to select an advisor. In order to foreclose personal confrontation between the parties during cross-examination while preserving the neutrality of the recipient's decision-maker, that procedure must be conducted by advisors rather than by parties, and where a party does not take the opportunity to select an advisor of the party's choice, that choice falls to the recipient. As noted above, the final regulations do not preclude a recipient from adopting and applying codes of conduct and rules of decorum to ensure that parties and advisors, including assigned advisors, conduct cross-examination questioning in a respectful and

non-abusive manner, and the decision-maker remains obligated to ensure that only relevant questions are posed during cross-examination.

The Department understands commenters' desire that both parties have advisors of equal competency during a hearing. However, the Department does not wish to impose burdens and costs on recipients beyond what is necessary to achieve a Title IX grievance process with robust procedural protections leading to a reliable outcome. The Department believes that giving both parties equal *opportunity* to select advisors of choice, who may be, but are not required to be attorneys, and assuring parties who cannot or do not select their own advisor that the party can still accomplish cross-examination at a hearing because the recipient will provide an advisor for that limited purpose, sufficiently achieves the purpose of a Title IX grievance process without imposing additional burdens on recipients to hire attorneys for the parties. Nothing in the final regulations precludes a recipient from offering to provide attorney representation or non-attorney advisors to both parties throughout the entire grievance process or just for a live hearing, though § 106.45(b)(5)(iv) ensures that parties would retain the right to select their own advisor of choice and refuse any such offer by a recipient. To allow recipients to meet their obligations with as much flexibility as possible, the Department declines to require recipients to pre-screen a panel of assigned advisors from which a party could make a selection at a hearing, or to require provided advisors to receive training from the recipient. The final regulations do not preclude a recipient from taking such steps, in the recipient's discretion, and the final regulations require decision-makers to be trained specifically in issues of relevance. The Department reiterates that a recipient may fulfill its obligation to provide an advisor for a party to conduct cross-examination at a hearing without hiring an attorney to be that party's advisor, and that remains true regardless of whether the other party has hired a lawyer as an advisor of choice. The final regulations do not

create an "arms race" with respect to the hiring of attorneys by recipients, and recipients remain free to decide whether they wish to incur the cost or burden of providing attorneys when they must provide an advisor to a party at a hearing to conduct cross-examination. This provision does not impose an unfunded mandate on recipients because recipients retain discretion whether to incur the cost of hiring attorney or non-attorney advisors.

The Department does not believe that the final regulations' expectation for an advisor to "conduct cross-examination on behalf of a party" constitutes the practice of law; a Title IX adjudication is not a civil or criminal trial so the advisor is not representing a party in a court of law, and the advisor is not required to perform any function beyond relaying a party's desired questions to the other party and witnesses. However, to the extent that a recipient is concerned that State bar associations do, or may, consider party advisors at a live hearing to be practicing law, the recipient retains discretion to select attorneys as assigned party advisors. Whether attorneys become more involved in Title IX adjudications as a result is not the Department's concern; the final regulations focus on those procedural protections necessary to ensure that a Title IX grievance process is designed to reach accurate determinations.

The Department believes that § 106.45(b)(6)(i), as revised in the final regulations, addresses commenters' concerns that parties will challenge the outcome based on the recipient's choice of advisor. This provision clarifies that the choice of advisor where one must be provided by the recipient lies in the recipient's sound discretion, and removes the "aligned with that party" criterion so that a party cannot challenge the recipient's choice by claiming the assigned advisor was not sufficiently aligned. Whether or not the recipient complied with this provision is now more objectively determined, i.e., by observing whether the assigned advisor "conducted cross-examination on behalf of the party" which in essence only needs to mean relaying the party's

desired questions to the other party and witnesses. The Department does not have control over claims made by parties against recipients in private litigation, but clarifies here that this provision does not impose a burden on the recipient to ensure the "adequacy" of an assigned advisor, merely that the assigned advisor performs the role described in this provision.

The Department disagrees that this provision exceeds the Department's statutory authority under Title IX. The Department believes this provision furthers Title IX's non-discrimination mandate by contributing to a fair grievance process leading to reliable outcomes, which is necessary in order to ensure that recipients appropriately remedy sexual harassment occurring in education programs or activities. The Department is authorized to promulgate rules and regulations to effectuate the purpose of Title IX, including regulatory requirements that do not, themselves, purport to represent a definition of discrimination. Particular requirements of a grievance process are no different in kind from the regulatory requirements the Supreme Court has expressly acknowledged fall under the Department's regulatory authority. For example, the Department's regulations have long required recipients to have grievance procedures in place even though the absence of grievance procedures does not, itself, constitute discrimination,[1320] because adopting and publishing grievance procedures for the "prompt and equitable" resolution of sex discrimination[1321] makes it more likely that a recipient will not engage in sex

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[1320] *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979) (noting that the primary congressional purposes behind Title IX were "to avoid the use of Federal resources to support discriminatory practices" and to "provide individual citizens effective protection against those practices."); *see also Gebser*, 524 U.S. at 291-92 (refusing to allow plaintiff to pursue a claim under Title IX based on the school's failure to comply with the Department's regulatory requirement to adopt and publish prompt and equitable grievance procedures, stating "And in any event, the failure to promulgate a grievance procedure does not itself constitute 'discrimination' under Title IX. Of course, the Department of Education could enforce the requirement administratively: Agencies generally have authority to promulgate and enforce requirements that effectuate the statute's non-discrimination mandate, 20 U.S.C. 1682, even if those requirements do not purport to represent a definition of discrimination under the statute.").

[1321] 34 CFR 106.9; § 106.8(c).

discrimination and will remedy any discrimination brought to the recipient's attention by a student or employee. Similarly, the Department has carefully considered what procedures appropriately address allegations of sex discrimination in the form of sexual harassment and has determined that the § 106.45 grievance process, including cross-examination conducted through advisors in postsecondary institutions, effectuates Title IX's non-discrimination mandate by making it less likely that a recipient will fail to accurately determine whether a student or employee has been victimized by sexual harassment and needs remedies to restore or preserve equal access to the recipient's education programs or activities.

The Department appreciates commenters' requests for clarification of this provision. Some clarification requests have been answered by the modifications made to this provision, such as removal of the "aligned with that party" language and specification that when a recipient must provide an advisor during a hearing the selection of that advisor is "of the recipient's choice" and the assigned advisor "may be, but is not required to be, an attorney."

As to commenters' additional questions about this provision: the assigned advisor is not required to assume the party's version of events is accurate, but the assigned advisor still must conduct cross-examination on behalf of the party. The only limitation on recipients' discretion to restrict advisors' active participation in proceedings is this provision's requirement that advisors conduct cross-examination, so recipients remain free to apply rules (equally applicable to both parties) restricting advisor participation in non-cross examination aspects of the hearing. Recipients cannot impose a cost or fee limitation on a party's advisor of choice and if required to provide a party with an advisor at a hearing, the recipient may not charge the party any fee. The final regulations require the recipient to keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a

report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute or regulations, 20 U.S.C. 1232g and 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any hearing. These confidentiality obligations may affect a recipient's ability to offer parties a recipient-provided advisor to conduct cross-examination *in addition* to allowing the parties' advisors of choice to appear at the hearing. The final regulations do not preclude recipients from adopting a rule that requires parties to inform the recipient in advance of a hearing whether the party intends to bring an advisor of choice to the hearing; but if a party then appears at a hearing without an advisor the recipient would need to stop the hearing as necessary to permit the recipient to assign an advisor to that party to conduct cross-examination. A party cannot "fire" an assigned advisor during the hearing, but if the party correctly asserts that the assigned advisor is refusing to "conduct cross-examination on the party's behalf" then the recipient is obligated to provide the party an advisor to perform that function, whether that means counseling the assigned advisor to perform that role, or stopping the hearing to assign a different advisor. If a party to whom the recipient assigns an advisor refuses to work with the advisor when the advisor is willing to conduct cross-examination on the party's behalf, then for reasons described above that party has no right of self-representation with respect to conducting cross-examination, and that party would not be able to pose any cross-examination questions. Whether advisors also may conduct direct examination is left to a recipient's discretion (though any rule in this regard must apply equally to both parties). This provision applies to parties who are a recipient's employees, including at-will employees; recipients may not impose training or competency assessments on advisors of choice selected by parties, but nothing in the final

regulations prevents a recipient from training and assessing the competency of its own employees whom the recipient may desire to appoint as party advisors.

The Department declines to require training for assigned advisors because the goal of this provision is not to make parties "feel adequately represented" but rather to ensure that the parties have the opportunity for their own view of the case to be probed in front of the decision-maker. Whether a party views an advisor of choice as "representing" the party during a live hearing or not, this provision only requires recipients to permit advisor participation on the party's behalf *to conduct cross-examination*; not to "represent" the party at the live hearing. A recipient may, but is not required to, allow advisors to "represent" parties during the entire live hearing (or, for that matter, throughout the entire grievance process).[1322]

The Department notes that nothing in these final regulations infringes on a recipient's ability to enforce its own codes of conduct with respect to conduct other than Title IX sexual harassment, and thus if a party or advisor "breaks a recipients' rules" during a hearing the recipient retains authority to respond in accordance with its codes of conduct, so long as the recipient is also complying with all obligations under § 106.45. If a party's advisor of choice refuses to comply with a recipient's rules of decorum (for example, by insisting on yelling at the other party), the recipient may provide that party with an advisor to conduct cross-examination on behalf of that party. If a provided advisor refuses to comply with a recipient's rules of decorum, the recipient may provide that party with a different advisor to conduct cross-examination on behalf of that party. The Department also notes that § 106.71 protects participants in a Title IX grievance process against retaliation so an action taken against any

[1322] Section 106.45(b)(5)(iv).

participant in a hearing may not be taken for the purpose of interfering with any right or privilege secured by Title IX or because the individual has participated in any manner in a hearing.

Changes: The Department has revised § 106.45(b)(6)(i) to remove the phrase "aligned with that party" and clarify that if a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.

We have also added § 106.71, prohibiting retaliation and providing in pertinent part that no recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing; and the recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as required by the FERPA statute or regulations, 20 U.S.C. 1232g and 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation or hearing.

Explain Decision to Exclude Questions

Comments: Some commenters supported the requirement in § 106.45(b)(6)(i) that decision-makers explain to the party's advisor posing a question any decision to exclude a question as not relevant. Commenters asserted that they have observed Title IX proceedings in which recipients refused to allow a party's questions to be asked of the opposing party with no explanation as to how or why the question was not relevant to the allegations. Commenters asserted that this

requirement may reveal and prevent bias in proceedings by making the decision-maker explain the rationale for deciding that a question is not relevant.

Other commenters opposed the requirement that decision-makers explain any reason for excluding a question as not relevant, arguing that decision-makers are usually not lawyers or judges and are not legally trained to make complex rulings, so that requiring on-the-spot decisions about relevance will expose recipients to legal liability. Commenters argued that this provision exceeds procedural norms in criminal courts where rules of procedure do not demand that judges provide explanation for rulings. Commenters argued that parties should have the right to appeal wrongful decisions to exclude evidence and thus it is unnecessary to require decision-makers to explain exclusion decisions during the hearing. Commenters wondered whether the parties are allowed to argue with the decision-maker upon hearing a decision-maker's explanation about the relevance of a question and expressed concern that protracted arguments over relevance would lengthen hearings and feel tortuous for students. Commenters expressed concern that the requirement to explain irrelevancy decisions will disincentivize decision-makers from properly excluding questions that violate the rape shield protections.

Commenters proposed that the provision be modified to require decision-makers to explain the decision to exclude questions in writing after the hearing rather than during the hearing. Commenters suggested that the final regulations also give decision-makers the right to screen questions before the hearing so the decision-maker has adequate time to consider whether the questions are relevant. Commenters wondered what type of information a decision-maker is required to give to meet this provision. Commenters argued this provision is meaningless because if a decision-maker decides a question is irrelevant, presumably the decision-maker believes the question does not tend to prove the matter at issue and thus, telling the decision-

maker to state self-evidently during the hearing: "This question is not relevant because it is not relevant" adds no value to the proceeding and only allows party advisors to bog down the hearing by demanding that rote explanation.

Discussion: The Department agrees with commenters that a decision-maker's refusal to explain why questions are excluded has caused problems with the accuracy and perception of legitimacy of recipients' Title IX proceedings and thus believes that this provision reasonably prevents those problems and helps ensure that decision-makers are making relevance determinations without bias for or against complainants or respondents.

The Department disagrees that this provision requires legal expertise on the part of a decision-maker. One of the benefits to the final regulations' refusal to import wholesale any set of rules of evidence is that the legal sophistication required to navigate rules of evidence results often from determining the scope of exceptions to admissibility rules. By contrast, the decision-maker's only evidentiary threshold for admissibility or exclusion of questions and evidence is whether the question or evidence is relevant – not whether it would then still be excluded under the myriad of other evidentiary rules and exceptions that apply under, for example, the Federal Rules of Evidence. While this provision does require "on the spot" determinations about a question's relevance, the decision-maker must be trained in how to conduct a grievance process, specifically including how to determine relevance within the scope of this provision's rape shield language and the final regulations' protection of privileged information and parties' treatment records. Contrary to some commenters' assertions, judges in civil and criminal trials often do make "on the spot" relevance determinations, and while this provision requires the decision-maker to "explain" the decision in a way that rules of procedure do not require of judges, the Department believes that this provision will aid parties in having confidence that Title IX

decision-makers are appropriately considering all relevant evidence. The final regulations contemplate that decision-makers often will be laypersons, not judges or lawyers. A judge's relevance ruling from the bench needs no in-the-moment explanation because a judge has the legal sophistication to have reached a ruling against the backdrop of the judge's legal knowledge. By contrast, a layperson's determination that a question is not relevant is made by applying logic and common sense, but not against a backdrop of legal expertise. Thus, an explanation of how or why the question was irrelevant to the allegations at issue, or is deemed irrelevant by these final regulations (for example, in the case of sexual predisposition or prior sexual behavior information) provides transparency for the parties to understand a decision-maker's relevance determinations.

Commenters correctly note that parties may appeal erroneous relevance determinations, if they affected the outcome, because § 106.45(b)(8) allows the parties equal appeal rights on grounds that include procedural irregularity that affected the outcome. However, asking the decision-maker to also explain the exclusion of questions during the hearing does not affect the parties' appeal rights and may reduce the number of instances in which a party feels the need to appeal on this basis because the decision-maker will have explained the decision during the hearing. The final regulations do not preclude a recipient from adopting a rule (applied equally to both parties) that does, or does not, give parties or advisors the right to discuss the relevance determination with the decision-maker during the hearing. If a recipient believes that arguments about a relevance determination during a hearing would unnecessarily protract the hearing or become uncomfortable for parties, the recipient may adopt a rule that prevents parties and advisors from challenging the relevance determination (after receiving the decision-maker's explanation) during the hearing.

The Department does not believe this requirement will negatively affect a decision-maker's incentive to properly exclude questions under this provision's rape shield protections. The decision-maker is under an obligation to exclude such questions and evidence, and to only evaluate relevant evidence in reaching a determination. Requiring the decision-maker to explain relevance decisions during the hearing only reinforces the decision-maker's responsibility to accurately determine relevance, including the irrelevance of information barred under the rape shield language. Further, we have revised § 106.45(b)(1)(iii) to require decision-makers (and investigators) to be trained in issues of relevance, including how to apply the rape shield protections in these final regulations.

Requiring the decision-maker to explain decisions about irrelevance also helps reinforce the provision in § 106.45(b)(1)(iii) that a decision-maker must not have a bias for or against complaints or respondents generally or an individual complainant or respondent. Providing a reason for the decision reveals whether the decision-maker is maintaining a neutral, objective position throughout the hearing. The explanation for the decision may reveal any bias for a particular complainant or respondent or a bias for or against complainants or respondents generally.

The Department declines to change § 106.45(b)(6)(i) to require after-hearing explanation of relevance determinations, but nothing in the final regulations precludes a recipient from adopting a rule that the decision-maker will, for example, send to the parties after the hearing any revisions to the decision-maker's explanation that was provided during the hearing. In order to preserve the benefits of live, back-and-forth questioning and follow-up questioning unique to cross-examination, the Department declines to impose a requirement that questions be submitted for screening prior to the hearing (or during the hearing); the final regulations revise this

provision to clarify that cross-examination must occur "directly, orally, and in real time" during the live hearing, balanced by the express provision that questions asked of parties and witnesses must be relevant, and before a party or witness answers a cross-examination question the decision-maker must determine relevance (and explain a determination of irrelevance).

This provision does not require a decision-maker to give a lengthy or complicated explanation; it is sufficient, for example, for a decision-maker to explain that a question is irrelevant because the question calls for prior sexual behavior information without meeting one of the two exceptions, or because the question asks about a detail that is not probative of any material fact concerning the allegations. No lengthy or complicated exposition is required to satisfy this provision. Accordingly, the Department does not believe this requirement will "bog down" the hearing. We have revised this provision by moving the requirement for the decision-maker to explain determinations of irrelevance to be combined with a sentence that did not appear in the NPRM, instructing the decision-maker to determine the relevance of a cross-examination question before the party or witness answers the question and to explain any decision to exclude a question as not relevant.

Changes: The Department has revised § 106.45(b)(6)(i) to add the phrase "directly, orally, and in real time" to describe how cross-examination must be conducted, thereby precluding a requirement that questions be submitted or screened prior to the live hearing. We have further revised this provision by moving the requirement for the decision-maker to explain determinations of irrelevance to be combined with a sentence that did not appear in the NPRM, instructing the decision-maker to determine the relevance of a cross-examination or other question before the party or witness answers the question and to explain any decision to exclude a question as not relevant. We have also revised § 106.45(b)(1)(iii) to require training for

decision-makers on issues of relevance, including application of the rape shield protections in § 106.45(b)(6).

No Reliance on Statements of a Party Who Does Not Submit to Cross-Examination

Comments: Some commenters supported the provision in § 106.45(b)(6)(i) prohibiting a decision-maker from relying on statements made by a party or witness who does not submit to cross-examination in a postsecondary institution live hearing, because this requirement ensures that only statements that have been tested for credibility, in the "crucible" of cross-examination, will be considered. Commenters asserted that Title IX sexual misconduct cases often concern accusations of a "he said/she said" nature where accounts differ between complainant and respondent and corroborating evidence is inconclusive or non-existent, thus making cross-examined party statements critical to reaching a fair determination.

Other commenters supported this provision but argued that one exception should apply: statements against a party's own interest should remain admissible even where the party refuses to appear or testify. Commenters argued that without this change, this provision incentivizes respondents who have already been convicted criminally not to appear for hearings because the respondent's absence would ensure that any admission, such as part of a plea bargain, could not be considered.

Other commenters opposed the provision that a decision-maker cannot rely on statements of a party or witness who does not submit to cross-examination. Some commenters argued that if

a party refuses to submit to cross-examination, the consequence should be dismissal of the proceeding, not exclusion of the refusing party's statements.[1323]

Commenters argued that a respondent may refuse to submit to cross-examination in a Title IX hearing when criminal charges are also pending against the respondent due to concerns about self-incrimination and that this provision should prevent a decision-maker from drawing any adverse inferences against a respondent based on a respondent's refusal to submit to cross-examination because a decision by an accused not to testify has no probative value and is irrelevant to the issue of culpability. Commenters expressed concern that public institutions could be opened up to legal challenges alleging violation of respondents' Fifth Amendment right against self-incrimination because where a respondent answered some questions, but refused to answer other questions due to refusal to self-incriminate, the proposed rules would demand exclusion of all the respondent's statements, even as to the information about which the respondent was subjected to cross-examination. Commenters argued this provision is unfair to respondents because a respondent may not want to appear for a Title IX hearing for fear that oral testimony could be admitted in a future criminal or civil proceeding, yet § 106.45(b)(6)(i) will "all but require" the adjudicator to make a finding of responsibility against the respondent if the reporting party testifies, is cross-examined, and is credible. Other commenters argued that it is unfair that a complainant's entire statement would be excluded where a respondent refused to appear and thus the complainant could not be cross-examined by the respondent's advisor.

[1323] Commenters cited: *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 401-02 (6th Cir. 2017) ("Given the parties' competing claims, and the lack of corroborative evidence to support or refute Roe's allegations, the present case left the [recipient] with a choice between believing an accuser and an accused. Yet, the [recipient] resolved this problem of credibility without assessing Roe's credibility. In fact, it decided plaintiff's fate without seeing or hearing from Roe at all. That is disturbing and, in this case, a denial of due process.") (internal quotation marks and citations omitted).

Commenters argued that this provision makes cross-examination mandatory and forces survivors into a Hobson's choice by requiring the decision-maker to disregard the statement of a complainant who does not agree to be cross-examined. Commenters argued that it is unfair to exclude a complainant's statements from consideration when often a complainant will not wish to submit to cross-examination due to fear of retaliation by a respondent, or chooses not to participate in a grievance process initiated against the complainant's wishes (such as where the Title IX Coordinator signs a formal complaint). Commenters argued that this provision requires exclusion of a complainant's statements even where the complainant's absence from a hearing is because the respondent wrongfully procured the complainant's absence, in contravention of the doctrine of forfeiture by wrongdoing.[1324]

Commenters argued that in criminal cases, the right to cross-examine the prosecution's hearsay declarants only extends to declarants who, at the time of their statement, understood they were giving evidence likely to be used in a later prosecution, and the proposed regulations thus inappropriately exclude a common category of statements gathered in Title IX investigations: statements to friends and family who are consoling a victim and are not aware that any crime is under investigation.[1325] Commenters argued that excluding a complainant's statement, including the initial formal complaint, just because a survivor does not want to undergo cross-examination is prejudicial and not a trauma-informed practice, when even reporting sexual misconduct requires bravery. Commenters argued that this provision is punitive when survivors are already

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[1324] Commenters cited: *Reynolds v. United States*, 98 U.S. 145, 158 (1878) for the proposition that forfeiture by wrongdoing is a doctrine that says a respondent gives up his right to confront the witness when he has procured that person's absence, and arguing that the NPRM requires exclusion of a complainant's statements even if the complainant's absence is due to the respondent's wrongdoing.

[1325] Commenters cited: *Crawford v. Washington*, 541 U.S. 36 (2004).

required to participate in an investigation that can last for months. Commenters argued it is unfair to punish a survivor by denying relief for a meritorious claim just because key witnesses refuse to testify or refuse to submit to cross-examination.

Commenters argued that this provision may make it difficult for schools to address situations where they know of predators operating on their campuses, as victim after victim declines to participate in cross-examination, potentially creating incentives for schools to coerce unwilling victims into participating in traumatizing processes, leading to further breakdown in trust between students and their institutions.

Commenters argued that the statements of witnesses should not be excluded due to non-appearance or refusal to submit to cross-examination, because witnesses may be unavailable for legitimate reasons such as studying abroad, illness, graduation, out-of-state residency, class activities, and so forth. Some commenters suggested that for witnesses (but not parties) written statements or telephonic testimony should be sufficient.

Commenters argued that parties and witnesses may be unavailable for a hearing for a variety of reasons unrelated to the reliability of their statements, including death, or disability that occurs after an investigation has begun but before the hearing occurs.

Commenters argued that the Federal Rules of Evidence[1326] allow out-of-court statements to be admitted in certain circumstances and for limited purposes, while § 106.45(b)(6)(i) creates a "draconian" rule that excludes even relevant, reliable statements, a result that is particularly unfair in light of the fact that recipients do not have subpoena powers to compel parties and witnesses to attend hearings. Commenters argued that courts do not impose cross-examination as

[1326] Commenters cited: Fed. R. Evid. 804, 805.

a due process requirement where the legislature has not granted subpoena power to an administrative body because to do so would allow the administrative body to act in a manner contrary to its enabling statute, and public universities do not have subpoena power; thus, commenters argued, the university cannot be foreclosed from relying on hearsay testimony of absent witnesses.[1327] Commenters argued that this provision should be modified so that a recipient may consider all information presented during the investigation and hearing regardless of who appears at the hearing, so that videos, texts, and statements are all evaluated on their own merits. Commenters argued that this provision creates a blanket exclusion of hearsay evidence, yet the Supreme Court has never announced a "blanket rejection . . . of administrative reliance on hearsay irrespective of reliability and probative value" and hearsay evidence may constitute substantial evidence supporting an administrative finding.[1328]

Commenters suggested that this provision be modified so that the consequence of a party failing to appear or answer questions is a change of the standard of evidence, not exclusion of the party's statements, so that if a complainant refuses to testify, the standard of evidence is increased to the clear and convincing evidence standard, while if the respondent refuses to testify, the standard of evidence is decreased to the preponderance of the evidence standard.

Commenters requested clarification that where a respondent fails to appear for a hearing, the recipient may still enter a default finding against the respondent and implement protective measures for the complainant.

[1327] Commenters cited: *Pub. Employees' Ret. Sys. v. Stamps*, 898 So.2d 664, 676 (Sup. Ct. Miss. 2005).
[1328] Commenters cited: *Richardson v. Perales*, 402 U.S. 389, 407 (1971); *Johnson v United States*, 628 F.2d 187, 190-91 (D.C. Cir. 1980) ("We have rejected a per se approach that brands evidence as insubstantial solely because it bears the hearsay label. . . . Instead, we evaluate the weight each item of hearsay should receive according to the item's truthfulness, reasonableness, and credibility.").

Commenters argued that the final regulations should allow for evidence not subject to cross-examination ("uncrossed") to be taken into account "for what it's worth" by the decision-maker who may assign appropriate weight to uncrossed statements rather than disregarding them altogether, so as to provide more due process and fundamental fairness to both parties in the search for truth.

Commenters asked for clarification of a number of questions including: Does this provision exclude only statements made during the hearing or to all of a party's statements even those made during the investigation, or prior to a formal complaint being filed? What is the threshold for not submitting to cross-examination (e.g., if a party answers by saying "I don't want to answer that" or answers several questions but refuses to answer one particular question, has the party "submitted to cross-examination" or not, and does the reason for refusing to answer matter, for instance where a respondent refuses to answer due to self-incrimination concerns, or a complainant refuses to answer due to good faith belief that the question violates rape shield protections and disagrees with the decision-maker's decision to the contrary)? Does exclusion of "any statement" include, for example, text messages or e-mail sent by the party especially where one party submitted to cross-examination and the other did not, but the text message exchange was between the two parties? Are decision-makers able to consider information provided in documents during the investigation stage (e.g., police reports, SANE (sexual assault nurse examiner) reports etc.), if certain witnesses referenced in those documents (e.g., police officers and SANE nurses) do not submit to cross-examination or refuse to answer a specific question during cross-examination? If a party or witness refuses to answer a question posed by the decision-maker (not by a party advisor) must the decision-maker exclude the party's statements? Commenters suggested making this provision more precise by replacing "does not submit to

cross-examination" with "does not appear for cross-examination." Commenters asserted that parties should have the right to "waive a question" without the party's entire statement being disregarded.

Discussion: The Department appreciates commenters' support for this provision in § 106.45(b)(6)(i) and agrees that it ensures that in the postsecondary context, only statements that have been tested for credibility will be considered by the decision-maker in reaching a determination regarding responsibility. Where a Title IX sexual harassment allegation does not turn on the credibility of the parties or witnesses, this provision allows the other evidence to be considered even though a party's statements are not relied on due to the party's or witness's non-appearance or refusal to submit to cross-examination. The Department declines to add exceptions to this provision, such as permitting reliance on statements against a party's interest. Determining whether a statement is against a party's interest, and applying the conditions and exceptions that apply in evidentiary codes that utilize such a rule,[1329] would risk complicating a fact-finding process so that a non-attorney decision-maker – even when given training in how to impartially conduct a grievance process – may not be equipped to conduct the adjudication.

The Department declines to change this provision so the consequence of refusal to submit to cross-examination is dismissal of the case rather than non-reliance on the refusing party or witness's statement. Such a change would operate only against complainants' interests because a respondent could choose to refuse cross-examination knowing the result would be dismissal (which, presumably, is a positive result in a respondent's view). This would essentially give

[1329] *E.g.*, Fed. R. Evid. 804(a) (describing conditions that constitute "unavailability" of a declarant); Fed. R. Evid. 804(b) (listing various exceptions to hearsay exclusion where declarant is unavailable).

respondents the ability to control the outcome of the hearing, running contrary to the purpose of the final regulations in giving both parties equal opportunity to meaningfully be heard before an impartial decision-maker reaches a determination regarding responsibility.

As commenters acknowledged, not all Title IX sexual harassment allegations rely on party testimony; for example, in some situations video evidence of the underlying incident is available, and in such circumstances even if both parties fail to appear or submit to cross-examination the decision-maker would disregard party statements yet proceed to evaluate remaining evidence, including video evidence that does not constitute statements or to the extent that the video contains non-statement evidence. If a party or witness makes a statement in the video, then the decision-maker may not rely on the statement of that party or witness in reaching a determination regarding responsibility. The Department understands commenters' arguments that courts have noted the unfairness of reaching a determination without ever probing or testing the credibility of the complainant.[1330] But § 106.45(b)(6)(i) does not raise such unfairness, because the central unfairness is where a decision-maker "resolved this problem of credibility" in favor of the party whose statements remained untested. The nature of such unfairness is not present under the final regulations where, if a party does not appear or submit to cross-examination the party's statement cannot be relied on – this provision does not allow a decision-

[1330] *See, e.g., Doe v. Univ. of Cincinnati*, 872 F.3d 393, 401-02 (6th Cir. 2017) ("Given the parties' competing claims, and the lack of corroborative evidence to support or refute Roe's allegations, the present case left the [recipient] with a choice between believing an accuser and an accused. Yet, the [recipient] resolved this problem of credibility without assessing Roe's credibility. In fact, it decided plaintiff's fate without seeing or hearing from Roe at all. That is disturbing and, in this case, a denial of due process.") (internal quotation marks and citations omitted); *Doe v. Purdue Univ. et al.*, 928 F.3d 652, 664 (7th Cir. 2019) (finding it "particularly concerning" that the university concluded the complainant "was the more credible witness – in fact, that she was credible at all – without ever speaking to her in person. Indeed, they did not even receive a statement written by Jane herself, much less a sworn statement.").

maker to "resolve" credibility in favor of a party whose statements remain untested through cross-examination.

The Department understands commenters concerns that respondents, complainants, and witnesses may be absent from a hearing, or may refuse to submit to cross-examination, for a variety of reasons, including a respondent's self-incrimination concerns regarding a related criminal proceeding, a complainant's reluctance to be cross-examined, or a witness studying abroad, among many other reasons. In response to commenters' concerns, the Department has revised the proposed regulations as follows: (1) We have revised § 106.45(b)(6)(i) to state that where a decision-maker must not rely on an absent or non-cross examined party or witness's statements, the decision-maker cannot draw any inferences about the determination regarding responsibility based on such absence or refusal to be cross-examined; (2) We have revised § 106.45(b)(6)(i) to grant a recipient discretion to hold the entire hearing virtually using technology that enables any or all participants to appear remotely; (3) § 106.71 expressly prohibits retaliation against any party, witness, or other person exercising rights under Title IX, including the right to participate or refuse to participate in a grievance process; (4) § 106.45(b)(3)(ii) grants a recipient discretion to dismiss a formal complaint, or allegations therein, where the complainant notifies the Title IX Coordinator in writing that the complainants wishes to withdraw the allegations, or the respondent is no longer enrolled or employed by the recipient, or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination. These changes address many of the concerns raised by commenters stemming from reasons why parties or witnesses may not wish to participate and the consequences of non-participation.

It is possible that one party's refusal to submit to cross-examination could result in the other party's statements remaining under consideration by the decision-maker even though the refusing party's statements are excluded (e.g., where one party refuses to submit to cross-examination, yet that party's advisor cross-examines the opposing party, whose statements are then considered by the decision-maker), but the opportunity of the refusing party to conduct cross-examination of the opposing party ensures that the opposing party's statements are not considered unless they have been tested via cross-examination. Because the final regulations preclude a decision-maker from drawing any inferences about the determination regarding responsibility based solely on a party's refusal to be cross-examined, the adjudication can still yield a fair, reliable outcome even where, for example, the refusing party is a respondent exercising a Fifth Amendment right against self-incrimination.

Where one party appears at the hearing and the other party does not, § 106.45(b)(6)(i) still states: "If a party does not have an advisor present at the hearing, the recipient must provide without fee or charge to that party an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party." Thus, a party's advisor may appear and conduct cross-examination even when the party whom they are advising does not appear. Similarly, where one party does not appear and that party's advisor of choice does not appear, a recipient-provided advisor must still cross-examine the other, appearing party "on behalf of" the non-appearing party, resulting in consideration of the appearing party's statements but not the non-appearing party's statements (without any inference being drawn based on the non-appearance). Because the statements of the appearing party were tested via cross-examination, a fair, reliable outcome can result in such a situation.

The Department disagrees that this provision leaves complainants (or respondents) in a Hobson's choice. The final regulations address a complainant's fear of retaliation, the inconvenience of appearing at a hearing, and the emotional trauma of personal confrontation between the parties. Further, as noted above, if a complainant still does not wish to appear or be cross-examined, an appointed advisor may conduct cross-examination of the respondent (if the respondent does appear) so that a decision-maker only considers the respondent's statements if the statements have been tested for credibility. Where a grievance process is initiated because the Title IX Coordinator, and not the complainant, signed the formal complaint, the complainant who did not wish to initiate a grievance process remains under no obligation to then participate in the grievance process, and the Department does not believe that exclusion of the complainant's statements in such a scenario is unfair to the complainant, who did not wish to file a formal complaint in the first place yet remains eligible to receive supportive measures protecting the complainant's equal access to education. If the respondent "wrongfully procures" a complainant's absence, for example, through intimidation or threats of violence, and the recipient has notice of that misconduct by the respondent (which likely constitutes prohibited retaliation), the recipient must remedy the retaliation, perhaps by rescheduling the hearing to occur at a later time when the complainant may appear with safety measures in place.

The Department disagrees that this provision needs to be modified so that a party's statements to family or friends would still be relied upon even when the party does not submit to cross-examination. Even if the family member or friend did appear and submit to cross-examination, where the family member's or friend's testimony consists of recounting the statement of the party, and where the party does not submit to cross-examination, it would be unfair and potentially lead to an erroneous outcome to rely on statements untested via cross-

examination.[1331] Further, such a modification would likely operate to incentivize parties to avoid submitting to cross-examination if a family member or friend could essentially testify by recounting the party's own statements. The Department understands that courts of law operate under comprehensive, complex rules of evidence under the auspices of judges legally trained to apply those rules of evidence (which often intersect with other procedural and substantive legal rules, such as rules of procedure, and constitutional rights). Such comprehensive rules of evidence admit hearsay (generally, out-of-court statements offered to prove the truth of the matter asserted) under certain conditions, which differ in criminal and civil trials. Because Title IX grievance processes are not court proceedings, comprehensive rules of evidence do not, and need not, apply. Rather, the Department has prescribed procedures designed to achieve a fair, reliable outcome in the context of sexual harassment in an education program or activity where the conduct alleged constitutes sex discrimination under Title IX. While judges in courts of law are competent to apply comprehensive, complicated rules of evidence, the Department does not believe that expectation is fair to impose on recipients, whose primary function is to provide education, not to resolve disputes between students and employees.

[1331] *E.g.*, *Crawford v. Washington*, 541 U.S. 36 (2004) (although decided under the Sixth Amendment's Confrontation Clause which only applies to criminal trials, the Supreme Court discussed how the Confrontation Clause stands for the principle that written statements are no substitute for cross-examination of witnesses in front of the trier of fact); *id.* at 49 (noting that cross-examining the witness who simply reads or recounts the statements of another witness in no way accomplishes the purposes and benefits of cross-examination) *id.* at 50, 51, 53 ("Raleigh was, after all, perfectly free to confront those who read Cobham's confession in court") (referring to the trial of Sir Walter Raleigh as a "paradigmatic confrontation violation"). Although the Confrontation Clause does not apply in a noncriminal trial, the principle of cross-examining witness before allowing statements to be used is so deeply rooted in American jurisprudence that ensuring that these final regulations reflect that fundamental American notion of justice increases party and public confidence in the legitimacy of Title IX adjudications in postsecondary institutions.

Absent importing comprehensive rules of evidence, the alternative is to apply a bright-line rule that instructs a decision-maker to either consider, or not consider, statements made by a person who does not submit to cross-examination. The Department believes that in the context of sexual harassment allegations under Title IX, a rule of non-reliance on untested statements is more likely to lead to reliable outcomes than a rule of reliance on untested statements. If statements untested by cross-examination may still be considered and relied on, the benefits of cross-examination as a truth-seeking device will largely be lost in the Title IX grievance process. Thus, the Department declines to import a rule of evidence that, for example, allows a witness's statement to be relied on where the statement was made to friends or family without awareness that a crime was under investigation.

The Department notes that the Supreme Court case cited to by some commenters urging a rule that would essentially allow non-testimonial statements to be considered without having been tested by cross-examination, analyzed a judicially-implied hearsay exception in light of the constitutional (Sixth Amendment's Confrontation Clause) right of a criminal defendant to confront witnesses; the Court reasoned that the plain language of the Confrontation Clause refers to "witnesses," that the dictionary definition of a witness is one who "bears testimony" and thus the Confrontation Clause generally does not allow testimonial statements – such as formal statements, solemn declarations, or affirmations, intended to prove or establish a fact – to be used against a criminal defendant unless such statements are made by a person subject to cross-examination in court, or where the defendant had a previous opportunity to cross-examine the person making the statement.[1332] The Court reasoned that hearsay exceptions as applied to non-

[1332] *Crawford v. Washington*, 541 U.S. 36, 50-55 (2004).

testimonial statements, such as business records, did not raise the core concern of the Confrontation Clause and, thus, rules of evidence permitting admission of non-testimonial statements under specific hearsay exceptions did not raise constitutional problems.[1333] While commenters correctly observe that the Confrontation Clause is concerned with use of *testimonial* statements against criminal defendants, even if use of a non-testimonial statement poses no constitutional problem under the Sixth Amendment, the statement would still need to meet a hearsay exception under applicable rules of evidence in a criminal court. For reasons discussed above, the Department does not wish to impose a complex set of evidentiary rules on recipients, whether patterned after civil or criminal rules. Even though a party's statements that are not subject to cross-examination might be admissible in a civil or criminal trial under rules of evidence that apply in those contexts, the Department has determined that such untested statements, whether testimonial or non-testimonial, should not be relied on in a Title IX grievance process. Reliance on party and witness statements that have not been tested for credibility via cross-examination undermines party and public confidence in the fairness and accuracy of the determinations reached by postsecondary institutions. This provision need not result in failure to consider relevant evidence because parties and witnesses retain the opportunity to have their own statements considered, by submitting to cross-examination.

In cases where a complainant files a formal complaint, and then does not appear or refuses to be cross-examined at the hearing, this provision excludes the complainant's statements, including allegations in a formal complaint. The Department does not believe this is prejudicial or punitive against a complainant because the final regulations provide complainants

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[1333] *Id.* at 56.

with opportunities to submit to cross-examination and thus have their statements considered, in ways that lessen the inconvenience and potential trauma of such a procedure. Complainants may request (and the recipient must grant the request) for the live hearing to be held with the parties in separate rooms so as not to come face to face with the respondent; questioning cannot be conducted by the respondent personally; the recipient may allow parties to appear virtually for the live hearing; complainants have the right to an advisor of choice to support and assist the party throughout the grievance process; and recipients may establish rules of decorum to ensure questioning is conducted in a respectful manner. Further, recipients must offer supportive measures to a complainant which may, for example, forbid contact or communication between the parties. The Department believes that without the credibility-testing function of cross-examination, whether the complainant's claim is meritorious cannot be ascertained with sufficient assurance. The Department understands that complainants (and respondents) often will not have control over whether witnesses appear and are cross-examined, because neither the recipient nor the parties have subpoena power to compel appearance of witnesses. Some absences of witnesses can be avoided by a recipient thoughtfully working with witnesses regarding scheduling of a hearing, and taking advantage of the discretion to permit witnesses to testify remotely. Where a witness cannot or will not appear and be cross-examined, that person's statements will not be relied on by the decision-maker, but the Department believes that any determination reached under this provision will be more reliable than a determination reached based on statements that have not been tested for credibility.

The Department notes that the final regulations expressly allow a recipient to remove a respondent on an emergency basis and do not prescribe cross-examination as a necessary

procedure during the post-removal opportunity to challenge the removal.[1334] Recipients may also implement supportive measures that restrict students' or employees' contact or communication with others. Recipients thus have avenues for addressing serial predator situations even where no victim chooses to participate in a grievance process. A recipient is prohibited from coercing unwilling victims to participate in a grievance process,[1335] even where the recipient's goal is to investigate a possible predator on campus.

The final regulations grant recipients discretion to allow participants, including witnesses, to appear at a live hearing virtually; however, technology must enable all participants to see and hear other participants, so a telephonic appearance would not be sufficient to comply with § 106.45(b)(6)(i). For reasons discussed above, written statements cannot be relied upon unless the witness submits to cross-examination, and whether a witness's statement is reliable must be determined in light of the credibility-testing function of cross-examination, even where non-appearance is due to death or post-investigation disability. The Department notes that recipients have discretion to apply limited extensions of time frames during the grievance process for good cause, which may include, for example, a temporary postponement of a hearing to accommodate a disability.

The Department understands commenters' concerns that a blanket rule against reliance on party and witness statements made by a person who does not submit to cross-examination is a broader exclusionary rule than found in the Federal Rules of Evidence, under which certain

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[1334] Section 106.44(c).

[1335] Section 106.71 provides: "No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated *or refused to participate* in any manner in an investigation, proceeding, or hearing under this part." (emphasis added).

hearsay exceptions permit consideration of statements made by persons who do not testify in court and have not been cross-examined. The Department understands that postsecondary institutions lack subpoena power to compel parties or witnesses to appear and testify at a live hearing. The final regulations do not purport to grant recipients the authority to compel appearance and testimony. However, where a party or witness does not appear and is not cross-examined, the statements of that party or witness cannot be determined reliable, truthful, or credible in a non-courtroom setting like that of an educational institution's proceeding that lacks subpoena powers, comprehensive rules of evidence, and legal professionals. As many commenters noted, recipients are educational institutions that should not be converted into *de facto* courtrooms. The final regulations thus prescribe a process that simplifies evidentiary complexities while ensuring that determinations regarding responsibility result from consideration of relevant, reliable evidence. The Department declines to adopt commenters' suggestion that instead the decision-maker should be permitted to rely on statements that are not subject to cross-examination, if they are reliable; making such a determination without the benefit of extensive rules of evidence would likely result in inconsistent and potentially inaccurate assessments of reliability. Commenters correctly note that courts have not imposed a blanket rule excluding hearsay evidence from use in administrative proceedings. However, cases cited by commenters do not stand for the proposition that every administrative proceeding *must*

be permitted to rely on hearsay evidence, even where the agency lacks subpoena power to compel witnesses to appear.[1336]

The Department acknowledges that the evidence gathered during an investigation may be broader than what is ultimately deemed relevant and relied upon in making a determination regarding responsibility, but the procedures in § 106.45 are deliberately selected to ensure that all evidence directly related to the allegations is reviewed and inspected by the parties, that the investigative report summarizes only relevant evidence, and that the determination regarding responsibility relies on relevant evidence. Because party and witness statements so often raise credibility questions in the context of sexual harassment allegations, the decision-maker must consider only those statements that have benefited from the truth-seeking function of cross-examination. The recipient, and the parties, have equal opportunity (and, for the recipient, the obligation) to gather and present relevant evidence including fact and expert witnesses, and face the same limitations inherent in a lack of subpoena power to compel witness testimony. The Department believes that the final regulations, including § 106.45(b)(6)(i), strike the appropriate balance for a postsecondary institution context between ensuring that only relevant and reliable evidence is considered while not over-legalizing the grievance process.

The Department declines to tie reliance on statements that are not subject to cross-examination to the standard of evidence used. For reasons discussed in the "Section

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[1336] *E.g.*, *Johnson v United States*, 628 F.2d 187, 190-91 (D.C. Cir. 1980) (holding that substantial evidence supported U.S. Civil Service Commission's termination determination even though it relied on hearsay statements of three witnesses, where the agency's procedural rules expressly allowed introduction of witness statements and the statements were found to be reliable because they were from disinterested witnesses, consistent with each other, and the defense had seen the witness statements prior to the hearing); *Richardson v. Perales*, 402 U.S. 389, 407, 410 (1971) (Social Security Administration hearing regarding disability benefits eligibility did not deprive claimant of due process by relying on written medical consultant reports, where those written reports were relevant and the claimant could have compelled the doctors to appear for cross-examination but did not do so).

106.45(b)(7)(i) Standard of Evidence and Directed Question 6" subsection of the "Determinations Regarding Responsibility" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble, the Department believes that it is appropriate to leave recipients flexibility to choose between two standards of evidence but has made changes in the final regulations to clarify that a recipient's choice must then apply to *all* formal complaints of sexual harassment subject to a § 106.45 grievance process. Making the standard of evidence dependent on whether a decision-maker relies on party or witness statements that are not subject to cross-examination would effectively remove a recipient's discretion to select a standard of evidence, and would not achieve the benefits of a recipient implementing a predictable grievance process.

The Department appreciates commenters' requests for clarification of this provision. As noted above, even where a respondent fails to appear for a hearing, the decision-maker may still consider the relevant evidence (excluding statements of the non-appearing party) and reach a determination regarding responsibility, though the final regulations do not refer to this as a "default judgment." If a decision-maker does proceed to reach a determination, no inferences about the determination regarding responsibility may be drawn based on the non-appearance of a party. The Department notes that under § 106.45(b)(3)(ii) a recipient may in its discretion, but is not required to, dismiss a formal complaint where the respondent is no longer enrolled or employed by the recipient or where specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination regarding responsibility (or where a complainant informs the Title IX Coordinator in writing that the complainant wishes to withdraw the formal complaint).

The prohibition on reliance on "statements" applies not only to statements made during the hearing, but also to *any* statement of the party or witness who does not submit to cross-examination. "Statements" has its ordinary meaning, but would not include evidence (such as videos) that do not constitute a person's intent to make factual assertions, or to the extent that such evidence does not contain a person's statements. Thus, police reports, SANE reports, medical reports, and other documents and records may not be relied on to the extent that they contain the statements of a party or witness who has not submitted to cross-examination. While documentary evidence such as police reports or hospital records may have been gathered during investigation[1337] and, if directly related to the allegations inspected and reviewed by the parties,[1338] and to the extent they are relevant, summarized in the investigative report,[1339] the hearing is the parties' first opportunity to argue to the decision-maker about the credibility and implications of such evidence. Probing the credibility and reliability of *statements* asserted by witnesses contained in such evidence requires the parties to have the opportunity to cross-examine the witnesses making the statements.

The Department appreciates the opportunity to clarify here that to "submit to cross-examination" means answering those cross-examination questions that are relevant; the decision-maker is required to make relevance determinations regarding cross-examination in real time during the hearing in part to ensure that parties and witnesses do not feel compelled to answer irrelevant questions for fear of their statements being excluded. If a party or witness disagrees

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[1337] The Department notes that the final regulations add to § 106.45(b)(5)(i) a provision that restricts a recipient from accessing or using a party's treatment records without the party's voluntary, written consent. If the party is not an "eligible student," as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a "parent," as defined in 34 CFR 99.3.
[1338] Section 106.45(b)(5)(vi).
[1339] Section 106.45(b)(5)(vii).

with a decision-maker's determination that a question is relevant, during the hearing, the party or witness's choice is to abide by the decision-maker's determination and answer, or refuse to answer the question, but unless the decision-maker reconsiders the relevance determination prior to reaching the determination regarding responsibility, the decision-maker would not rely on the witness's statements.[1340] The party or witness's reason for refusing to answer a relevant question does not matter. This provision does apply to the situation where evidence involves intertwined statements of both parties (e.g., a text message exchange or e-mail thread) and one party refuses to submit to cross-examination and the other does submit, so that the statements of one party cannot be relied on but statements of the other party may be relied on. If parties do not testify about their own statement and submit to cross-examination, the decision-maker will not have the appropriate context for the statement, which is why the decision-maker cannot consider that party's statements. This provision requires a party or witness to "submit to cross-examination" to avoid exclusion of their statements; the same exclusion of statements does not apply to a party or witness's refusal to answer questions posed by the decision-maker. If a party or witness refuses to respond to a decision-maker's questions, the decision-maker is not precluded from relying on that party or witness's statements.[1341] This is because cross-examination (which differs from questions posed by a neutral fact-finder) constitutes a unique opportunity for parties to present a decision-maker with the party's own perspectives about evidence. This adversarial testing of credibility renders the person's statements sufficiently reliable for consideration and fair for

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[1340] Parties have the equal right to appeal on three bases including procedural irregularity that affects the outcome, so if a party disagrees with a decision-maker's relevance determination, the party has the opportunity to challenge the relevance determination on appeal. § 106.45(b)(8).

[1341] The decision-maker still cannot draw any inference about the determination regarding responsibility based solely on a party's refusal to answer questions posed *by the decision-maker*; the final regulations refer in § 106.45(b)(6)(i) to not drawing inferences based on refusal to answer "cross-examination *or other* questions" (emphasis added).

consideration by the decision-maker, in the context of a Title IX adjudication often overseen by laypersons rather than judges and lacking comprehensive rules of evidence that otherwise might determine reliability without cross-examination.

The Department disagrees that the phrase "does not appear for cross-examination" is clearer or leads to better results than this provision's language, "does not submit to cross-examination." The former would permit a party or witness to appear but not engage in the cross-examination procedure, which would not achieve the benefits of cross-examination discussed above. For similar reasons, the Department declines to allow a party or witness to "waive" a question because such a rule would circumvent the benefits and purposes of cross-examination as a truth-seeking tool for postsecondary institutions' Title IX adjudications.

Changes: The Department has revised § 106.45(b)(6)(i) to clarify that although a decision-maker cannot rely on the statement of a party or witness who does not submit to cross-examination, the decision-maker cannot draw any inference about the determination regarding responsibility based solely on a party's or witness's absence from the hearing or refusal to answer cross-examination or other questions. This provision has been further revised to allow recipients discretion to hold live hearings with any or all parties, witnesses, and other participants appearing virtually, with technology enabling participants simultaneously to see and hear each other. The Department has also added § 106.71, prohibiting retaliation against any person exercising rights under Title IX including participating or refusing to participate in any grievance process. Section 106.45(b)(3)(ii), added in the final regulations, grants a recipient discretion to dismiss a formal complaint, or allegations therein, where the complainant notifies the Title IX Coordinator in writing that the complainants wishes to withdraw the allegations, or the

respondent is no longer enrolled or employed by the recipient, or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination.

Rape Shield Protections

Comments: Some commenters supported the rape shield protections in § 106.45(b)(6)(i) (prohibiting questions or evidence about a complainant's prior sexual behavior or sexual predisposition, with two exceptions – where evidence of prior sexual behavior is offered to prove someone other than the respondent committed the alleged offense, or where prior sexual behavior evidence is specifically about the complainant and the respondent and is offered to prove consent) because prohibiting asking about a complainant's sexual history will give victims more control when bringing claims, and because these provisions protect victims' privacy.

Some commenters opposed the rape shield protections in § 106.45(b)(6)(i), arguing that the ban on evidence concerning a complainant's sexual history is too broad because evidence of a complainant's sexual history with the respondent should also be allowed to prove motive to fabricate or conceal a sexual interaction, and not only to prove consent. Commenters argued that Fed. R. Evid. 412 allows such evidence if the probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party, and because the rape shield language in § 106.45(b)(6)(i) is based on Fed. R. Evid. 412, the final regulations should incorporate that exception as well. Commenters argued that Fed. R. Evid. 412(b)(1)(B) allows sexual history evidence to be offered by a criminal defendant without restriction but Fed. R. Evid. 412(b)(2) provides that in civil cases, sexual history evidence is admissible to prove consent only if its probative value substantially outweighs the danger of harm and unfair prejudice to a victim or any party; commenters argued that because a Title IX grievance process is more analogous to a

civil trial than a criminal trial, the rape shield language in § 106.45(b)(6)(i)-(ii) should include the limitation contained in Fed. R. Evid. 412(b)(2).

Commenters argued that the prohibition against questions or evidence about sexual predisposition or sexual history should also apply to respondents so that the questioning focuses on the allegation at issue and does not delve into irrelevant details about a respondent's sexual history. At least one commenter mistakenly understood this provision to allow questions about a complainant's sexual history but not allow the same questions about a respondent's sexual history such that a respondent's propensity to violence or past behaviors speaking to a pattern could not be considered.

Commenters argued that an additional provision of Fed. R. Evid. 412 should be added into the final regulations: allowance of "evidence whose exclusion would violate the defendant's constitutional rights."

Other commenters supported the rape shield language but expressed concern that the protections will be ineffective without comprehensive rules of evidence. Some commenters cited a study that found lawyers in many cases routinely attempt to circumvent rape shield limitations.[1342] Other commenters argued that because the rape shield protections are patterned after Fed. R. Evid. 412, the final regulations should incorporate the explanatory information in the Advisory Committee notes to Fed. R. Evid. 412[1343] so that parties and decision-makers better understand the parameters of what kind of questioning is off-limits. Commenters argued that

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[1342] Commenters cited: Claire McGlynn, *Rape Trials and Sexual History Evidence*, 81 J. CRIM. L. 5 (2017).
[1343] Commenters cited: Advisory Committee Notes, Fed. R. Evid. 412, stating sexual behavior "connotes all activities that involve actual physical conduct, i.e., sexual intercourse and sexual contact, or that imply sexual intercourse or sexual contact" including the victim's use of contraceptives, evidence of the birth of a child, and sexually transmitted diseases, and that the definition of sexual behavior also includes "the behavior of the mind," while "sexual predisposition" is defined to include the victim's "mode of dress, speech, or life-style."

without further guidance on how to apply the rape shield limitations, the exceptions contained in this provision may still subject complainants to unwarranted invasions of privacy, character attacks, and sex stereotyping, and suggested that the final regulations specify how recipients should enforce the rape shield protections. Commenters argued that the two exceptions to the rape shield protections should be eliminated because having non-legal professionals try to determine the scope of the exceptions will result in the exceptions swallowing the rape shield protections. Commenters argued that the evidence exchange provision in § 106.45(b)(5)(vi) risks negating the rape shield protections in § 106.45(b)(6)(i)-(ii). Commenters asserted that because the proposed rules fail to define consent, the scope of the rape shield protections is unclear.

Commenters argued that the two rape shield exceptions are too favorable to respondents and unfair to complainants because those exceptions let respondents discuss a complainant's sexual history any time the respondent wants to point the finger at a third party or show consent was present due to consent being present in past sexual interactions, a problem that commenters argued will frequently arise since a significant number of sexual assaults are committed by intimate partners.[1344] Commenters argued that the rape shield exceptions expose a thinly disguised reworking of the rape myth that women in sexual harassment cases are so unreliable that they may be mistaken about who committed the act, and allow slut-shaming (implications that a woman with an extensive sexual history likely consented to sexual activity) to be used as a defense to a sexual assault accusation. Commenters argued that research shows that during sexual assault trials victims are routinely asked about their sexual history to imply the presence

[1344] Commenters cited: U.S. Dep't. of Justice, Bureau of Justice Statistics, *Special Report: Rape and Sexual Assault Victimization Among College-Age Females, 1995-2013* (2016).

of consent, often relying on an incorrect assumption that women with more sexual experience are more likely to make a false allegation.[1345]

Commenters argued that the "offered to prove consent" exception should be eliminated because past sexual encounters, even with the respondent, are always irrelevant to issues of consent because valid consent can only ever be given in the particular moment.[1346] Commenters asserted that experts believe that there is no evidentiary theory under which sexual history is relevant to any claim or defense except when establishing a pattern of inappropriate behavior on the part of the harasser.[1347]

Commenters argued that this provision violates State laws, such as in New York, that have legislated an affirmative consent standard for campus sexual misconduct. Commenters asserted that this provision should: state that evidence of sexual behavior is never allowed to prove reputation or character (or only allowed if the complainant has placed the complainant's own reputation or character at issue);[1348] require that sexual behavior evidence that ostensibly meets one of the rape shield exceptions be allowed only if a neutral evaluator decides in advance that the evidence meets an exception and that its probative value outweighs potential harm or

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[1345] Commenters cited: Olivia Smith & Tina Skinner, *Observing Court Responses to Victims of Rape and Sexual Assault*, 7 FEMINIST CRIMINOLOGY 4, 298, 300 (2012).
[1346] Commenters cited: 10 U.S.C. 920(g)(8)(a) (governing rape and sexual assault in the armed forces) ("A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent.").
[1347] Commenters cited: Linda J. Krieger & Cindi Fox, *Evidentiary Issues in Sexual Harassment Litigation*, 1 BERKELEY WOMEN'S L. J. 115 (1985); Megan Reidy, *Comment: The Impact of Media Coverage on Rape Shield Laws in High-Profile Cases: Is the Victim Receiving a "Fair Trial",* 54 CATH. UNIV. L. REV. 297, 308 (2005).
[1348] Commenters cited: Seth I. Koslow, *Rape Shield Laws and the Social Media Revolution*, 29 TOURO L. REV. 3, Art. 19 (2013), for the proposition that so many students use social media that those platforms have become a significant means through which a complainant might be said to have placed their reputation in controversy or at issue.

prejudice to the complainant; and require recipients to inform complainants in advance if such evidence will be allowed.

Commenters objected to use of the phrase "sexual predisposition" claiming the phrase harkens back to the past and puts on trial the sexual practices and identity of the complainant, which have no relevance to the adjudication of particular allegations.

Commenters wondered if the rape shield protected complainants during all stages of a grievance process, for example during the collection of evidence phase or during an informal resolution process, or only during a live hearing. Commenters stated that the rape shield provision, though well-intentioned, conflicts with other provisions in § 106.45 such as allowing the parties during investigation to review and respond to evidence gathered by the recipient as well as offer additional evidence during the investigation; these commenters asserted that while greater transparency in the grievance process is warranted and welcome, the unfettered right to introduce and review evidence conflicts with both the rape shield protections in the proposed rules and with some State laws that also prevent admission of prior sexual behavior evidence. Commenters argued that respondents should only be allowed to ask questions, especially about sexual behavior, after presenting an adequate foundation and where the questions do not rely on hearsay or speculation.

Commenters asserted that this provision does not accurately mirror Fed. R. Evid. 412 because the latter allows the evidence where it is "offered by the defendant to prove consent or if offered by the prosecutor," and commenters argued that the final regulations should allow prior sexual behavior evidence "if offered by the defendant to prove consent or welcomeness, or if offered by the institution or complainant." Commenters argued that this modification would appropriately allow testimony to be impeached when welcomeness is at issue in non-sexual

assault situations, in addition to where consent is at issue in sexual violence situations, and would give a complainant or the institution equal opportunity to use such evidence where welcomeness or consent is contested. Other commenters argued that the rape shield language appeared not to take into account the full range of sexual harassment because under the second prong of the sexual harassment definition in § 106.30, consent is not an element but rather the issue might be whether the conduct was unwelcome versus invited, but, commenters asserted, even if sexual history was relevant in those situations, the relevance would be outweighed by potential harm to the complainant and so should be excluded.

Commenters argued that this provision's wording in the NPRM, referring to "cross-examination must exclude evidence of the complainant's sexual behavior or predisposition" lacked clarity because questions are not evidence, though questions can lead to testimony that is evidence, and the provision was thus ambiguous as to whether the rape shield protections applied solely to "questions" or also to "evidence" that concerns a complainant's sexual behavior or predisposition. Commenters widely used the phrase "prior sexual behavior" or "prior sexual history" in reference to the rape shield provision in § 106.45(b)(6)(i). Commenters noted that some State laws, for example Maryland and New York, address the same issue with rules prohibiting "prior" sexual history.

Discussion: The Department agrees with commenters that the rape shield protections serve a critically important purpose in a Title IX sexual harassment grievance process: protecting complainants from being asked about or having evidence considered regarding sexual behavior, with two limited exceptions. The final regulations clarify that such questions, and evidence, are not only excluded at a hearing, but are deemed irrelevant.

The Department disagrees that the rape shield language is too broad. Scenarios described by commenters, where a respondent might wish to prove the complainant had a motive to fabricate or conceal a sexual interaction, do not require admission or consideration of the complainant's sexual behavior. Respondents in that scenario could probe a complainant's motive by, for example, inquiring whether a complainant had a dating or romantic relationship with a person other than the respondent, without delving into a complainant's sexual behavior; sexual behavior evidence would remain irrelevant in such circumstances. Commenters correctly note that the Department adapted the rape shield language in § 106.45(b)(6)(i) from Fed. R. Evid. 412.[1349] As with other determinations about what procedures should be part of a § 106.45 grievance process, the Department carefully considered whether Fed. R. Evid. 412 would be useful in formulating rape shield provisions for application in Title IX adjudications. However, the final regulations do not import wholesale Fed. R. Evid. 412. The Department believes the protections of the rape shield language remain stronger if decision-makers are not given discretion to decide that sexual behavior is admissible where its probative value substantially outweighs the danger of harm to a victim and unfair prejudice to any party. If the Department permitted decision-makers to balance ambiguous factors like "unfair prejudice" to make admissibility decisions, the final regulations would convey an expectation that a non-lawyer decision-maker must possess the legal expertise of judges and lawyers. Instead, the Department expects decision-makers to apply a single admissibility rule (relevance), including this

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[1349] 83 FR 61476 (regarding § 106.45(b)(6)(i)-(ii), the NPRM stated "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).").

provision's specification that sexual behavior is irrelevant with two concrete exceptions. This approach leaves the decision-maker discretion to assign weight and credibility to evidence, but not to deem evidence inadmissible or excluded, except on the ground of relevance (and in conformity with other requirements in § 106.45, including the provisions discussed above whereby the decision-maker cannot rely on statements of a party or witness if the party or witness did not submit to cross-examination, a party's treatment records cannot be used without the party's voluntary consent, and information protected by a legally recognized privilege cannot be used).

The Department declines to extend the rape shield language to respondents. The Department does not wish to impose more restrictions on relevance than necessary to further the goals of a Title IX sexual harassment adjudication, and does not believe that a respondent's sexual behavior requires a special provision to adequately protect respondents from questions or evidence that are *irrelevant*. By contrast, in order to counteract historical, societal misperceptions that a *complainant's* sexual history is somehow always relevant to sexual assault allegations, the Department follows the rationale of the Advisory Committee's Note to Fed. R. Evid. 412, and the Supreme Court's observation in *Michigan v. Lucas*,[1350] that rape shield protections are intended to protect *complainants* from harassing, irrelevant questions at trial. The Department cautions recipients that some situations will involve counter-claims made between two parties, such that a respondent is also a complainant, and in such situations the recipient must take care to apply the rape shield protections to any party where the party is designated as a "complainant"

[1350] 500 U.S. 145, 146 (1991) ("Like most States, Michigan has a 'rape-shield' statute *designed to protect victims* of rape from being exposed at trial to harassing or irrelevant questions concerning their past sexual behavior.") (emphasis added).

even if the same party is also a "respondent" in a consolidated grievance process.[1351] The Department clarifies here that the rape shield language in this provision considers all questions and evidence of a complainant's sexual *predisposition* irrelevant, with no exceptions; questions and evidence about a complainant's prior *sexual behavior* are irrelevant unless they meet one of the two exceptions; and questions and evidence about a *respondent's* sexual predisposition or prior sexual behavior are not subject to any special consideration but rather must be judged like any other question or evidence as relevant or irrelevant to the allegations at issue.

For two reasons, the Department also declines to import the additional provision in Fed. R. Evid. 412 that would allow in evidence "whose exclusion would violate the defendant's constitutional rights." First, this exception to the preclusion of sexual behavior evidence is intended to protect the constitutional rights of *criminal* defendants, and respondents in a Title IX grievance process are not due the same rights as criminal defendants. Second, the Department believes that the procedures in § 106.45, including the use of relevance as the only admissibility criterion, ensure that trained, layperson decision-makers are capable of making relevance determinations and then evaluating relevant evidence with discretion to decide how persuasive certain evidence is to a determination regarding responsibility, whereas imposing a complex set of evidentiary rules would make it less likely that a non-lawyer would feel competent to be a recipient's decision-maker. The final regulations permit a wide universe of evidence that may be "relevant" (and thus not subject to exclusion), and the Department believes it is unlikely that a recipient applying the § 106.45 grievance process with its robust procedural protections would be

[1351] Section 106.45(b)(4) allows consolidation of formal complaints, in a recipient's discretion, when allegations arise from the same facts or circumstances.

found to have violated any respondent's constitutional rights, whether under due process of law Supreme Court cases like *Mathews* and *Goss*, or the Sixth Circuit's due process decision in *Baum*.[1352] As discussed above, we have revised § 106.45(b)(6)(i) to direct a decision-maker who must not rely on the statement of a party who has not appeared or submitted to cross-examination not to draw any inference about the determination regarding responsibility based on the party's absence or refusal to be cross-examined (or refusal to answer other questions, such as those posed by the decision-maker). This modification provides protection to respondents exercising Fifth Amendment rights against self-incrimination (though it applies equally to protect complainants who choose not to appear or testify).

For reasons discussed above, the Department believes that well-trained decision-makers are fully capable of determining relevance of questions and evidence, including the special consideration given to a complainant's sexual history under this provision. Section 106.45(b)(1)(iii) has been revised to require decision-makers to be trained on issues of relevance, including specifically application of the rape shield protections. Regardless of studies that show that lawyers routinely try to circumvent rape shield protections, the Department expects recipients to ensure that decision-makers accurately determine the relevance and irrelevance of a complainant's sexual history in accordance with these regulations. The Department disagrees that the two exceptions in the rape shield provisions should be eliminated because non-lawyer decision-makers will misapply this provision and end up allowing questions and evidence

[1352] As acknowledged in § 106.6(d), the Department will not enforce these regulations in a manner that requires any recipient to violate the U.S. Constitution, including the First Amendment, Fifth and Fourteenth Amendment, or any other constitutional provision. The Department believes that the § 106.45 grievance process allows, and expects, recipients to apply the grievance process in a manner that avoids violation of any party's constitutional rights.

contrary to this provision. Nothing in the final regulations precludes a recipient from including in its training of decision-makers information about the purpose and scope of rape shield language in Fed. R. Evid. 412, including the Advisory Committee Notes, so long as the training remains focused on applying the rape shield protections as formulated in these final regulations.

The Department disagrees that the evidence exchange provision in § 106.45(b)(5)(vi) negates the rape shield protections in § 106.45(b)(6)(i)-(ii). As noted by the Supreme Court, rape shield protections generally are designed to protect complainants from harassing, irrelevant inquiries into sexual behavior *at trial*.[1353] The final regulations permit exchange of all evidence "directly related to the allegations in a formal complaint" during the investigation, but require the investigator to only summarize "relevant" evidence in the investigative report (which would exclude sexual history information deemed by these final regulations to be " not relevant"), and require the decision-maker to objectively evaluate only "relevant" evidence during the hearing and when reaching the determination regarding responsibility. To further reinforce the importance of correct application of the rape shield protections, we have revised § 106.45(b)(6)(i) to explicitly state that only relevant questions may be asked, and the decision-maker must determine the relevance of each cross-examination question before a party or witness must answer.

Commenters correctly observe that the final regulations do not define "consent." For reasons explained in the "Consent" subsection of the "Section 106.30 Definitions" section of this preamble, the final regulations clarify that the Department will not require recipients to adopt a

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[1353] *Michigan v. Lucas*, 500 U.S. 145, 146 (1991) ("Like most States, Michigan has a 'rape-shield' statute designed to protect victims of rape from being exposed *at trial* to harassing or irrelevant questions concerning their past sexual behavior.") (emphasis added).

particular definition of consent. This provision in § 106.30 allows recipients flexibility to use a definition of sexual consent that best reflects the recipient's values and/or complies with State laws that require recipients to adopt particular definitions of consent for campus sexual misconduct proceedings. The second of the two exceptions to the rape shield protections refers to "if offered to prove consent" and thus the scope of that exception will turn in part on the definition of consent adopted by each recipient. Decision-makers will be trained in how to conduct a grievance process and specifically on how to apply the rape shield protections, which will include the recipient's adopted definition of consent, and thus the decision-maker will understand how to apply the rape shield language in accordance with that definition. Because of the flexibility recipients have under these final regulations to adopt a definition of consent, the Department disagrees that the scope of the second exception to the rape shield protections is too broad or favors respondents. Rather, the scope of the "offered to prove consent" exception is determined in part by a recipient's definition of consent, which may be broad or narrow at the recipient's discretion. The Department disagrees that the first exception ("offered to prove that someone other than the respondent" committed the alleged misconduct) is too broad, because in order for that exception to apply a respondent's contention must be that someone other than the respondent is the person who committed the sexual harassment; commenters have informed the Department that this defense is not common compared to the defense that a sexual interaction occurred but consent was present, a conclusion buttressed by commenters' assertions that a significant number of sexual assaults are committed by intimate partners. When a respondent has evidence that someone else committed the alleged sexual harassment, a respondent must have opportunity to pursue that defense, or else a determination reached by the decision-maker may be

an erroneous outcome, mistakenly identifying the nature of sexual harassment occurring in the recipient's education program or activity.[1354]

Neither of the two exceptions to the rape shield protections promote the notion that women, or complainants generally, are unreliable and that they may be mistaken about who committed an assault, or allow slut-shaming as a defense to sexual assault accusations. Rather, the first exception applies to the narrow circumstance where a respondent contends that someone other than the respondent committed the misconduct, and the second applies narrowly to allow sexual behavior questions or evidence *concerning incidents between the complainant and respondent* if offered to prove consent. The second exception does not admit sexual history evidence of a complainant's sexual behavior with someone other than the respondent; thus, "slut-shaming" or implication that a woman with an extensive sexual history probably consented to sexual activity with the respondent, is not validated or promoted by this provision. As noted above, the scope of when sexual behavior between the complainant and respondent might be relevant to the presence of consent regarding the particular allegations at issue depends in part on a recipient's definition of consent. Not all definitions of consent, for example, require a verbal expression of consent; some definitions of consent inquire whether based on circumstances the respondent reasonably understood that consent was present (or absent), thus potentially making relevant evidence of past sexual interactions between the complainant and the respondent. The Department reiterates that the rape shield language in this provision does not pertain to the

[1354] The Department notes that where a decision-maker determines, for example, that the respondent is not responsible for the allegations in the formal complaint, but also determines that the complainant did suffer the alleged sexual harassment but it was perpetrated by someone other than the respondent, the recipient is free to provide supportive measures to the complainant designed to restore or preserve equal access to education.

sexual predisposition or sexual behavior of respondents, so evidence of a pattern of inappropriate behavior by an alleged harasser must be judged for relevance as any other evidence must be.

As discussed above, the Department defers to recipients on a definition of consent, and thus recipients subject to State laws imposing particular definitions may comply with those State laws during a § 106.45 grievance process. The recipient's definition of consent will determine the scope of the rape shield exception that refers to "consent." The Department does not believe that the provision needs to expressly state that a complainant's sexual behavior can never be allowed to prove a complainant's reputation or character; rather, this provision already deems irrelevant all questions or evidence of a complainant's prior sexual behavior unless offered to prove that someone other than the respondent committed the alleged offense or if the questions or evidence concern specific sexual behavior between the complainant and respondent and are offered to prove consent. No other use of a complainant's sexual behavior is authorized under this provision.

The Department declines to require questions or evidence that may meet one of the rape shield exceptions to be allowed to be asked or presented at a hearing only if a neutral evaluator first decides that one of the two exceptions applies. As discussed above, the decision-maker will be trained in how to conduct a grievance process, including how to determine relevance and how to apply the rape shield protections, and at the live hearing the decision-maker must determine the relevance of a cross-examination question before a party or witness must answer. As discussed above, the Department declines to import a balancing test that would exclude sexual behavior questions and evidence (even meeting the two exceptions) unless probative value substantially outweighs potential harm or undue prejudice, because that open-ended, complicated standard of admissibility would render the adjudication more difficult for a layperson decision-

maker competently to apply. Unlike the two exceptions in this provision, a balancing test of probative value, harm, and prejudice contains no concrete factors for a decision-maker to look to in making the relevance determination.

The Department's use of the phrase "sexual predisposition" is mirrored in Fed. R. Evid. 412; far from indicating intent to harken back to the past where sexual practices of a complainant were used against a complainant, the final regulations take a strong position that questions or evidence of a complainant's "sexual predisposition" are simply irrelevant, without exception.

The final regulations clarify the rape shield language to state that questions and evidence subject to the rape shield protections are "not relevant," and therefore the rape shield protections apply wherever the issue is whether evidence is relevant or not. As noted above, this means that where § 106.45(b)(5)(vi) requires review and inspection of evidence "directly related to the allegations" that universe of evidence is not screened for relevance, but rather is measured by whether it is "directly related to the allegations." However, the investigative report must summarize "relevant" evidence, and thus at that point the rape shield protections would apply to preclude inclusion in the investigative report of irrelevant evidence. The Department believes these provisions work consistently and logically as part of the § 106.45 grievance process, under which all evidence is evaluated for whether it is directly related to the allegations, evidence summarized in the investigative report must be relevant, and evidence (and questions) presented in front of, and considered by, the decision-maker must be relevant. The Department declines to require respondents to "lay a foundation" before asking questions, or to impose rules excluding questions based on hearsay or speculation. For reasons described above, relevance is the sole gatekeeper evidentiary rule in the final regulations, but decision-makers retain discretion regarding the weight or credibility to assign to particular evidence. Further, for the reasons

discussed above, while the final regulations do not address "hearsay evidence" as such, § 106.45(b)(6)(i) does preclude a decision-maker from relying on statements of a party or witness who has not submitted to cross-examination at the live hearing.

The Department notes that the rape shield language does not limit the "if offered to prove consent" exception to when the question or evidence is offered *by the respondent*. Rather, such questions or evidence could be offered by either party, or by the investigator, or solicited on the decision-maker's own initiative. The Department appreciates commenters' suggestion that the rape shield exception regarding "to prove consent" apply to proof of "welcomeness" so that it would apply to allegations of sexual harassment that turn on welcomeness and not on consent of the victim. However, as explained in the "Sexual Harassment" subsection of the "Section 106.30 Definitions" section of this preamble, the Department interprets the "unwelcome" element in the first and second prongs of the § 106.30 definition of sexual harassment subjectively; that is, if conduct is unwelcome to the complainant, that is sufficient to support that element of an allegation of sexual harassment. By contrast, the final regulations impose a reasonable person standard on the other elements in the second prong of the § 106.45 definition – whether the unwelcome conduct was so "severe, pervasive, and objectively offensive" that it "effectively denied a person equal access" to education. The Department therefore declines to extend the rape shield language to encompass situations where the respondent wishes to prove the conduct was "welcome" as opposed to "unwelcome." The Department rejects the premise that a respondent may need to use a complainant's sexual behavior to challenge a complainant's subjective interpretation of conduct as unwelcome. Respondents facing allegations under the first or second prong of the § 106.30 definition may defend by, for example, arguing that the unwelcome conduct was not "conditioning any aid or benefit" on participation in the unwelcome sexual

activity, or that the unwelcome conduct was not "severe" or was not "pervasive," etc. A complainant's sexual behavior is simply irrelevant to those defenses. Contrary to commenters' concerns, the rape shield language deems irrelevant *all* questions or evidence of a complainant's sexual behavior *unless* offered to prove consent (and it concerns specific instances of sexual behavior with the respondent); thus, if "consent" is not at issue – for example, where the allegations concern solely unwelcome conduct under the first or second prong of the § 106.30 definition – then that exception does not even apply, and the rape shield protections would then bar *all* questions and evidence about a complainant's sexual behavior, with no need to engage in a balancing test of whether the value of the evidence is outweighed by harm or prejudice.

The Department is persuaded by commenters who argued that the NPRM's wording of the rape shield language lacked clarity as to whether "exclusion" applied only to questions, or also to evidence. The Department has revised this provision in the final regulations to refer to both questions and evidence, and replace reference to "exclusion" with deeming the sexual predisposition and sexual behavior questions or evidence to be "not relevant" (subject to the same two exceptions as stated in the NPRM). To conform the final regulations with the intent of the rape shield provision and with commenters' widely understood view of this provision, we have added the word "prior" before "sexual behavior" in § 106.45(b)(6)(i), and in § 106.45(b)(6)(ii) that contains the same rape shield language.[1355]

[1355] The Department notes that "prior" sexual behavior is a phrase widely used by commenters to discuss rape shield protections, and commenters noted that various State laws, such as New York and Maryland, use the word "prior" to distinguish a complainant's sexual behavior that is unrelated to the sexual misconduct allegations at issue. The Department emphasizes that "prior" does not imply admissibility of questions or evidence about a complainant's sexual behavior that occurred after the alleged sexual harassment incident, but rather must mean anything "prior" to

Changes: The Department has revised the rape shield language in § 106.45(b)(6)(i)-(ii) to clarify that questions and evidence about the complainant's prior sexual behavior or predisposition are not relevant unless offered to prove that someone other than the respondent committed the offense or if the sexual history evidence concerns specific sexual incidents with the respondent and is offered to prove consent. We have also revised § 106.45(b)(1)(iii) to require decision-makers to be trained on issues of relevance, including application of the rape shield protections in § 106.45(b)(6).

Separate Rooms for Cross-Examination Facilitated by Technology; Directed Question 9

Comments: Some commenters supported the provision in § 106.45(b)(6)(i) that upon request of any party a recipient must permit cross-examination to occur with the parties located in separate rooms with technology facilitating the ability of all participants to see and hear the person answering questions. Commenters asserted that this provision appropriately acknowledges the intimidating nature of cross-examination. Commenters also asserted that this provision reaches a reasonable balance between allowing cross-examination and protecting victims from personal confrontation with a perpetrator. Some commenters supported this provision but expressed concern that the live question-and-answer format, even avoiding face-to-face trauma, will still impose significant trauma for both parties. Commenters stated that many recipients already effectively utilize technology to enable parties to testify at live hearings without being physically

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conclusion of the grievance process. This aligns with the intent of Fed. R. Evid. 412, which prohibits evidence of a victim's "other" sexual behavior; the Advisory Committee Notes on that rule explain that use of the word "other" is to "suggest some flexibility in admitting evidence 'intrinsic' to the alleged sexual misconduct." The Department chooses to use the phrase "prior sexual behavior" rather than "other sexual behavior" because based on public comments, "prior sexual behavior" is a widely understood reference to evidence unrelated to the alleged sexual harassment at issue.

present in the same room at the same time, including asking the non-testifying party to wait in a separate room listening by telephone or watching by videoconference while the testifying party is in the same room as the decision-maker, and then the parties switch rooms with safety measures imposed so the parties do not encounter each other during transitions.

At least one commenter opposed this provision, arguing that there is no substitute for direct eye contact and full view of a person's mannerisms and gestures, which will not be as effective using technology, even though face-to-face confrontation may cause trauma to both complainants and respondents.

Some commenters opposed this provision, asserting that complainants should not be forced to be "live streamed" and instead should have the right to remain anonymous. Some commenters argued that "watering down" the Sixth Amendment right to face-to-face confrontation just to avoid traumatizing victims is not appropriate because the Constitution expects victims to endure the experience of making their accusations directly in front of an accused[1356] and the proposed rules do not even require a threshold showing of the potential for trauma before granting a request to permit virtual testimony.

Other commenters argued that separating the parties does not adequately diminish the intimidating, retraumatizing prospect of a live hearing. Commenters shared personal examples of being cross-examined during Title IX proceedings and feeling traumatized even with the respondent located in a separate room; one commenter described being cross-examined during a hearing with the perpetrator telling each question to a judge, who then asked the question over

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[1356] Commenters cited: *Maryland v. Craig*, 497 U.S. 836, 851 (1990) for the proposition that a limited exception to a criminal defendant's Sixth Amendment right to confront witnesses was approved by the Supreme Court in the context of protecting child sex abuse victims by permitting a child victim to testify via closed circuit television.

Skype if the judge approved the question, and the commenter stated that even with technology separating the commenter from the perpetrator, the commenter was still diagnosed a week later with PTSD (post-traumatic stress disorder). Commenters argued that survivors of sexual violence will still be aware that their attacker is witnessing the proceedings and may feel less safe as a result. At least one commenter argued that accommodating a complainant's request to testify from a separate room puts the complainant at a disadvantage because, for example, the respondent might be located in the same room as the decision-maker who would thus have a greater opportunity to "develop a personal connection" with the respondent than with the complainant, and advantage the respondent by allowing the respondent to observe the decision-maker's reactions to testimony while the complainant cannot observe those reactions when located in a separate room. At least one commenter argued that remote cross-examination puts survivors at a distinct disadvantage because assessing non-verbal and behavioral evidence of trauma is necessary in sexual violence incidents.

At least one commenter argued that witnesses must also be given the right to request to testify in a separate room. One commenter recounted a case in which a witness had also been raped by the respondent but the recipient did not allow the witness to testify in a separate room and the witness had to frequently leave the room during testimony due to sobbing too hard to speak.

Commenters opposed requiring testimony in separate rooms on the basis that internet functionality on campus is not always reliable, and thus a rule that depends on technology is not realistic. Commenters supported use of technology to facilitate parties being in separate rooms as "ideal" but expressed concern that the cost of technology that is both reliable and secure could be prohibitive for some recipients because while software enabling simultaneous viewing of parties

in separate rooms may be relatively inexpensive, acquiring additional hardware that may be necessary and expensive, such as audio-visual equipment, monitors, and microphones. Commenters stated that some recipients do not currently have technology set up in the spaces used for Title IX proceedings and acquiring the requisite technology would be costly.[1357] Commenters asserted that complying with this provision may also require acquisition of, or renovations to, facilities that are not currently used for Title IX purposes by the recipient, or specialized technology that meets the needs of individuals with disabilities, resulting in expenditures that will only be used for the limited purpose of Title IX hearings. Commenters requested that the Department provide grant funding for acquiring technology needed to meet this provision.

Other commenters asserted that it is reasonable for separate rooms to be used to ensure complete, comfortable honesty by each party and that numerous low cost, secure presentation videoconferencing technologies are available and already in use by many recipients to ensure that participants can view and hear questions and responses in real time.[1358] Some commenters stated that while this provision would require some monetary investment in technology the requirement was reasonable and beneficial to allow the parties to participate in a hearing from separate rooms.

Discussion: The Department appreciates commenters' support for the provision in § 106.45(b)(6)(i) that requires recipients, upon any party's request, to permit cross-examination to

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[1357] At least one commenter cited: ezTalks.com, "How Much Does Video Conferencing Equipment Cost?," https://www.eztalks.com/video-conference/video-conference-equipment-cost html, for the proposition that room-based video conferencing could cost $10,000 to $100,000 to set up.

[1358] Commenters listed GoTo Meeting, Skype, Skype for Business, Zoom, and Google Hangouts as examples of existing technology platforms.

occur with the parties in separate rooms using technology that enables participants to see and hear the person answering questions. Commenters correctly asserted that this provision is a direct acknowledgment of the potential for cross-examination to feel intimidating and retraumatizing in sexual harassment cases. Because the decision-maker cannot know until the conclusion of a fair, reliable grievance process whether a complainant is a victim of sexual harassment perpetrated by the respondent, cross-examination is necessary to test party and witness statements for veracity and accuracy, but the Department has determined that the full value of cross-examination can be achieved while shielding the complainant from being in the physical presence of the respondent. The Department disagrees that only in-person, face-to-face confrontation enables parties and decision-makers to adequately evaluate credibility,[1359] and declines to remove this shielding provision. As discussed above, assessing demeanor is just one of the ways in which cross-examination tests credibility, which includes assessing plausibility, consistency, and reliability; judging truthfulness based solely on demeanor has been shown to be less accurate than, for instance, evaluating credibility based on consistency.[1360] Thus, any minimal reduction in the ability to gauge demeanor by use of technology is outweighed by the benefits of shielding victims from testifying in the presence of a perpetrator. The Department disagrees that complainants should have to make a threshold showing that trauma is likely because the Department is persuaded by the many commenters who asserted that facing a perpetrator is

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[1359] H. Hunter Bruton, *Cross-Examination, College Sexual-Assault Adjudications, and the Opportunity for Tuning up the Greatest Legal Engine Ever Invented*, 27 CORNELL J. OF L. & PUB. POL'Y, 145, 169 (2017) ("For example, studies comparing live-video or videotaped testimony to traditional live-testimony formats show no significant differences across mediums in observers' ability to detect deception.").

[1360] *E.g.*, Susan A. Bandes, *Remorse, Demeanor, and the Consequences of Misinterpretation: The Limits of Law as a Window into the Soul*, JOURNAL OF L., RELIGION & ST. 3, 170, 179 (2014); *cf.* 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, 161 (2017).

inherently traumatic for a victim. Further, the Sixth Amendment's Confrontation Clause protects *criminal* defendants, and the Department is not obligated to ensure that this provision would comply with the Confrontation Clause, which does not apply to a respondent in a noncriminal adjudication under Title IX.

The Department notes that recipients are obligated under § 106.71 to "keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness" in a Title IX grievance process except as permitted by FERPA, required by law, or as necessary to conduct the hearing or proceeding; this cautions recipients to ensure that technology used to comply with this provision does not result in "live streaming" a party in a manner that exposes the testimony to persons outside those participating in the hearing.

The Department understands commenters' assertions that even with shielding, cross-examination by a respondent's advisor may still be a daunting prospect. The final regulations provide both parties with the right to be supported and assisted by an advisor of choice, and protect the parties' ability to discuss the allegations freely, including for the purpose of seeking out emotional support or strategic advice.[1361] The final regulations do not preclude a recipient from adopting rules (applied equally to complainants and respondents) that govern the taking of breaks and conferences with advisors during a hearing, to further ameliorate the stress and

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[1361] For further discussion see the "Section 106.45(b)(5)(iii) Recipients Must Not Restrict Ability of Either Party to Discuss Allegations or Gather and Present Relevant Evidence" subsection of the "Investigation" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble.

emotional difficulty of answering questions about sensitive, traumatic events. We have also revised § 106.45(b)(6)(i) to provide that upon a party's request the entire live hearing (and not only cross-examination) must occur with the parties located in separate rooms. These measures are intended to balance the need for statements to be tested for credibility so that accurate outcomes are reached, with accommodations for the sensitive nature of the underlying matters at issue.

The Department disagrees that shielding under § 106.45(b)(6)(i) disadvantages complainants (or respondents) and reiterates that both parties' meaningful opportunity to advance their own interests in a case may be achieved by party advisors conducting cross-examination virtually. The Department notes that decision-makers are obligated to serve impartially and thus should not endeavor to "develop a personal relationship" with one party over another regardless of whether one party is located in a separate room or not. For the same reasons that judging credibility solely on demeanor presents risks of inaccuracy generally, the Department cautions that judging credibility based on a complainant's demeanor through the lens of whether observed demeanor is "evidence of trauma" presents similar risks of inaccuracy.[1362]

[1362] *E.g.,* Jeffrey J. Nolan, *Fair, Equitable Trauma-Informed Investigation Training* 10 (Holland & Knight updated July 19, 2019) (while counterintuitive behaviors may be driven by trauma-related hormones or memory issues, counterintuitive behavior may also bear on a witness's credibility, and thus training about whether or how trauma or stress may influence a person's demeanor should be applied equally to interviewing any party or witness); "Recommendations of the Post-SB 169 Working Group," 3 (Nov. 14, 2018) (report by a task force convened by former Governor of California Jerry Brown to make recommendations about how California institutions of higher education should address allegations of sexual misconduct) (trauma-informed "approaches have different meanings in different contexts. Trauma-informed training should be provided to investigators so 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.").

The Department reiterates that while assessing demeanor is one part of judging credibility, other factors are consistency, plausibility, and reliability. Real-time cross-examination presents an opportunity for parties and decision-makers to test and evaluate credibility based on all these factors.

The Department declines to grant witnesses the right to demand to testify in a separate room, but revises § 106.45(b)(6)(i) to allow a recipient the discretion to permit any participant to appear remotely. Unlike complainants, witnesses usually do not experience the same risk of trauma through cross-examination. Witnesses also are not required to testify and may simply choose not to testify because the determination of responsibility usually does not directly impact, implicate, or affect them. With respect to a witness who claims to also have been sexually assaulted by the respondent, the recipient has discretion to permit the witness to testify remotely, or to hold the entire live hearing virtually.

The Department appreciates commenters' assertions that some recipients already effectively use technology to enable virtual hearings, and other commenters' concerns that acquiring technology may cause a recipient to incur costs. The Department agrees with some commenters who asserted that even where this provision requires a monetary investment in technology, low-cost technology is available and the importance of this shielding provision outweighs the burden of setting up the requisite technology. Although this shielding provision requires that a Title IX live hearing would be held in two "separate rooms" the Department is not persuaded that such a requirement necessitates any recipient's capital investment in renovations or acquiring new real property, because the Department is unaware of a recipient whose existing facilities consist of a single room. These final regulations do not address the eligibility or

purpose of grant funding for recipients, and the Department thus declines to provide technology grants via these regulations.

Changes: We have revised § 106.45(b)(6)(i) to allow recipients, in their discretion, to hold live hearings virtually or for any participant to appear remotely, using technology to enable participants to see and hear each other, and to require a recipient to grant any party's request for the entire live hearing to be held with the parties located in separate rooms.

Discretion to Hold Live Hearings and Control Conduct of Hearings

Comments: Many commenters supported the requirement in § 106.45(b)(6)(i) that postsecondary institutions hold live hearings at the conclusion of an investigation of a formal complaint, because a live hearing ensures that the decision-maker hears from the parties and witnesses, which gives both parties an opportunity to present their side of the story to the decision-maker and reduces opportunity for biased decision making. Commenters argued that in the college or university setting, where the participants are usually adults, live hearings provide the most transparent mechanism for ensuring all parties have the opportunity to submit, review, contest, and rebut evidence to be considered by the fact-finder in reaching a determination, and this is critical where both parties' interests are at stake and potential sanctions are serious.[1363] Commenters stated that live hearings are the only method by which deciding parties can accurately assess the veracity of both the complainant's and respondent's statements, and where allegations have been tested in a live hearing and the determination finds the respondent to be

[1363] Commenters cited: American Bar Association, 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* 3 (2017) (expressing a preference for the "adjudicatory model," defined as "a hearing in which both parties are entitled to be present, evidence is presented, and the decision-maker(s) determine(s) whether a violation of school policy has occurred").

responsible that outcome is more likely to be reliable and less likely to be overturned on appeal or in litigation. Commenters argued that requiring a live hearing ensures that all parties see the same evidence and testimony as the fact-finder, so that each party can fully rebut or buttress that evidence and testimony to serve the party's own interest. Commenters argued that live hearings also decrease the chance that the bias of a single investigator or fact-finder may warp the process by reaching determinations not by the facts and a desire for a just outcome, but by prejudice, well-intentioned or otherwise.

Many commenters opposed the live hearing requirement. Commenters argued that even though the withdrawn 2011 Dear Colleague Letter caused many recipients to overcorrect their sexual misconduct policies by shirking due process responsibilities,[1364] commenters asserted that recipients should have the option but not the mandate to provide live hearings to preserve recipients' flexibility to design a fair process. Commenters argued that live hearings make campus proceedings so much like court proceedings that the benefit of going through an equitable Title IX process instead of formal court trials will be lost.[1365] Commenters argued that while hearings and cross-examination may be deeply rooted in the legal system, such procedures are not deeply rooted in school disciplinary processes. Commenters also argued that requiring live hearings is going "a bridge too far" because recipients are not equipped to conduct court-like hearings.

[1364] Commenters cited: Blair Baker, *When Campus Sexual Misconduct Policies Violate Due Process Rights*, 26 CORNELL J. OF L. & PUB. POL'Y 533, 535 (2017) (in response to the 2011 Dear Colleague Letter "colleges overcorrected their sexual assault policies by adopting policies that shirk the legally mandated due process rights of students accused of misconduct and effectively presume their guilt").

[1365] Commenters cited: Alexandra Brodsky, *A Rising Tide: Learning About Fair Disciplinary Process from Title IX*, 77 JOURNAL OF LEGAL EDUC. 4 (2017).

Commenters argued that requiring an adversarial, high-stakes live hearing ignores many cultures that rely on the inquisitorial system to achieve justice, under which decision makers are vested with the duty of fact finding instead of pitting the parties against each other to offer competing versions of the truth.

Commenters asserted that live hearings add no value to the fact-finding process so long as a full, fair investigation was conducted. Commenters described experiences with particular recipients where the recipient used a live hearing model for a significant period of time but stopped using a live hearing model after experiencing pitfalls that outweighed its usefulness, stating that hearings became a springboard to introduce new evidence and witnesses, embarrassed parties in ways that derailed the hearing, and hearing panels were left needing legal advice on a myriad of issues like evidentiary determinations. Commenters argued that while school employees who are asked to adjudicate are well-intentioned, they lack the legal expertise and immunity available in court proceedings, and an investigative model has been more efficient than a live hearing model, has resulted in fewer contested outcomes, and has led to increased reporting of sexual harassment.

Commenters asserted that a live hearing contains no mechanism to act as a check against bias[1366] and that decision-makers are capable of being impartial and reaching unbiased decisions without the parties and witnesses appearing at a live hearing.

[1366] Commenters cited: Jessica A. Clarke, *Explicit Bias*, 113 NORTHWESTERN UNIV. L. REV. 505 (2018); Cara A. Person *et al.*, *"I Don't Know That I've Ever Felt Like I Got the Full Story": A Qualitative Study of Courtroom Interactions Between Judges and Litigants in Domestic Violence Protective Order Cases*, 24 VIOLENCE AGAINST WOMEN 12 (2018); Lee Ross, *From the Fundamental Attribution Error to the Truly Fundamental Attribution Error and Beyond*, 13 PERSPECTIVES ON PSYCHOL. SCIENCE 6 (2018); Margit E. Oswald & Ingrid Stucki, *Automatic Judgment and Reasoning About Punishment*, 23 SOCIAL SCIENCE RESEARCH 4 (2018); Eve Hannan, *Remorse Bias*, 83 MISSOURI L. REV. 301 (2018).

Likening campus disciplinary proceedings to administrative proceedings, commenters argued that courts permit a wide variety of administrative proceedings to utilize less formal procedures and still comport with constitutional due process, for example allowing consideration of hearsay evidence, not requiring a live hearing, and not requiring cross-examination, even when such proceedings implicate liberty and property interests.[1367]

Commenters asserted that sometimes a witness is a friend of a party and must truthfully share information that damages the witness's friendship with the party, and that while a witness might be willing to put truth above friendship by privately talking to an investigator, a witness is less likely to do this when it requires testimony at a live hearing in front of the witness's friend. Commenters argued that the live hearing requirement puts a burden on the parties to pressure or cajole their friends into appearing as witnesses because the recipient has no subpoena power to compel witness participation.

Commenters argued that requiring the formal process of a live hearing demonstrates that the proposed regulations value the potential future of respondents more than the safety and well-being of complainants. Commenters asserted that the formalities of a live hearing with cross-examination "swing the pendulum" too far when schools need a refined approach to reach balanced fairness.

[1367] Commenters cited, e.g., *Richardson v. Perales*, 402 U.S. 389, 402 (1971) (cross-examination is not an absolute requirement in a Social Security Disability benefits case); *Wolff v. McDonnell*, 418 U.S. 539, 567-68 (1974) (prison officials may rely on hearsay evidence to add to a prisoner's sentence); *Johnson v United States*, 628 F.2d 187 (D.C. Cir. 1980) (cross-examination not required where professional licensing was at stake); *Williams v U.S. Dep't. of Transp.*, 781 F.2d 1573 (11th Cir. 1986) (cross-examination not required for a Coast Guard finding that a pilot negligently operated a boat); *Matter of Friedel v. Bd. of Regents*, 296 N.Y. 347, 352-353 (N.Y. Ct. App. 1947) (limitation on right to confront investigators in suspension hearing for performing illegal procedures); *Delgado v. City of Milwaukee Employees' Ret. Sys./Annuity and Pension Bd.*, 268 Wis.2d 845 (Wisc. Ct. App. 2003) (cross-examination is not required at a hearing to revoke a police officer's duty disability payments); *In re J.D.C.*, 284 Kan. 155, 170 (Kan. 2007) (child welfare officials may depend on hearsay to determine child custody if it is relevant and probative, particularly where the parent waives the right to cross-examine the child).

Commenters asserted that recipients have spent time and resources developing non-hearing adjudication models and should have the flexibility to continue using such models so long as the procedures are fair and equitable. Commenters asserted that requiring live hearings will force recipients to abandon hybrid investigatory models that recipients have carefully developed over the last several years.

Commenters argued that where the facts are not contested, or where the respondent has admitted responsibility, or video evidence of the incident in question exists, there is no need to put parties through the ordeal of a live hearing yet the proposed rules would force an institution to hold a live hearing anyway, straining the limited resources of all schools but especially smaller institutions. One commenter argued that if, for example, a respondent video-taped the respondent raping a student and the hearing officer watches the video and hears from the complainant who confirms the incident did happen, and the respondent denies doing it, a live hearing with cross-examination would not be useful in such a scenario.

Commenters suggested that this provision be modified to require the parties to attempt mediation, so that a live hearing is required only if mediation fails. Commenters stated that some recipients use an administrative disposition model where a respondent may accept responsibility based on an investigator's findings and the final regulations should permit the recipient, or the respondent, in that situation to waive the right to a live hearing. Commenters asserted that the final regulations should include a provision allowing the parties to enter into a voluntary resolution agreement (VRA) that includes disciplinary action against the respondent, where the recipient could offer the VRA to both parties in advance of a live hearing, and if the parties accepted the VRA it would become the final outcome, or the parties could reject the VRA and demand a live hearing. Other commenters argued that either party should have the right to waive

a live hearing so that a live hearing should only occur if both parties and the recipient agree it is the appropriate method of resolution for a particular case.

Commenters argued that the proposed regulations do not allow universities to follow State APAs (Administrative Procedure Acts), for example in Washington State where a student may appeal a responsibility finding made in an investigation to a live hearing, or in New York where New York Education Law Article 129-B (known as "Enough is Enough") allows written submission of questions instead of live cross-examination. Commenters argued that some public universities are already subject to State APAs that impose the kind of live hearings and cross-examination procedures required by these final regulations, and recipients find these procedures to be burdensome, costly, and lengthy.

Commenters quoted a Federal district court memorandum from 1968 setting forth guidelines on how that district court should evaluate claims against tax-funded colleges and universities, where the court memorandum stated the nature and procedures of college discipline should not be required to conform to Federal criminal law processes which are "far from perfect" and designed for circumstances unrelated to the academic community.[1368] Commenters argued that most Federal courts adopt that approach, acknowledging that student discipline is part of the education process and is not punitive in the criminal sense; rather, expelled students may suffer damaging effects but do not face imprisonment, fines, disenfranchisement, or probation. Commenters asserted that deference to a college or university's chosen disciplinary system is

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[1368] Commenters cited: *General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education*, ED025805 (1968); *Esteban v. Cent. Mo. State Coll.*, 415 F.2d 1077, 1090 (8th Cir. 1969) ("school regulations are not to be measured by the standards which prevail for the criminal law and for criminal procedure.").

even more warranted for private institutions that do not owe constitutional due process to students or employees.[1369]

Many commenters argued that the NPRM gave recipients too little flexibility to determine how hearings should be conducted, and that the final regulations should grant recipients discretion to adopt rules to control the conduct and environment of hearings in a manner that is effective and fair to all parties and witnesses. Some commenters suggested that the final regulations should state more broadly that recipients must offer parties reasonable mitigating measures during a live hearing, of which locating the parties in separate rooms is but one example.

Commenters asked for clarification such as: Can recipients limit the hearing to consideration only of evidence previously included in the investigative report? Can recipients impose rules of evidence left unaddressed by the proposed regulations, such as excluding questions that are misleading, assume facts not in evidence, or call for disclosure of attorney-client privileged information, or questions that are cumulative, repetitive, or abusive? Can recipients impose time limits on hearings so that parties and witnesses do not spend multiple days in a hearing rather than fulfilling their academic or work responsibilities? Can a recipient specify who may raise objections to evidence during the hearing?

Commenters asserted that live hearings are administratively time-consuming and will lengthen the grievance process by requiring both parties and their advisors to be on campus simultaneously, which is impractical and often undesirable. Commenters urged the Department

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[1369] Commenters cited: William A. Kaplin & Barbara A. Lee, *The Law of Higher Education* § 10.2.3 (5th ed. 2013) ("Private institutions, not being subject to federal constitutional constraints, have even more latitude than public institutions do in promulgating disciplinary rules.").

to authorize recipients to hold the entire live hearing virtually, with parties in separate locations, using technology so that each party can see and hear all other parties, because some recipients offer mostly online courses such that parties might reside significant distances from any physical campus, or parties may move or be called to military service after a formal complaint has been filed, or the alleged harassment itself may have occurred entirely online and the parties may not reside close to campus. Commenters asserted that since the proposed rules already allow the parties to be located in separate rooms, there is no reason not to also allow a recipient to hold the entire hearing virtually using technology. At least one commenter asserted that even allowing participation virtually would not make this provision fair because the commenter had a case in which a key witness was studying abroad in a country with a large time zone difference making it impossible for the witness to testify even remotely using technology. Commenters argued that coordinating the schedules of parties, advisors, hearing panels, and witnesses to appear for a live hearing will delay proceedings. Other commenters stated that some rural university systems have satellite campuses in remote locations off the road system, with insufficient internet access even to allow videoconferencing, posing significant barriers to complying with a live hearing requirement.

Commenters asserted that all hearings should be recorded and either a transcript or video or audio recording should be provided to each party following the hearing, so the parties have access to it when appealing decisions or possibly for later use in litigation, because too many Title IX proceedings have occurred in secret, behind closed doors, with no record of the proceedings. According to this commenter, universities typically forbid parties from recording hearings and not having such a record can allow a grievance board's illegal bias against a party to fester and remain unchecked by the university, regulatory agencies, or the courts.

One commenter asserted that hearings should be closed and attended only by the parties, their advisors, witnesses, and school officials relevant to the hearing, and requested that confidentiality of the hearing be written into the final regulations.

Discussion: The Department appreciates commenters' support for this provision, requiring postsecondary institutions to hold live hearings. The Department agrees that a live hearing gives both parties the most meaningful, transparent opportunity to present their views of the case to the decision-maker, reducing the likelihood of biased decisions, improving the accuracy of outcomes, and increasing party and public confidence in the fairness and reliability of outcomes of Title IX adjudications.

The Department agrees with commenters that hearings and cross-examination of witnesses are deeply rooted concepts in American legal systems, but disagrees that the principles underlying those procedures should be absent from postsecondary institutions' adjudications under Title IX. Administrative law "seeks to ensure that those whose rights are affected by the decisions of administrative tribunals are given notice of hearings, guaranteed an oral, often public hearing, have a right to be represented, are granted disclosure of the case against them, are able to introduce evidence, call witnesses and cross-examine those testifying against them, have access to reason for decision, and an opportunity to appeal an adverse outcome. . . . The process assumes the value of an adversarial hearing in which impartial adjudicators are exposed to representations from those asserting a claim and those seeking a contrary finding."[1370]

[1370] Farzana Kara & David MacAlister, *Responding to academic dishonesty in universities: a restorative justice approach*, 13 CONTEMPORARY JUSTICE REV. 4, 443-44 (2010) (internal citations omitted).

Furthermore, while not all recipients use a hearing model in student misconduct matters, many do or have in the recent past.[1371]

The Department agrees that postsecondary institutions are not equipped to act as courts of law. The final regulations acknowledge this reality by prescribing a grievance process that intentionally avoids importation of comprehensive rules of procedure (including discovery procedures) and rules of evidence that govern civil or criminal court trials. Instead, the § 106.45 grievance process requires procedures rooted in fundamental concepts of due process and fairness that layperson recipient officials are capable of applying without professional legal training. The Department disagrees that live hearings transform Title IX adjudications into court proceedings; the advantages to reaching determinations about sex discrimination in the form of sexual harassment without going through a civil or criminal trial remain distinct under the final regulations.

The Department disagrees that live hearings add no value to the fairness or accuracy of outcomes even where an investigation was full and fair. Despite some commenters' contention that recipients prefer moving to an investigative model rather than a hearing model, the Department believes that an adversarial adjudication model better serves the interests of fairness, accuracy, and legitimacy that underlie the § 106.45 grievance process.

[1371] *See* Tamara Rice Lave, *Ready, Fire, Aim: How Universities Are Failing The Constitution In Sexual Assault Cases*, 48 ARIZ. STATE L. J. 637, 656 (2016) (in a survey of 50 American universities, 84 percent reported that they use an adjudicatory model with a hearing at which witnesses testify in front of a fact-finder); Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUMBIA L. REV. 289 (1999) (authors surveyed 200 public and private colleges and universities, and 90 percent of public institutions and 80 percent of private institutions reported using adjudicatory hearings with cross-examination rights).

The adversarial system "stands with freedom of speech and the right of assembly as a pillar of our constitutional system."[1372] Just as the final regulations reflect acute awareness of the importance of freedom of speech and academic freedom, these regulations are equally concerned with reflecting the importance of the adversarial model with respect to adjudications of contested facts. "Rights like trial by jury and the assistance of counsel – the cluster of rights that comprise constitutional due process of law – are most important when the individual stands alone against the state as an accused criminal. The fundamental characteristics of the adversary system also have a constitutional source, however, in our administration of civil justice" to redress grievances, resolve conflicts, and vindicate rights.[1373] "The Supreme Court has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as plaintiffs attempting to redress grievances or as defendants trying to maintain their rights."[1374] The final regulations recognize the importance of due process principles in a noncriminal context by focusing on procedures that apply equally to complainants and respondents and give both parties equal opportunity to actively pursue the case outcome they desire.

In addition to representing core constitutional values, an adversarial system yields practical benefits. "[T]he available evidence suggests that the adversary system is the method of dispute resolution that is most effective in determining truth" and that "gives the parties the

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[1372] Geoffrey C. Hazard, Jr., *Ethics in the Practice of Law* 122-23 (Yale Univ. Press 1978).
[1373] Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAPMAN L. REV. 57, 66-67 (1998) ("In fact, the adversary system in civil litigation has played a central role in fulfilling the constitutional goals 'to . . . establish Justice, insure domestic Tranquility, . . . promote the general Welfare, and secure the Blessings of Liberty . . . .'") (quoting U.S. CONST. PREAMBLE).
[1374] *Id.* at 67.

greatest sense of having received justice."[1375] "An adversary presentation seems the only effective means for combating this natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known."[1376] With respect to "the idea of individual autonomy – that each of us should have the greatest possible involvement in, if not control over, those decisions that affect our lives in significant ways [--] . . . empirical studies that have been done suggest, again, a preference for the adversary system over the inquisitorial."[1377] Studies conducted to determine "whether a litigant's acceptance of the fairness of the actual decision is affected by the litigation system used" have concluded that "the perception of the fairness of an adversary procedure carries over to create a more favorable reaction to the verdict . . . regardless of the outcome."[1378] As to commenters' contention that moving to an investigatory rather than hearing model resulted in increased reporting of sexual harassment, the Department emphasizes that the final regulations ensure that every complainant may report and receive supportive measures *without* undergoing an investigation or adjudication.[1379]

[1375] *Id.* at 73-74; David L. Kirn, *Proceduralism and Bureaucracy: Due Process in the School Setting*, 28 STANFORD L. REV. 841, 847-49 (1976) ("In the classic due process hearing, the disputants themselves, not the decisionmaker, largely determine what evidence bearing on the issue is to be introduced. The veracity of that evidence is tested through questioning of witnesses, a procedure structured to uncover both lapses of memory and falsehoods, conducted by an advocate skilled in this enterprise. During the course of the hearing, the decisionmaker acts only to contain the colloquy within the bounds of the actual dispute. He is a disinterested and impartial arbiter, constrained to reach a judgment based exclusively on facts presented at the hearing, with respect to which there has been opportunity for rebuttal. His decision is a reasoned one that explicitly resolves disagreements concerning facts and relates a determination in the case before him to the governing rule. Subject to the availability of appeal, that decision is dispositive of the matter. These several elements of the ideal due process hearing are intended primarily to assure that factual determinations have been reliably made, and hence to promote the societal interest in just outcomes."); *id*. ("Reliability, valued by society, is not the only end held to be promoted by due process. The participants to the dispute are themselves seen as better off. . . . Participation also assures that the individual is not being treated as a passive creature, but rather as a person whose dignitary rights include an interest in influencing what happens to his life. Personal involvement, it is argued, promotes fairness in individual perception as well as fairness in fact.").

[1376] Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAPMAN L. REV. 57, 76 (1998).

[1377] *Id.* at 87.

[1378] *Id.* at 89 (internal quotation marks and citations omitted).

[1379] Section 106.44(a).

The Department does not dispute that other countries rely on an inquisitorial rather than adversarial model of adjudication, but Title IX is a Federal civil rights statute representing the American value placed on education programs and activities free from sex discrimination, and Title IX must be applied and interpreted in accordance with American law rather than laws and systems that prevail elsewhere.[1380] While commenters cited research studies calling into doubt the truth-seeking effectiveness of the adversarial process and calling for reforms including moving toward inquisitorial models, the adversarial system remains deeply embedded in the U.S. Constitution and in American legal systems and civic values, and "the research that has been done provides no justification for preferring the inquisitorial search for truth or for undertaking radical changes in our adversary system."[1381]

The Department appreciates commenters' concerns that based on experience holding hearings, a hearing model was abandoned by particular recipients in favor of an investigatory model, but the Department disagrees that properly conducted hearings will become a springboard to introduce new evidence, derail hearings by embarrassing the parties, or require hearing panels to seek out extensive legal advice. The Department reiterates that recipients may adopt rules to govern a Title IX grievance process in addition to those required under § 106.45, so long as such

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[1380] Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAPMAN L. REV. 57, 74 (1998) (observing that sophisticated critics of the adversarial system of criminal and civil litigation "have turned to the inquisitorial systems of continental European democracies for an alternative to the adversary system. The central characteristic of the inquisitorial model is the active role of the judge, who is given the principal responsibility for searching out the relevant facts. In an adversary system the evidence is presented in dialectical form by opposing lawyers; in an inquisitorial system the evidence is developed in a predominantly unilateral fashion by the judge, and the lawyers' role is minimal.") (internal citation omitted).

[1381] *Id.* at 80; *Crawford v. Washington*, 541 U.S. 36, 43-44 (2004). Although decided under the Sixth Amendment's Confrontation Clause which only applies to criminal trials, the Supreme Court analyzed the history of American legal systems' insistence that adversarial procedures rooted in English common law (as opposed to inquisitorial procedures utilized by civil law countries in Europe) represented fundamental notions of due process of law, and American founders deliberately rejected devices that English common law borrowed from civil law.

rules apply equally to both parties.[1382] Thus, recipients may decide whether or how to place limits on evidence introduced at a hearing that was not gathered and presented prior to the hearing, and rules controlling the conduct of participants to ensure that questioning is done in a respectful manner. The Department reiterates that the procedures in § 106.45 have been selected with awareness that decision-makers in Title IX grievance processes need not be judges or lawyers, and the Department believes that each provision of these final regulations may be complied with and applied by layperson recipient officials.

The Department does not dispute that decision-makers are capable of being impartial and unbiased without the parties appearing at a live hearing, and the final regulations expect that decision-makers will serve impartially without bias. However, adversarial procedures make it even less likely that any bias held by a decision-maker will prevail because the parties' own views about the evidence are presented to the decision-maker, and the decision-maker observes the parties as individuals which makes it more difficult to apply even unconsciously-held stereotypes or generalizations about groups of people.

The Department agrees that a variety of administrative agency proceedings have been declared by courts to comport with constitutional due process utilizing procedures less formal than those that apply in criminal or even civil courts. The Department believes that the procedures embodied in the § 106.45 grievance process meet or exceed constitutional due

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[1382] The introductory sentence of revised § 106.45(b) provides: "For the purpose of addressing formal complaints of sexual harassment, a recipient's grievance process must comply with the requirements of this section. Any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in § 106.30, must apply equally to both parties."

process of law, while being adapted for application with respect to an education program or activity, and do not mirror civil or criminal trials.

The Department realizes that witnesses with information relevant to sexual harassment allegations that involve the witness's friends or co-students may feel disinclined to provide information during an investigation, and perhaps more so at a live hearing. However, the importance of both parties' opportunity to present and challenge evidence – particularly witness statements – requires that a witness make statements in front of the decision-maker, with both parties' advisors able to cross-examine. This does not permit parties to coerce witnesses into appearing at a hearing. No person should coerce or intimidate any witness into participating in a Title IX proceeding, and § 106.71(a) protects every individual's right not to participate free from retaliation.

The final regulations, and the live hearing requirement in particular, benefit complainants and respondents equally by granting both parties the same rights and specifying the same consequences for lack of participation. The safety of complainants can be addressed in numerous ways consistent with these final regulations, including holding the hearing virtually, having the parties in separate rooms, imposing no-contact orders on the parties, and allowing advisors of choice to accompany parties to the hearing. For the reasons described above, the Department believes that the final regulations balance the pendulum rather than swing the pendulum too far, in terms of balancing the rights of both parties in a contested sexual harassment situation to pursue their respective desires regarding the case outcome.

The Department believes that the time and resources recipients have spent over the past several years developing non-hearing adjudication models can largely be applied to a recipient's obligations under these final regulations. For example, recipients who have developed thorough

and fair investigative processes may continue to conduct such investigations. The benefits of a full, fair investigation will continue to be an important part of the § 106.45 grievance process. Even though postsecondary institutions will reach actual determinations regarding responsibility after holding a live hearing, the time and resources dedicated to developing recipients' current systems will largely carry over into compliance with the final regulations.

Where the facts alleged in a formal complaint are not contested, or where the respondent has admitted, or wishes to admit responsibility, or where both parties want to resolve the case without a completed investigation or adjudication, § 106.45(b)(9) allows a recipient to facilitate an informal resolution of the formal complaint that does not necessitate a full investigation or adjudication.[1383] As noted above, even if no party appears for the live hearing such that no party's statements can be relied on by the decision-maker, it is still possible to reach a determination regarding responsibility where non-statement evidence has been gathered and presented to the decision-maker. Commenters' descriptions of an administrative disposition model, or a proposed voluntary resolution agreement, are permissible under the final regulations if applied as part of an informal resolution process in conformity with § 106.45(b)(9), which requires both parties' written, voluntary consent to the informal process. The Department declines to authorize one or both parties, or the recipient, simply to "waive" a live hearing, and § 106.45(b)(9) in the final regulations impresses upon recipients that a recipient cannot condition enrollment, employment, or any other right on the waiver of rights under § 106.45, nor may a recipient ever require parties to participate in an informal resolution process. Participating in

[1383] Section 106.45(b)(9) does not permit recipients to offer or facilitate informal resolution of allegations that an employee sexually harassed a student.

mediation, which is a form of informal resolution, should remain a decision for each party, individually, to make in a particular case, and the Department will not require the parties to attempt mediation.

The Department appreciates commenters' concerns that State APAs may prescribe grievance procedures that differ from those in a § 106.45 grievance process. To the extent that a recipient is able to comply with both, it must do so, and if compliance with both is not possible these final regulations, which constitute Federal law, preempt conflicting State law.[1384] The Department cautions, however, that preemption may not be necessary where, for example, a State law requires fewer procedures than do these final regulations, such that a recipient complying with § 106.45 is not violating State law but rather providing more or greater procedures than State law requires. To the extent that recipients find hearings under State APAs to be burdensome, the Department contends that the value of hearings outweighs such burdens, a policy judgment ostensibly shared by State legislatures that already require recipients to hold hearings.

The Department generally does not disagree with the general propositions set forth in the Federal district court memorandum cited by commenters to explain that college discipline differs from Federal criminal processes.[1385] The Department observes that the memorandum notes that "Only where erroneous and unwise actions in the field of education deprive students of federally protected rights or privileges does a federal court have power to intervene in the educational

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[1384] For further discussion see the "Section 106.6(h) Preemptive Effect" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble.

[1385] *General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education*, ED025805 (1968).

process."[1386] These final regulations precisely protect the rights and privileges owed to every person participating in an education program or activity under Title IX, a Federal civil rights law. In so doing, these final regulations reflect that a Title IX grievance process is not a criminal proceeding and defer to all recipients (public and private institutions) to make their own decisions within a consistent, predictable framework.

In response to commenters' concerns that the NPRM was unclear about the extent of recipients' discretion to adopt rules and practices to govern the conduct of hearings (and other aspects of a grievance process) the Department has added to the introductory sentence of § 106.45(b): "Any provisions, rules, or practices other than those required by § 106.45 that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in § 106.30, must apply equally to both parties." Under this provision a recipient may, for instance, adopt rules that instruct party advisors to conduct questioning in a respectful, non-abusive manner, decide whether the parties may offer opening or closing statements, specify a process for making objections to the relevance of questions and evidence, place reasonable time limitations on a hearing, and so forth. The Department declines to require recipients to offer "mitigating measures" during hearings in addition to the shielding provision in § 106.45(b)(6)(i) that requires a recipient to allow parties to participate in the live hearing in separate rooms upon any party's request. Similarly, recipients may adopt evidentiary rules (that also must apply equally to both parties), but any such rules must comport with all provisions in § 106.45, such as the obligation to summarize all relevant evidence in an investigative report, the obligation to evaluate all relevant evidence both inculpatory and exculpatory, the right of parties

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[1386] *Id.*

to gather and present evidence including fact and expert witnesses, the right to pose relevant cross-examination questions, and the rape shield provisions that deem sexual behavior evidence irrelevant subject to two exceptions. Thus, a recipient's additional evidentiary rules may not, for example, exclude *relevant* cross-examination questions even if the recipient believes the questions assume facts not in evidence or are misleading. In response to commenters' concerns that relevant questions might implicate information protected by attorney-client privilege, the final regulations add § 106.45(b)(1)(x) to bar the grievance process from requiring, allowing, relying on, or otherwise using questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege. This bar on information protected under a legally recognized privilege applies at all stages of the § 106.45 grievance process, including but not limited to the investigator's gathering of evidence, inspection and review of evidence, investigative report, and the hearing. This protection of privileged information also applies to a privilege held by a recipient. Additionally, questions that are duplicative or repetitive may fairly be deemed not relevant and thus excluded.

In response to commenters' concerns that holding live hearings is administratively time-consuming and presents challenges coordinating the schedules of all participants, the Department has revised this provision to allow a recipient discretion to conduct hearings virtually, facilitated by technology so participants simultaneously see and hear each other. The Department appreciates the concerns of commenters that some recipients operate programs or activities that are difficult to access via road systems and are in remote locations where technology is not accessible or reliable. The final regulations permit a recipient to apply temporary delays or limited extensions of time frames to all phases of a grievance process where good cause exists. For example, the need for parties, witnesses, and other hearing participants to secure

transportation, or for the recipient to troubleshoot technology to facilitate a virtual hearing, may constitute good cause to postpone a hearing.

The Department is persuaded by commenters' suggestions that all hearings should be recorded or transcribed, and has revised § 106.45(b)(6)(i) to require recipients to create an audio or audiovisual recording, or transcript, of any live hearing and make that recording or transcript available to the parties for inspection and review. As the commenters asserted, such a recording or transcript will help any party who wishes to file an appeal pursuant to § 106.45(b)(8) and also will reinforce the requirement that a decision-maker not have a bias for or against complainants or respondents generally or an individual complainant or respondent as set forth in § 106.45(b)(1)(iii).

The Department appreciates the opportunity to clarify here that hearings under § 106.45(b)(6) are not "public" hearings, and § 106.71(a) states that recipients must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as permitted by the FERPA statute or regulations, 20 U.S.C. 1232g and 34 CFR part 99, or as required by law, or as necessary to conduct the hearing.

Changes: The Department has revised § 106.45(b)(6)(i) to add language authorizing recipients to conduct live hearings virtually, specifically providing that live hearings pursuant to this subsection may be conducted with all parties physically present in the same geographic location, or at the recipient's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear

each other. We have also revised this provision so that upon a party's request the parties must be in separate rooms for the live hearing, and not only for cross-examination. We have also revised § 106.45(b)(6)(i) to add a requirement that recipients create an audio or audiovisual recording, or transcript, of any live hearing held and make the recording or transcript available to the parties for inspection and review.

Additionally, we have revised the introductory sentence of § 106.45(b) to provide that any provisions, rules, or practices other than those required by § 106.45 that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in § 106.30, must apply equally to both parties.

We have revised § 106.45(b)(9) to provide that a recipient may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with § 106.45. We have also added § 106.71 prohibiting retaliation and stating that recipients must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute or regulations, 20 U.S.C. 1232g and 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including these final regulations.

Finally, we have added § 106.45(b)(1)(x) to bar the grievance process from requiring, allowing, relying on, or otherwise using questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege.

Section 106.45(b)(6)(ii) Elementary and Secondary School Recipients May Require Hearing and Must Have Opportunity to Submit Written Questions

Comments: Many commenters supported § 106.45(b)(6)(ii), making hearings optional for elementary and secondary schools and prescribing a right for parties to submit written questions to other parties and witnesses prior to a determination regarding responsibility whether a hearing is held or not. Commenters asserted that high school students deserve due process protections as much as college students, and believed that this provision provides adequate due process in elementary and secondary schools while taking into account that students in elementary and secondary schools are usually under the age of majority.

Other commenters recounted personal experiences with family members being accused of sexual misconduct as high school students and argued that the required live hearings with cross-examination in § 106.45(b)(6)(ii) should also apply in high schools.

Some commenters asserted that this provision should be modified to require live hearings and cross-examination in elementary and secondary schools, but only for peer-on-peer sexual harassment allegations; commenters argued that this level of due process was more consistent with *Goss* and *Mathews*[1387] and where the allegations involve peers, the parties are on equal footing such that a hearing will effectively reduce risk of erroneous outcomes.

Commenters requested that this provision be modified to expressly state that live hearings are *not* required in elementary and secondary schools, instead of the phrasing that the grievance process "may require a live hearing."

[1387] Commenters cited: *Goss v. Lopez*, 419 U.S. 565 (1975); *Mathews v Eldridge*, 419 U.S. 565 (1975).

Commenters called the written question process in this provision appropriately fair, flexible, and trauma-informed, and consistent with recommendations in the withdrawn 2011 Dear Colleague Letter. Commenters asserted that this provision, more so than § 106.45(b)(6)(i), balances the potential benefits of cross-examination with the drawbacks of a live hearing, including the chilling effect on complainants, the significant cost to recipients, and the potential for errors and poor spur-of-the-moment judgment calls in a setting with critically high stakes. Many commenters approved of this provision and urged the Department to make it apply also to postsecondary institutions in replacement of § 106.45(b)(6)(i) under which live hearings and cross-examination are required.

Some commenters opposed this provision, asserting that even a written form of cross-examination exposes elementary and secondary school students to unnecessarily hostile proceedings and limits the discretion of local educators who are more knowledgeable about their students and school communities, obligating schools to expend valuable resources in an unwarranted manner. Commenters argued that this provision would allow five year old students (or their parents or advisors) to face off against other five year old students about the veracity of allegations with written questions and responses being exchanged. Commenters argued this is inappropriate because it does not take into account how to obtain information from young children or students with disabilities, creates an air of intimidation and potential revictimization, allows confidential information to be shared with "countless individuals" whereas an appeal could address concerns about the investigation without sharing FERPA-protected information, and formal discipline proceedings involving potential exclusion of a public school student are already subject to State laws giving sufficient due process protections to an accused student.

Commenters argued that in elementary and secondary schools, a formal investigation process is not always needed or advisable because often State law may require school interventions prior to when exclusionary discipline is considered. Commenters argued that this provision perpetuates America's patriarchal culture that already does not believe survivors, because this provision allows survivors to be questioned when we do not question someone who goes to the police and says they were robbed or someone who reports being hit by a car, so questioning sexual assault victims just gives perpetrators a chance to terrorize the victim again and fails to convey to the victim respect, belief, or justice.

Commenters asserted that this provision essentially provides the non-hearing equivalent of cross-examination via the written submission of questions, but argued this will be difficult for elementary and secondary school officials to implement without significant legal guidance because the purpose of cross-examination is to judge credibility and officials will not know how to accomplish that purpose. Commenters argued it is unclear how many back-and-forth follow-up questions need to be allowed in this "quasi-cross examination process" and asserted that this process will result in even greater hesitation among classmates to offer information about the parties involved, because peer pressure looks different among susceptible children and adolescents than with college-age students and already works against "tattling" or "ratting" on fellow students. Commenters expressed concern that the written "cross-examination" procedure will delay the ability of schools to timely respond to sexual harassment complaints, that this procedure is not already in use by schools, and that a cycle of written questions at the end of already overly formal, prescribed procedures will only serve to extend the time frame for completing investigations impairing an elementary and secondary school recipient's ability to effectuate meaningful change to student behavior if the behavior is found to be misconduct.

Commenters opposed this provision and urged the Department to remove the option for live hearings, because even permitting elementary and secondary schools the discretion to hold live hearings adds the possibility of a new layer to the investigative process that could subject a young student to cross-examination, which would intimidate and retraumatize victims.[1388] Commenters argued that research has consistently shown the extreme importance of handling investigations and interviews properly when dealing with childhood sexual abuse situations, that subjecting child victims of sexual abuse to multiple interviews is re-traumatizing and that the interview process should be conducted with an interdisciplinary team and trained mental health professionals utilizing trauma-informed practices, yet § 106.45(b)(6)(ii) would allow school administrators to ignore all of these best practices that are in the interest of protecting young victims,[1389] subjecting abused children to secondary victimization.[1390]

Commenters argued that the Supreme Court has held, even in the criminal law context, that a State's interest in protecting child abuse victims outweighs an accused's constitutional right to face-to-face confrontation of witnesses.[1391] Commenters argued that child sexual abuse is far too common an experience among America's schoolchildren, and teachers, counselors, and

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[1388] Commenters cited the Zydervelt 2016 study discussed in the "Section 106.45(b)(6)(i) Postsecondary Institution Recipients Must Provide Live Hearings with Cross-Examination" subsection of the "Hearings" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble, for the proposition that cross-examination often relies on victim-blaming attitudes, sex stereotypes, and rape myths.

[1389] Commenters cited: Monit Cheung & Needha McNeil Boutté-Queen, *Assessing the Relative Importance of the Child Sexual Abuse Interview Protocol Items to Assist Child Victims in Abuse Disclosure*, 25 JOURNAL OF FAMILY VIOLENCE 11 (2010); John F. Tedesco & Steven V. Schnell, *Children's Reactions to Sex Abuse Investigation and Litigation*, 11 CHILD ABUSE & NEGLECT 2 (1987); Joseph H. Beitchman *et al.*, *A Review of the Long-term Effects of Child Sexual Abuse*, 16 CHILD ABUSE & NEGLECT 1 (1992).

[1390] Commenters cited: Janet Leach Richards, *Protecting Child Witnesses in Abuse Cases*, 34 FAMILY L. QUARTERLY 393 (2000).

[1391] Commenters cited: *Maryland v. Craig*, 497 U.S. 836 (1990).

principals have no training in, and are not, forensic interviewers, criminal investigators, judges, or evidence technicians, and thus no school district should even be allowed to choose a live hearing model for sexual misconduct allegations. Commenters stated that live hearings place a sharp spotlight on both parties, and students in elementary and secondary schools typically lack the maturity necessary to participate. Commenters argued that live hearings should not even be optional in elementary and secondary schools because it is difficult to imagine any positive effects of a respondent's attorney cross-examining a sixth grader alleging sexual harassment at school or a complainant's attorney cross-examining the alleged perpetrator. Commenters argued that live hearings should only be allowed for elementary and secondary schools if otherwise required under State law. Commenters stated that if live hearings are even an option, school districts will be inundated with requests to hold adversarial live hearings.

Commenters asked for clarity as to which circumstances require an elementary and secondary school recipient to hold a live hearing, who would preside over a hearing, whether the hearing would need to be held on school grounds, and what responsibility the school district would have to mitigate re-traumatization, or whether if a school district opts to hold live hearings all the provisions in § 106.45(b)(6)(i) would then apply.

Commenters inquired whether a vocational school that is neither an elementary or secondary school, nor an institution of higher education, would have to follow § 106.45(b)(6)(i), § 106.45(b)(6)(ii), or some other process for Title IX adjudications.

Commenters suggested that this provision be modified to state that a minor has the right for a parent to help the minor student pose questions and answer questions but that the parent (or advisor) is not allowed to write the questions or answers without input from the minor student; commenters reasoned that it would be unfair if a respondent was an adult capable of strategically

posing questions while a minor complainant lacked the developmental ability to do the same. Other commenters argued that written submission of questions by the parties should never be allowed in the elementary and secondary school context because the procedure is likely to devolve into a fight between the parents of the complainant and parents of the respondent, further traumatizing both children involved.

Discussion: The Department appreciates commenters' support for § 106.45(b)(6)(ii) making hearings optional for elementary and secondary schools while providing opportunity for the parties to submit written questions and follow-up questions to other parties and witnesses with or without a hearing. The Department agrees that this provision ensures due process protections and fairness while taking into account that students in elementary and secondary schools are usually under the age of majority. Thus, the Department declines to mandate hearings and cross-examination for elementary and secondary schools, including only as applied to allegations of peer-on-peer harassment, or to high schools. Even where the parties are in a peer age group, parties in elementary and secondary schools generally are not adults with the developmental ability and legal right to pursue their own interests on par with adults. The Department is persuaded by commenters' concerns that the language in this provision should state even more clearly that hearings are optional and not required, and has revised this provision to state that "the recipient's grievance process may, but need not, provide for a hearing." For the reasons explained in the "Section 106.45(b)(6)(i) Postsecondary Institution Recipients Must Provide Live Hearing with Cross-Examination" subsection of the "Hearings" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble, the Department declines to make § 106.45(b)(6)(ii) applicable to postsecondary institutions.

The Department disagrees that the written submission of questions procedure in this provision exposes students to hostile proceedings, unnecessarily limits the discretion of local school officials, or obligates school districts to expend resources in an unwarranted manner. While due process of law is a flexible concept, at a minimum it requires notice and a meaningful opportunity to be heard, and the Department has determined that with respect to sexual harassment allegations under Title IX, both parties deserve procedural protections that translate those due process principles into meaningful rights for parties and increase the likelihood of reliable outcomes. This provision prescribes written submission of questions prior to adjudication, a procedure that benefits the truth-seeking purpose of the process even when the rights of a young student are exercised by a parent or legal guardian.

The final regulations do not preclude a recipient from providing training to an investigator concerning effective interview techniques applicable to children or to individuals with disabilities. Even when a party's rights are being exercised by a parent, each party's interest in the case is best advanced when the parties have the right to review and present evidence; the Department disagrees that the § 106.45 grievance process results in confidential information being shared with "countless individuals" or in violation of FERPA.[1392] Section 106.71 directs recipients to keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted

[1392] For further discussion see the "Section 106.6(e) FERPA" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble.

by the FERPA statute or regulations, 20 U.S.C. 1232g and 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including these final regulations.

The Department appreciates commenters' concerns that State laws already govern disciplinary proceedings, especially with respect to exclusionary discipline. The Department has determined that the procedural protections in § 106.45 best serve the interests implicated in resolution of allegations of sexual harassment under Title IX, a Federal civil rights law, and discipline for non-Title IX matters does not fall under the purview of these final regulations. To the extent that these final regulations provide the same protections as State laws governing student discipline already provide, these final regulations pose no challenge for recipients; to the extent that a recipient cannot comply with both State law and these final regulations, these final regulations, as Federal law, would control.[1393]

The Department disputes a commenter's contention that only sexual assault survivors are "questioned" when they report being assaulted; contrary to the commenter's assertion, robbery victims and hit-and-run victims are also "questioned" during criminal or civil proceedings. Similarly, students accused of cheating also are often questioned. Whether or not commenters accurately describe American culture as "patriarchal," the Department believes that these final regulations further the sex-equality mandate of Title IX by ensuring fair, accurate determinations regarding responsibility where sexual harassment is alleged under Title IX, so that sexual harassment victims receive remedies from recipients to promote equal educational access.

[1393] For further discussion see the "Section 106.6(h) Preemptive Effect" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble.

The Department disagrees that this provision will require significant legal guidance for school officials to comply. The provision gives each party the opportunity to submit written questions to be asked of other parties and witnesses, including limited follow-up questions. The decision-maker then objectively evaluates the answers to such questions, and any other relevant evidence gathered and presented during the investigation and reaches a determination regarding responsibility. Although observing demeanor is not possible without live cross-examination, a decision-maker may still judge credibility based on, for example, factors of plausibility and consistency in party and witness statements. Specialized legal training is not a prerequisite for evaluating credibility, as evidenced by the fact that many criminal and civil court trials rely on jurors (for whom no legal training is required) to determine the facts of the case including the credibility of witnesses.

This provision requires "limited follow-up questions" and leaves recipients discretion to set reasonable limits in that regard. The Department understands commenters' concerns that witnesses face peer pressure in many sexual harassment situations, and that stating factual information may be viewed as "tattling" or "ratting out" friends or fellow students which may be very uncomfortable for witnesses. Nothing in these final regulations purports to authorize recipients to compel witness participation in a grievance process, and § 106.71(a) protects every individual from retaliation for participating or refusing to participate in a Title IX proceeding.

The Department understands commenters' concerns that the written submission of questions procedure in § 106.45(b)(6)(ii) may be a new procedure in elementary and secondary schools, and the concern that such a procedure may create a "cycle" that extends the time frame for concluding a grievance process. To clarify that the written submission of questions procedure need not delay conclusion of the grievance process, we have revised § 106.45(b)(6)(ii) to state

that the opportunity for each party to submit written questions to other parties and witnesses must take place after the parties are sent the investigative report, and before the determination regarding responsibility is reached. Because § 106.45(b)(5)(vii) gives the parties ten days[1394] to submit a response to the investigative report, this revision to § 106.45(b)(6)(ii) makes it clear that the written submission of questions procedure may overlap with that ten-day period, so that the written questions procedure need not extend the time frame of the grievance process.

In order to leave school districts as much flexibility as possible while creating a consistent, predictable grievance process framework, the Department declines to foreclose the option of holding hearings (whether "live" or otherwise) in elementary and secondary schools. Local school officials, for example, could determine that their educational community is best served by holding live hearings for high school students, for students above a certain age, or not at all.[1395] State law may prescribe hearings for school discipline matters, in which case by leaving hearings optional these final regulations makes a conflict with State laws less likely. Further, the final regulations clarify that this provision applies not only to elementary and secondary schools but also to any other recipient that is not a postsecondary institution, and the nature of such a recipient's operations may lead such a recipient to desire a hearing model for

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[1394] As noted in the "Other Language/Terminology Comments" subsection of the "Section 106.30 Definitions" section of this preamble, the final regulations allow recipients to choose how to calculate "days" as used in these final regulations; a recipient may, for instance, calculate a ten-day period by calendar days, school days, business days, or other method.

[1395] The Department notes that this provision states that non-postsecondary institution recipients' grievance processes may, but need not, provide for a hearing. Therefore, the recipient has flexibility to make a hearing available on a case by case basis, for example where the Title IX Coordinator determines a hearing is needed, so long as the grievance process (of which the recipient's students and employees receive notice, pursuant to § 106.8) clearly identifies the circumstances under which a hearing may, or may not, be held. A recipient's discretion in this regard is limited by the introductory sentence in § 106.45(b) that any rules adopted by a recipient must apply equally to both parties. Thus, a recipient's grievance process could not, for example, state that a hearing will be held only if a respondent requests it, or only if a complainant agrees to it, but could state that a hearing will be held only if *both parties* request it or consent to it.

adjudications. For these reasons the final regulations leave hearings optional regardless of whether State law requires hearings. The Department understands commenters' concerns that if hearings are an option, school districts may become "inundated" with requests to hold hearings. The Department reiterates that this provision does not require elementary or secondary schools to use hearings (live or otherwise) to adjudicate formal complaints under Title IX, and any choice to do so remains within a recipient's discretion.

As noted above, nothing in the final regulations precludes a recipient from training investigators in best practices for interviewing children, and the final regulations minimize the number of times a young victim might have to be interviewed, by not requiring appearances at live hearings. The Department understands that school officials are not forensic or criminal investigation experts, and recognizes that in many situations, conduct that constitutes sexual harassment as defined in § 106.30 will also constitute sexual abuse resulting in law enforcement investigations. These final regulations contemplate the intersection of a recipient's investigation under Title IX with concurrent law enforcement activity, expressly stating that good cause may exist to temporarily delay the Title IX grievance process to coordinate or cooperate with a concurrent law enforcement investigation. The Department disagrees that these final regulations require schools to disregard best practices with respect to interviewing child sex abuse victims and reiterate that the final regulations do not preclude a recipient from training Title IX personnel in interview techniques sensitive to the unique needs of traumatized children.

If an elementary and secondary school recipient chooses to hold a hearing (live or otherwise), this provision leaves the recipient significant discretion as to how to conduct such a hearing, because § 106.45(b)(6)(i) applies only to postsecondary institutions. The Department desires to leave elementary and secondary schools as much flexibility as possible to apply

procedures that fit the needs of the recipient's educational environment. The Department notes that § 106.45(b) requires any rules adopted by a recipient for use in a Title IX grievance process, other than those required under § 106.45, must apply equally to both parties. Within that restriction, elementary and secondary school recipients retain discretion to decide how to conduct hearings if a recipient selects that option.

In response to commenters wondering whether hearings are optional or required for a recipient that is neither a postsecondary institution nor an elementary and secondary school, the Department has revised § 106.30 to define "postsecondary institution" and "elementary and secondary school" and clarify that § 106.45(b)(6)(ii) applies to elementary and secondary schools and any "other recipient that is not a postsecondary institution."

In response to commenters concerned about whether a minor party has the right to have a parent help pose questions and answers under this provision, we have added § 106.6(g) to clarify that nothing in these regulations changes or limits the legal rights of parents or guardians to act on behalf of a party. The Department declines to specify whether a parent writing out questions or answers on behalf of the student-party must consult their child; this matter is addressed by other laws concerning the scope of a parent's legal right to act on behalf of their child. The Department understands commenters' concerns that the written submission of questions procedure may "devolve into a fight" between parents of minor parties, but reiterates that recipients retain discretion to adopt rules of decorum that, for example, require questions to be posed in a respectful manner (e.g., without using profanity or irrelevant *ad hominem* attacks). Further, the decision-maker has the obligation to permit only relevant questions to be asked and must explain to the party posing the question any decision to exclude a question as not relevant.

Changes: The Department has revised § 106.45(b)(6)(ii) to clarify that it applies to elementary and secondary schools and to "other recipients that are not postsecondary institutions," and to clarify that "the recipient's grievance process may, but need not, provide for, a hearing." We have further revised § 106.45(b)(6)(ii) to provide that, with or without a hearing, after the recipient has sent the investigative report to the parties pursuant to § 106.45(b)(5)(vii) and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.

We have added definitions of "elementary and secondary schools" and "postsecondary institutions" in § 106.30. We have also added § 106.6(g) acknowledging that nothing in these final regulations abrogates the legal rights of parents or guardians to act on behalf of party. We have added § 106.71 directing recipients to keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute or regulations, 20 U.S.C. 1232g and 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including these final regulations.

Comments: Some commenters supported or opposed the rape shield protections in § 106.45(b)(6)(ii) for the same reasons stated in support of or opposition to the same language in § 106.45(b)(6)(ii); see discussion under the "Section 106.45(b)(6)(i) Postsecondary Institution Recipients Must Provide Live Hearings with Cross-Examination" subsection of the "Hearings"

subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble.

Some commenters argued that the two exceptions should be eliminated with respect to minors because the sexual behavior of children should never be relevant or asked about or because minors cannot legally consent and thus an exception where "offered to prove consent" serves no purpose with respect to minors.

Discussion: The Department's incorporates here its response to commenters' support and opposition for the rape shield language stated in the "Section 106.45(b)(6)(i) Postsecondary Institution Recipients Must Provide Live Hearings with Cross-Examination" subsection of the "Hearings" subsection of "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble.

The Department disagrees that the two exceptions (or even the exception that refers to "consent") should be eliminated in this provision because minors cannot legally consent to sexual activity. While this fact may make the issue of "consent" irrelevant in certain sexual harassment cases, consent may be relevant in other formal complaints investigated and adjudicated by elementary and secondary school recipients; for example, where the parties are over the age of consent in the relevant jurisdiction, or the age difference between the two minor parties is such that State law decriminalizes consensual sexual activity between the two individuals.[1396] The Department will defer to State law regarding the age when a person has the

[1396] The age of consent to sexual activity varies across States, from age 16 to age 18, and many States have a "close in age exemption" to decriminalize consensual sex between two individuals who are both under the age of consent. Age of Consent net, *United States Age of Consent Map*, "What is the legal Age of Consent in the United States?," https://www.ageofconsent net/states.

ability to consent. Further, we have revised this provision in the final regulations to clarify that it applies not only to elementary and secondary schools but also to other recipients that are not postsecondary institutions, and parties associated with such "other recipients" may be adults rather than children. The Department thus retains the rape shield language in this provision, including the two exceptions, mirroring the rape shield language used in § 106.45(b)(6)(i).

Changes: For the same reasons as discussed under § 106.45(b)(6)(i), the Department has revised the rape shield language in § 106.45(b)(6)(ii) by clarifying that questions and evidence about the complainant's prior sexual behavior or predisposition are not relevant unless such questions or evidence are offered for one of the two exceptions (offered to prove someone other than the respondent committed the alleged conduct, or offered to prove consent).

Comments: Some commenters supported or opposed the requirement in § 106.45(b)(6)(ii) that decision-makers explain the reason for excluding any question proposed by a party as not relevant, for the same reasons stated in support or opposition for similar language in § 106.45(b)(6)(i); see discussion under the "Section 106.45(b)(6)(i) Postsecondary Institution Recipients Must Provide Live Hearings with Cross-Examination" subsection of the "Hearings" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble.

Some commenters opposed this requirement because it would essentially force an elementary and secondary school administrator to make evidentiary determinations that can be difficult even for lawyers and judges. Commenters opposed this requirement based on personal experience handling questions from minor parties and their parents in Title IX proceedings and observing that many questions posed by parents are irrelevant, so having to explain the relevance of each excluded question would draw out the length of proceedings unnecessarily.

Discussion: The Department incorporates here its response to commenters' support of and opposition to the similar provision in § 106.45(b)(6)(i) under which the decision-maker must explain any decision to exclude questions as not relevant; see the "Section 106.45(b)(6)(i) Postsecondary Institution Recipients Must Provide Live Hearings with Cross-Examination" subsection of the "Hearings" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble.

The Department appreciates commenters' concerns that based on experience with parents exercising rights on behalf of students during Title IX proceedings, parents tend to pose a lot of irrelevant questions. The Department believes the burden of this requirement is outweighed by the right of parties (including when a party's rights are exercised by parents) to meaningfully participate in the grievance process through posing questions to the other party and witnesses, and understanding why a question has been deemed irrelevant is important to ensure that the parties feel confident that their perspectives about the facts and evidence are appropriately taken into account prior to the determination regarding responsibility being reached.

Changes: None.

Determinations Regarding Responsibility

Section 106.45(b)(7)(i) Single Investigator Model Prohibited

Benefits of Ending the Single Investigator Model

Comments: Many commenters supported the NPRM's prohibition on the single investigator model because it would reduce the risk of bias and unfairness. Commenters argued that ending the single investigator model would decentralize power from one individual, allow for checks and balances, reduce the risk of confirmation bias, and increase the overall fairness and reliability of Title IX proceedings. Commenters stated that a strict separation of investigative and

decision-making functions is essential because it is unrealistic to expect a person to fairly review their own investigative work. One commenter argued that procedural protections are necessary but not sufficient to render fair outcomes; the commenter stated it is also necessary to prohibit, detect, and eliminate bias. The commenter argued that unbiased adjudicators are a bedrock principle of any disciplinary proceeding, and this principle has been well understood since the founding of this country and development of the common law.[1397] Several commenters asserted that schools are currently facing significant pressure from the media and general public to achieve "social justice" and find respondents guilty. Commenters argued that blending the investigative and adjudicative functions increases the risk of false positives (i.e., inaccurate findings of responsibility).

Several commenters submitted personal stories where investigators under the single investigator model acted improperly, for instance by meeting with complainants but not respondents, failing to promptly notify the respondent of charges, withholding evidence, ignoring exculpatory evidence, ignoring inconsistencies in complainant's testimony, framing language in an inflammatory way against the respondent, relying on triple hearsay favoring the complainant, and entering a suspected personal relationship with the complainant. Commenters stated that improper or biased actions by an investigator might at least be recognized and corrected where the decision-maker is a different person. A few commenters asserted that ending the single investigator model would reinforce a genuine live hearing process with cross-examination. One

[1397] Commenters cited: The Federalist No. 10 (J. Madison) ("No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity."). At least one commenter cited: *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 867, 877 (2009) (common law recognized the need for unbiased adjudicators, and the U.S. Constitution incorporated and expanded upon the protections at common law against biased adjudicators).

commenter suggested that the single investigator model precludes effective confrontation of witnesses because even where there is a live hearing the investigator's finding is a "heavy thumb on the scale." Commenters noted that under the single investigator model often there is no live hearing at all where parties can probe each other's credibility, and no opportunity for parties to know what evidence the investigator is considering before rendering an ultimate decision.

Discussion: The Department appreciates the support from commenters for § 106.45(b)(7)(i) of the final regulations which, among other things, would require the decision-maker to be different from any person who served as the Title IX Coordinator or investigator, thus foreclosing recipients 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 (or team of persons each of whom performed all those roles). 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 (such as a panel), but no decision-maker can be the same person who served as the Title IX Coordinator or investigator.

Commenters correctly noted that separating the investigative and decision-making functions will not only increase the overall fairness of the grievance process but also will increase the reliability of fact-finding and the accuracy of outcomes, as well as improve party and public confidence in outcomes. Combining the investigative and adjudicative functions in a single individual may decrease the accuracy of the determination regarding responsibility,

because individuals who perform both roles may have confirmation bias and other prejudices that taint the proceedings, whereas separating those functions helps prevent bias and prejudice from impacting the outcome.

Changes: None.

Consistency with Case Law

Comments: Several commenters contended that ending the single investigator model would be consistent with case law. Commenters cited cases where courts overturned recipient findings against respondents, raised concerns regarding preconceptions and biases that may arise where a single person has the power to investigate, prosecute, and convict, and asserted that a single investigator model can impede effective cross-examination and credibility determinations.[1398] On the other hand, some commenters cited case law to suggest the single investigator model can be fair and appropriate.[1399]

[1398] Commenters cited: *Doe v. Claremont McKenna Coll.*, 25 Cal. App. 5th 1055, 1072-73 (Cal. App. 2018) (all decision makers "must make credibility determinations, and not simply approve the credibility determinations of the one Committee member who was also the investigator."); *Doe v. Miami Univ.*, 882 F.3d 579, 601, 605 (6th Cir. 2018) (court found "legitimate concerns" raised by the investigator's "alleged dominance on the three-person [decision making] panel," because "she was the only one of the three with conflicting roles."); *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 573 (D. Mass. 2016) (referring to the "obvious" "dangers of combining in a single individual the power to investigate, prosecute, and convict, with little effective power of review"); *Doe v. Allee*, 30 Cal. App. 5th 1036, 1068 (Cal. App. 2019) ("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.").

[1399] Commenters cited: *Withrow v. Larkin*, 421 U.S. 35, 49 (1975) (rejecting the argument that a "combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias"); *Hess v. Bd. of Trustees of So. Ill. Univ.*, 839 F.3d 668 (7th Cir. 2016) (bias of decision-maker would violate due process, but combination of investigative and adjudicative functions into a single person does not, by itself, demonstrate that the decision-maker is actually biased); *Pathak v. Dep't. of Veterans Affairs*, 274 F.3d 28, 33 (1st Cir. 2001); *Doe v. Purdue Univ.*, 281 F. Supp. 3d 754, 779 (N.D. Ind. 2017), *aff'd, Doe v. Purdue Univ.*, 928 F.3d 652 (7th Cir. 2019).

Discussion: The Department appreciates commenters' input on the consistency of the single investigator model with case law. We acknowledge that the Supreme Court has held that a biased decision-maker violates due process but that combining the investigative and adjudicative functions in a *single agency* does not present a constitutional due process problem.[1400] The final regulations comport with that holding, inasmuch as a single recipient is expected to perform the investigative and adjudicative roles in a Title IX grievance process. As noted by commenters, lower courts have reached mixed results as to whether a *single person* performing the investigative and adjudicative functions in a student misconduct process violates due process.[1401]

Notwithstanding whether the single investigator model withstands constitutional scrutiny under due process requirements, the Department believes that combining these functions raises an unnecessary risk of bias that may unjustly impact one or both parties in a given Title IX proceeding.[1402] Particularly because the stakes are so high in these cases, with potentially life-

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[1400] Kenneth Oshita, *Home Court Advantage? The SEC and Administrative Fairness*, 90 S. CAL. L. REV. 879, 902 (2017) (noting that the Supreme Court established that "the combination of investigative and adjudicative functions does not, without more, constitute a due process violation" but continuing, "Interestingly, the *Withrow* Court recognized that a biased adjudicator is 'constitutionally unacceptable' and that 'our system of law has always endeavored to prevent even the probability of unfairness.' Yet, even recognizing the importance of fairness in this constitutional principle, the Court reasoned that the combination of functions within an agency is constitutionally acceptable.") (citing *Withrow v. Larkin*, 421 U.S. 35, 49 (1975)).

[1401] *E.g.*, Richard H. Underwood, *Administrative Adjudication in Kentucky: Ethics and Unauthorized Practice Considerations*, 29 N. KY. L. REV. 359, 361 (2002) ("[T]he case law generally rejects the proposition that a *combination of functions in one agency* necessarily creates an unconstitutional risk of bias, or that such a combination automatically constitutes a denial of due process such as to warrant disqualification of the involved administrative adjudicator. On the other hand, *when functions are combined in a single individual*, the case for disqualification for 'unfairness' or bias is stronger. How can an administrative adjudicator deal fairly with a party or parties if he or she has performed other functions - investigatory or prosecutorial - in the same matter?") (internal quotation marks and citations omitted; emphasis added).

[1402] Michael R. Lanzarone, *Professional Discipline: Unfairness and Inefficiency in the Administrative Process*, 51 FORDHAM L. REV. 818, 827 (1983) (noting that the "commingling of investigatory and adjudicatory functions" is a "daily occurrence in [professional] disciplinary proceedings. The Supreme Court in [*Withrow v. Larkin*, 421 U.S. 35 (1975)], however, concluded that the Constitution tolerates such commingling. *Entirely apart from any specific*

altering consequences that may flow from a decision in favor of either party, the Department believes that separating investigation from decision making is important to promote the overall fairness of the process.

Changes: None.

Alternative Approaches to Ending Single Investigator Model

Comments: Some commenters asserted that ending the single investigator model is unnecessary to reduce bias and may in fact increase the risk of unfairness. Commenters argued that Title IX investigators are highly-trained professionals who are often most familiar with the evidence and best-positioned to make credibility determinations and render consistent decisions. These commenters suggested that requiring different decision-makers may increase the risk of overlooked details and incorrect outcomes because other persons may not be as close to the evidence as investigators.

Some commenters argued that hybrid models are adequate and can satisfy due process concerns because, for example, hybrid models in use by some recipients use an investigator (or team of investigators) to gather evidence and write up recommendations about responsibility yet allow both parties to review gathered evidence and pose questions to each other, and hold live hearings for the sanctioning and appeals processes, while parties may resort to civil litigation to challenge the school's proceedings. One commenter acknowledged the possibility of bias within

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constitutional infirmities, the question remains whether the basic unfairness of the procedure counsels against its use.") (internal citations omitted); *id.* at fn. 60 ("There are dangers in allowing an individual who has investigated misconduct and determined that there is probable cause to suspend a professional's license to sit as a trier of fact in a later de novo hearing. The state board that is responsible for professional discipline may view its role as more of a prosecutor than as a disinterested finder of fact. A board of education may find it difficult to be unbiased when the chief executive of the school district has already recommended dismissal of a tenured teacher. And the danger of bias undoubtedly increases when an individual actually conducts an investigation (as opposed to passing upon another's work) and then sits as the trier of fact to hear and pass upon the credibility of witnesses.").

the single investigator model and recommended a hybrid system involving investigation by an impartial investigator followed by referral to a student conduct system for live hearing. One commenter proposed that the Department's concern regarding bias with the single investigator model could be addressed through less restrictive means, such as by allowing parties to assert alleged bias before or during an investigation and by offering an appeal to a different decision-maker to consider alleged bias during the investigation. One commenter suggested that the Department allow recipients who use two investigators to also use them as decision-makers. This commenter argued that two investigators are in the best position to review all the evidence and determine responsibility and appropriate sanction; moreover, ensuring two investigators assigned to each case prevents any one person from being decision-maker and allows the second person to serve as an effective check. Other commenters asserted that prohibiting the single investigator model is unnecessary because the Department already carefully safeguarded the selection process for investigators, Title IX Coordinators, and decision-makers by prohibiting bias and conflicts of interest in § 106.45(b)(1)(iii).

Discussion: The Department believes the robust training and impartiality requirements for all individuals serving as Title IX Coordinators, investigators, or decision-makers contained in § 106.45(b)(1)(iii) of the final regulations[1403] will effectively promote the reliability of fact-finding and the overall fairness and accuracy of the grievance process. In addition, the final regulations require that any materials used to train Title IX personnel must not rely on sex stereotypes. We believe these measures will promote consistent outcomes, addressing commenters' concerns

[1403] The final regulations revise § 106.45(b)(1)(iii) to include training for persons who facilitate informal resolution processes, in addition to Title IX Coordinators, investigators, and decision-makers.

about decision-makers not having the same level of training or expertise as investigators. Furthermore, § 106.45(b)(5)(vii) requires the investigator to prepare an investigative report that fairly summarizes all relevant evidence, and therefore the parties and decision-maker will be aware of the evidence gathered during the investigation.

The Department appreciates commenters' suggestion that a "hybrid" model could provide many of the same checks against bias and inaccuracy as complete separation of the investigation and adjudication roles. However, the Department believes that formally separating the investigative and adjudicative roles in the Title IX grievance process is important to reduce the risk and perception of bias, increase the reliability of fact-finding, and promote sound bases for responsibility determinations. As such, the Department concludes that adopting the various less restrictive means that commenters suggested to reduce the bias inherent in the single investigator model, such as permitting two investigators to also serve as decision-makers, would not go far enough to promote these important goals. Consistent with the commenters' suggestion, however, the Department also emphasizes that § 106.45(b)(8), in addition to requiring that recipients offer appeals for both parties, explicitly permits either party to assert that the Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias. These provisions are meant to reinforce each other in increasing the fairness of Title IX proceedings.

Changes: None.

Chilling Reporting and Other Harmful Effects

Comments: Commenters suggested that ending the single investigator model would increase the number of people who must be involved in the Title IX process, and this may increase the risk of untrained and biased people shaming survivors and not believing in them, and also lead to re-traumatization for survivors having to share their stories multiple times. Commenters suggested

that ending the single investigator model reinforces the requirement for traumatizing and unnecessary live hearings with cross-examination, which could discourage reporting. Commenters argued that the single investigator model reduces pressure on both parties because the investigator can interact with each party in a less stressful, less adversarial setting.

Commenters asserted that the NPRM's prohibition of the single investigator model could be problematic under Title IX and potentially harmful to parties who want closure, because requiring a separate decision-maker could lengthen the adjudicative process, make it less efficient, and delay resolutions. One commenter argued that ending the single investigator model could frustrate the NPRM's due process goals, by perversely incentivizing recipients to avoid the NPRM's formal grievance process through informal resolution, or incentivize schools to not provide an appeal process due to added compliance costs.

Discussion: The Department does not believe that precluding a single investigator model for investigations and adjudications will discourage reporting, traumatize parties, unreasonably lengthen the grievance process, or incentivize recipients to forgo important due process protections for parties. Rather, the purpose of formally separating the investigative and adjudicative functions is to reduce the risk of bias, increase the reliability of fact-finding, and promote sound bases for determinations of responsibility. The Department acknowledges that without a requirement that the decision-maker be separate from any person that performed the role of Title IX Coordinator and investigator, a complainant potentially could give a statement only once – to the single person or team of people performing all those functions, and that complainants may feel intimidated by needing speak with more than one person during the course of the grievance process. Such a necessity, however, is not different from participation in any typical adjudicative process, whether civil or criminal, where a complainant (or civil

plaintiff, or victim-witness in a criminal case) would also need to recount the allegations and answer questions several times during the course of an investigation and adjudication. Because a grievance process must contain consistent procedural protections in order to reach factually accurate outcomes, the final regulations ensure that a complainant retains control over deciding whether to participate in a grievance process[1404] and ensures that a complainant can receive supportive measures to restore or preserve the complainant's equal access to education regardless of whether a grievance process is undertaken.[1405] The final regulations also permit recipients to offer and facilitate informal resolution processes which can resolve allegations without a full investigation and adjudication.[1406]

Contrary to the claims made by some commenters that increasing the number of people who must be involved in the formal grievance process would increase the risk of using untrained personnel and causing unfairness, the Department believes that the robust training and impartiality requirements contained in § 106.45(b)(1)(iii) that apply to all individuals

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[1404] *E.g.*, § 106.30 specifies that only a complainant, or a Title IX Coordinator, can sign or file a formal complainant initiating the grievance process such that even if a report about the complainant's alleged victimization is made to the recipient by a third party, the complainant retains autonomy to decide whether to file a formal complaint; § 106.30 revises the definition of "complainant" to remove the phrase "or on whose behalf the Title IX Coordinator files a formal complaint" to clarify that even when a Title IX Coordinator does sign a formal complaint initiating a grievance process, that action is not taken "on behalf of" the complainant, so that the complainant remains in control of when a formal process is undertaken on the complainant's behalf. The final regulations removed proposed § 106.44(b)(2) that would have required a Title IX Coordinator to file a formal complaint upon receipt of multiple reports against the same respondent, in order to avoid situations where a Title IX Coordinator would have been forced (by the proposed rules) to sign a formal complaint over the wishes of a complainant. The final regulations add § 106.71 prohibiting retaliation and including under prohibited actions those taken to dissuade a complainant from reporting or filing and those taken to punish a complainant (or anyone else) from refusing to participate in a Title IX proceeding.

[1405] *E.g.*, § 106.44(a) requires the Title IX Coordinator promptly to contact each complainant to discuss the availability of supportive measures (with or without a formal complaint being filed), consider the wishes of the complainant with respect to supportive measures, and explain to the complainant the process for filing a formal complaint.

[1406] Section 106.45(b)(9) (permitting informal resolutions of any formal complaint except where the allegations are that an employee has sexually harassed a student).

participating as Title IX Coordinators, investigators, decision-makers, or persons facilitating informal resolution processes, reduce these risks. Furthermore, ensuring that the investigative and adjudicative functions are performed by different individuals is critical for effective live cross-examination, as other commenters noted, because under the single investigator model the decision-maker may be biased in favor of the decision-maker's own investigative recommendations and conclusions rather than listening to party and witness statements during a hearing impartially and with an open mind; similarly, if the decision-maker is the same person as the Title IX Coordinator the decision-maker may be influenced by information gleaned from a complainant due to implementation of supportive measures rather than by information relevant to the allegations at issue. Moreover, under the single investigator model often there is no live hearing where parties can probe each other's credibility and as discussed under § 106.45(b)(6)(i), the Department believes that live hearings are a critical part of a fair process in the postsecondary context.

The Department acknowledges concerns that separating the investigative and adjudicative functions may lengthen the adjudicative process in some cases. However, we emphasize that § 106.45(b)(1)(v) of the final regulations requires that the grievance process be completed within a reasonably prompt time frame, including completion of a live hearing (for postsecondary institutions). We do not believe that eliminating the single investigator model will incentivize recipients to offer informal resolution process to avoid the grievance process. We have revised § 106.45(b)(9) so that informal resolutions must be voluntarily agreed to by each party, forbidding recipients from requiring any party to participate in an informal process, and preventing recipients from conditioning enrollment, employment, or any other right on a party's participation in informal resolution. We have also revised § 106.45(b)(8) to require recipients to

offer appeals equally to both parties, which also must be subject to a recipient's designated, reasonably prompt time frames; this revision also ensures that recipients cannot rationalize removal of the single investigator model as a reason to refuse to offer an appeal.

Changes: We have revised § 106.45(b)(9) governing informal resolutions, to forbid recipients from requiring parties to participate in informal resolution and to preclude recipients from conditioning enrollment, employment, or enjoyment of rights on a party's participation in informal resolution. We have revised § 106.45(b)(8) governing appeals to require recipients to offer appeals equally to both parties, on three specified bases: procedural irregularity, newly discovered evidence, or conflict of interest or bias on the part of Title IX personnel.

Respecting the Roles of Title IX Coordinators and Investigators

Comments: A few commenters asserted that excluding Title IX Coordinators and investigators from any decision-making role is inherently insulting to them because it undervalues their training, professionalism, and expertise. One commenter proposed that the Department require separate investigators and decision-makers, but not prohibit Title IX Coordinators from being decision-makers. This commenter reasoned that Title IX Coordinators are highly trained professionals and Title IX subject matter experts who are reliably impartial and that removing their expertise from the equation may increase the risk of bias, unfairness, and inconsistency across cases.

Discussion: The Department appreciates the integrity and professionalism of individuals serving as Title IX Coordinators. However, and as discussed above, given the high stakes involved for all parties in Title IX cases, the Department believes that separating the investigative and adjudicative functions is essential to mitigate the risk of bias and unfairness in the grievance process. The final regulations would not remove the expertise of Title IX Coordinators from the

grievance process. Section 106.45(b)(7)(i) does not prevent the Title IX Coordinator from serving as the investigator; rather, this provision only prohibits the decision-maker from being the same person as either the Title IX Coordinator or the investigator. As other commenters have pointed out, the final regulations place significant responsibilities on Title IX Coordinators. Separating the functions of a Title IX Coordinator from those of the decision-maker is no reflection on the ability of Title IX Coordinators to serve impartially and with expertise. Rather, requiring different individuals to serve in those roles acknowledges that the different phases of a report and formal complaint of sexual harassment serve distinct purposes. At each phase, the person responsible for the recipient's response likely will receive information and have communications with one or both parties, for different purposes. For example, the Title IX Coordinator must inform every complainant about the availability of supportive measures and coordinate effective implementation of supportive measures, while the investigator must impartially gather all relevant evidence including party and witness statements, and the decision-maker must assess the relevant evidence, including party and witness credibility, to decide if the recipient has met a burden of proof showing the respondent to be responsible for the alleged sexual harassment. Placing these varied responsibilities in the hands of a single individual (or even team of individuals) risks the person(s) involved improperly relying on information gleaned during one role to affect decisions made while performing a different role. For example, a Title IX Coordinator may have a history of communications with the complainant before any formal complaint has been filed (for instance, due to implementing supportive measures for the complainant), which may influence the Title IX Coordinator's perspective about the complainant's situation before the Title IX Coordinator (if allowed to be the "decision-maker") has even spoken with the respondent. Similarly, an investigator may obtain information from a

party that is not related to the allegations under investigation during an interview with a party, and if the investigator also serves as the decision-maker, such unrelated information may influence that person's decision making, resulting in a determination that is not based on relevant evidence. Separating the roles of investigation from adjudication therefore protects both parties by making a fact-based determination regarding responsibility based on objective evaluation of relevant evidence more likely.

Changes: None.

Preserving Recipient Autonomy

Comments: Several commenters contended that ending the single investigator model constitutes Federal overreach into recipient decision making. Commenters emphasized that recipients vary widely in size, resources, mission, and composition of students, faculty, and staff, and that imposing a one-size-fits-all approach on them by ending the single investigator model is unwise. Commenters argued that, currently, disciplinary processes are tailored to fit each recipient's unique needs, including the single investigator model where a recipient has deemed that to best fit the recipient's needs. Commenters argued that the Department should not limit school autonomy or dictate how private institutions allocate their staff.

Discussion: The Department respects the importance of granting recipients flexibility and discretion to design and implement policies and procedures that reflect their unique values and the needs of their educational communities. However, this interest must be balanced with other important goals, including increasing the reliability of fact-finding, the overall fairness in the process, and the accuracy of responsibility determinations. Title IX is a Federal civil rights law that requires recipients to operate education programs and activities free from sex discrimination, and when a recipient is presented with allegations of sexual harassment, the Department and the

recipient have an interest in ensuring that the recipient applies procedures designed to accurately identify the nature of sexual harassment that has occurred in the recipient's education program or activity. The Department believes that separating the investigative and adjudicative functions most effectively balance the goals of ensuring accurate identification of sexual harassment and respecting recipients' autonomy. The Department notes that the final regulations leave significant flexibility to recipients, including whether the Title IX Coordinator can also serve as the investigator, whether to use a panel of decision-makers or a single decision-maker, and whether to use the recipient's own employees or outsource investigative and adjudicative functions to professionals outside the recipient's employ.

Changes: None.

Consistency with Federal Law and Employment Practices

Comments: Some commenters argued that ending the single investigator model would conflict with Federal and State laws and employment practices. One commenter reasoned that if the respondent is an employee, then the site administrator with line authority may be in best position to investigate due to confidentiality with personnel issues and the Department should not create a conflicting process. Commenters argued that the NPRM's prohibition of the single investigator model is unworkable in the employee context, especially where schools take disciplinary action against at-will employees because at-will employees do not have the same due process rights to their jobs as students do to their education. Commenters asserted that ending the single investigator model could conflict with existing collective bargaining agreements and faculty handbooks. Commenters also asserted that the NPRM's application to the employment context is problematic because workplace harassment is already addressed by Title VII and State non-discrimination laws.

Discussion: The Department acknowledges efficiency interests and the value of a recipient's flexibility and discretion to address sexual misconduct situations involving the recipient's employees, such as by using site administrators to investigate and adjudicate complaints against employee-respondents. However, these interests must be balanced with other important goals, including increasing the reliability of fact-finding, the overall fairness in the process, and the accuracy of responsibility determinations. The Department believes that separating the investigative and adjudicative functions most effectively promotes these goals. As such, the prohibition of the single investigator model contained in § 106.45(b)(7)(i) of the final regulations would apply to all recipients, including elementary and secondary schools and postsecondary institutions, and it would also equally apply to student and employee respondents. For reasons discussed in the "Section 106.6(f) Title VII and Directed Question 3 (Application to Employees)" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble, these final regulations apply to any person, including employees, in an education program or activity receiving Federal financial assistance.

A recipient may use a site administrator to conduct the investigation into a formal complaint of sexual harassment against an employee, as long as the site administrator is not the decision-maker, as set forth in § 106.45(b)(7)(i). In that situation, the recipient must designate someone other than the site administrator to serve as the decision-maker. If the recipient would like the site administrator to serve as the decision-maker, then the recipient must designate someone other than the site administrator to serve as the investigator.

The Department appreciates the concerns raised by several commenters that ending the single investigator model may pose untenable conflict with State laws, the nature of at-will employment relationships where the respondent is an employee, and with existing collective

bargaining agreements and faculty handbooks. With respect to potential conflict with State laws regarding the prohibition of the single investigator model contained in § 106.45(b)(7)(i) of the final regulations, the final regulations preclude the decision-maker from being the same person as the Title IX Coordinator or the investigator, but do not preclude the Title IX Coordinator from serving as the investigator. Further, the final regulations do not prescribe which recipient administrators are in the most appropriate position to serve as a Title IX Coordinator, investigator, or decision-maker, and leave recipients discretion in that regard, including whether a recipient prefers to have certain personnel serve in certain Title IX roles when the respondent is an employee. To generally address commenters' questions about preemption, the Department has added § 106.6(h) which provides that to the extent of a conflict between State or local law and Title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law.

The Department acknowledges that Title VII and Title IX impose different requirements and that some recipients will need to comply with both Title VII and Title IX, as reflected in § 106.6(f) of these final regulations. The Department believes that recipients may comply with different regulations implementing Title VII and Title IX. These final regulations require all recipients with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, to respond promptly in a manner that is not deliberately indifferent, irrespective of whether the complainant and respondent are students or employees. The grievance process in § 106.45 does not contradict Title VII or its implementing regulations in any manner and at most may provide more process than Title VII requires (such as specifying that a decision-maker must be a different person than the Title IX Coordinator or investigator). These final regulations, however, do not expand Title VII, as these final

regulations are promulgated under Title IX. For further discussion of the intersection between Title VII and these final regulations, see the "Section 106.6(f) Title VII and Directed Question 3 (Application to Employees)" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble.

With respect to the general at-will employment doctrine, or the fact that recipients often have employment contracts or collective bargaining agreements in place that govern employee misconduct, where Title IX is implicated the Department has determined that the protections and rights set forth in these final regulations represent the most effective ways to promote Title IX's non-discrimination mandate, and recipients of Federal financial assistance agree to comply with Title IX obligations as a condition of receiving Federal funds. Recipients' contractual arrangements with employees must conform to Federal law, as a condition of receipt of Federal funds.

Changes: None.

Limiting the Prohibition of the Single Investigator Model

Comments: Some commenters supported ending the single investigator model but argued against a categorical prohibition. One commenter proposed that the Department only prohibit the single investigator model where the respondent faces the possibility of expulsion or dismissal. This commenter argued that more minor cases, such as sexual harassment claims against respondents for making inappropriate jokes, can be fairly investigated and resolved by a single person without bias. However, the commenter reasoned, where the stakes are higher, such as with a sexual assault allegation and the possibility of dismissal, then a strict separation of the investigative and adjudicative functions is justified. The commenter asserted that this is a logical cost/benefit analysis, especially for smaller recipients. One commenter suggested that the

Department should only prohibit the single investigator model for larger schools (such as those with over 3,000 students) or for schools that have greater numbers of Title IX complaints that result in formal investigations (such as ten or more per year). One commenter requested that the Department prohibit the single investigator model but exempt recipients that submit a reasoned written explanation as to why their disciplinary system is fair and necessary. One commenter urged the Department to allow the single investigator model, but only where both parties consent to it. Another commenter emphasized that postsecondary institutions generally have more resources than elementary and secondary school districts, and therefore the Department should initially apply the single investigator prohibition only to postsecondary institutions, and see how effective it is before applying it to elementary and secondary schools.

Discussion: The Department appreciates the logistical concerns raised by some commenters regarding an across-the-board prohibition on the single investigator model contained in the final regulations and the suggestions for alternative approaches. However, the Department believes, as discussed above, that separating requiring investigative and adjudicative roles to be filled by different individuals is critical for reducing the risk of unfairness, increasing the reliability of fact-finding, and enhancing the accuracy of Title IX adjudications. Furthermore, we do not see the propriety in crafting different sets of procedural requirements under Title IX for recipients based on their size, the number of Title IX complaints they typically receive on an annual basis, or the potential severity of the punishment the respondent may receive if determined to be responsible for the alleged sexual harassment. It is unclear what criteria would justify an exemption to the general requirement that the same person cannot investigate and adjudicate a case, particularly because all the conduct described as "sexual harassment" under § 106.30 is serious conduct that jeopardizes a victim's equal access to education, and the Department resists

attempts to characterize certain forms of sexual harassment defined under § 106.30 as automatically warranting more or less severe sanctions. The Department notes that § 106.45(b)(9) of the final regulations permits informal resolutions as long as both parties voluntarily consent to attempt an informal process. Informal resolutions under the final regulations would not require more than one person to facilitate the process. In this regard, the Department recognizes the importance of giving recipients flexibility and discretion to satisfy their Title IX obligations in a manner consistent with their unique values and the needs of their educational communities, and the wishes of the parties to each formal complaint.

Changes: None.

Requests for Clarification

Comments: Commenters sought clarification on several issues regarding the NPRM's prohibition of the single investigator model. A few commenters asked whether the NPRM requires that the Title IX Coordinator be different than the investigator and, if so, how a Title IX Coordinator can remain fair and unbiased in situations where the NPRM requires the Title IX Coordinator to file a formal complaint. One commenter inquired as to whether the Title IX Coordinator can make preliminary determinations of responsibility that are then passed along to the decision-maker. Another commenter requested more clarity as to whether the NPRM's prohibition on a Title IX Coordinator serving as decision-maker also applies to appeal decisions. One commenter asked whether the decision-maker and hearing officer presiding over the live hearing can be different individuals. Another commenter asserted that § 106.45(b)(7)(i) has been understood to require different individuals to assume each of three different roles: decision-maker, investigator, and Title IX Coordinator. This commenter inquired as to what the Title IX Coordinator's role would be regarding investigations under the NPRM.

Discussion: The Department appreciates the questions commenters raised regarding the implications of the prohibition of the single investigator model contained in § 106.45(b)(7)(i) of the final regulations. The Department wishes to clarify that the final regulations require the Title IX Coordinator and investigator to be different individuals from the decision-maker, but nothing in the final regulations requires the Title IX Coordinator to be an individual different from the investigator. Nothing in the final regulations prevents Title IX Coordinators from offering recommendations regarding responsibility to the decision-maker for consideration, but the final regulations require the ultimate determination regarding responsibility to be reached by an individual (i.e., the decision-maker) who did not participate in the case as an investigator or Title IX Coordinator.

The final regulations have removed proposed § 106.44(b)(2) that would have required Title IX Coordinators to file formal complaints upon receiving multiple reports of sexual harassment against the same respondent; however, the final regulations leave Title IX Coordinators with discretion to decide to sign a formal complaint on the recipient's behalf. Although signing a formal complaint initiates a grievance process, for reasons discussed in the "Formal Complaint" subsection of the "Section 106.30 Definitions" section of this preamble, we do not believe that taking such an action necessarily renders a Title IX Coordinator biased or poses a conflict of interest, and we have revised the § 106.30 definition of "formal complaint" to clarify that Title IX Coordinators must comply with § 106.45(b)(1)(iii) even in situations where the Title IX Coordinator decides to sign a formal complaint.

The final regulations revise § 106.45(b)(8) to provide that appeals on specified bases must be offered equally to both parties and that the appeal decision-maker cannot be the same person as the decision-maker who reached the determination regarding responsibility, the Title

IX Coordinator, or the investigator. With respect to the roles of a hearing officer and decision-maker, the final regulations leave recipients discretion to decide whether to have a hearing officer (presumably to oversee or conduct a hearing) separate and apart from a decision-maker, and the final regulations do not prevent the same individual serving in both roles. Lastly, regarding the role of the Title IX Coordinator, as discussed above, § 106.8(a) of the final regulations requires recipients to designate and authorize at least one employee to serve as Title IX Coordinator and coordinate the recipient's efforts to comply with the final regulations. Among other things, the Title IX Coordinator is responsible for responding to reports and complaints of sex discrimination (including reports and formal complaints of sexual harassment), informing complainants of the availability of supportive measures and of the process for filing a formal complaint, offering supportive measures to complainants designed to restore or preserve equal access to the recipient's education program or activity, working with respondents to provide supportive measures as appropriate, and coordinating the effective implementation of both supportive measures (to one or both parties) and remedies (to a complainant). As noted previously, the Title IX Coordinator is not precluded from also serving as the investigator, under these final regulations.

Changes: None.

Section 106.45(b)(7)(i) Standard of Evidence and Directed Question 6

Mandating a Higher Standard of Evidence

Comments: Several commenters asserted that the Department should mandate a higher standard of evidence than the preponderance of the evidence standard. Commenters cited cases describing the preponderance of the evidence standard as inadequate in sexual misconduct cases given the seriousness of allegations, the lack of other procedural safeguards found in civil litigation, and

the reputational and socioeconomic damage resulting from a finding of sexual misconduct responsibility. Some commenters argued that the Department should mandate, or at least permit, recipients to use the criminal "beyond a reasonable doubt" standard in Title IX adjudications.[1407] One commenter suggested that the Department mandate the clear and convincing evidence standard but only where the alleged sexual misconduct is a Clery Act/VAWA offense or where the potential sanction is expulsion or suspension. One commenter asserted that Supreme Court case law requires application of the beyond a reasonable doubt standard in school Title IX proceedings.[1408]

Commenters asserted that the clear and convincing evidence standard would enhance the overall accuracy of the system by reducing false positives as compared to the preponderance of the evidence standard. One commenter argued that requiring the clear and convincing evidence standard is essential to protect academic freedom and free speech because it would be unjust to have a mere 50 percent threshold to punish professors for "improper" or controversial speech in their classrooms. One commenter asserted that it is especially important to raise the standard of evidence because in the current #MeToo environment women are automatically believed and men are assumed guilty; this commenter argued that sexual misconduct cases often boil down to credibility and such allegations are virtually impossible to disprove.

[1407] Commenters cited: Valerie Wilson, *The Problem with Title IX and Why it Matters*, THE PRINCETON TORY (February 19, 2015).

[1408] Commenters cited: James M. Piccozi, *Note, University Disciplinary Process: What's Fair, What's Due, and What You Don't Get*, 96 YALE L. J. 2132, 2138 (1987) (impairment of accused's reputation severely limits the accused student's freedom and can make it virtually impossible to successfully transfer). Commenters also cited: *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974) for the proposition that State action results where a private party conducts activities exclusively and traditionally reserved to the State, such as adjudication of sexual misconduct.

Discussion: The Department acknowledges the suggestions offered by commenters to mandate a higher standard of evidence than the preponderance of the evidence standard, such as the clear and convincing evidence standard, or the beyond a reasonable doubt standard used in criminal proceedings. In recognition that sexual misconduct cases involve high stakes and potentially life-altering consequences for both parties, and such cases often involve competing, plausible narratives about the truth of allegations, the Department authorizes recipients, in § 106.45(b)(1)(vii) of the final regulations, to select either the preponderance of the evidence standard or the clear and convincing evidence standard to reach determinations regarding responsibility.[1409] Because Title IX proceedings differ in purpose and consequence from criminal proceedings, the Department does not believe the criminal law standard of "beyond a reasonable doubt" is appropriate in a noncriminal setting like a Title IX grievance process for various reasons.[1410] Recipients are not courts and do not have the power to impose a criminal punishment such as imprisoning a respondent. Recipients bear the burden of proof under §106.45(b)(5)(i), but they do not have subpoena power. These final regulations also provide privacy protections for complainants and respondents which prohibits the recipient from accessing, considering, disclosing, or otherwise using a party's treatment records without the party's voluntary, written consent under § 106.45(b)(5)(i), even if these treatment records are relevant to the allegations in

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[1409] A preponderance of the evidence standard of evidence is understood to mean concluding that a fact is more likely than not to be true. *E.g.*, *Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 622 (1993) (a preponderance of the evidence standard "requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence") (internal quotation marks and citation omitted). A clear and convincing evidence standard of evidence is understood to mean concluding that a fact is highly probable to be true. *E.g.*, *Sophanthavong v. Palmateer*, 378 F.3d 859, 866-67 (9th Cir. 2004) (a clear and convincing evidence standard requires "sufficient evidence to produce in the ultimate factfinder an abiding conviction that the truth of its factual contentions are [*sic*] highly probable.") (internal quotation marks and citation omitted).

[1410] *See, e.g.*, *Santosky v. Kramer*, 455 U.S. 745, 768 (1982) (noting that the Supreme Court hesitates to apply the "unique standard" of beyond a reasonable doubt "too broadly or casually in noncriminal cases") (internal quotation marks and citations omitted).

a formal complaint. The "beyond a reasonable doubt" standard also is rarely used in any civil proceeding.[1411] We therefore decline to permit a recipient to select that standard of evidence, and instead permit a recipient to select either of two standards of evidence, each of which is used in civil matters.[1412] The Department shares commenters' concerns for protecting academic freedom and free speech, and § 106.6(d)(1) emphasizes that nothing in the final regulations requires restriction of rights otherwise protected by the First Amendment. To further reinforce First Amendment rights, § 106.44(a) of the final regulations would explicitly prohibit the Department from deeming recipients' restriction of rights protected under the First Amendment to be evidence that the recipient was not deliberately indifferent, and the conduct constituting actionable harassment under § 106.30 must be either serious misconduct constituting *quid pro quo* harassment or Clery Act/VAWA sex offenses, or meet the *Davis* standard of being severe, pervasive, and objectively offensive denying a person equal educational access.[1413] When a formal complaint alleges conduct constituting "sexual harassment" as defined in § 106.30, the Department has concluded that the robust procedural protections granted to both parties in § 106.45 mean that the preponderance of the evidence standard, or the clear and convincing evidence standard, may be used to reach consistently fair, reliable outcomes. Contrary to the

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[1411] *Id*.

[1412] *E.g.*, *Addington v. Tex.*, 441 U.S. 418, 424 (1979) (holding that the clear and convincing evidence standard was required in civil commitment proceedings) (noting that clear and convincing evidence is an "intermediate standard" between preponderance of the evidence and the criminal beyond a reasonable doubt standard and that the clear and convincing evidence standard "usually employs some combination of the words 'clear,' 'cogent,' 'unequivocal,' and 'convincing'" and while less commonly used than the preponderance of the evidence standard, the clear and convincing evidence standard is "no stranger to the civil law" and is sometimes used in civil cases "involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant" where "the interests at stake are deemed to be more substantial than mere loss of money" justifying reduction of "the risk to the defendant of having his [or her] reputation tarnished erroneously.") (internal quotation marks and citations omitted).

[1413] For discussion of the intersection between the § 106.30 definition of sexual harassment, and the First Amendment, see the "Sexual Harassment" subsection of the "Section 106.30 Definitions" section of this preamble.

claims made by one commenter, the Supreme Court has never required application of the criminal "beyond a reasonable doubt" standard in Title IX proceedings, and the Department is not aware of a Federal appellate court decision requiring adoption of the criminal standard of evidence in Title IX proceedings. The Department believes that requiring such a "beyond a reasonable doubt" standard of evidence in a noncriminal Title IX proceeding is unnecessary to meet due process of law and fundamental fairness requirements, or increase accuracy of outcomes, in Title IX grievance processes.

Changes: The final regulations revise § 106.45(b)(7)(i) to refer to the revised requirement in § 106.45(b)(1)(vii), such that the a recipient must select between the preponderance of the evidence standard and clear and convincing evidence standard, and apply that selected standard consistently to all formal complaints alleging Title IX sexual harassment regardless of whether the respondent is a student or an employee. We also revise § 106.44(a) of the final regulations to explicitly prohibit the Department from deeming recipients' restriction of rights protected under the First Amendment to be evidence that the recipient was not deliberately indifferent.

Supporting § 106.45(b)(7)(i)

Comments: Some commenters expressed support for the NPRM's approach to the standard of evidence. Commenters asserted that many collective bargaining agreements (CBAs) applicable to school employees mandate the clear and convincing evidence standard and argued that students deserve the same rights and protections since students are the ones paying tuition. One commenter cited a poll about public perceptions of higher education that found 71 percent of people responding to the poll believed, "[s]tudents accused of sexual assault on college campuses

should be punished only if there is clear and convincing evidence that they are guilty of a crime."[1414]

Discussion: The Department appreciates the support from commenters regarding the proposed rules' approach to the standard of evidence. For reasons discussed above, the final regulations at § 106.45(b)(1)(vii) and § 106.45(b)(7)(i) continue to permit recipients to select between the preponderance of the evidence standard, or the clear and convincing evidence standard. We acknowledge the poll cited by one commenter finding that the majority of people responding to the poll supported application of the clear and convincing evidence standard to address allegations of sexual assault in the postsecondary context. While the Department does not reach legal or policy decisions on the basis of public polls, we believe that in light of the strong procedural rights granted to both parties under the § 106.45 grievance process, either the preponderance of the evidence standard or the clear and convincing evidence standard may be applied to reach fair, accurate determinations regarding responsibility in Title IX grievance processes, and recipients should be permitted to select either standard.

We acknowledge that many employee CBAs mandate the clear and convincing evidence standard. The Department believes that giving recipients the choice between the preponderance of the evidence standard and the clear and convincing evidence standard, along with the requirement contained in § 106.45(b)(1)(vii) that the same standard of evidence must apply for complaints against students as for complaints against employees and faculty, helps to ensure consistency in recipients' handling of Title IX proceedings. To better ensure that recipients have

[1414] Commenter cited: Bucknell Institute for Public Policy, *Perceptions of Higher Education Survey – Topline Results* (2017).

a true choice between the two standards of evidence, we have removed the NPRM's language from § 106.45(b)(7)(i) that would have allowed selection of the preponderance of the evidence standard only if the recipient also used that standard for non-sexual harassment misconduct that carried similar potential sanctions. The grievance process, including the standard of evidence the recipient will apply, should not vary based on the identity or status of the respondent (i.e., student or employee). However, each recipient is allowed to select one of the two standards of evidence (both of which are used in a variety of civil proceedings) to decide what degree of confidence the recipient's decision-makers must have in the factual correctness of determinations regarding responsibility in Title IX grievance processes.

Changes: The Department has revised § 106.45(b)(7)(i) of the final regulations such that recipients have the choice of either applying the preponderance of the evidence standard or the clear and convincing evidence standard, and § 106.45(b)(1)(vii) requires a recipient to make that choice applicable to all formal complaints of sexual harassment, including those against employees and faculty. We have removed the limitation contained in the NPRM that would have permitted recipients to use the preponderance of the evidence standard only if a recipient used that standard for non-sexual misconduct that has the same maximum disciplinary sanction.

One-Sided Condition on Choice of Evidentiary Standard

Comments: Commenters questioned the NPRM's requirement that if the preponderance of the evidence standard is used in Title IX cases then it must be used in non-Title IX cases with the same maximum punishment. Commenters suggested this would undermine recipient flexibility. Some commenters asserted that the NPRM presented a false choice of an evidentiary standard because the proposed rules imposed a one-way ratchet where schools may use the clear and convincing evidence standard in sexual assault cases and a lower standard in other cases, but not

vice versa, thereby disadvantaging complainants in sexual harassment situations but not in other situations. Some commenters asserted that the Department lacks authority under Title IX to impose requirements on non-Title IX related disciplinary proceedings.

One commenter argued that the Department should not interfere with recipient autonomy in determining the appropriate standard of evidence; this commenter suggested that the Department: (1) limit the preponderance of the evidence standard to recipients who used it before the Department advised them to; (2) limit the preponderance of the evidence standard for sexual misconduct cases to recipients who had the preponderance of the evidence standard for non-sexual cases before the NPRM; or (3) mandate all recipients use the clear and convincing evidence standard, but allow recipients to adopt the preponderance of the evidence standard if done by internal process initiated at least one year after the clear and convincing evidence standard takes effect.

One commenter asserted the NPRM's approach to standard of evidence is a heavy-handed Federal mandate to use the clear and convincing evidence standard, which is inconsistent with the current Administration's deregulatory agenda. This commenter asserted that the Department should not usurp the authority of school boards or micromanage recipients.

Discussion: The Department is persuaded by the concerns raised by commenters that the NPRM's prohibition on recipients using the preponderance of the evidence standard unless they also used that standard for non-sexual misconduct that carries the same maximum punishment constituted a one-way restriction that appeared to many commenters to leave a recipient without a genuine choice between the two standards of evidence. The Department is also persuaded by commenters' objections that the NPRM approach may have had the unintended consequence of pressuring recipients to choose a standard of evidence for non-Title IX misconduct situations,

potentially exceeding the Department's authority to effectuate the purpose of Title IX. For these reasons, the Department has simplified its approach to the standard of evidence contained in § 106.45(b)(1)(vii) and referenced in § 106.45(b)(7)(i), such that recipients may select the preponderance of the evidence standard or the clear and convincing evidence standard, without restricting that selection based on what standard of evidence a recipient uses in non-Title IX proceedings. The Department believes this revised approach better ensures that the Department is not inspecting how recipients handle non-Title IX misconduct proceedings.

We acknowledge the alternative approaches to the standard of evidence raised by one commenter that would limit the application of the preponderance of the evidence standard. However, the Department believes that recipients are in the best position to select the standard of evidence that suits their unique values and the needs of their educational community and the Department thus declines to impose restrictions or requirements upon recipients who select the preponderance of the evidence standard. Because the final regulations grant recipients the unrestricted right to choose between the preponderance of the evidence standard and the clear and convincing evidence standard, we disagree that the final regulations reflect a heavy-handed Federal mandate inconsistent with the current Administration's deregulatory agenda.

Changes: The Department has revised § 106.45(b)(7)(i) of the final regulations such that recipients have the choice of either applying the preponderance of the evidence standard or the clear and convincing evidence standard, and § 106.45(b)(1)(vii) requires a recipient to make that choice applicable to all formal complaints of sexual harassment, including those against employees and faculty. We have removed the limitation contained in the NPRM that would have permitted recipients to use the preponderance of the evidence standard only if they used that standard for non-sexual misconduct that has the same maximum disciplinary sanction.

Same Evidentiary Standard in Student and Faculty Cases

Comments: Several commenters expressed support for the NPRM's requirement that the same standard of evidence be used in student and faculty cases. Commenters stated that this is important for fairness; the Department should not permit recipients to disfavor certain groups. A few commenters raised the point that, unlike students, employees and faculty often have superior leverage as a group when negotiating terms with recipients. Commenters stated that the NPRM's approach would level this playing field. One commenter contended that setting the same standard for both students and employees will enhance predictability and consistency. Another commenter asserted that promoting a uniform set of evidentiary standards would reduce recipients' costs to administer their Title IX disciplinary programs and train personnel.

Some commenters believed that the Department was correctly encouraging schools to apply the clear and convincing evidence standard in Title IX cases. They stated that the clear and convincing evidence standard is appropriate given the long-lasting and serious consequences of being deemed responsible for sexual misconduct. Commenters argued that faculty may lose lifelong employment and suffer permanent reputational damage, and the preponderance of the evidence standard is insufficient to protect academic freedom and tenure. One commenter argued that just because the preponderance of the evidence standard is used in civil litigation does not mean it is appropriate for Title IX proceedings; the two systems are fundamentally distinct because the latter does not have procedural protections such as civil access to counsel, discovery, cross-examination, presumption of innocence, juries, or impartiality of decision-makers that may otherwise render the proceeding fair despite a lower evidentiary standard. The commenter asserted that the clear and convincing evidence standard may also mitigate the impact of racial bias that disproportionately affects male students and faculty in sexual harassment cases.

Other commenters opposed the NPRM's requirement that the same standard of evidence apply in student and faculty cases. Commenters emphasized the practical difficulty of recipients changing applicable standards for employee cases, given the reality that many faculty collective bargaining agreements (CBAs) mandate the clear and convincing evidence standard[1415] and that many postsecondary institutions choose to follow American Association of University Professors (AAUP) standards that include a clear and convincing evidence standard for faculty misconduct, even if the recipient's CBA does not mandate that standard.[1416] Commenters asserted that some State laws require recipients to use the clear and convincing evidence standard, especially for tenured faculty discipline cases, which may negate the flexibility that the Department was trying to provide recipients regarding a choice of standard of evidence. Commenters argued that recipients subject to such CBAs or State laws do not have a neutral choice because these recipients may be required to use a clear and convincing evidence standard for employees and the NPRM requires such recipients to also use that standard for students even if recipients would rather use different standards for students than employees. Other commenters stated that some State laws require postsecondary institution recipients to apply a preponderance of the evidence standard to student sexual misconduct disciplinary proceedings yet the proposed regulations may leave such recipients with a potential conflict between continuing to follow their State law by using the preponderance of the evidence standard (in student cases) but violating these final

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[1415] Commenters cited: *Vill. of Posen v. Ill. Fraternal Order of Police Labor Council*, 2014 Ill. App. 133329 (Ill. Ct. App. 2014) (in cases involving criminal conduct or stigmatizing behavior, many arbitrators apply higher burden of proof, typically the clear and convincing evidence standard) (quoting American Bar Association Section of Labor and Employment Law, *Elkouri & Elkouri: How Arbitration Works* 15-25 (Kenneth May *et al.* eds., 7th ed. 2012)); Nick Gier, *An Update on Unions in Higher Education*, IDAHO STATE JOURNAL (Sept. 2, 2018).

[1416] Commenters cited: Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEORGETOWN L. J. 946 (2009).

regulations (if the recipient is also bound under a CBA to apply a clear and convincing evidence standard to faculty misconduct and cannot raise the standard of evidence used in student cases without violating State law).

One commenter stated that at the commenter's university, clear and convincing evidence is required to dismiss a faculty member while a preponderance of the evidence is required to punish a student, even for similar misconduct, which "translates to the school being less inclined to fire a faculty member over an allegation than to punish a student over an allegation." This commenter argued that the proposed rules would force schools in that situation to make a choice: either lower the standard of evidence required to dismiss a faculty member, or raise the standard of evidence for all claims to the standard used for dismissing a faculty member, which would mean either making it easier to prove accusations against a faculty member or making it harder to prove any allegation (against any respondent). The commenter believed that the proposed rules should not force schools to make a choice between making it easier to fire faculty or making it harder to believe sexual assault victims.

One commenter cited studies of faculty sexual harassment cases that showed professors usually have multiple victims, mostly students, and that faculty harassers who experience sanctions are less likely to repeat serious harassment.[1417] This commenter argued that if the proposed rules' approach leads universities to comply by applying the clear and convincing evidence standard across the board for student and faculty sexual misconduct matters, then in effect universities would be forced by Federal regulatory requirements to "single out" for

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[1417] Commenters cited: Nancy Chi Cantalupo & William Kidder, *A Systematic Look at a Serial Problem: Sexual Harassment of Students by University Faculty*, 2018 UTAH L. REV. 671, 744 fig. 5B (2018); Margaret A. Lucero *et al.*, *Sexual Harassers: Behaviors, Motives, and Change Over Time*, 55 SEX ROLES 331 (2006).

unfavorable treatment their faculty and graduate students who are investigated for research misconduct because Federal regulations require research misconduct linked to federally funded research grants to be shown under a preponderance of the evidence standard, while sexual misconduct would be investigated under a clear and convincing evidence standard. The commenter asserted that because a finding of research misconduct carries significant public stigma (such as the respondent's name and case summary posted on government websites and scientific watchdog organization websites), concern for the heightened stigma faced by respondents accused of sexual misconduct is not an appropriate justification for the proposed rules' apparent encouragement of the clear and convincing evidence standard.

Some commenters argued that discipline of students, and discipline of employees, serve fundamentally different goals and applying a one-size-fits-all approach is inappropriate. Commenters asserted that student discipline has a mainly educational purpose, whereas employee discipline is about when to take adverse employment action. Commenters cited scholarly articles and cases to suggest that students and employees are different constituencies with different interests; for example, universities have obligations to protect student safety that differ from obligations to protect employee safety.[1418] Commenters asserted that the student/recipient relationship is different than the employee/recipient relationship, in part because the student pays tuition to gain educational and developmental services from the school

[1418] Commenters cited, *e.g.*, Kristen Peters, *Protecting the Millennial College Student*, 16 S. CAL. REV. OF L. & SOCIAL JUSTICE 431, 448 (2007) (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."); *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.").

and the school has an affirmative obligation to create an educational environment conducive to that goal. On the other hand, commenters argued, employees provide services to the school, mainly to benefit the students, and are paid by the school for their services, and while all employees have a right to a workplace free from discrimination, the school has no obligation to encourage an employee's social and personal development. Commenters argued that Title IX is about equal educational access, not about making sure that schools treat all classes of respondents the same way. One commenter contended that it is unfair to hold students to the same standard of evidence as employees because students are not parties to the employee union's CBAs and argued that the Department should not bind students to outcomes of negotiations in which the students could not participate. One commenter stated that, unlike students, university employees can lose lifetime employment, a much more serious outcome than being forced to leave one particular university, and this difference justifies using a higher burden of proof in faculty cases.

One commenter asserted that the proposed rules' requirement to use the same standard of evidence for cases with student-respondents as with employee-respondents stems from anti-union bias.

One commenter argued that the proposed choice given to recipients in the NPRM could potentially expose recipients to liability for sex discrimination under 34 CFR 106.51 ("A recipient shall not enter into a contractual or other relationship which directly *or indirectly* has the effect of subjecting employees or students to discrimination…") (emphasis added). This commenter argued that recipients who currently use the preponderance of the evidence standard in sexual harassment cases involving student-respondents, may be forced by the NPRM to raise the standard of evidence to the clear and convincing evidence standard in order to comply with

recipients' CBAs, yet that reason for raising the standard of evidence (and, in the commenter's view, disfavoring complainants by raising the standard of evidence) may constitute violation of 34 CFR 106.51 because raising the standard of evidence to match what the recipient uses in a CBA could be viewed as having entered into a CBA (i.e., a contractual or other relationship) that indirectly has the effect of subjecting students to discrimination (i.e., by "disfavoring" complainants alleging sexual harassment).

One commenter contended that the inherent power imbalance between faculty and students means that faculty may be viewed as more credible than students, and thus the applicable standard of evidence should not necessarily be identical.

Discussion: The Department appreciates commenters' support for the approach to recipients' selection of a standard of evidence, and agrees that offering a choice between two reasonable standards provides consistency across cases, within each recipient's educational community, regardless of whether the respondent is an employee or a student, while providing recipients flexibility to select the standard that best meets the recipient's unique needs and reflects the recipient's values. The Department disputes commenters' assertion that the Department is encouraging the selection of the clear and convincing evidence standard. As shown by the fact the final regulations respond to commenters' concerns by removing the NPRM's restriction on the use of the preponderance of the evidence standard, the Department's intention is to permit recipients to choose between two standards of evidence, either of which can be applied to Title IX grievance processes to produce fair and reliable outcomes.

The Department acknowledges the concerns raised by some commenters regarding the challenges that may arise from implementing the requirement contained in § 106.45(b)(1)(vii) and § 106.45(b)(7)(i) that the same standard of evidence be used for complaints against students

as for complaints against employees and faculty. We recognize the reality that some employee CBAs or State laws mandate application of the clear and convincing evidence standard for employee or faculty misconduct, that some recipients use a lower standard of evidence in cases involving student-respondents than in cases involving employee-respondents, and that it may be challenging for such recipients to decide whether to raise the standard of evidence (for student cases) or lower the standard of evidence (for employee cases) so that all formal complaints of sexual harassment use the same standard of evidence as required under the final regulations. The Department believes that recipients should carry the same burden of proof,[1419] weighing relevant evidence against the same standard of evidence, with respect to any complainant's allegations of Title IX sexual harassment. The Department believes that complainants in a recipient's educational community should face the same process, including the same standard of evidence, in a Title IX grievance process regardless of whether the respondent who allegedly sexually harassed the complainant is a student, employee, or faculty member. The Department believes that either the preponderance of the evidence standard, or the clear and convincing evidence standard, may be applied to allegations of sexual harassment to reach fair, reliable outcomes, and thus the Department permits recipients to select either of those standards of evidence. As shown by the fact that commenters confirmed that many recipients currently use the clear and convincing evidence standard of evidence in employee-respondent sexual misconduct cases while using the preponderance of the evidence standard of evidence standard in student-respondent cases, valid reasons exist as to why a recipient might believe that either one of those standards of evidence reflects the appropriate level of confidence that decision-makers should

[1419] Under the final regulations, § 106.45(b)(5)(i), the burden of proof rests on the recipient, not on the parties.

have in the factual correctness of determinations regarding responsibility in sexual misconduct cases. The final regulations require recipients to give complainants the predictability of knowing that the standard of evidence that applies to a formal complaint of sexual harassment in a particular recipient's grievance process will not vary depending on whether the complainant was sexually harassed by a fellow student, or by a school employee.

The Department acknowledges that employees and faculty members may have greater bargaining power and leverage than students in extracting guarantees of protection under a recipient's grievance procedures, and that some recipients apply a clear and convincing evidence standard for complaints of employee misconduct through CBAs or due to choosing to follow AAUP guidelines. However, the Department does not believe that is necessary or reasonable to draw distinctions among complainants alleging Title IX sexual harassment based on the status of the respondent as a "student" versus an "employee." Furthermore, a growing trend within postsecondary institutions is for graduate students to unionize, and such a trend blurs the lines between categories of students and employees, with respect to collective bargaining power.[1420]

Collective bargaining through a union may, as commenters asserted, give employees greater "bargaining power" than students have; on the other hand, student activism often succeeds in "bargaining" for university action on a variety of matters that affect students. Regardless of the relative strength of "bargaining power" of employees and students, the

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[1420] *E.g.*, Leslie Crudele, *Graduate Student Employees or Employee Graduate Students? The National Labor Relations Board and the Unionization of Graduate Student Workers in Postsecondary Education*, 10 WILLIAM & MARY BUS. L. REV. 739, 741-42 (2019) (noting that as college enrollment has increased, so has the number of teaching staff, and that as of 2013 the Bureau of Labor Statistics found there were approximately 1.13 million graduate teaching assistants employed at postsecondary institutions); *id.* at 780 (after detailing the history of unionization of graduate students at public and private colleges and universities, concluding that the National Labor Relations Board has most recently laid groundwork for a continuing trend toward graduate student unionization).

Department believes that a recipient must implement a fair grievance process for all complainants that does not use a different standard of evidence based on whether the complainant alleges sexual harassment against an employee, or against a student. Complainants (especially students) who allege sexual harassment against an employee already face the possibility that the respondent, as an employee, may be in a position of actual or perceived authority over the complainant, and the Department does not wish to encourage recipients to exacerbate that power differential by treating some complainants (i.e., those who allege sexual harassment against a recipient's employee) differently from other complainants (i.e., those who allege sexual harassment against a recipient's student) by requiring the former group of complainants to navigate a grievance process that will apply a higher standard of evidence than complainants in the latter group of complainants.[1421] Complainants should know that their school, college, or university has selected a standard of evidence (representing the "degree of confidence"[1422] that a recipient requires a decision-maker to have in the factual accuracy of the determination regarding responsibility) that will apply regardless of the identity, status, or position of authority of the respondent.

[1421] The standard of evidence used for a class of claims reflects a societal judgment about the level of confidence a decision-maker should have before reaching a conclusion in the case. *E.g.*, *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring) (the purpose of a standard of proof is "to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."). The Department believes that a recipient's selection of a standard of evidence appropriate for resolving sexual harassment formal complaints should reflect the recipient's decision about the level of confidence the recipient believes a decision-maker should have in reaching a conclusion, that all complainants who file formal complaints of sexual harassment with a recipient should have the benefit of understanding the recipient's decision on that issue, and that different "degrees of confidence" should not be applied based on a respondent's status as a student or employee because whether the respondent is a student or employee does not necessarily alter the nature of the harm that the alleged conduct inflicted on the complainant or lessen the seriousness of potential consequences for the respondent.

[1422] *Id.*

The Department does not view the potential consequences of being found responsible for sexual harassment as less serious for students than employees; while employees face potential loss of employment, students face potential loss of educational opportunities which may also affect a student's career opportunities. While some employees found responsible for sexual harassment may lose all future career opportunities and some students found responsible may transfer to other institutions, the converse also occurs; some employees found responsible find work elsewhere and some students found responsible find it impossible to transfer to other institutions. The potential consequences of being found responsible, therefore, may be just as serious for a student as for an employee, and differences in the nature of potential consequences does not justify using a different standard of evidence for employee-respondent cases than for student-respondent cases. At the same time, a complainant alleging Title IX sexual harassment faces potential loss of equal educational access if sexual harassment allegations are not resolved accurately, regardless of whether the complainant has been allegedly sexually harassed by a student or by an employee. For respondents (whether students or employees) and for complainants (whether students or employees), it is important for a Title IX grievance process to reach a reliable outcome.[1423]

[1423] For an example of divergent views about the appropriate standard of evidence within a university's faculty members, raising arguments for and against retaining the clear and convincing evidence standard for employees, *see, e.g.*, Matt Butler, *Standard of proof in sexual assault cases debated by professors*, THE REVIEW (Nov. 10, 2014) (University of Delaware student newspaper article reporting on a faculty debate about whether the university should lower the standard of evidence used in faculty sexual misconduct cases from the clear and convincing evidence standard to the preponderance of the evidence standard, in light of OCR's insistence that universities must use the preponderance of the evidence standard, reporting that "some faculty supported the lower burden of proof as a means of creating – in reality and perception – a safer place for students" but also quoting Kathy Turkel, a women and gender studies professor, as asserting that "the student environment should be the most important factor" but "the lower standards of proof violate due process rights of the professors" and a "higher standard of proof" would "outweigh the negatives, and it would actually help both the accuser and the accused in cases of sexual assault" because "it is due process that protects both complainants and perpetrators in these cases").

The Department agrees that recipients have a different relationship with the recipient's students than with the recipient's employees; the Department's approach to the standard of evidence ensures that a recipient does not adjudicate a student-complainant's formal complaint differently based on whether the student-complainant was allegedly sexually harassed by a student, or by an employee. Because the final regulations do not require particular disciplinary sanctions, the final regulations do not preclude a recipient from imposing student discipline as part of an "educational purpose" that may differ from the purpose for which a recipient imposes employee discipline. The Department's approach to the standard of evidence is not based on concern that a recipient must treat all classes of respondents the same way, but is based on the Department's concern that all complainants within a recipient's education program or activity are treated the same way, including facing the same standard of evidence when a complainant's sexual harassment allegations are resolved.

Permitting recipients to select between the two standards of evidence allows recipients who face conflicting requirements imposed by contracts or laws outside these final regulations the ability to resolve such conflict in whichever way a recipient deems appropriate.[1424] Not all

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[1424] The challenge with potential conflict between Federal Title IX expectations regarding a standard of evidence, and CBAs that require a different (usually higher) standard of evidence, is a challenge that has faced recipients since the Department first took a position with respect to an appropriate standard of evidence. In the withdrawn 2011 Dear Colleague Letter the Department insisted that *only* the preponderance of the evidence standard was appropriate in Title IX sexual harassment cases and made no exception for cases against faculty. The Department believes that the approach in these final regulations may help recipients address the challenge that some recipients face in reconciling CBAs with Title IX obligations, by allowing recipients to select one of two reasonable options regarding a standard of evidence for Title IX purposes. *See* Lance Toron Houston, *Title IX Sexual Assault Investigations in Public Institutions of Higher Education: Constitutional Due Process Implications of the Evidentiary Standard Set Forth in the Department of Education's 2011 Dear Colleague Letter*, 34 HOFSTRA LABOR & EMPLOYMENT L. J. 321, 322-23 (2017) ("This issue represents the evolution and eventual collision of years of legal jurisprudence involving collective bargaining rights from the origin of public employee law and the administratively relaxed evidentiary

recipients are subject to CBAs that require a different standard of evidence for employee discipline than the recipient uses for student discipline, and not all recipients are subject to State laws that mandate the standard of evidence to be used in student disciplinary cases; such recipients may select a standard of evidence in compliance with these final regulations without the external factors of CBA or State law requirements. For recipients who have CBAs requiring a clear and convincing evidence standard in employee cases but no State law directive requiring a different standard of evidence in student cases, recipients may comply with these final regulations by using the clear and convincing evidence standard in student cases, or by renegotiating their CBAs to use the preponderance of the evidence standard for employee cases.

For recipients who do have CBAs requiring a clear and convincing evidence standard (in employee cases) and State laws requiring a preponderance of the evidence standard (in student cases), such recipients may find it appropriate to comply with these final regulations by renegotiating their CBAs rather than violate State law. We acknowledge commenters' point that renegotiating a CBA is often a time-consuming process; however, a recipient's contractual and employment arrangements must comply with Federal laws,[1425] and recipients of Federal financial assistance understand that a condition placed upon receipt of Federal funds is operation of education programs or activities free from sex discrimination under Title IX, including

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standards at play in Title IX sexual assault investigations in public higher education. In a nutshell, when collectively bargained labor agreements on American public college campuses calls for the heightened 'clear and convincing' evidentiary standard in a sexual assault investigation of a unionized employee, but federally mandated Title IX investigations as required by the 2011 Dear Colleague Letter only require the much lower threshold 'preponderance of the evidence' standard to discipline the accused public employee, which prevails?").

[1425] *E.g.*, a typical clause included in a college's faculty CBA states: "This agreement and its component provisions are subordinate to any present or future Federal or New York laws and regulations." *Agreement (Faculty) Between Onondaga Community College And The Onondaga Community College Federation Of Teachers And Administrators AFT, Local 1845 September 1, 2014 - August 31, 2019*.

compliance with regulations implementing Title IX. Some recipients cooperatively worked with their employee unions and renegotiated their CBAs in response to the Department's withdrawn 2011 Dear Colleague Letter so that the recipient would use the preponderance of the evidence standard with respect to employee cases, and student cases.[1426] These final regulations do not require recipients who have already modified their policies and procedures in that manner to make further changes in that regard, because under these final regulations a recipient may select the preponderance of the evidence standard.

These final regulations are focused on the appropriate standard of evidence for use in resolving allegations of Title IX sexual harassment, and not on the appropriate standard of evidence for use in cases of other types of misconduct by students, or employees. This is emphasized by our revision to the final regulations removing the NPRM's approach that tied the preponderance of the evidence standard to the standard of evidence a recipient uses in non-sexual harassment misconduct cases. Whether or not a recipient is required to use a certain standard of evidence under Federal regulations governing non-sexual misconduct violations (for instance, research misconduct by faculty or graduate students), the Department's concern in these final regulations is ensuring that a recipient uses a single, selected standard of evidence for Title IX sexual harassment cases so that complainants alleging sexual harassment face a predictable grievance process regardless of whether the complainant has alleged sexual harassment by a student, employee, or faculty member.

[1426] Lance Toron Houston, *Title IX Sexual Assault Investigations in Public Institutions of Higher Education: Constitutional Due Process Implications of the Evidentiary Standard Set Forth in the Department of Education's 2011 Dear Colleague Letter*, 34 HOFSTRA LABOR & EMPLOYMENT L. J. 321, 351 (2017) (stating that "some schools have taken the bold initiative to preemptively lower the standard of proof in cooperation with university labor unions in order to avoid litigation and potential DOE [Department of Education] Title IX investigations" and citing a University of Delaware CBA from 2015, and a California State University system CBA from 2014, as examples).

Contrary to commenters' assertions otherwise, the Department does not through these final regulations promote or encourage the clear and convincing evidence standard (or the preponderance of the evidence standard) and while we acknowledge that reputational stigma and potential life-altering consequences facing respondents accused of sexual misconduct may be reasons why a recipient might select a clear and convincing evidence standard, we do not contend that reputational stigma or life-altering consequences are absent in other types of misconduct allegations, such as research misconduct by graduate students or faculty.[1427]

The Department does not believe this approach to a recipient selecting the standard of evidence for use in all Title IX sexual harassment cases harms unions or reflects anti-union bias. If a recipient decides to renegotiate CBA terms in order to comply with Title IX obligations, that result is for the benefit of all students and employees (including complainants and respondents) whose Title IX rights will be more predictable and transparent, reflecting the recipient's judgment as to what level of confidence decision-makers should have in the accuracy of determinations regarding responsibility in sexual harassment cases. The Department does not believe that this approach subjects recipients to liability under 34 CFR 106.51, because the

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[1427] We disagree that using a clear and convincing evidence standard for formal complaints of sexual harassment, while using a preponderance of the evidence standard for allegations of research misconduct, necessarily places respondents accused of the latter misconduct in a disfavored position. The elements of research misconduct differ from the elements of sexual harassment (as defined in § 106.30) in ways that may justify using different standards of evidence (as explained above, a standard of evidence represents the degree of confidence the decision-maker must have in having reached a factually correct conclusion). For instance, "research misconduct" requires the misconduct to be committed intentionally, knowingly, or recklessly, while the § 106.30 definition of sexual harassment does not require an element of intentionality. *E.g.*, Gary S. Marx, *An Overview of The Research Misconduct Process and an Analysis of the Appropriate Burden of Proof*, 42 JOURNAL OF COLL. & UNIV. L. 311, 317 (2016) ("Under the regulations adopted by HHS and by NSF, the following evidence is required to establish research misconduct: (a) there must be a significant departure from accepted practices of the relevant research community, (b) the misconduct must be committed intentionally, knowingly, or recklessly; and (c) the allegation must be proven by a preponderance of the evidence.").

Department does not assume that a recipient that changes the standard of evidence used in student cases to be the same standard as the recipient uses under employee CBAs makes that change for the purpose of disadvantaging complainants who allege sexual harassment; the Department believes that a recipient that makes that decision does so because the recipient has determined that the selected standard of evidence is the appropriate standard for resolving sexual harassment allegations. As discussed throughout this "Section 106.45(b)(7)(i) Standard of Evidence and Directed Question 6" subsection, commenters noted a variety of reasons to prefer the preponderance of the evidence standard over the clear and convincing evidence standard and vice versa. The Department believes that either standard of evidence (preponderance of the evidence, or clear and convincing evidence) may be applied fairly to reach reliable outcomes. The Department also does not believe that a recipient that selects the clear and convincing evidence standard subjects complainants to discrimination by "disfavoring" complainants of sexual harassment compared to complainants of other forms of misconduct just because the preponderance of the evidence is used as the standard in other forms of misconduct. As noted previously with respect to, for example, Federal regulations that require use of the preponderance of the evidence standard in cases of research misconduct, there may be differences in the elements needed to prove a type of misconduct that may justify using different standards of evidence. Further, the severity of potential consequences of a finding of responsibility for sexual misconduct may differ from the potential consequences of a finding of other kinds of misconduct. Additionally, recipients sometimes use a standard of evidence *lower* than the preponderance of the evidence standard for student misconduct. Thus, unless using *preponderance* also "disfavors" complainants of sexual harassment because some misconduct may continue to be decided under a *lower* standard of evidence, the Department does not believe

that a recipient's use of the clear and convincing evidence standard subjects complainants of sexual harassment to discrimination (by "disfavoring" them) just because other types of misconduct may be decided under the preponderance of the evidence standard.[1428]

Whether or not commenters are correct in noting that power differentials between employees (particularly faculty) and students may tempt recipients to treat faculty as more credible than students, the final regulations allow recipients to select one of two standards of evidence consistently to all formal complaints; under either standard selected, the recipient is obligated to assess credibility based on objective evaluation of the evidence and not due to the party's status as a complainant or respondent,[1429] and without bias for or against complainants or respondents generally or for or against an individual complainant or respondent.[1430]

[1428] *E.g.*, Lavinia M. Weizel, *The Process That Is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudications of Student-on-Student Sexual Assault Complaints*, 53 BOSTON COLL. L. REV. 1613, 1633, 1637 (2012) ("Substantial evidence is defined as enough relevant evidence that a reasonable person would support the fact-finder's conclusion" and substantial evidence is a lower standard than the preponderance of the evidence standard because the former requires only "some reasonable quantity of evidence" while the latter requires "facts to be true to the degree of more likely than not"); *id.* at 1642-43 (noting that OCR's interpretation of Title IX and implementing regulations was, as of 2011, that only the preponderance of the evidence standard could be used for sexual harassment cases and "As a practical matter, schools may be more likely to face constitutional challenges for moving from the higher clear and convincing evidence standard to the lower preponderance of the evidence standard than for moving from the lower substantial evidence standard to the higher preponderance of the evidence standard," analyzing "the benefits of preponderance of the evidence as compared to the lower substantial evidence standard" focusing on "whether the preponderance of the evidence standard is sufficient to protect accused students' due process rights or whether the higher standard of clear and convincing evidence is required," and asserting that "the use of the preponderance of the evidence standard, rather than the lower substantial evidence standard, will benefit schools, accused students, and perhaps all students, by lending greater legitimacy and uniformity to school disciplinary proceedings."); *see also, e.g.*, Miss. Code Ann. § 37-9-71 (in Mississippi, "The standard of proof in all disciplinary proceedings shall be substantial evidence" and students may be suspended or expelled for "unlawful activity" defined in Miss. Code Ann. § 37-11-29 to include rape, sexual battery, and fondling as well as non-sex crimes such as aggravated assault; thus, if Mississippi follows OCR's position since the withdrawn 2011 Dear Colleague Letter that only the preponderance of the evidence standard should be used for sexual violence cases, and follows Mississippi State law directing schools to apply the substantial evidence standard for unlawful activity, Mississippi would use preponderance of the evidence for sexual harassment complainants and a *lower* standard of evidence for complainants of other types of misconduct, and the Department does not view this as Mississippi subjecting complainants of sexual harassment to discrimination by "disfavoring" them as compared to complainants of non-sexual harassment misconduct).

[1429] Section 106.45(b)(1)(ii).

[1430] Section 106.45(b)(1)(iii).

Changes: The Department has revised § 106.45(b)(7)(i) of the final regulations such that recipients have the choice of either applying the preponderance of the evidence standard or the clear and convincing evidence standard, and § 106.45(b)(1)(vii) requires a recipient to make that choice applicable to all formal complaints of sexual harassment, including those against employees and faculty. We have removed the limitation contained in the NPRM that would have permitted recipients to use the preponderance of the evidence standard only if they used that standard for non-sexual misconduct that has the same maximum disciplinary sanction.

Requiring the Preponderance of the Evidence Standard

Comments: Many commenters urged the Department to mandate the preponderance of the evidence standard in Title IX proceedings. Commenters argued that the preponderance of the evidence standard is the only standard that treats both parties fairly, consistent with Title IX's requirement that grievance procedures be "equitable," and that a higher standard would unfairly tilt proceedings in favor of respondents and against complainants.[1431] Commenters argued that application of a heightened standard specifically in sexual misconduct cases reflects wrongful stereotypes that survivors, mainly girls and women, are more likely to lie than students who report other types of misconduct.[1432] Commenters argued that the preponderance of the evidence standard is most appropriate because both parties have an equal interest in continuing their education. Commenters cited Title IX experts who support the preponderance of the evidence

[1431] Commenters cited: Katharine Baker *et al.*, *Title IX & the Preponderance of the Evidence: A White Paper* (July 18, 2017) (signed by 90 law professors).

[1432] Commenters cited, e.g., Sarah McMahon & G. Lawrence Farmer, *An Updated Measure for Assessing Subtle Rape Myths*, 35 SOCIAL WORK RESEARCH 2 (2011); Linda A. Fairstein, *Sexual violence: Our war against rape* (William Morrow & Co. 1993); S. Zydervelt *et al.*, *Lawyers' Strategies for Cross-Examining Rape Complainants: Have We Moved Beyond the 1950s?*, 57 BRITISH JOURNAL OF CRIMINOLOGY 3 (2016); Martha R. Burt, *Cultural Myths and Supports for Rape*, 38 JOURNAL OF PERSONALITY & SOCIAL PSYCHOL. 2 (1980).

standard because, for example, it treats both parties equitably, levels the playing field between men and women, and because any higher standard than preponderance of the evidence would unfairly benefit respondents and discourage reporting of sexual assault by sending the message that a respondent's future at the institution is more important than the complainant's future at the institution.[1433] At least one commenter opined that using anything other than the preponderance standard demonstrates caring more about the accused than the complainant.[1434]

Commenters also asserted that the Department's longstanding practice has been to require the preponderance of the evidence standard, that many recipients currently use this standard,[1435] and that courts generally use the preponderance of the evidence standard in civil

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[1433] Commenters cited: Edward Stoner II & John Wesley Lowery, *Navigating Past the "Spirit of Subordination": A Twenty-First Century Model Student Conduct Code with a Model Hearing Script*, 31 JOURNAL OF COLL. & UNIV. L. 1, 49 (2004); Lavinia M. Weizel, *The Process that is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudications of Student-on-Student Sexual Assault Complaints*, 53 BOSTON COLL. L. REV. 4, 1613, 1632 (2012); National Center for Higher Education Risk Management (The NCHERM Group), *Due Process and the Sex Police* (Apr. 2017) at 2, 17-18; Elizabeth Bartholet *et al.*, *Fairness For All Students Under Title IX* 5 (Aug. 21, 2017); Association of Title IX Administrators (ATIXA), *ATIXA Position Statement: Why Colleges Are in the Business of Addressing Sexual Violence* 4 (Feb. 17, 2017) ("The whole point of Title IX is to create a level playing field for men and women in education, and the preponderance standard does exactly that. No other evidentiary standard is equitable."); Student Affairs Administrators in Higher Education (NASPA), *NASPA Priorities for Title IX: Sexual Violence Prevention & Response* 1 ("Rather than leveling the field for survivors and respondents, setting a standard higher than preponderance of the evidence tilts proceedings to unfairly benefit respondents."); Association for Student Conduct Administration (ASCA), *ASCA 2014 White Paper: Student Conduct Administration & Title IX: Gold Standard Practices for Resolution of Allegations of Sexual Misconduct on College Campuses* 2 (2014); Association for Student Conduct Administration (ASCA), *The Preponderance of Evidence Standard: Use In Higher Education Campus Conduct Processes* ("Considering the serious potential consequences for all parties in these cases, it is clear that preponderance is the appropriate standard by which to reach a decision, since it is the only standard that treats all parties equitably. To use any other standard says to the victim/survivor, 'Your word is not worth as 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. Such messages do not contribute to a culture that encourages victims to report sexual assault.").

[1434] Commenters cited: Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L. J. 1940, 1986 (2016).

[1435] Commenters cited: Letter from Association of Title IX Administrators (ATIXA) *et al.* to Russlynn Ali, Assistant Sec'y for Civil Rights, Office for Civil Rights, Dep't. of Education 2 (Feb. 7, 2012) (for the proposition that 80 percent of schools already used the preponderance of the evidence standard before OCR insisted on its use). Some commenters cited: Heather M. Karjane *et al.*, *Campus Sexual Assault: How America's Institutions of Higher*

rights litigation including for Title VI and Title VII.[1436] At least one commenter argued that VAWA created civil rights of action for claims of rape and sexual assault and requires the preponderance of the evidence standard, and thus Title IX should not permit a different evidentiary standard to be used for conduct that also constitutes rape and sexual assault.[1437] One commenter invoked the canon of *in pari materia*, in which similar statutes should be interpreted similarly, and argued that because lawsuits under Title VI and Title VII cases apply the preponderance of the evidence standard and these statutes serve the same basic civil rights purpose as Title IX, the preponderance of the evidence standard should also apply in Title IX proceedings.

Education Respond 120, Final Report, NIJ Grant # 1999-WA-VX-0008 (Education Development Center, Inc. 2002); Angela Amar *et al.*, *Administrators' Perceptions of College Campus Protocols, Response, and Student Prevention Efforts for Campus Sexual Assault*, 29 VIOLENCE & VICTIMS 579, 584-85 (2014); Jake New, *Burden of Proof in the Balance*, INSIDE HIGHER EDUCATION (Dec. 16, 2016) (for the proposition that 60-70 percent of institutions already used the preponderance of the evidence standard prior to the withdrawn 2011 Dear Colleague Letter); Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 BOSTON UNIV. L. REV. 945, 1000 (2004) (for the proposition that most postsecondary institutions had voluntarily adopted the preponderance of the evidence standard for all student misconduct (not just sexual misconduct) by the early 2000s).

[1436] Commenters cited: *Bazemore v. Friday*, 478 U.S. 385, 400 (1986), citing cases under Title VII (e.g., *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003)), *Price Waterhouse v. Hopkins*, 490 U.S. 228, 253 (1989); *Tex. Dep't. of Cmty. Affairs v. Burdine*, superseded by statute, Civil Rights Act of 1991, as recognized in *Landgraf v. USI Film Prods.*, 511 U.S. 244, 251 (1994); *Elston v. Talladega Cnty. Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993); Ramya Sekaran, *The Preponderance of the Evidence Standard and Realizing Title IX's Promise: An Educational Environment Free from Sexual Violence*, 19 GEORGETOWN J. OF GENDER & THE L. 3 (2018); *Judicial Business 2014*, U.S. COURTS (Sept. 30, 2014) (for the proposition that the majority of cases in U.S. legal system use the preponderance of the evidence standard, shown by the fact that the number of filings for criminal defendants represented less than a third of all Federal case filings in 2014); *SEC v. Posner*, 16 F.3d 520, 521 (2d Cir. 1994); *EEOC v. Gaddis*, 733 F.2d 1373, 1378-79 (10th Cir. 1984); D. Allison Baker, *Gender-Based Discrimination*, 1 GEORGETOWN J. OF GENDER & THE L. 2 (2000) (for the proposition that preponderance of the evidence is the standard used in civil proceedings involving sexual harassment claims). Commenters also cited: *Steadman v. SEC*, 450 U.S. 91, 95-102 (1982); *Valmonte v. Bane*, 18 F.3d 992, 1003-05 (2d Cir. 1994) (for the proposition that preponderance is used in various administrative proceedings involving imposition of serious sanctions). Commenters also cited: William E. Thro, *No Clash of Constitutional Values: Respecting Freedom and Equality in Public University Sexual Assault Cases*, 28 REGENT UNIV. L. REV. 197, 209 (2016) (for the proposition that a higher standard should not be used for campus proceedings than what is used in traditional court litigation); Patricia H. Davis, *Higher Education Law: Title IX Cases*, 80 TEX. BUS. J. 512 (2017) (for the proposition that preponderance is essential to hold perpetrators accountable and promote healthy campus environments).

[1437] Commenters cited: Amy Chmielewski, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, 2013 BYU EDUC. & L. J. 143 (2013).

Commenters argued that Title IX proceedings do not involve potential denial of significant liberty interests or jail, but rather involve determinations about whether the accused has violated school policy. These commenters described Supreme Court cases requiring a higher standard of evidence (such as clear and convincing evidence) in only a narrow set of cases implicating particularly important interests,[1438] such as civil commitment, deportation, denaturalization, termination of parental rights, and similar cases, and commenters argued that school disciplinary proceedings do not implicate uniquely important interests that would warrant a heightened evidentiary standard.[1439] A few commenters argued that potential damage to future career prospects does not justify a higher standard because the preponderance of the evidence standard applies to Federal research misconduct cases, civil anti-fraud proceedings, and professional discipline cases.[1440]

One commenter asserted that the clear and convincing evidence standard is unfairly vague compared to the preponderance of the evidence standard, and can increase ambiguity in situations where there is already distrust of sexual assault survivors. This commenter asserted that schools often do not have capacity to thoroughly undertake investigations and uncover corroborative evidence, so the preponderance of the evidence standard is the most appropriate standard. Commenters expressed concern that economically disadvantaged students might not

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[1438] Commenters cited: Amy Chmielewski, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, 2013 BYU EDUC. & L. J. 143, 150 (2013).
[1439] Commenter cited: Chelsea Avent, *Karasek v. Regents of the University of California: The Victimization of Title IX*, 96 NEB. L. REV. 772, 776 (2018).
[1440] Commenters cited, e.g., *In re Barach*, 540 F.3d 82, 85 (1st Cir. 2008); *Granek v. Tex. State Bd. of Med. Examiners*, 172 S.W.3d 761, 777 (Tex. Ct. App. 2005) (for the proposition that many State and Federal courts apply the preponderance of the evidence standard to professional license revocation proceedings); Commenters cited an HHS study finding that two-thirds of States use the preponderance of the evidence standard in physician misconduct cases: Randall R. Bovbjerg *et al.*, *State Discipline of Physicians* 14-15 (2006). Commenters cited: Gary S. Marx, *An Overview of the Research Misconduct Process and an Analysis of the Appropriate Burden of Proof*, 42 JOURNAL OF COLL. & UNIV. L. 311, 364 (2016).

have the ability to access resources immediately after being raped or assaulted, and thus might not be able to obtain evidence that courts deem to meet a clear and convincing evidence standard. Another commenter expressed concern that applying a heightened standard for sexual misconduct could inadvertently set up young men to fail once they enter the corporate world, where a zero-tolerance approach applies.

Discussion: The Department acknowledges the arguments raised by many commenters that the Department should mandate a preponderance of the evidence standard in Title IX proceedings for reasons including fairness, consistency with civil litigation, and consistency with other civil rights laws including Title VI and Title VII. As to the sufficiency of evidence to meet a clear and convincing evidence standard, the Department appreciates the opportunity to clarify that neither the preponderance of the evidence standard, nor the clear and convincing evidence standard, requires corroborating evidence.[1441] We recognize, as have many commenters, that sexual harassment situations may arise under circumstances where the only available evidence is the statement of each party involved. A recipient is obligated to objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence.[1442] The decision-maker can reach a determination regarding responsibility under a preponderance of the evidence standard, or a clear and convincing evidence standard, based on objective evaluation of party statements, with or

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[1441] Courts do not impose a requirement of corroborating evidence with respect to meeting either the preponderance of the evidence, or clear and convincing evidence, standard. *See, e.g.*, *Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 622 (1993) (quoting *In re Winship*, 397 U.S. 358, 371-372 (1970) (Harlan, J., concurring) ("The burden of showing something by a 'preponderance of the evidence,' the most common standard in the civil law, 'simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'")); *cf.*, *Sophanthavong v. Palmateer*, 378 F.3d 859, 866-67 (9th Cir. 2004) ("Clear and convincing evidence requires greater proof than preponderance of the evidence. To meet this higher standard, a party must present sufficient evidence to produce 'in the ultimate factfinder an abiding conviction that the truth of its factual contentions are [*sic*] highly probable.") (quoting *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984)).

[1442] Section 106.45(b)(1)(ii).

without evidence that corroborates either party's statements.[1443] As discussed previously, a standard of evidence represents the "degree of confidence" that a decision-maker must have in the conclusion reached;[1444] a standard of evidence does not dictate the nature of available evidence that might lead a decision-maker to reach the designated level of confidence.

The statutory text of Title IX does not dictate a standard of evidence to be used by recipients in investigations of sexual harassment. The Department's 2001 Guidance was silent on an appropriate standard of evidence during Title IX grievance procedures,[1445] although the withdrawn 2011 Dear Colleague Letter took the position that using a clear and convincing evidence standard violates Title IX because only a preponderance of the evidence standard is consistent with resolution of civil rights claims.[1446]

It is true that civil litigation generally uses the preponderance of the evidence standard (although a clear and convincing evidence standard is applied in some civil litigation issues),[1447] and that Title IX grievance processes are analogous to civil litigation in some ways. However, it is also true that Title IX grievance processes (as prescribed under these final regulations) do not

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[1443] Gary S. Marx, *An Overview of The Research Misconduct Process and an Analysis of the Appropriate Burden of Proof*, 42 JOURNAL OF COLL. & UNIV. L. 311, 347 (2016) (noting that with respect to a clear and convincing evidence standard, while "the proof must be of a heavier weight than merely the greater weight of the credible evidence, it does not require the evidence be unequivocal or undisputed").

[1444] *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring) (the purpose of a standard of proof is "to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.").

[1445] 2001 Guidance at 20.

[1446] 2011 Dear Colleague Letter at 11.

[1447] *Cal. ex rel. Cooper v. Mitchell Bros.' Santa Ana Theater*, 454 U.S. 90, 92-93 (1981) (noting that the "purpose of a standard of proof is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication" and "[t]hree standards of proof are generally recognized, ranging from the preponderance of the evidence standard employed in most civil cases, to the clear and convincing evidence standard reserved to protect particularly important interests in a limited number of civil cases, to the requirement that guilty be proved beyond a reasonable doubt in a criminal prosecution.") (internal quotation marks and citations omitted).

have the same set of procedures available in civil litigation. For example, many recipients choose not to allow active participation by counsel; there are no comprehensive rules of evidence or rules of civil procedure in Title IX grievance processes that allow and govern pretrial motion practice; and Title IX grievance processes do not afford parties the same discovery tools available under rules of civil procedure. The Department does not wish to force schools, colleges, and universities to become *de facto* civil courts by imposing all the features of civil litigation onto the Title IX grievance process; rather, the Department has included in the § 106.45 grievance process those procedural protections the Department has determined necessary to serve the critical interests of creating a consistent, fair process promoting reliable outcomes. While selecting a standard of evidence is important to ensuring a transparent, fair, reliable process, the Department has determined that a recipient may apply either the preponderance of the evidence standard, or the clear and convincing evidence standard, to fairly and accurately resolve formal complaints of sexual harassment. The Department believes that recipients reasonably may conclude that the preponderance of the evidence standard is more appropriate (perhaps for the reasons advocated by commenters) or that the clear and convincing evidence standard is more appropriate (perhaps for the reasons advocated by other commenters). The Department believes that either standard of evidence, in combination with the rights and protections required under § 106.45, creates a consistent, fair process under which recipients can reach accurate determinations regarding responsibility. Factually accurate outcomes are critical in sexual harassment cases, where both parties face potentially life-altering consequences from the outcome, and either standard of evidence allowed under these final regulations reduces the risk of a factually inaccurate outcome. "Being labeled a sex offender by a university has both an immediate and lasting impact on a student's life" may affect "educational and employment

opportunities down the road".[1448] When a finding of responsibility is erroneous, such consequences are unjust. At the same time, when a respondent is found *not* responsible for sexual harassment, the complainant receives no remedy restoring the complainant's equal access to education,[1449] with immediate and lasting impact on the complainant's life, which may affect educational and employment opportunities down the road. When the finding of non-responsibility is erroneous, such consequences are unjust. A complainant "deserves a reliable, accurate outcome as much as" a respondent.[1450]

The Department disagrees that the preponderance of the evidence standard means that complainants and respondents are treated "equally" or placed "on a level playing field." Where the evidence in a case is "equal" or "level" or "in equipoise," the preponderance of the evidence standard results in a finding that the respondent is not responsible.[1451]

The Department recognizes that consistency with respect to administrative enforcement of Title IX and other civil rights laws (such as Title VI and Title VII) is desirable. However, these final regulations focus on furthering Title IX's non-discrimination mandate and address challenges unique to recipients' responses to sexual harassment. In this regard the Department has determined that recipients should retain flexibility to select the standard of evidence that they

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[1448] *Doe v. Baum*, 903 F.3d 575, 582 (6th Cir. 2018).
[1449] Nothing in these final regulations prevents a recipient from providing supportive measures to a complainant even after a determination of non-responsibility.
[1450] *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 404 (6th Cir. 2017).
[1451] *See, e.g.*, Vern R. Walker, *Preponderance, Probability, and Warranted Factfinding*, 62 BROOKLYN L. REV. 1075, 1076 (1996) (noting that the traditional formulation of the preponderance of the evidence standard by courts and legal scholars is that the party with the burden of persuasion must prove that a proposition is more probably true than false meaning a probability of truth greater than 50 percent); Neil B. Cohen, *The Gatekeeping Role in Civil Litigation and the Abdication of Legal Values in Favor of Scientific Values*, 33 SETON HALL L. REV. 943, 954-56 (2003) (noting that the preponderance of the evidence standard applied in civil litigation results in the plaintiff losing the case where the plaintiff's and defendant's positions are "in equipoise," i.e., where the evidence presented makes the case "too close to call").

believe is most appropriate, because either of the two standards of evidence permitted under these final regulations may be used to produce reliable outcomes. The Department does not believe this approach to a standard of evidence under Title IX is in conflict with statutory or regulatory requirements under Title VI or Title VII that may apply to recipients who also have obligations under Title IX. Similarly, while VAWA authorizes private rights of action that (similarly to judicially implied private rights of action under Title VI and Title IX) use a preponderance of the evidence standard in civil litigation exercising those rights of action, these final regulations do not impact the standard of evidence that applies in civil litigation under any statute. For the reasons explained above the Department believes that either the preponderance of the evidence standard, or the clear and convincing evidence standard, is an appropriate standard in Title IX grievance processes, which differs from civil litigation. Even as to ways in which a Title IX grievance process is similar to civil litigation, both standards of evidence (the preponderance of the evidence standard and the clear and convincing evidence standard) are used in various types of civil litigation.

As many commenters have noted, a Title IX grievance process differs in purpose and context from criminal, civil, and administrative agency proceedings. A Title IX grievance process serves a unique purpose (i.e., reaching accurate factual determinations about whether sexual harassment must be remedied by restoring a victim's equal access to education) in a unique context (i.e., decisions must be reached by schools, colleges, and universities whose primary function is to educate, not to serve as courts or administrative bodies). A Title IX grievance process is different from criminal, civil, and administrative proceedings, yet bears similarities to each. The preponderance of the evidence standard, and the clear and convincing

evidence standard, each are used in various civil and administrative proceedings.[1452] Additionally, recipients have historically used either the preponderance of the evidence standard or the clear and convincing evidence standard for a variety of student and employee misconduct proceedings, under a variety of rationales for choosing one or the other.[1453] The Department believes that a recipient could view either standard as appropriate in the context of Title IX proceedings, and the Department agrees that either standard may be fairly applied to reach accurate outcomes, and thus these final regulations allow recipients to select the preponderance of the evidence standard, or the clear and convincing evidence standard, for use in resolving formal complaints of sexual harassment under § 106.45.[1454] Selecting a standard of evidence represents a statement about the "degree of confidence" that a recipient believes its decision-makers should have in reaching determinations regarding responsibility in Title IX sexual harassment cases. We do not agree that the recipient's selection of one standard over the other implies a belief that any party is lying or untruthful, and regardless of the applicable standard of

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[1452] *See, e.g.*, *Nguyen v. Wash. Dep't. of Health*, 144 Wash.2d 516 (2001) (concluding that the Due Process Clause requires proof by at least the clear and convincing evidence standard in a sexual misconduct case in a medical disciplinary proceeding); *Disciplinary Counsel v. Bunstine*, 136 Ohio St. 3d 276 (2013) (applying the clear and convincing evidence standard in sexual harassment case involving a lawyer); *cf. In re Barach*, 540 F.3d 82, 85 (1st Cir. 2008); *Granek v. Tex. State Bd. of Med. Examiners*, 172 S.W.3d 761, 777 (Tex. Ct. App. 2005) (noting that many State and Federal courts apply the preponderance of the evidence standard to professional license revocation proceedings).

[1453] As many commenters noted, there exist valid reasons for supporting the preponderance of the evidence standard, and for supporting the clear and convincing evidence standard, with respect to sexual misconduct allegations. Commenters, for instance, cited this debate by citing to: Nancy Chi Cantalupo & John Villasenor, *Is a Higher Standard Needed for Campus Sexual Assault Cases?*, THE NEW YORK TIMES (Jan. 4, 2017). The final regulations permit recipients to select between these standards to best meet the legal, cultural, and pedagogical needs of the recipient's community with respect to the degree of certainty the recipient expects decision-makers to have when reaching determinations regarding responsibility for sexual harassment allegations.

[1454] For reasons explained in the "Mandating a Higher Standard of Evidence" subsection of this "Section 106.45(b)(7)(i) Standard of Evidence and Directed Question 6" subsection of this preamble, the Department does not permit recipients to select a standard of evidence higher than clear and convincing evidence (such as the criminally used "beyond a reasonable doubt" standard).

evidence, Title IX personnel must avoid prejudgment of the facts at issue[1455] and reach determinations regarding responsibility based on objective evaluation of the evidence without drawing credibility determinations based on a party's status as a complainant or respondent. [1456] We also reiterate that regardless of the applicable standard of evidence, the burden of proof rests on the recipient, not on either party.[1457]

We disagree that the clear and convincing evidence standard is unfairly vague. The clear and convincing evidence standard is a widely recognized standard of evidence used in a variety of civil and administrative proceedings,[1458] and many recipients have historically used clear and

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[1455] Section 106.45(b)(1)(iii).
[1456] Section 106.45(b)(1)(i).
[1457] Section 106.45(b)(5)(i).
[1458] *E.g.*, *Addington v. Texas*, 441 U.S. 418, 424 (1979) (holding that the clear and convincing evidence standard was required in civil commitment proceedings) (noting that clear and convincing evidence is an "intermediate standard" between preponderance of the evidence and the criminal beyond a reasonable doubt standard and that the clear and convincing evidence standard "usually employs some combination of the words 'clear,' 'cogent,' 'unequivocal,' and 'convincing'" and while less commonly used than the preponderance of the evidence standard the clear and convincing evidence standard is "no stranger to the civil law" and is sometimes used in civil cases "involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant" where "the interests at stake are deemed to be more substantial than mere loss of money" justifying reduction of "the risk to the defendant of having his reputation tarnished erroneously.") (internal quotation marks and citations omitted); *Sophanthavong v. Palmateer*, 378 F.3d 859, 866-67 (9th Cir. 2004) ("Clear and convincing evidence requires greater proof than preponderance of the evidence. To meet this higher standard, a party must present sufficient evidence to produce 'in the ultimate factfinder an abiding conviction that the truth of its factual contentions are [*sic*] highly probable.'") (quoting *Colorado. v. New Mexico*, 467 U.S. 310, 316 (1984)) (brackets in original); Jane B. Baron, *Irresolute Testators, Clear and Convincing Wills Law*, 73 WASH. & LEE L. REV. 3, 45 (2016) (discussing application of the "clear and convincing evidence" standard in the context of proving that a facially defective will represented the testator's intent, and noting that "It is common, however, for courts to vary in their formulation and expression of a legal standard. No evidentiary standard can define itself; all are indeterminate to some degree. Still, the idea behind requiring clear and convincing evidence seems intuitive enough; the factfinder need not be absolutely certain, but highly confident, about the fact in issue."); Haley Hawkins, *Clearly Unconvincing: How Heightened Evidentiary Standards in Judicial Bypass Hearings Create an Undue Burden Under Whole Woman's Health*, 67 AM. UNIV. L. REV. 1911, 1923 (2018) ("The clear and convincing evidence standard of proof is the highest evidentiary standard employed in civil proceedings, second only to the 'beyond a reasonable doubt' standard employed in criminal proceedings. In general, standards of proof function to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.' Within the range of standards, clear and convincing evidence is situated to 'protect particularly important individual interests in various civil cases' that involve more than 'mere loss of money.' Though the meaning of 'clear and convincing' varies by state, one can generally articulate the standard as 'persuad[ing] the [factfinder] that the proposition is highly probable, or . . . produc[ing] in the mind of the factfinder a firm belief or conviction that the allegations in question are true.'") (internal citations omitted).

convincing evidence as an evidentiary standard for various types of student or employee misconduct.[1459]

We disagree that a recipient who selects the clear and convincing evidence standard for resolution of sexual harassment cases is failing to prepare students for future careers in the corporate world. While corporate employers may or may not choose to, or be required to, use the clear and convincing evidence standard for sexual misconduct proceedings involving employees, workplaces differ from educational environments and different laws and policies govern discrimination complaints and misconduct proceedings in each context. Whether or not the commenter correctly characterized corporate environments as having "zero tolerance policies," we note that nothing in these final regulations precludes a recipient from adopting a zero tolerance policy (with respect to harassment or any other misconduct); these final regulations apply only to a recipient's obligations to respond to sexual harassment (as defined in § 106.30) of which the recipient knows and which occurs in the recipient's education program or activity.[1460] As noted in § 106.45(b)(3)(i), even if a recipient must dismiss allegations of sexual harassment in a formal complaint under these final regulations, such dismissal is only for Title IX purposes and does not preclude action under another provision of the recipient's code of conduct.

[1459] 2011 Dear Colleague Letter at 11 (noting that the clear and convincing evidence standard was, at that time, "currently used by some schools" and insisting that only the preponderance of the evidence standard is permissible under Title IX); Matthew R. Triplett, *Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection*, 62 DUKE L. J. 487, fn. 107 (2012) (noting that "the standard of proof in student disciplinary hearings has historically varied wildly across institutions" and listing examples of several prominent universities that lowered their standard of evidence from the clear and convincing evidence standard, to the preponderance of the evidence standard, after OCR issued the [now-withdrawn] 2011 Dear Colleague Letter).
[1460] Section 106.44(a) (requiring a recipient with actual knowledge of sexual harassment in the recipient's education program or activity against a person in the United States to respond promptly in a manner that is not deliberately indifferent).

Changes: The Department has revised § 106.45(b)(7)(i) of the final regulations such that recipients have the choice of either applying the preponderance of the evidence standard or the clear and convincing evidence standard, and § 106.45(b)(1)(vii) requires a recipient to make that choice applicable to all formal complaints of sexual harassment, including those against employees and faculty. We have removed the limitation contained in the NPRM that would have permitted recipients to use the preponderance of the evidence standard only if they used that standard for non-sexual misconduct that has the same maximum disciplinary sanction.

Improving Accuracy of Outcomes

Comments: A number of commenters asserted that the preponderance of the evidence standard increases the overall accuracy of the system because it is an error-minimizing standard and argued that the clear and convincing evidence standard would increase false negative errors to a greater extent than it reduces false positive errors, thus reducing the accuracy of Title IX outcomes.[1461] Other commenters pointed to a study explaining that use of the preponderance of the evidence standard increases false positive errors.[1462]

Discussion: The Department shares commenters' concerns that increasing the overall accuracy of determinations of responsibility in Title IX proceedings is critical and that minimizing either type of error (i.e., false positives and false negatives) is important and desirable. The Department does not believe that evidence is conclusive either way regarding whether using the preponderance of the evidence standard or the clear and convincing evidence standard as the

[1461] Commenters cited: Nicholas E. Khan, *The Standard of Proof in the Substantiation of Child Abuse and Neglect*, 14 JOURNAL OF EMPIRICAL LEGAL STUDIES 333, 356-57 (2017).
[1462] Commenters cited: John Villasenor, *A Probabilistic Framework for Modelling False Title IX 'convictions' under the Preponderance of the Evidence Standard*, 15 LAW, PROBABILITY & RISK 4 (2016).

standard of evidence in Title IX proceedings best reduces risk of error, in part because studies that may shed light on that question assume features and processes in place that differ from those prescribed by the final regulations under § 106.45. The final regulations permit recipients to select either the preponderance of the evidence standard or the clear and convincing evidence standard for application to formal complaints of sexual harassment in the recipient's educational community, because in combination with the other procedural features of the § 106.45, either standard of evidence can be applied fairly to result in accurate outcomes.

Changes: The Department has revised § 106.45(b)(7)(i) of the final regulations such that recipients have the choice of either applying the preponderance of the evidence standard or the clear and convincing evidence standard, and § 106.45(b)(1)(vii) requires a recipient to make that choice applicable to all formal complaints of sexual harassment, including those against employees and faculty. We have removed the limitation contained in the NPRM that would have permitted recipients to use the preponderance of the evidence standard only if they used that standard for non-sexual misconduct that has the same maximum disciplinary sanction.

Safety Concerns

Comments: Many commenters contended that the clear and convincing evidence standard will make campuses less safe, chill reporting, and harm already vulnerable students.[1463] Commenters argued that the clear and convincing evidence standard will discourage survivors, particularly students of color, LGBTQ students, and students with disabilities, from reporting because this

[1463] Commenters cited: Nancy Chi Cantalupo, *For the Title IX Civil Rights Movement: Congratulations and Cautions,* 125 YALE L. J. OF FEMINISM 282, 290 (2016); Kathryn J. Holland & Lilia M. Cortina, *"It happens to girls all the time": Examining sexual assault survivors' reasons for not using campus supports*, 59 AM. J. OF COMMUNITY PSYCHOL. 1-2 (2017); Shamus Khan *et al.*, *"I Didn't Want to Be 'That Girl'": The Social Risks of Labeling, Telling, and Reporting Sexual Assault*, 5 SOCIOLOGICAL SCI. 432 (2018).

standard unjustly favors respondents. Commenters argued that the clear and convincing evidence standard may result in a lower number of respondents found responsible and removed from campus, thus increasing the risk of victim re-traumatization by encountering their perpetrator and possibly resulting in "constructive expulsion," where survivors leave school to avoid seeing their perpetrator. Commenters argued that the clear and convincing evidence standard may perversely incentivize perpetrators to attack again because of the perception they will not be held accountable.

Discussion: Under the final regulations, complainants (or third parties) may report sexual harassment triggering a recipient's mandatory obligation to offer the complainant supportive measures and inform the complainant about the option of filing a formal complaint; complainants are not required to file a formal complaint or participate in a grievance process in order to report sexual harassment and receive supportive measures.[1464] Thus, regardless of how a complainant perceives or anticipates the experience of a grievance process, a complainant has the right to report sexual harassment and receive supportive measures. If or when a complainant also decides to file a formal complaint initiating a grievance process against a respondent, § 106.45 ensures that the burden of gathering evidence, and the burden of proof, remain on the recipient and not on the complainant (or respondent). Complainants who participate in a grievance process receive the strong, clear procedural rights and protections in § 106.45 including, among other things, the right to gather, present, review, and respond to evidence, the right to review and respond to the recipient's investigative report summarizing relevant evidence, and the right to pose questions to be answered by a respondent to further the complainant's perspective about the

[1464] Section 106.44(a).

case and what the outcome should be, and the right to an advisor of choice to advise and assist the complainant throughout the process.[1465] Whether the recipient selects a preponderance of the evidence standard, or a clear and convincing evidence standard, complainants have the right and opportunity to participate in the process on an equal basis with the respondent. Regardless of which standard of evidence a recipient selects, we reiterate that neither standard requires corroborating evidence in order to reach a determination regarding responsibility; the standard of evidence reflects the "degree of confidence" that a decision-maker has in correctness of the factual conclusions reached.[1466]

The Department understands that whether a determination regarding responsibility is reached using the preponderance of the evidence standard or the clear and convincing evidence standard, the outcome reflects the weight and persuasiveness of the available, relevant evidence in the case. We have added § 106.71 in the final regulations to caution recipients not to draw conclusions about any party's truthfulness during a grievance process based solely on the outcome of the case. The final regulations do not preclude a recipient from keeping supportive measures in place even after a determination that a respondent is not responsible, so complainants do not necessarily need to be left in constant contact with the respondent, regardless of the result of a grievance process. The Department understands the potential for loss of educational access for complainants, and for respondents, in situations where sexual harassment allegations are not resolved accurately. The Department is not aware of a Federal

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[1465] Section 106.45(b)(5)(i); § 106.45(b)(5)(iii); § 106.45(b)(5)(iv); § 106.45(b)(5)(vi); § 106.45(b)(5)(vii); § 106.45(b)(6).

[1466] *Cal. ex rel. Cooper v. Mitchell Bros.' Santa Ana Theater*, 454 U.S. 90, 92-93 (1981) (noting that the "purpose of a standard of proof is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication").

appellate court holding that the clear and convincing evidence standard is required to satisfy constitutional due process or fundamental fairness in Title IX proceedings, and the Department is not aware of a Federal appellate court holding that the preponderance of the evidence standard is required under Title IX. Because recipients have historically used either the preponderance of the evidence standard or the clear and convincing evidence standard in sexual misconduct disciplinary proceedings, and because studies are inconclusive about which standard is more likely to reduce the risk of erroneous outcomes, the Department concludes that recipients must select and consistently apply a standard of evidence that is not lower than the preponderance of the evidence standard and not higher than the clear and convincing evidence standard, but that either the preponderance of the evidence standard or the clear and convincing evidence standard may be applied to reach accurate determinations in a Title IX grievance process, consistent with constitutional due process and fundamental fairness and with Title IX's non-discrimination mandate. The Department believes that the predictable, fair grievance process prescribed under § 106.45 will convey to complainants and respondents that the recipient treats formal complaints of sexual harassment seriously and aims to reach a factually accurate conclusion; the Department does not agree that using one standard of evidence rather than the other conveys to respondents that Title IX sexual harassment can be perpetrated without consequence.

Changes: The Department has revised § 106.45(b)(7)(i) of the final regulations such that recipients have the choice of either applying the preponderance of the evidence standard or the clear and convincing evidence standard, and § 106.45(b)(1)(vii) requires a recipient to make that choice applicable to all formal complaints of sexual harassment, including those against employees and faculty. We have removed the limitation contained in the NPRM that would have permitted recipients to use the preponderance of the evidence standard only if they used that

standard for non-sexual misconduct that has the same maximum disciplinary sanction. We have added § 106.71 prohibiting retaliation for exercising rights under Title IX and specifying that while a recipient may punish a party for making bad-faith materially false statements during a grievance process, the outcome of the case alone cannot be the basis for concluding that a party made a bad-faith materially false statement.

Consistency of Standards of Evidence Across Recipients

Comments: A few commenters raised concerns that allowing recipients to choose between two standards of evidence will lead to inconsistent systems across the country, which may complicate campus crime reporting under the Clery Act and make it harder for prospective students to compare crime statistics across campuses. Commenters argued that the Department should not allow justice to apply unequally across the country.

Discussion: These final regulations do not alter requirements under the Clery Act or its implementing regulations. The Department disagrees that data gathering and reporting under the Clery Act will be affected by the standard of evidence selected by a recipient for resolving formal complaints of sexual harassment under Title IX. A recipient's obligations to report under the Clery Act depend on when a crime has been reported to the recipient and do not depend on the outcome of any disciplinary proceeding that results from a person's report of a crime.

The final regulations' approach to the standard of evidence for Title IX grievance processes (whereby a recipient may select either the preponderance of the evidence standard, or the clear and convincing evidence standard), may result in some recipients selecting one standard and other recipients selecting the other standard. The Department disagrees that this approach results in "unequal justice" across the country. The Department believes that this approach to the standard of evidence maintains consistency with respect to all Title IX grievance processes,

across recipients, because all grievance processes regardless of which standard of evidence a recipient applies, are fair processes likely to lead to accurate determinations regarding responsibility.

Changes: The Department has revised § 106.45(b)(7)(i) of the final regulations such that recipients have the choice of either applying the preponderance of the evidence standard or the clear and convincing evidence standard, and § 106.45(b)(1)(vii) requires a recipient to make that choice applicable to all formal complaints of sexual harassment, including those against employees and faculty. We have removed the limitation contained in the NPRM that would have permitted recipients to use the preponderance of the evidence standard only if they used that standard for non-sexual misconduct that has the same maximum disciplinary sanction.

Standards of Evidence Below the Preponderance of the Evidence

Comments: A few commenters proposed that the Department consider lower standards of evidence than the preponderance of the evidence standard. One commenter suggested "substantial evidence," or enough relevant evidence that a reasonable person would find supports the fact-finder's conclusion. Another commenter suggested "reasonable cause" and noted that child welfare agencies protecting children from abuse use the "reasonable cause" standard, which is lower than the preponderance of the evidence standard.

Discussion: As discussed above, the Department does not wish to be more prescriptive than necessary to ensure a consistent grievance process yielding accurate outcomes, so that recipients are held responsible for redressing sexual harassment as a form of sex discrimination under Title IX. As commenters pointed out, the two standards of evidence between which the final regulations permit recipients to choose are not the only possible standards of evidence that could be used in Title IX proceedings. For example, some commenters urged adoption of the higher,

criminal "beyond a reasonable doubt" standard, while other commenters noted that preponderance of the evidence standard is not "the lowest" possible standard that could be used, because lower standards such as "substantial evidence," "reasonable cause," or "probable cause" are used, or have been used, in student discipline and certain types of legal proceedings. The Department believes that students and employees deserve clarity as to the standard of evidence a recipient will apply during the grievance process and that recipients should be permitted as much flexibility as reasonably possible while ensuring reliable outcomes in these high-stakes cases. For reasons described above, the Department believes that either the preponderance of the evidence standard or the clear and convincing evidence standard can be applied within the § 106.45 grievance process and yield reliable outcomes, but does not believe that a standard lower than the preponderance of the evidence standard, or higher than the clear and convincing evidence standard, would result in a fair process or reliable outcomes.[1467]

As discussed above, the Department does not believe that the highest possible standard (beyond a reasonable doubt) should apply in a noncriminal proceeding such as a Title IX grievance process where, as commenters have accurately pointed out, a respondent's liberty interests are not at stake.[1468] The Supreme Court has cautioned against applying the "beyond a

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[1467] *See* Lavinia M. Weizel, *The Process That Is Due: Preponderance of The Evidence as The Standard of Proof For University Adjudications of Student-On-Student Sexual Assault Complaints*, 53 BOSTON COLL. L. REV. 1613, 1635 (2012) (analyzing court cases that have criticized colleges for using a standard of evidence lower than the preponderance of the evidence standard, such as what many schools have referred to as "substantial evidence" because using a standard lower than the preponderance of the evidence standard "leaves the fact-finder adrift to be persuaded by individual prejudices rather than by the weight of the evidence presented") (internal quotation marks and citations omitted).

[1468] The clear and convincing evidence standard is an "intermediate standard" that while less commonly used than the preponderance of the evidence standard, is sometimes used in civil cases "involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant" that justify reducing "the risk to the defendant of having his reputation tarnished erroneously." *Addington v. Texas*, 441 U.S. 418, 424 (1979) (internal quotation marks and citations omitted). As some commenters observed, the consequences for a respondent in a Title IX case often involve allegations of quasi-criminal wrongdoing with possible lifelong impact on a respondent's reputation.

reasonable doubt" standard to noncriminal proceedings.[1469] At the same time, the Department does not believe that a standard lower than preponderance (such as substantial evidence or probable cause) should apply to the Title IX grievance process either, because the stakes are high for both parties in a Title IX process; without a determination based on a probability of accuracy greater than 50 percent (i.e., more likely than not to be true), the Department does not believe that an outcome can be deemed reliable or perceived as legitimate. Without a reliable outcome, the parties, recipients, Department, and the public cannot confidently assess whether a recipient has responded to sex discrimination in the recipient's education program or activity by providing remedies to victims and taking disciplinary action against perpetrators with respect to sexual harassment allegations.

Changes: None.

Questioning the Department's Legal Authority

Comments: Several commenters contended that the NPRM's choice of evidence standard exceeds the Department's legal authority. One commenter argued that allowing the clear and convincing evidence standard for sexual harassment cases but a lower preponderance of the evidence standard for non-sexual harassment cases could violate the Fourteenth Amendment Equal Protection Clause. Other commenters suggested that allowing a clear and convincing evidence standard is inconsistent with Title IX's statutory objectives and would not effectuate the prohibition on sex discrimination. One commenter stated that the Supreme Court, not the Department, must ultimately determine the applicable Title IX standard of evidence. Another

[1469] *See, e.g.*, *Santosky v. Kramer*, 455 U.S. 745, 768 (1982) (noting that the Supreme Court hesitates to apply the "unique standard" of beyond a reasonable doubt "too broadly or casually in noncriminal cases") (internal quotation marks and citations omitted).

commenter suggested that the NPRM's approach to the standard of evidence violates the International Covenant on Civil and Political Rights, under which the U.S. is obligated to prohibit and eliminate sex discrimination. One commenter asserted that the Department lacks authority over evidence standards at all, and that the Department should instead defer to recipients' administrative discretion to set their own evidentiary standards. One commenter argued that the Department lacks authority over negotiated agreements between recipient management and employees, and the Department's attempt to supersede these agreements with mandated evidentiary standards is regulatory overreach. This commenter emphasized that recipients did not contemplate such a requirement when accepting Federal funding.

Discussion: Contrary to the claims made by some commenters, the Department believes the final regulations address the issue of what standard of evidence should apply in Title IX proceedings, in a reasonable manner that falls within the Department's regulatory authority. The Department acknowledges that the statutory text of Title IX does not reference, much less dictate, a standard of evidence to be used by recipients to resolve allegations of sexual harassment. The Department's authority to regulate on the subject of sexual harassment, including how a recipient responds when a complainant files a formal complaint raising allegations of sexual harassment against a respondent, flows from the Department's statutory directive to promulgate rules and regulations to effectuate the purposes of Title IX.[1470] Those purposes have been described by the Supreme Court as preventing Federal funds from supporting education programs or activities that

[1470] 20 U.S.C. 1681; 20 U.S.C. 1682; *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 638-39 (1999).

tolerate sex discriminatory practices and providing individuals with effective protections against such sex discriminatory practices.[1471]

Where sexual harassment allegations present contested narratives regarding a particular incident between a complainant and respondent, accurately determining the truth of the allegations in a non-sex biased manner is critical to ensuring that a recipient responds appropriately by providing the complainant with remedies that restore or preserve the complainant's equal access to education. As noted previously in this preamble, a complainant is a victim of sexual harassment where a fair process has reached an accurate determination that the respondent perpetrated sexual harassment against the complainant and the final regulations require recipients to provide such complainants with remedies. For the reasons discussed above, the Department has determined that a fair, reliable outcome requires that a recipient notify its students and employees in advance of the standard of evidence the recipient will apply in sexual harassment grievance processes, and the Department has further determined that either the preponderance of the evidence standard, or the clear and convincing evidence standard (but not a standard lower than preponderance of the evidence or higher than clear and convincing evidence) can produce an accurate determination. Both of the standards of evidence available for recipients to choose under these final regulations are standards common to civil proceedings, and not to

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[1471] *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979) (noting that the primary congressional purposes behind Title IX were "to avoid the use of Federal resources to support discriminatory practices" and to "provide individual citizens effective protection against those practices."). As noted previously, the Department is not aware of a Federal appellate court holding that the preponderance of the evidence standard is required in order to be consistent with Title IX's non-discrimination mandate, and is not aware of a Federal appellate court holding that the clear and convincing evidence standard is required to satisfy constitutional due process or fundamental fairness in Title IX proceedings. The Department believes that either of these two standards of evidence may be applied by a recipient in a Title IX grievance process because both are consistent with Title IX's non-discrimination and due process protections.

criminal proceedings. The difference between the two options is a difference in the degree of confidence that each recipient decides that a decision-maker must have in the factual correctness of the conclusions reached in Title IX sexual harassment cases; that is, the difference between having confidence that a conclusion is based on facts that are more likely true than not,[1472] or having confidence that a conclusion is based on facts that are highly probable to be true.[1473] Thus, the Department's provisions regarding selection and application of a standard of evidence effectuates the dual purposes of Title IX – preventing Federal dollars from flowing to schools that fail to protect victims of sexual harassment, and providing individuals with effective protections against discriminatory practices that occur by failure to accurately determine who has been victimized by sexual harassment. At the same time, these provisions regarding selection and application of a standard of evidence are consistent with constitutional due process and fundamental fairness. Fair adversarial procedures increase the probability that the truth of allegations will be accurately determined,[1474] and reduce the likelihood that impermissible sex bias will affect the outcome. Acknowledging the arguments from commenters urging the Department to mandate one or the other standard, the Department has determined that either the

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[1472] A preponderance of the evidence standard of evidence is understood to mean concluding that a fact is more likely than not to be true. *E.g.*, *Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 622 (1993) (a preponderance of the evidence standard "requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence") (internal quotation marks and citation omitted).

[1473] A clear and convincing evidence standard of evidence is understood to mean concluding that a fact is highly probable to be true. *E.g.*, *Sophanthavong v. Palmateer*, 378 F.3d 859, 866-67 (9th Cir. 2004) (a clear and convincing evidence standard requires "sufficient evidence to produce in the ultimate factfinder an abiding conviction that the truth of its factual contentions are [*sic*] highly probable.") (internal quotation marks and citation omitted; brackets in original).

[1474] The adversarial "system is premised on the well-tested principle that truth – as well as fairness – is 'best discovered by powerful statements on both sides of the question.'" *Penson v. Ohio*, 488 U.S. 75, 84 (1988) (quoting Irving R. Kaufman, *Does the Judge Have a Right to Qualified Counsel?*, 61 AM. BAR ASS'N J. 569, 569 (1975)).

preponderance of the evidence standard or the clear and convincing evidence standard reasonably can be applied as part of the fair procedures prescribed under § 106.45.

The Department further notes that the Supreme Court has specifically approved of the Department's authority to regulate specific requirements under Title IX even when those requirements are not referenced under the statute and even when the administratively imposed requirements do not represent a definition of sex discrimination under the statute; the Department has wide latitude to issue requirements for the purpose of furthering Title IX's non-discrimination mandate, including measures designed to make it less likely that sex discrimination will occur, even if a Federal court would not hold the recipient accountable to the same requirements in a private lawsuit under Title IX.[1475] For example, the Department's existing regulations in 34 CFR 106 have, since 1975, required recipients to have in place grievance procedures for the "prompt and equitable" resolution of complaints that a recipient is committing sex discrimination,[1476] even though the Title IX statute does not require recipients to have in place any grievance procedures to handle sex discrimination complaints.

[1475] *See, e.g.*, *Gebser*, 524 U.S. at 291-92 (refusing to allow plaintiff to pursue a claim under Title IX based on the school's failure to comply with the Department's regulatory requirement to adopt and publish prompt and equitable grievance procedures, stating "And in any event, the failure to promulgate a grievance procedure does not itself constitute 'discrimination' under Title IX. Of course, the Department of Education could enforce the requirement administratively: Agencies generally have authority to promulgate and enforce requirements that effectuate the statute's non-discrimination mandate, 20 U.S.C. 1682, even if those requirements do not purport to represent a definition of discrimination under the statute.").

[1476] The final regulations revise 34 CFR 106.8(b), in ways discussed in the "Section 106.8(b) Dissemination of Policy" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble. Under the final regulations, recipients still must have grievance procedures that provide for the prompt and equitable resolutions of complaints from students and employees alleging sex discrimination. The final regulations update § 106.8 to clarify that "prompt and equitable" grievance procedures must still exist for sex discrimination that is *not* sexual harassment, and that recipients must also notify students, employees, and others that the recipient has a grievance process that complies with § 106.45 for the purpose of resolving formal complaints of sexual harassment.

The Department rejects the contention made by one commenter that the approach to the standard of evidence contained in § 106.45(b)(7)(i) of the final regulations may violate the Fourteenth Amendment Equal Protection Clause. Nothing in the final regulations dictates what standard of evidence recipients use in non-sexual harassment cases, so a recipient does not necessarily treat different types of cases differently because of the final regulations. Further, the Department notes that the appropriate standard of review under an Equal Protection challenge would be the rational basis test, which upholds a State action that makes distinctions that are not based on suspect classifications, if there is any reasonable set of facts that could provide a rational basis for the action.[1477] The Department has determined that allowing recipients to select one of two standards of evidence,[1478] either of which can be applied within a fair grievance process to reach accurate determinations, is rationally related to the legitimate interest of ensuring reliable outcomes in Title IX sexual harassment cases.

With respect to obligations under international law such as the International Covenant on Civil and Political Rights, nothing in the final regulations impairs any U.S. obligation to prohibit and eliminate sex discrimination, nor does the Department see any conflict between recipients' compliance with the final regulations, and U.S. compliance with applicable international laws or treaties.[1479]

[1477] *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) (holding that in areas of social and economic policy, statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide rational basis for classification).

[1478] As noted above, the final regulations removed the NPRM condition that a recipient only use the preponderance of the evidence standard if the recipient also uses that standard in non-sexual harassment code of conduct proceedings.

[1479] For further discussion, see the "Conflicts with First Amendment, Constitutional Confirmation, International Law" subsection of the "Miscellaneous" section of this preamble.

We discuss the implications of the final regulations' approach to the standard of evidence with respect to a recipient's employees and CBAs in the "Same Evidentiary Standard in Student and Faculty Cases" subsection of this section, above. For further discussion of the Department's application of these final regulations to employees, see the "Section 106.6(f) Title VII and Directed Question 3 (Application to Employees)" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble. For reasons discussed in the "Spending Clause" subsection of the "Miscellaneous" section of this preamble, the Department disagrees that these final regulations exceed the Department's regulatory authority to promulgate rules that effectuate the purposes of Title IX with respect to education programs or activities that receive Federal financial assistance.

Changes: None.

Alternative Approaches and Clarification Requests

Comments: Several commenters proposed alternative regulatory language for § 106.45(b)(7)(i). One commenter urged the Department to explicitly address both sexual harassment and "sexual misconduct" in the standard of evidence provisions. This commenter agreed that it was appropriate to require the same standard of evidence in student and faculty cases but also believed that the Department should apply the same due process rights for students and faculty alike. This commenter also requested that the Department include "staff" and not just "faculty" in this provision.

One commenter requested that the Department explicitly define the preponderance of the evidence standard as satisfied where the conclusion is supported by persuasive, relevant, and substantial evidence and the procedures are both transparent and fair. This commenter rejected the notion that the preponderance of the evidence standard is 50 percent "plus a feather." One

commenter suggested that if in a particular case the preponderance of the evidence standard is satisfied, but not the clear and convincing evidence standard, then the Department should allow recipients to suspend or expel the respondent but not put a permanent notation on the respondent's transcript that would prevent transfer to another school. The commenter argued that this strikes a balance between protecting wrongly convicted students and protecting victims seeking to continue their education. One commenter requested that the Department adopt the provision as written, but also require recipients to provide a written explanation as to why it is necessary to use one evidentiary standard instead of another. Another commenter argued that the clear and convincing evidence standard is unclear, and the Department should explicitly define it in the final regulations. And one commenter suggested that the Department include statistics in the final regulations to justify changing its approach to evidentiary standards.

Commenters also raised several questions regarding evidentiary standards. One commenter inquired as to whether the requirement that if the preponderance of the evidence standard is used in Title IX cases then it must be used in non-Title IX cases with the same maximum punishment is satisfied where the preponderance of the evidence standard is used for: (a) all conduct code violations with same maximum punishment; (b) most of such conduct code violations; (c) more than one but less than a majority of such violations; (d) even a single such violation; (e) a penalty phase only (such as to impose expulsion); (f) student infractions governed by a separate policy than the student conduct code; or (g) student conduct code violations, but not for other forms of discrimination or harassment by students. The same commenter asked whether the requirement that the same standard of evidence be used for Title IX complaints against students and faculty means recipients must use the clear and convincing evidence standard for student cases if the clear and convincing evidence standard is applied to: (a) all Title

IX complaints against employees; (b) Title IX complaints against a majority of employees; (c) Title IX complaints against even a single employee: (d) Title IX complaints against some but not all types of misconduct by employees; (e) Title IX complaints about even a single type of misconduct; (f) complaints about employee misconduct not involving alleged discrimination and/or harassment by employees towards students; (g) complaints about employee misconduct not involving alleged discrimination and/or harassment by employees towards other employees, (h) some, but not all, aspects of complaints against employees (for example, where the preponderance of the evidence standard is used to determine whether misconduct occurred, but the clear and convincing evidence standard is required for some forms of discipline against a class of employees, such as revoking tenure for tenured faculty).

Discussion: The Department notes that "sexual harassment" is defined in § 106.30 of the final regulations, and this definition encompasses a wide range of sexual misconduct. The Department does not believe that the term "sexual misconduct" would be more appropriate than "sexual harassment" in these regulations, because the Supreme Court interpretations of Title IX refer to sexual harassment. Furthermore, § 106.45(b)(1)(vii) and § 106.45(b)(7)(i) mandate that recipients use the same standard of evidence to reach determinations regarding responsibility in response to formal complaints against students as they do for formal complaints against employees, including all staff and faculty, and the final regulations also require the other provisions in § 106.45 to apply to all formal complaints of sexual harassment whether against students and employees, including faculty.

The Department declines to provide definitions of the "preponderance of the evidence" standard and the "clear and convincing evidence" standard. The Department believes that each standard of evidence referenced in the final regulations has a commonly understood meaning in

other legal contexts and intends the "preponderance of the evidence" standard to have its traditional meaning in the civil litigation context and the "clear and convincing evidence" standard to have its traditional meaning in the subset of civil litigation and administrative proceedings where that standard is used.[1480]

For discussion of transcript notations, see the "Transcript Notations" subsection of the "Determinations Regarding Responsibility" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble.

The Department expects that recipients will select a standard of evidence based on the recipient's belief about which standard best serves the interests of the recipient's educational community, or because State law requires the recipient to apply one or the other standard, or because the recipient has already bargained with unionized employees for a particular standard of evidence in misconduct proceedings. The Department declines to require recipients to explain why a recipient has selected one or the other standard of evidence, though nothing in the final regulations precludes a recipient from communicating its rationale to its educational community.

The Department has examined statistics, data, and information regarding standards of evidence submitted by commenters through public comment on the NPRM, and has considered

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[1480] *See, e.g.*, *Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 622 (1993) (quoting *In re Winship*, 397 U.S. 358, 371-372 (1970) (Harlan, J., concurring) ("The burden of showing something by a 'preponderance of the evidence,' the most common standard in the civil law, 'simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'") (brackets in original; citation omitted)); *Sophanthavong v. Palmateer*, 378 F.3d 859, 866-67 (9th Cir. 2004) ("Clear and convincing evidence requires greater proof than preponderance of the evidence. To meet this higher standard, a party must present sufficient evidence to produce 'in the ultimate factfinder an abiding conviction that the truth of its factual contentions are [*sic*] highly probable.'") (quoting *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984)) (brackets in original); Justia.com, "Evidentiary Standards and Burdens of Proof," https://www.justia.com/trials-litigation/lawsuits-and-the-court-process/evidentiary-standards-and-burdens-of-proof/ (describing preponderance of the evidence as proof "that a particular fact or event was more likely than not to have occurred" and clear and convincing evidence as proof "that a particular fact is substantially more likely than not to be true.").

commenters' arguments in favor of the preponderance of the evidence standard, in favor of the clear and convincing evidence standard, and in favor of other standards of evidence. For reasons described above, the Department has determined that the approach to the standard of evidence contained in § 106.45(b)(1)(vii) and § 106.45(b)(7)(i) of the final regulations represents the most effective way of legally obligating recipients to select a standard of evidence for use in resolving formal complaints of sexual harassment under Title IX to ensure a fair, reliable grievance process without unnecessarily mandating that a recipient select one standard over the other.

As discussed above, and after careful consideration of many comments we found to be persuasive, the Department removed the NPRM's requirement that recipients may only apply the preponderance of the evidence standard to reach determinations regarding responsibility in Title IX proceedings if they use that same standard to address non-sexual misconduct cases that carry the same maximum punishment. However, the final regulations retain the NPRM's requirement that recipients use the same standard of evidence to reach determinations of responsibility in Title IX proceedings against students as they do for Title IX proceedings against employees including faculty, for reasons discussed above. With respect to the questions raised by one commenter as to the scope of this requirement, the Department wishes to clarify that the same standard of evidence must apply to each formal complaint alleging sexual harassment against employees as it does for each formal complaint alleging sexual harassment against students. In short, under the final regulations the same standard of evidence will apply to all formal complaints of sexual harassment under Title IX responded to by a particular recipient, whether the respondent is a student or employee.

Changes: The Department has revised § 106.45(b)(7)(i) of the final regulations such that recipients have the choice of either applying the preponderance of the evidence standard or the

clear and convincing evidence standard, and § 106.45(b)(1)(vii) requires a recipient to make that choice applicable to all formal complaints of sexual harassment, including those against employees and faculty. We have removed the limitation contained in the NPRM that would have permitted recipients to use the preponderance of the evidence standard only if they used that standard for non-sexual misconduct that has the same maximum disciplinary sanction.

Section 106.45(b)(7)(ii) Written Determination Regarding Responsibility Must Include Certain Details

Comments: A number of commenters expressed support for § 106.45(b)(7) because it requires the decision-maker to provide a written determination regarding responsibility. Commenters stated that putting decisions in writing will prevent confusion as to what was decided and provide a written record for appeals or other administrative needs, or judicial review. Commenters asserted that a written determination will protect due process and prevent schools from inserting bias into proceedings. Commenters expressed support for § 106.45(b)(7) due to concern that institutions were "railroading" respondents.

One commenter argued that § 106.45(b)(7) is a reasonable means of reducing sex discrimination because requiring decision-makers to give reasons for their decisions has been shown to enhance the thoroughness of decision making and to improve the willingness of decision-makers to engage in self-critical thinking,[1481] a concept well known to the legal

[1481] Commenters cited: Itamar Simonson & Peter Nye, *The Effect of Accountability on Susceptibility to Decision Errors*, 51 ORGANIZATIONAL BEHAVIOR & HUM. DECISION PROCESSES 416, 430-32, 437 (1992); Itamar Simonson & Barry M. Staw, *Deescalation Strategies: A Comparison of Techniques for Reducing Commitment to Losing Courses of Action*, 77 J. APPLIED PSYCHOL. 419, 422-25 (1992); Diederik A. Stapel *et al.*, *The Impact of Accuracy Motivation on Interpretation, Comparison, and Correction Processes: Accuracy x Knowledge Accessibility Effects*, 74 JOURNAL OF PERSONALITY & SOCIAL PSYCHOL. 878, 891 (1998); Erik P. Thompson *et al.*, *Accuracy Motivation Attenuates Covert Priming: The Systematic Reprocessing of Social Information*, 66 JOURNAL OF PERSONALITY & SOCIAL PSYCHOL. 474, 484 (1994).

system.[1482] The commenter further argued that requiring reason-giving tends to foster independent decision making and reduce overconfidence in decision making,[1483] so that individual decision-makers become less susceptible to group pressure,[1484] all of which contribute to rendering more accurate decisions.

A few commenters urged the Department to also require that the written determination must include or describe contradictory facts, exculpatory evidence, all evidence presented at the hearing, and/or credibility assessments. One commenter argued that § 106.45(b)(7)(ii)(C) should be revised to require findings of fact *sufficient to allow the parties and any appellate reviewer to understand the facts tending to support or refute the determination*.

Some commenters argued that requiring a written determination is too burdensome, especially for smaller institutions and for elementary and secondary schools.

Discussion: The Department believes § 106.45(b)(7) serves the important function of ensuring that both parties know the reasons for the outcome of a Title IX grievance process, and agrees that requiring decision-makers to give written reasoning helps ensure independent judgment and decision making free from bias. Section 106.45(b)(7)(i) requires recipients to issue a written determination regarding responsibility to foster reliability and thoroughness, and to ensure that a recipient's findings are adequately explained.

[1482] Commenters cited: Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 657-58 (1995) ("[W]hen institutional designers have grounds for believing that decisions will systematically be the product of bias, self-interest, insufficient reflection, or simply excess haste, requiring decision-makers to give reasons may counteract some of these tendencies.").

[1483] Commenters cited: Karen Siegel-Jacobs & J. Frank Yates, *Effects of Procedural and Outcome Accountability on Judgment Quality*, 65 ORGANIZATIONAL BEHAVIOR & HUM. DECISION PROCESSES 1, 15 (1996); Philip E. Tetlock & Jae Il Kim, *Accountability and Judgment Processes in a Personality Prediction Task*, 52 JOURNAL OF PERSONALITY & SOCIAL PSYCHOL. 700, 706-07 (1987).

[1484] Commenters cited: Marceline B.R. Kroon *et al.*, *Managing Group Decision Making Processes: Individual Versus Collective Accountability and Groupthink*, 2 INT'L J. OF CONFLICT MGMT. 91, 99 (1991).

Section 106.45(b)(7)(ii) mandates that the written determination must include certain key elements so that the parties have a thorough understanding of the investigative process and information considered by the recipient in reaching conclusions. Section 106.45(b)(7)(iii) requires that this written determination be provided to the parties simultaneously. The substance of these provisions generally tracks language in the Clery Act regulations at 34 CFR 668.46(k)(2)(v) and (k)(3)(iv) and reflect concepts familiar to institutions of higher education that receive Federal student aid under Title IV of the Higher Education Act of 1965, as amended. The Department believes that the benefits of these provisions, including promoting transparency and equal treatment of the parties, are also important in the elementary and secondary school context, even though elementary and secondary schools are not subject to the Clery Act. Furthermore, the provisions in § 106.45(b)(7) are consistent with Department guidance, which has always been applicable to both postsecondary institutions and elementary and secondary schools. For example, the 2001 Guidance stated that an equitable grievance procedure should include providing notice to the parties of the outcome of a sexual harassment complaint,[1485] and the withdrawn 2011 Dear Colleague Letter stated that notice of the outcome should be in writing and sent to both parties concurrently.[1486]

Requiring recipients to describe, in writing, conclusions (and reasons for those conclusions) will help prevent confusion about how and why a recipient reaches determinations regarding responsibility for Title IX sexual harassment. We agree that requiring a written

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[1485] 2001 Guidance at 20 (prompt and equitable grievance procedures should provide for "Notice to the parties of the outcome of the complaint").

[1486] 2011 Dear Colleague Letter at 13 ("Both parties must be notified, in writing, about the outcome of both the complaint and any appeal, i.e., whether harassment was found to have occurred. OCR recommends that schools provide the written determination of the final outcome to the complainant and the alleged perpetrator concurrently.").

determination (sent simultaneously to both parties) is an important due process protection for complainants and respondents, ensuring that both parties have relevant information about the resolution of allegations of Title IX sexual harassment. Section 106.45(b)(7) also helps prevent injection of bias into Title IX sexual harassment grievance processes, by requiring transparent descriptions of the steps taken in an investigation and explanations of the reasons why objective evaluation of the evidence supports findings of facts and conclusions based on those facts. Because the Department believes that § 106.45(b)(7) is important to ensure that recipients consistently, transparently, fairly, and accurately respond to Title IX sexual harassment, the Department declines to exempt smaller institutions, or elementary and secondary schools, from the requirements of this provision. The Department believes that the requirements of this provision are reasonable, and that the burden of complying with this provision is outweighed by the benefit of a consistent, transparent Title IX grievance process for students in elementary and secondary schools, as well as students at postsecondary institutions, irrespective of the size of the institution's student body.

In order to ensure that the written determination resolves allegations that a respondent committed sexual harassment as defined in § 106.30, and to avoid confusion caused by the NPRM's reference in § 106.45(b)(7)(ii)(A) to a recipient's code of conduct, we have revised that provision to reference identification of "allegations potentially constituting sexual harassment as defined in § 106.30" instead of "identification of sections of the recipient's code of conduct alleged to have been violated." Recipients retain discretion to also refer in the written determination to any provision of the recipient's own code of conduct that prohibits conduct meeting the § 106.30 definition of sexual harassment; however, this revision to § 106.45(b)(7)(ii)(A) helps ensure that these final regulations are understood to apply to a

recipient's response to Title IX sexual harassment, and not to apply to a recipient's response to non-Title IX types of misconduct.

We decline to expressly require the written determination to address evaluation of contradictory facts, exculpatory evidence, "all evidence" presented at a hearing, or how credibility assessments were reached, because the decision-maker is obligated to objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence (and to avoid credibility inferences based on a person's status as a complainant, respondent, or witness), under § 106.45(b)(1)(ii). It is precisely this objective evaluation that provides the basis for the decision-maker's "rationale" for "the result" of each allegation, which must be described in the written determination under § 106.45(b)(7)(ii)(E). The Department believes that § 106.45(b)(7), as revised in these final regulations, provides for a written determination adequate for the purposes of an appeal or judicial proceeding reviewing the determination regarding responsibility. We therefore decline to revise the language of this provision to specify that findings of fact must be described sufficiently to allow the parties and any appellate reviewer to understand the facts supporting or refuting the determination.

Changes: We have revised § 106.45(b)(7)(ii)(A) to reference identification of allegations potentially constituting sexual harassment as defined in § 106.30, instead of referencing identification of sections of the recipient's code of conduct alleged to have been violated.

Comments: One commenter argued that requiring a written determination that describes the procedural steps of the investigation (i.e., § 106.45(b)(7)(ii)(B) requiring inclusion of notifications to parties, interviews of parties and witnesses, site visits, methods used to gather evidence) has no equivalent within criminal or civil procedure. Commenters argued that this provision would be unreasonably burdensome for recipients, especially for smaller institutions

and for elementary and secondary schools. Some commenters asserted that the only procedural detail that should be included in the written determination is the investigation timeline. Other commenters asserted that information about the investigation should be included in the investigative report, but not in the written determination.

One commenter argued that proposed § 106.45(b)(7)(ii)(C)-(D), which required that the written determination include findings of fact supporting the determination and "conclusions regarding the application of the recipient's code of conduct to the facts," would be contrary to the Administrative Procedure Act ("APA"), 5 U.S.C. 701 *et seq.*, because the Department is not authorized to impose requirements on a recipient based whether the recipient's own code of conduct has been violated. The commenter argued that the Department's authority is strictly restricted to the application of Title IX to the facts and does not extend to application of the recipient's code of conduct to the facts.

One commenter expressed concern that the requirements related to the written determination are an example of how the proposed rules would conflate a sexual harassment investigation with disciplinary proceedings for behavioral violations. The commenter asserted that in the elementary and secondary school context, a sexual harassment investigation is designed to determine whether or not a student experienced sexual harassment and what remedies are necessary to stop the harassment, eliminate a hostile environment, prevent the harassment from reoccurring, and address any effects of the hostile environment. The commenter furthered argued that determinations of an individual student's culpability for sexual harassment should be handled under a school district's code of conduct and State student discipline due process laws.

A number of commenters expressed concerns about including "remedies" in the written determination, under proposed § 106.45(b)(7)(ii)(E). One commenter requested a definition of the term "remedies." One commenter argued that this proposed provision's reference to including "any sanctions the recipient imposes on the respondent, and any remedies provided by the recipient to the complainant" is consistent with FERPA. Other commenters asserted that disclosing a complainant's remedies to the respondent may violate FERPA, and would violate the complainant's right to privacy regardless of whether FERPA would allow the disclosure. Commenters asserted that including remedies in the written determination would endanger safety on campus, deter students from seeking help, deter faculty and staff from participating in the process, and subject victims to further harassment from respondents. With respect to describing sanctions and remedies, some commenters suggested adding a FERPA compliance clause to this provision, and other commenters suggested modifying this provision to mirror the Clery Act.

Commenters asserted that the Department should require the written determination to contain assurances that the school will take steps to prevent recurrence of harassment, correct the discriminatory effects of harassment, and prevent any retaliation against the complainant. Commenters argued that the effects of harassment can impact not only the complainant and respondent but also other members of the recipient's community; because of this, commenters asserted, the final regulations should specify that a school's obligation to respond following a determination of responsibility is not time-limited, and should require the school to take steps to ensure that remedial efforts are successful and to take further remedial steps if initial remedial efforts are not successful.

One commenter suggested that the Department should require recipients to make a transcript or recording of all proceedings, and that the Department should require recipients to

provide the transcript or recording to the parties along with the determination regarding responsibility, at least ten days prior to any appeal deadline.

Commenters suggested that the written determination should not be prepared by the recipient but, rather, should be prepared by the Department, the U.S. Department of Justice, or a local or State human rights commission under work-sharing agreements. Commenters suggested that the same arrangement should be used to conduct the entire investigation.

Discussion: The Department believes that the written determination must include certain key elements so that the parties have a complete understanding of the process and information considered by the recipient to reach its decision and that as revised, § 106.45(b)(7)(ii) appropriately and reasonably prescribes what a determination regarding responsibility must include. Such key information includes: identification of the allegations alleged to constitute sexual harassment as defined in § 106.30; the procedural steps taken from receipt of the formal complaint through the determination regarding responsibility; findings of fact supporting the determination; conclusions regarding the application of the recipient's code of conduct to the facts of the conduct allegedly constituting Title IX sexual harassment; a determination regarding responsibility for each allegation and the decision-maker's rationale for the result; any disciplinary sanctions the recipient imposes on the respondent and whether the recipient will provide remedies to the complainant; and information regarding the appeals process and the recipient's procedures and permissible bases for the complainant and respondent to appeal. These requirements promote transparency and consistency so that both parties have a thorough understanding of how a complainant's allegations of Title IX sexual harassment have been resolved. We believe these requirements are reasonable, and that the cost or burden associated with compliance with this provision is outweighed by the benefit of promoting a consistent,

transparent Title IX grievance process, including in elementary and secondary schools, and in institutions of a smaller size.

The Department acknowledges a commenter's point that a requirement to prepare a written determination that details steps of the investigation has no equivalent within criminal or civil procedure. However, in a criminal or civil proceeding, the criminal defendant or the civil litigation parties would likely have access to the same information through a combination of discovery rules and the ability to compel witnesses to appear at trial. To avoid attempting to make educational institutions mimic courts of law, the final regulations refrain from imposing discovery rules or purporting to create subpoena powers to compel parties or witnesses to be interviewed or to testify, in a Title IX grievance process. However, the written determination detailing the steps of the recipient's investigation ensures that both parties in a Title IX grievance process understand the investigative process. This gives the parties equal opportunity to raise any procedural irregularities on appeal.[1487]

The Department disagrees with the suggestion by commenters that the Department should require the investigator's timeline to be included in the investigative report, and not in the written determination. The investigative report must fairly summarize relevant evidence, but § 106.45(b)(5)(vii) does not require that investigative report to describe the investigator's timeline. The procedural steps in the investigation will instead appear in the written determination regarding responsibility, so that both parties have a thorough understanding of the investigative process that led to the decision-maker's determination regarding responsibility.

[1487] Section 106.45(b)(8) (requiring recipients to offer both parties equal opportunity to appeal, on any of three bases, including that procedural irregularity affected the outcome of the matter).

The Department disagrees that requiring the written determination to include findings of fact supporting the determination and conclusions regarding application of the recipient's code of conduct to the facts runs contrary to the APA or otherwise exceeds the Department's regulatory authority. The Department recognizes that the Department's regulatory authority to enforce Title IX does not extend to purporting to enforce a recipient's own code of conduct. Nothing in these final regulations, including with respect to a recipient's issuance of a written determination regarding responsibility, purports to regulate a recipient's application of the recipient's own code of conduct. Instead, these final regulations, including the provisions in § 106.45(b)(7)(ii), govern how a recipient describes and explains its conclusions regarding Title IX sexual harassment in the recipient's education program or activity. The facts supporting the determination required to be included in the written determination under § 106.45(b)(7)(ii) are relevant to evaluating a recipient's response to Title IX sexual harassment regardless of the recipient's code of conduct. However, requiring the recipient to "match up" how the conduct that allegedly constituted Title IX sexual harassment also violates the recipient's code of conduct serves to notify the parties of any rules the recipient applies in its own code of conduct that, while not required by the § 106.45 grievance process, are permissible exercises of a recipient's discretion with respect to a Title IX grievance process. In response to commenters' concerns, we have revised § 106.45(b)(7)(ii)(A) to remove reference to identification of sections of the recipient's code of conduct alleged to have been violated, and replaced that language with a requirement to identify the allegations potentially constituting sexual harassment as defined in § 106.30. Similarly, as discussed in the "Written Notice of Allegations" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble, we have revised § 106.45(b)(2) to remove unnecessary references to the recipient's "code of conduct" that could have mistakenly implied

that alleged conduct under investigation in a § 106.45 grievance process is conduct that violates the recipient's code of conduct without also constituting sexual harassment as defined in § 106.30. With these revisions, we do not believe that the final regulations, including 106.45(b)(7)(ii), unduly or impermissibly reference a recipient's code of conduct. Rather, this provision gives the parties information about how the conduct under investigation and adjudication (i.e., Title IX sexual harassment) fits within a recipient's own unique code of conduct so that the parties are apprised of rules unique to the recipient's own code of conduct that affect the determination or consequences of a determination regarding responsibility. For example, the final regulations include an entry for "Consent" under § 106.30 that assures recipients that the Department will not require recipients to adopt any particular definition of consent. Parties will benefit from a written determination that, for example, explains how the recipient's own definition of "consent" has been applied in a particular case to an allegation of sexual assault. Thus, the written determination requirement to include how the conduct being adjudicated fits into the recipient's code of conduct does not imply that the Department is regulating conduct outside Title IX sexual harassment.

The Department disagrees that the final regulations, or the written determination provision in particular, conflate sexual harassment with student code of conduct violations. As explained above, the written determination requirements in § 106.45(b)(7)(ii) are intended to transparently disclose to the parties how the conduct under investigation and subject to adjudication (which conduct, by virtue of § 106.45(b)(2) must consist of allegations that meet the § 106.30 definition of sexual harassment) "matches up" against particular portions of a recipient's code of conduct, so that the parties understand how rules unique to a recipient's code of conduct affect the determination. As to conduct that does not meet the § 106.30 definition of

sexual harassment (or does not otherwise meet the jurisdictional conditions specified in § 106.44(a)), a formal complaint regarding such conduct must be dismissed for purposes of Title IX, though such conduct may be addressed by the recipient under its own code of conduct.[1488] Thus, the written determination provision in § 106.45(b)(7) only applies to Title IX sexual harassment, and does not govern a recipient's investigation or adjudication (or other response) to other misconduct under the recipient's own student conduct codes.

The Department does not believe a definition of the term "remedies" is necessary, but the final regulations add a statement in § 106.45(b)(1)(i) to lend clarity as to the nature of remedies. That provision now explains that remedies may include the same individualized services described in § 106.30 as "supportive measures" but that remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent. Beyond this, the Department believes recipients should have the flexibility to offer such remedies as they deem appropriate to the individual facts and circumstances of each case, bearing in mind that the purpose of remedies is to restore or preserve the complainant's equal access to education.

The Department acknowledges the privacy concerns expressed by commenters regarding the inclusion of remedies in the written determination of responsibility. In response to commenters' concerns about the privacy aspects of disclosing what remedies a victim receives and the resulting possible effects of deterring reporting or making complainants feel unsafe, and in an effort to align these Title IX regulations with what recipients are required to do under the Clery Act, the final regulations revise § 106.45(b)(7)(ii)(E) to state (emphasis added) that the written determination must include any disciplinary sanctions the recipient imposes on the

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[1488] Section 106.45(b)(3)(i).

respondent,[1489] "and *whether remedies will be provided* by the recipient to the complainant" to assure complainants that the nature of remedies provided does not appear in the written determination, while preserving the overall fairness of giving both parties identical copies of the written determination simultaneously. The final regulations also add § 106.45(b)(7)(iv) stating that the Title IX Coordinator is responsible for the effective implementation of remedies. These revisions to § 106.45(b)(7) help ensure that complainants know that where the final determination has indicated that remedies will be provided, the complainant can then communicate separately with the Title IX Coordinator to discuss what remedies are appropriately designed to preserve or restore the complainant's equal access to education. The Department believes that these changes address commenters' concerns about the privacy implications, safety concerns, and discouragement of students and employees from participating in the process, that were raised by the proposed rules' requirement that remedies granted to a victim must be stated and described in the written determination. For discussion of these final regulations' reference to remedies and disciplinary sanctions, and FERPA, see the "§106.6(e) FERPA" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble.

Commenters suggested requiring assurances that the school will take steps to prevent recurrence of harassment, correct its discriminatory effects, and prevent any retaliation against the complainant because the effects of harassment can go beyond the complainant and the respondent. The Department does not believe such assurances are necessary given the recipient's ongoing and continuous duty to not be deliberatively indifferent. The Department believes the

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[1489] We have also revised this provision to use the phrase "disciplinary sanctions" instead of "sanctions" as part of consistent use throughout the final regulations of "disciplinary sanctions" to avoid confusion over whether "sanctions" means something other than "disciplinary sanctions."

existing requirements under the final regulations are sufficient to promote prevention of recurrence of harassment and restore equal access to education. The Department believes the standard it has articulated, that a recipient's response to sexual harassment must not be clearly unreasonable in light of the known circumstances, sufficiently addresses further Title IX concerns for all students following a determination of responsibility. In response to concerns about retaliation, the Department has added a new section addressing the topic, § 106.71.

The Department is persuaded by the suggestion from commenters that the Department require recipients to make a transcript or recording of the live hearing. The Department believes that such a transcript is necessary to preserve the record for appeal and judicial review. This requirement is now contained in § 106.45(b)(6)(i), requiring a recipient to make an audiovisual recording, or a transcript, of any live hearing, but the Department notes that this recording or transcript is not required to be part of the written determination sent to the parties. Rather, under § 106.45(b)(6)(i) the parties have equal opportunity to inspect and review the recording or transcript of a live hearing, but that inspection and review right does not obligate the recipient to send the parties a copy of the recording or transcript.

The Department acknowledges the suggestions by commenters that the written determination should be prepared by the Department, the Department of Justice, or a local or State human rights commissions through work-sharing agreements. While the final regulations do not preclude a recipient from delegating the recipient's obligation to investigate and adjudicate formal complaints of sexual harassment to persons or entities not affiliated with the recipient (for example, under a regional center model), Title IX governs each recipient's obligation to appropriately respond to sexual harassment in the recipient's education program or activity, and the recipient remains responsible for ensuring that it responds to a formal complaint

by conducting a grievance process that complies with § 106.45, including issuing a written determination.

Changes: The Department revised this provision to harmonize the language with other provisions of the final regulations. Section 106.45(b)(7) has been revised to reflect changes in § 106.45(b)(8), which now makes appeals mandatory. The proposed version of § 106.45(b)(7)(i) included language reflecting that providing for appeals was optional. Section 106.45(b)(7)(ii) uses the phrase "disciplinary sanctions" instead of "sanctions." We have added § 106.45(b)(7)(iv) to clarify that the Title IX Coordinator is responsible for effective implementation of any remedies. This clarification reflects the mirror provision in the § 106.30 definition of "supportive measures" that made the Title IX Coordinator responsible for the effective implementation of supportive measures. We have also revised § 106.45(b)(7)(ii)(E) to require the written determination to state *whether* remedies will provided to the complainant.

Section 106.45(b)(7)(iii) Timing of When the Decision Becomes Final

Comments: One commenter expressed general support for § 106.45(b)(7)(iii). A few commenters expressed concerns regarding when the determination regarding responsibility becomes final and argued that the Department should permit recipients flexibility to impose sanctions on respondents upon the initial determination of responsibility and before the appeal process is complete. One commenter asserted that this approach is a best practice; appeals are meant to be limited to correcting rare error, and recipients can offer remote learning opportunities to respondents during the appeal period to preserve educational access.

One commenter argued that the proposed requirement that an appeal by either party "stays" the determination is also problematic because practice is not accepted in other elementary and secondary school proceedings. The commenter reasoned that a school for

example, would almost never stay a school's suspension or expulsion order pending an appeal and that if a school district determines after a thorough investigation that sexual harassment occurred, school officials need to implement remedies as soon as possible in addition to continuing any interim measures already in place.

One commenter expressed concern about the possibility that nearly all respondents found in violation of a school's code of conduct will automatically appeal to OCR to have their findings overturned since such an appeal is free and can only help their position. This will significantly increase the effort and expenditures of recipients when compared with the far less expensive task of responding to an OCR data request and addressing any issues through the administrative process.

One commenter suggested that the Department clarify the meaning of "final," because if "final" means the determination can be the basis for disciplinary measures then it could conflict with existing State timelines and appeal procedures for disciplinary decisions. One commenter expressed concern that making a "final determination" at the hearing could have the effect of limiting essential time to render informed decisions, thus unfairly altering the hearing process for all parties.

One commenter suggested that institutions should not be required to disclose the final outcome where doing so might upset the complainant.

Discussion: The Department appreciates the support for § 106.45(b)(7)(iii) regarding the timing of when determinations regarding responsibility become final. We acknowledge the concerns raised by some commenters regarding the effect that the timing of when a decision becomes final may have on recipients' ability to impose sanctions on respondents and remedies for complainants. The intent of this provision is to promote transparency for, and equal treatment of,

the parties, and to ensure that the recipient takes action on a determination that represents a reliable, accurate outcome. Importantly, the final regulations require recipients to offer both parties an appeals process to help mitigate risks such as procedural irregularity and investigator, decision-maker, or informal resolution facilitator bias. In order to ensure that both parties have the opportunity to benefit from their right to file an appeal, the written determination becomes "final" only after the time period to file an appeal has expired, or if a party does file an appeal, after the appeal decision has been sent to the parties. If the written determination became final prior to the outcome of an appeal, the right to have the case heard on appeal might be undermined. We also note that the § 106.44(c) emergency removal provision gives recipients some flexibility to remove respondents to protect the physical health or safety of students or employees. The Department notes that the final regulations also require recipients to designate reasonably prompt time frames for concluding appeals and leave recipients discretion over appeal procedures; thus, the appeals process would not necessarily have to be lengthy.

The Department disagrees with commenters who argued that the proposed requirement that an appeal by either party "stays" the determination is problematic. The Department acknowledges that the "judgment" in a recipient's determination regarding responsibility is more analogous to injunctive relief than monetary damages, and that civil court rules (e.g., the Federal Rules of Civil Procedure) do not provide for automatic stay of injunctions. However, the process for concluding a recipient's appeal (thereby finalizing the determination) differs from the process for an appeal in civil court. The recipient's appeal process is likely to conclude during a much shorter time period than an appeal from a court judgment, and furthermore, the final regulations obligate the recipient to offer supportive measures throughout the grievance process (unless failing to do so would not be clearly unreasonable) thus maintaining a status quo through the

grievance process that may continue a short time longer while an appeal is being resolved. The Department believes that in order for an appeal, by either party, to be fully effective, the recipient must wait to act on the determination regarding responsibility while maintaining the status quo between the parties through supportive measures designed to ensure equal access to education. Because a recipient's determination regarding responsibility in the nature of injunctive relief, if the recipient acts on a determination prior to resolving any appeal against that determination, the recipient likely will have taken steps requiring the parties to change their positions, in ways that cannot be easily reversed if the determination is changed due to the appeal. On the other hand, maintaining the status quo a short time while an appeal is resolved gives the parties, and the recipient, confidence that the determination regarding responsibility acted upon represents a factually accurate, reliable outcome.

The Department disagrees that all respondents will file an "appeal" with OCR, or that the rate at which respondents file complaints with OCR challenging the recipient's response to a formal complaint of sexual harassment will interfere with victims' abilities to receive remedies under a promptly-resolved grievance process. Any person, including any complainant or respondent, may file a complaint with OCR claiming that a recipient has not complied with the recipient's obligations under Title IX. However, filing a complaint with OCR does not "stay" or reverse the recipient's determination regarding responsibility. Moreover, the final regulations include § 106.44(b)(2) which gives deference to the recipient's determination regarding responsibility by assuring recipients that the Department will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient, or otherwise evidence of discrimination under Title IX by the recipient, solely because the Assistant Secretary would have reached a different determination based on an independent

weighing of the evidence. Thus, after a party (whether respondent or complainant) has taken advantage of the recipient's own appeal process, the Department believes it is unlikely that parties will rush to file with OCR, first because the recipient's appeal process will address procedural, new evidence, and bias or conflict of interest problems that affected the outcome, and second because the final regulations clarify for all parties that the Department will not reverse an outcome based solely on re-weighing the evidence.

We appreciate the opportunity to address commenters' questions regarding the meaning of a "final" determination. A "final" determination means the written determination containing the information required in § 106.45(b)(7), as modified by any appeal by the parties. With respect to potential conflict with State procedures, under the final regulations recipients have substantial discretion to designate time frames for concluding the grievance process, including appeals, thus lessening the likelihood that a recipient must violate a State law with respect to timely conclusion of a grievance process. In the event of actual conflict, our position is that the final regulations would have preemptive effect.[1490] Further, the Department appreciates the opportunity to clarify here that nothing in the final regulations requires final determinations to be made at the hearing; the commenter who expressed concern over this possibility appears to have misinterpreted the NPRM, as the proposed regulations did not provide for that outcome. Rather, the final regulations provide that a determination regarding responsibility cannot be reached without conducting a live hearing (for postsecondary institutions), or without first giving the parties an opportunity to submit written questions to parties and witnesses (for elementary and

[1490] *See* discussion under the "Section 106.6(h) Preemptive Effect" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble.

secondary schools, and other recipients who are not postsecondary institutions), and § 106.45(b)(7)(ii) states that the decision-maker "must issue a written determination regarding responsibility" but does not require that written determination to be issued *at the hearing*. The Department notes that the time frame for when the decision-maker should issue the written determination will be governed by the recipient's designated, reasonably prompt time frames under § 106.45(b)(1)(v).

The Department wishes to make clear that it is certainly not our intent to upset or traumatize complainants by requiring recipients to provide a written determination regarding responsibility to both complainants and respondents. To promote transparency, equal treatment of the parties, and to ensure that both parties' right to appeal may be meaningfully exercised, the final regulations require the decision-maker to simultaneously send a copy of the written determination to both parties. In response to commenters' concerns that including details about remedies for complainants in the written determination could pose unnecessary privacy, confidentiality, or safety problems that could negatively impact complainants, the final regulations revise this provision to require that the written determination state *whether* remedies will be provided to a complainant; the nature of such remedies can then be discussed separately between the complainant and the Title IX Coordinator. The final regulations also add § 106.45(b)(7)(iv) to state that the Title IX Coordinator is responsible for the effective implementation of remedies.

Changes: We have revised § 106.45(b)(7)(iii) such that responsibility determinations will become final either on the date the recipient simultaneously provides the written determination of the appeal result to the parties, or the date on which an appeal is no longer timely if neither party appeals. We have revised § 106.45(b)(7)(ii)(E) to state that while the written determination

must include "any sanctions the recipient imposes on the respondent," the written determination must only state "*whether* remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant." (Emphasis added.) We also add § 106.45(b)(7)(iv) to state that the Title IX Coordinator is responsible for the effective implementation of remedies.

[§ 106.45(b)(7)(iv) Title IX Coordinator responsible for effective implementation of remedies: addressed under § 106.45(b)(7)(iii)]

Transcript Notations

Comments: Some commenters expressed concern about harms to the education, career, well-being, and lives of students whose transcripts are marked as responsible for sexual misconduct. Several commenters referenced the notation as a "black mark" on a student's record and asserted that it is overly stigmatizing or punitive, and imposes permanent barriers to success in one's education and career. One commenter, for example, noted the damage of respondents having to disclose such records to apply to graduate school, to receive a professional license, or to potential employers, which risks being denied admission, disciplined, or suspended from one's professional practice, as well as a stain on one's personal relationships and reputation. Several commenters emphasized their concerns about such transcript notations being imposed without due process protections or using a low standard of evidence. Another commenter asserted that the records have no predictive value, would not prevent crimes even if shared, are often inaccurate or misleading (such as recording both an unwanted touch and rape as sexual misconduct), and create a high financial burden to clearing one's name through litigation that only well-off families can afford. Similarly, another commenter asserted that expunging

disciplinary records would significantly improve the lives of respondents while imposing minimal costs or administrative burdens on schools.

A number of commenters suggested mechanisms be added to the final regulations for removing sexual misconduct notations or for expunging such records so that the students involved could clear their names and reputations. Several commenters suggested expunging records after a certain time period, such as after a sanction has been served or after a certain number of years. Other commenters suggested limiting expungement to less egregious cases, such as in cases: not involving rape; with no criminal charges or findings; or for lower-level, noncriminal, or non-violent cases not involving weapons, evidence of force, incapacitation, multiple parties, or multiple witnesses. Several commenters suggested allowing schools to expunge records of students found responsible under withdrawn or disapproved OCR policies, which commenters stated could be accomplished if the Department would express to recipients that the Department will not penalize a recipient that chooses to re-open and reconsider closed cases.

One commenter suggested deeming a school in violation of Title IX for not removing a notation based on flawed prior proceedings or for refusing to provide continuing enrollment at an institution if a student does not proceed with a Title IX investigation and hearing that lacks fundamental safeguards; this commenter asserted that schools have used flawed procedures as a result of the Department's withdrawn 2011 Dear Colleague Letter. Another commenter proposed allowing transcript notations only in the most egregious cases and that used a clear and convincing evidence standard, allowed cross-examination, and gave the accused a chance to help select the trier of fact.

Some commenters provided other points of view. A few expressed concerns that individuals found responsible for sexual misconduct could transfer to other educational institutions that have no awareness of such misconduct. One such commenter proposed mandating that Title IX findings be shared between universities to help them avoid hiring sexual harassers. Another commenter, a State's attorney general, urged the Department not to restrict schools from being more aggressive in addressing sexual harassment, citing their State law requiring transcript notations for respondents who are suspended, dismissed, or who withdraw while under investigation for sexual assault.

Discussion: The Department understands the concerns that commenters raise about transcript notations, the value of these transcript notations, and the impact that these transcript notations may have on a respondent's future educational and career opportunities. The Department also appreciates the concerns of other commenters that individuals found responsible for sexual misconduct could transfer to other educational institutions that have no awareness of such misconduct. The Department intentionally did not take a position in the NPRM on transcript notations or the range of possible sanctions for a respondent who is found responsible for sexual harassment. The Department does not wish to dictate to recipients the sanctions that should be imposed when a respondent is found responsible for sexual harassment as each formal complaint of sexual harassment presents unique facts and circumstances. As previously stated, the Department believes that teachers and local school leaders with unique knowledge of the school climate and student body, are best positioned to make disciplinary decisions. If a respondent determines that a school is discriminating against the respondent based on sex with respect to a sanction such as a transcript notation, then a respondent may be able to challenge such a

discriminatory practice through a recipient's procedures under § 106.8(c) or through filing a complaint with OCR.

We do not wish to deem a school in violation for a school's conduct prior to the effective date of these final regulations, including conduct such as not removing a notation based on a prior proceeding that lacked due process or a school's past refusal to provide continuing enrollment at a postsecondary institution if a student does not proceed with a Title IX investigation and hearing that lacks fundamental safeguards. These final regulations will apply prospectively to give recipients adequate notice of the standards that apply to them. The Department shares some of the concerns that the commenter has about the 2011 Dear Colleague Letter, and the Department has withdrawn the 2011 Dear Colleague Letter.[1491]

The Department understands the commenter's concerns that respondents who have been found responsible for sexual harassment may transfer to another institution or be hired by another institution and declines to require that institutions share the result of a Title IX investigation or proceeding with other institutions. Requiring such disclosure of personally identifiable information from a student's education record outside the elementary or secondary school or postsecondary institution may require institutions to violate FERPA, and its implementing regulations. These final regulations are consistent with FERPA, and the Department does not wish to impose any requirements that violate FERPA.

As at least one commenter stated, some States have adopted laws concerning transcript notations in the context of sexual harassment, and the Department's approach does not present

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[1491] U.S. Dep't. of Education, Office for Civil Rights, *Dear Colleague Letter* (Sept. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf.

any conflict with these State laws. The Department's policy aligns with the holding of the Supreme Court in *Davis* that courts must not second guess recipients' disciplinary decisions.[1492] 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 equal educational access.[1493]

The Department also appreciates the concern that transcript notations may be imposed without adequate due process protections or a low standard of evidence. In response to these concerns, the Department revised § 106.44(a) to provide that an equitable response for a respondent means a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures, as defined in § 106.30. Although the Department will not interfere with the recipient's discretion in imposing an appropriate sanction, the Department requires that a respondent receive a grievance process with the fulsome due process protections in § 106.45 before any sanctions are imposed. Accordingly, a recipient will be held in violation of these regulations for failing to proceed with a Title IX investigation and hearing that lacks fundamental safeguards. These final regulations provide that a recipient may use either a preponderance of the evidence standard or a clear and convincing evidence standard and must apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty.[1494] If a recipient chooses to use a

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[1492] *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 646 (1999) (recognizing school officials' "comprehensive authority" to control student conduct subject to constitutional limitations) (internal citation omitted).
[1493] Section 106.45(b)(1)(i).
[1494] Section 106.45(b)(1)(vii); § 106.45(b)(7)(i).

preponderance of the evidence standard, then the recipient must carefully consider whether the sanction of a transcript notation is appropriate under Federal case law. As noted in § 106.6(d)(2), nothing in these final regulations deprives 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.

The Department also appreciates the comments regarding the expungement of records. The Department did not address expungement in its proposed regulations and declines to do so here. The concept of expungement in the context of an education program or activity appears novel. A recipient may choose to have an expungement process that removes a sanction or result of a hearing or appeal from a respondent's official academic or disciplinary record at the school or institution if a respondent is found not responsible after a hearing or an appeal. A recipient, however, must retain certain records of a sexual harassment investigation for at least seven years under § 106.45(b)(10), even if the recipient has a process for expungement. As explained earlier in this preamble, this seven-year period aligns with the record retention period in the Department's regulations,[1495] which is important as the definitions for sexual assault, dating violence, domestic violence, and stalking from the regulations implementing the Clery Act are part of the definition of sexual harassment in § 106.30. The Department will not dictate how recipients must treat these records after seven years because recipients may have other obligations that require them to preserve the records for a longer period of time such as the obligation to preserve records for litigation. Recipients, however, may choose to destroy records

[1495] 34 CFR 668.24(e)(2)(ii); *see* Dep't. of Education, Office of Postsecondary Education, *The Handbook for Campus Safety and Security Reporting* 9-11 (2016), https://www2.ed.gov/admins/lead/safety/handbook.pdf.

after this seven-year retention period. The Department notes that these final regulations, including the seven-year retention period, apply prospectively only.

Just as the Department is not dictating when and whether a recipient may destroy records after the seven-year retention period, the Department will not dictate when and whether recipients may destroy records of respondents found responsible for sexual harassment before these final regulations become effective. As long as recipients adhere to all other Federal retention requirements that the Department imposes, the Department will not interfere with a recipient's decision to expunge records of responsibility determinations made under prior OCR policies, irrespective of whether these policies were rescinded. Recipients, however, should be mindful of adhering to any retention requirements in State law and in their own policies. Recipients also must not treat or categorize records in a manner that results in discrimination based on sex under the Department's regulations. In other words, a recipient cannot treat people differently on the basis of their sex with respect to records pertaining to sexual harassment.

Changes: The Department revised § 106.44(a) to provide that an equitable response for a respondent means a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures, as defined in § 106.30.

Appeals

Section 106.45(b)(8) Appeals

Comments: A number of commenters supported equal appeal rights for both complainants and respondents because they believe it will bring campus procedures in line with the requirements of due process, First Amendment free speech rights, established case law, and existing legislation. Commenters also argued that equal appeal rights will reduce litigation by reducing the abuses of Title IX procedures and helping to ensure accuracy. Some commenters argued that

the proposed regulations promote fairness and push back on misguided efforts to micromanage the lives of students. Commenters stated that many institutions may not be equipped to decide whether to offer an appeal, or that institutions may have a conflict of interest, and that the proposed regulations balance the complexities of the modern education environment. Some commenters shared personal stories about how they have benefitted from attending institutions that offered appeal rights or, conversely, about how costly it was to overturn a denial of due process at institutions that did not offer appeal rights. Some commenters supported the NPRM because denying appeal rights to complainants would cause further trauma, while offering them the option to appeal will provide needed support. Other commenters argued that the NPRM promotes fair and impartial procedures that will protect justice and civil rights. Commenters supported giving both parties the opportunity to submit a written statement supporting or challenging the outcome.

Discussion: The Department appreciates the general support received from commenters regarding our approach to offering appeal rights to both parties in Title IX proceedings, and the urging of many commenters to require recipients to offer appeals. The Department is persuaded by commenters that recipient-level appeals should be mandatory and offered equally to both parties because this will make it more likely that recipients 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[.]"[1496] Although these interests may differ, each represents high-stakes, potentially life-altering consequences deserving of an accurate outcome.[1497] Accordingly, the Department has revised § 106.45(b)(8) to require recipients to offer both parties equal appeal rights on three bases: procedural irregularity, newly discovered evidence, and bias or conflict of interest. This provision further states that recipients may offer appeals on additional grounds but must do so equally for both parties. The revised provision also expressly permits both parties to appeal a recipient's dismissal of a formal complaint (or allegations therein), whether the dismissal was mandatory or discretionary under § 106.45(b)(3). We have also removed the limitation that precluded a complainant from appealing the severity of sanctions; the final regulations leave to a recipient's discretion whether severity or proportionality of sanctions is an appropriate basis for appeal, but any such appeal offered by a recipient must be offered equally to both parties.

Changes: We have revised § 106.45(b)(8) such that recipients must offer both parties an appeal from determinations regarding responsibility, or from a recipient's dismissal of a formal complaint or any allegations contained in a formal complaint. Recipients must offer appeals on at least the three following bases: (1) procedural irregularity that affected the outcome; (2) new evidence that was not reasonably available when the determination of responsibility was made that could affect the outcome; or (3) the Title IX Coordinator, investigator, or decision-maker had a general or specific conflict of interest or bias against the complainant or respondent that affected the outcome. Recipients may offer appeals equally to both parties on additional bases.

[1496] *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 400, 403 (6th Cir. 2017).
[1497] *Id.* at 404 (recognizing that the complainant "deserves a reliable, accurate outcome as much as" the respondent).

Complainants and respondents have equal appeal rights under the final regulations; we have removed the NPRM's limitation on complainants' right to appeal sanctions.

Comments: Some commenters argued that the proposed regulations do not reflect the high ideals we should have for education. Other commenters expressed concern about the application of § 106.45(b)(8), arguing that appeals procedures will not be applied equally across the country and that appeals should be made mandatory instead. Other commenters suggested that appeals should only be granted when parties can demonstrate specific rights that were violated by the proceedings. Other commenters suggested adding greater due process protections, such as barring appeals of any not guilty finding, in accordance with the double-jeopardy principle enshrined in the Constitution and applied in criminal proceedings. Commenters opposed § 106.45(b)(8) because many institutions already offer equal appeals to both parties.

Discussion: The Department is persuaded by commenters who asserted that appeal rights should be mandatory for Title IX proceedings. We have revised § 106.45(b)(8) to require recipients to offer both parties the opportunity to appeal a determination regarding responsibility on any of three bases, and equal opportunity to appeal a recipient's decision to dismiss a formal complaint or an allegation contained in a formal complaint.[1498] This will help to ensure that appeal rights are applied equally by recipients across the country, increasing the legitimacy of recipients' determinations regarding responsibility and ensuring that recipients have an opportunity to self-correct erroneous outcomes. The final regulations clearly specify which rights or interests could justify an opportunity to appeal; namely, where the outcome was affected by procedural

[1498] Section 106.45(b)(3)(i) (addressing mandatory dismissals); § 106.45(b)(3)(ii) (addressing discretionary dismissals).

irregularity, newly discovered evidence, or conflict of interest or bias in key personnel involved with the investigation and adjudication of the case. The Department also believes that giving recipients flexibility and discretion in crafting their Title IX processes is important, and we believe that recipients are in best position to know the unique values and interests of their educational communities. For this reason, § 106.45(b)(8) grants recipients discretion to offer appeals on additional grounds, so long as such additional bases for appeal are offered equally to both parties.

We respectfully disagree with the commenters who argued that the final regulations should prohibit appeals of not responsible determinations because of double jeopardy concerns. As discussed above, we believe that both respondents and complainants face potentially life-altering consequences from the outcomes of Title IX proceedings. As such, it is important to protect complainants' right to appeal as well as respondents' right to appeal. We believe the final regulations adequately protect both parties' interests in a fair, accurate outcome by requiring recipients to offer both parties the opportunity to appeal on at least three specific bases; requiring that appeal decision-makers be different than the Title IX Coordinator, investigator(s), or decision-maker(s) that reached the initial determination; requiring appeal decision-makers to satisfy the robust anti-bias and training requirements of § 106.45(b)(1)(iii); giving both parties a meaningful and equal opportunity to submit written statements supporting or challenging the outcome; and requiring written determinations explaining the appeal result and rationales to be given to both parties.

Changes: None.

Comments: Some commenters expressed concern that § 106.45(b)(8) was not drafted with the victim in mind. Commenters opposed restricting the complainant's right to appeal because equal

appeal rights are supported by experts, or because the complainant may have new evidence and restricting their appeal rights will put the integrity of the proceeding at risk. Commenters argued that appeals for only the respondent are not needed because false accusations are rare. These commenters also believed that approach proposed in the NPRM offers unequal appeal rights, which reinforces sex stereotypes, can be a form of sex bias, and can signal that sexual harassment is not treated seriously.

Some commenters opposed restricting the complainant's right to appeal because the Secretary spoke in favor of equal appeals. Other commenters argued that appeals are a guaranteed right for any individual who is participating in a federally-funded program and that complainants should not be restricted at all in their grounds for appeals. Commenters argued that a school's grievance procedure should be compared to an administrative process rather than a criminal process, and that appeals ensure an additional layer of review that is needed when fact-finders may not be sympathetic to claims that access to educational opportunities has been impaired. Some commenters expressed concern that the proposed appeal procedures would disrupt the balance of rights in campus procedures and, by treating sexual harassment uniquely, will cause sexual harassment claims to be received with skepticism.

Discussion: The Department has revised many provisions of the final regulations with the well-being of victims in mind, including revisions to § 106.45(b)(8) that require recipients to offer appeals equally to both parties and remove the restriction in the NPRM on complainants' ability to appeal a determination based on the severity of the sanctions imposed on the respondent. The Department is persuaded by many commenters' concerns that the right to appeals should be mandatory and equally available to both parties. We have revised § 106.45(b)(8) to provide equal appeal rights to both parties and include robust protections such as anti-bias and training

requirements for appeal decision-makers, strict separation of the appeal decision-makers from the individuals who investigated and adjudicated the underlying case to reinforce independence and neutrality, and retain the proposed provision's requirements allowing both parties equal opportunity to participate in the appeals process through submitting written statements, and requiring reasoned written decisions describing the appeal results to be provided to both parties. Under the final regulations, the appeal rights of complainants and respondents are identical. Appeals may be an important mechanism to reduce the possibility of unfairness or to correct potential errors made in the initial responsibility determination.

As a general principle, we agree with commenters that one of the goals of these regulations should be to preserve recipients' autonomy to craft procedures by which they address issues of sexual misconduct. However, the Department also believes that the requirements contained in the final regulations, including § 106.45(b)(8) on appeals, further the twin purposes of the Title IX statute. As the Supreme Court has stated, the objectives of Title IX are two-fold: first, to "avoid the use of Federal resources to support discriminatory practices" and second, to "provide individual citizens effective protection against those practices"[1499] The Department is persuaded by commenters who urged that recipient-level appeals are not only a best practice, but should be required equally for both parties, to provide additional, effective protections against a recipient reaching an unjust or inaccurate outcome in Title IX sexual harassment proceedings.

Changes: None.

Comments: Some commenters argued that granting the complainant a right to appeal will adversely affect the proceedings by empowering institutions to be advocates for complainants.

[1499] *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979).

Commenters asserted that institutions can offer supportive measures to complainants such that the benefits to the complainant of being able to appeal a finding of non-responsibility are not sufficient to outweigh the respondent's interest in not having to face the same accusation more than once. Commenters also argued that the Department has not offered enough guidance on how institutions can offer complainants appeals while preserving the presumption of innocence.

Discussion: We believe that granting appeal rights to complainants will not have the effect of turning recipients into advocates for complainants, and granting those same appeal rights to respondents does not turn recipients into advocates for respondents, either. The Department wishes to emphasize that supportive measures, such as mutual no-contact orders or academic course adjustments, remain available to help restore or preserve either party's equal access to education and that such measures may continue in place throughout an appeal process.[1500] We believe that maintaining a level of equal educational access while the recipient takes an additional step (assuming one or both parties decide to appeal) contributes to the benefit of requiring equal appeal rights, so that recipients may self-correct erroneous outcomes, better ensuring that the § 106.45 grievance process as a whole leads to reliable determinations regarding responsibility. As a result, we have revised § 106.45(b)(8) to require recipients to offer both parties equal appeal rights on bases of procedural irregularity, newly discovered evidence, or bias or conflict of interest; if such grounds exist, a party should be able to appeal and ask the recipient to revisit the outcome so that the recipient has the opportunity to correct the outcome, whether such an improvement in the accuracy of the outcome is for the complainant's benefit or

[1500] We reiterate that as to complainants, revised § 106.44(a) requires recipients to offer supportive measures to complainants, and the definition of supportive measures in § 106.30 states that supportive measures may be available for either party.

the respondent's benefit. The Department notes that under the final regulations, whether the parties can appeal based solely on the severity of sanctions is left to the recipient's discretion, though if the recipient allows appeals on that basis, both parties must have equal opportunity to appeal on that basis.

The Department does not believe that this approach to appeals constitutes double jeopardy unfair to respondents; the Department reiterates that the Title IX grievance process differs in purpose and procedure from a criminal proceeding, and the Department is not persuaded that a fair process under Title IX requires protection against "double jeopardy" the way that the U.S. Constitution grants such protection to criminal defendants. The Department acknowledges that respondents face a burden if a complainant appeals a determination of non-responsibility, but the Department believes it is important for recipients to revisit determinations that were reached via alleged procedural irregularity or bias or conflict of interest affecting the outcome, or where newly discovered evidence may affect the outcome. The Department notes that § 106.45(b)(1)(v) requires recipients to conclude the appeal process under designated, reasonably prompt time frames, and thus the end result is that the recipient's final determination in a Title IX grievance process is both accurate and reasonably prompt.

With respect to commenters' request that the Department offer additional guidance on how recipients may offer appeals to complainants while also respecting the presumption of non-responsibility contained in § 106.45(b)(1)(iv), we believe that nothing about § 106.45(b)(1)(iv), or the underlying principles justifying the presumption of non-responsibility, conflicts with the equal appeal rights that § 106.45(b)(8) of the final regulations offers to both complainants and respondents. As discussed in the "Section 106.45(b)(1)(iv) Presumption of Non-Responsibility" subsection of the "General Requirements for § Grievance Process" subsection of the "Section

106.45 Recipient's Response to Formal Complaints" section of this preamble, the presumption of non-responsibility is intended to ensure that recipients do not *treat* respondents as responsible prior to ultimate resolution of the grievance process. For the reasons discussed above, asking recipients to offer appeals where the outcome may have been affected by procedural irregularity, bias or conflict of interest, or where newly discovered evidence becomes available helps ensure that the final determination in each particular case is factually accurate, because a proceeding infected by such defects may have resulted in an erroneous outcome to the prejudice of the complainant or the respondent.

Changes: None.

Comments: Some commenters argued that unequal appeal rights will have an adverse effect on campus safety. Commenters cited the high rates of sexual assault and harassment and expressed fear about attending campus if these regulations take effect. Commenters expressed concern that victims will experience further trauma and not be able to receive an education if recipients cannot punish their attacker.

Discussion: In response to commenters' concerns that any inequality in the appeals provision could undermine the safety and security of recipients' educational communities, the Department has revised § 106.45(b)(8) to require recipients to offer appeals to both complainants and respondents on three specified bases, and if a recipient chooses to offer appeals on additional bases such appeals also must be offered equally to both parties. As discussed above, the Department believes that by offering the opportunity to appeal to both parties, recipients will be more likely to reach sound determinations, giving the parties greater confidence in the ultimate outcome and better ensuring that recipients appropriately respond to sexual harassment for the benefit of all students and employees in recipients' education programs and activities.

Changes: None.

Comments: Some commenters argued that the NPRM's appeal provisions conflicted with Federal law, including the Campus SAVE Act, because as proposed, § 106.45(b)(8) gave unequal appeal rights to the parties. Commenters also asserted that the Department mischaracterized case law in the NPRM's preamble to purportedly justify imposing unequal appeal rights on the parties. Some commenters contended the NPRM's appeal provisions conflicted with OCR's past enforcement practices.

Discussion: In response to well-taken arguments made by commenters, the Department is persuaded that the final regulations, unlike the NPRM, should require recipients to give equal appeal rights to the parties. That is why, as discussed above, the limitation contained in the NPRM that complainants could not appeal sanction decisions has been removed from the final regulations. We are leaving recipients with the discretion to permit both parties to appeal sanctions, provided that such an appeal must be offered equally to both parties. We therefore decline to address the contention raised by some commenters that the approach to appeal rights contained in the NPRM may have conflicted with Federal law such as the Campus SAVE Act, or with past Department enforcement practices.

The Department believes that by offering appeals to both complainants and respondents on an equal basis, recipients will be more likely to reach sound determinations, giving the parties greater confidence in the ultimate outcome. Both complainants and respondents have significant interests in the outcomes of these proceedings; the consequences of a particular determination of responsibility or sanction can be life-altering for both parties and thus each determination must be factually accurate. The stakes are simply too high in the context of sexual misconduct for appeals not to be part of the grievance process; as many commenters pointed out, a recipient-

level appeal gives the recipient an opportunity to ensure factual accuracy in determinations by permitting either party to bring to the recipient's attention improper factors that affected the initial determination. The Department is persuaded by commenters who urged the Department to recognize that an error or bias affecting the initial determination regarding responsibility is as likely to negatively affect a complainant as a respondent, and thus the equality of both parties' right to appeal is critical to the parties' sense of justice and confidence in the outcome. Furthermore, a procedural irregularity that affected the outcome, newly discovered evidence that may have affected the outcome, or bias or conflict of interest that affected the outcome, each represents an error that, if left uncorrected by the recipient, indicates that the determination was inaccurate, and thus that sexual harassment in the recipient's education program or activity has not been identified and appropriately addressed. Appeals enable recipients to correct errors in the adjudicative process, and may also reduce parties' reliance on OCR or private litigation to challenge the outcomes thereby yielding just outcomes more quickly than when a party must seek justice in a process outside the recipient's own Title IX grievance process. The Department has therefore revised § 106.45(b)(8) to ensure that both parties have equal right to appeal by asking recipients to reconsider determinations (using a different decision-maker from any person who served as the Title IX Coordinator, investigator, or decision-maker reaching the initial determination) where procedural irregularity, newly discovered evidence, or bias or conflict of interest affected the outcome.

The same reasoning applies to a recipient's dismissal of a formal complaint, or allegations therein; where a recipient's dismissal is in error (for example, the recipient incorrectly decided that the underlying alleged incident did not occur in the recipient's education program or activity leading to mandatory dismissal for Title IX purposes, or the recipient's

discretionary dismissal was based on incorrect facts), the parties should have the opportunity to challenge the recipient's dismissal decision so that the recipient may correct the error and avoid inaccurately dismissing a formal complaint that needs to be resolved in order to identify and remedy Title IX sexual harassment. Thus, we have also revised this provision to expressly allow both parties the equal right to appeal a recipient's mandatory or discretionary dismissals under § 106.45(b)(3)(i)-(ii).

Changes: None.

Comments: Some commenters opposed restricting complainants' rights to appeal because of the effect this provision would have on sanctions issued during the grievance process. Commenters argued that respondents are often given light sanctions and are permitted to remain at the institution, adversely impacting complainants' access to education. They contended that it is unfair to allow one party to appeal sanctions, but not the other party. Commenters asserted that complainants should have a say in the sanctions delivered to the respondents. Other commenters argued that complainants should be allowed to appeal sanctions because they will have a strong interest in doing so, while respondents should not be allowed to appeal sanctions because they would only do so out of self-interest.

Discussion: As discussed above, and in response to well-taken concerns raised by commenters, the Department has decided to remove the limitation contained in the NPRM that would have prevented complainants from appealing recipients' sanction decisions. Under § 106.45(b)(8) of the final regulations, recipients have the discretion to permit parties to appeal sanctions. The Department wishes to clarify that if recipients decide to offer appeal rights regarding sanctions, then both complainants and respondents must have the same rights to appeal. We agree with commenters that it would be unfair and run counter to the spirit of Title IX to permit

complainants to appeal sanction decisions but not permit respondents to appeal sanction decisions, and vice versa, and as such if a recipient allows appeals on the basis of severity of sanctions that appeal must be offered equally to both parties.

Changes: None.

Comments: Some commenters argued that the Department should require institutions to offer appeals. They argued that mandated appeals will ensure uniformity, reduce litigation, and will be necessary due to the decreased standard of liability. Other commenters expressed concern that offering complainants the right to appeal would violate due process. They argued that a false finding of responsibility will result in life-altering stigma and harm to respondents and that their interest in avoiding double jeopardy is significant. Some commenters suggested that if respondents are allowed to appeal, they should only be allowed to appeal for blatant errors. Some commenters argued that § 106.45(b)(8) was not clear that an appeals panel must be different from the original panel. Commenters suggested that the Department ensure a third-party appeals process to protect the fairness and independence of the decisions on appeal.

Discussion: The Department is persuaded by the concerns raised by commenters, and we note that § 106.45(b)(8) of the final regulations requires recipients to offer appeals equally to both parties. Further, we acknowledge that being found responsible for sexual misconduct under Title IX may carry a significant social stigma and life-altering consequences that could impact the respondent's future educational and economic opportunities. However, we also believe that complainants have significant, life-altering interests at stake, and that they "have a right, and are entitled to expect, that they may attend [school] without fear of sexual assault or harassment."[1501]

[1501] *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 403 (6th Cir. 2017).

For these reasons, along with the centrality of appeals as a mechanism for addressing potential unfairness or error in an adjudication, the Department believes that appeal rights should be offered equally to both complainants and respondents in recipients' Title IX proceedings. Further, we believe that appeal rights for respondents should not be limited to "blatant errors," as suggested by one commenter. Instead, the final regulations specify the bases upon which either party can appeal, including procedural irregularity or bias or conflict of interest in key personnel involved in the adjudicative process that affected the outcome, or newly discovered evidence that would affect the outcome. Moreover, we recognize the importance of granting recipients flexibility and discretion in designing and implementing their Title IX systems; the Department believes recipients are in best position to know the unique needs and values of their educational communities. For this reason, § 106.45(b)(8) permits recipients to offer appeals to both parties on additional bases in their discretion.

With respect to ensuring that appeal decision-makers are different individuals than investigators, Title IX Coordinators, or decision-makers who rendered the initial determination regarding responsibility, the Department agrees with commenters and therefore, § 106.45(b)(8)(iii) makes it clear that the appeal decision-maker cannot be the same person as the decision-maker below, or as the Title IX Coordinator or investigator in the case. This ensures that the recipient's appeal decision reviews the underlying case independently. The Department also notes that appeal decision-makers must be free from bias and conflicts of interest, and be trained to serve impartially, as required under § 106.45(b)(1)(iii).

We respectfully disagree with the commenters who argued that the final regulations should prohibit appeals of not responsible determinations because of double jeopardy concerns. As discussed above, we believe that both respondents and complainants face potentially life-

altering consequences from the outcomes of Title IX proceedings. As such, it is important to protect complainants' right to appeal as well as respondents' right to appeal.

The Department does not believe that a third party independent from the recipient would need to handle appeals to ensure impartiality and fairness. Rather, the robust anti-bias and training requirements of § 106.45(b)(1)(iii) that apply to appeal decision-makers, along with the requirement contained in § 106.45(b)(8)(iii) that the appeal decision-maker must be a different person than the Title IX Coordinator or any investigators or decision-makers that reached the initial determination of responsibility, will help to ensure that recipients' appeal processes are adequately independent and effective in curing possible unfairness or error.

Changes: None.

Informal Resolution

Section 106.45(b)(9) Informal Resolution

Supporting and Expanding Informal Resolution

Comments: Some commenters appreciated the option of informal resolution in the proposed rules for reasons that echoed one commenter's assertions as follows: "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."

A number of commenters urged the Department to make informal resolution the default option for addressing sexual misconduct. One commenter emphasized that sometimes alleged victims just want to be heard, that confidential settlement conferences should be required before any formal hearing process, and the final regulations should prohibit any settlement mediator from being called as a witness in subsequent proceedings. Another commenter argued that where the default option of mediation fails, the parties should then turn to the court system. One commenter suggested the Department place informal resolution near the start of the final regulations to encourage its use. Several commenters noted that informal resolution can empower victims and increase flexibility to address unique situations; they argued that informal resolution increases choice by allowing both parties to choose the option that is right for them and that the Department should not arbitrarily force them into a formal process. Commenters asserted that confidential conversations between the parties can be ideal where there is insufficient evidence to warrant investigation, or where there may be confusion or misunderstanding as to what exactly happened between the parties. One commenter asserted that it is inaccurate to call mediation "forced" or "unregulated" because the NPRM imposes important requirements on recipients' use of informal resolution and recipients remain free to prohibit it. A few commenters contended that informal resolution is more efficient than formal proceedings because it is faster and less costly and parties do not need to hire expensive attorneys.

Discussion: The Department appreciates the support from commenters regarding informal resolution and agrees that, subject to limitations, informal resolution may represent a beneficial

outcome for both parties superior to forcing the parties to complete a formal investigation and adjudication process as the only option once a formal complaint has raised allegations of sexual harassment. As discussed below, the Department has made several changes to the informal resolution provision in the final regulations to better address potential risks while retaining the benefits that such an option may hold for parties in particular cases.

As a general matter, informal or alternative dispute resolution processes have become increasingly available throughout the American legal system, in recognition of a variety of potential benefits (such as shortening the time frames governing litigation, greater party control over outcomes which may improve parties' sense of justice and increase compliance with outcomes, and yielding remedies more customized to the needs of unique situations) of alternative dispute resolution as a substitute for the adversarial process.[1502] Alternative dispute resolution presents the same potential benefits for sexual harassment cases as for other disputes.[1503]

[1502] *E.g.*, Marjorie A. Silver, *The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement*, 55 GEORGE WASH. L. REV. 482, 493 (1987) (noting that the legal system has "witnessed a massive movement towards the use of ADR procedures" to achieve fairness and justice while relieving overburdened court systems and providing access to resolutions for parties who find litigation cost-prohibitive, and noting that ADR gives greater autonomy to parties "by placing control over the dispute in their hands"); Developments, *The Paths of Civil Litigation: ADR*, 113 HARV. L. REV. 1851, 1851 (2000) (referring to ADR as a "virtual revolution" in the legal system); *id.* at 1852-53 ("In the 1970s, jurists began to voice concerns about the rising costs and increasing delays associated with litigation, and some envisioned cheaper, faster, less formal, and more effective dispute resolution in such alternatives as arbitration and mediation. As the use of ADR mechanisms grew, proponents viewed them as promising vehicles for an array of agendas. . . . In the 1980s, social scientists, game theorists, and other scholars showed how ADR mechanisms could facilitate settlement by dealing proactively with heuristic biases through the strategic imposition of a neutral third party. Meanwhile, process-oriented ADR advocates emphasized that problem-solving approaches would yield remedies better tailored to parties' unique needs and that the more direct involvement of disputants would encourage greater compliance with outcomes and help rebuild ruptured relationships.") (internal citations omitted).

[1503] *E.g.*, Barbara J. Gazeley, *Venus, Mars, and the Law: On Mediation of Sexual Harassment Cases*, 33 WILLAMETTE L. REV. 605 (1997) (notwithstanding "a perception" that sexual harassment, rape, and domestic

We acknowledge the suggestions made by some commenters that the Department go further to promote informal resolution as a means of addressing sexual misconduct under Title IX, such as by making informal resolution a default option or placing the informal resolution provisions near the start of the final regulations. As recognized by many commenters, the Department believes that informal resolution may empower complainants and respondents to address alleged sexual misconduct incidents through a process that is most appropriate for them, and that it is inaccurate to call informal resolution mechanisms such as mediation "forced" or "unregulated." Informal resolution also enhances recipient and party autonomy and flexibility to address unique situations. However, the Department also believes that the more formal grievance process under § 106.45 may be an appropriate mechanism to address sexual misconduct under Title IX in many circumstances because these provisions establish procedural safeguards providing a fair process for all parties, where disputed factual allegations must be resolved. Furthermore, the existence of a formal grievance process provides parties (where a recipient has chosen to offer informal resolution processes) with expanded choice in the form of alternatives that will best meet the needs of parties involved in a particular situation; the Department does not believe that requiring informal resolution to be attempted prior to engaging the formal grievance process results in the parties having genuine choice and control over the process. Because informal resolution, as opposed to formal investigation and adjudication, relies on the voluntary participation of both parties, the Department declines to require or allow informal resolution

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violence cases "uniformly involve a severe imbalance of power, rendering the woman incapable of participating effectively in mediation" many sexual harassment situations benefit from mediation where an "educative approach, which restores both parties' dignity, can be much more satisfying to all concerned"); Carrie A. Bond, *Note, Shattering the Myth: Mediating Sexual Harassment Disputes in the Workplace*, 65 FORDHAM L. REV. 2489 (1997) (advocating for greater use of mediation in the context of sexual harassment).

processes to be a "default." The "default" is that a formal complaint must be investigated and adjudicated by the recipient; within the parameters of § 106.45(b)(9) a recipient *may* choose to offer the parties an informal process that resolves the formal complaint without completing the investigation and adjudication, but such a result depends on whether the recipient determines that informal resolution may be appropriate and whether both parties voluntarily agree to attempt informal resolution. To clarify the intent of this provision, we have revised § 106.45(b)(9) to state that recipients may not offer informal resolution unless a formal complaint has been filed.

At the same time, the Department is persuaded by some commenters who expressed concern that it may be too difficult to ensure that mediation or other informal resolution is truly voluntary on the part of students who report being sexually harassed by a recipient's employee, due to the power differential and potential for undue influence or pressure exerted by an employee over a student. For this reason, the Department has revised § 106.45(b)(9)(iii) to state that recipients cannot offer an informal resolution process to resolve formal complaints alleging that an employee sexually harassed a student.

With respect to informal resolution facilitators potentially serving as witnesses in subsequent formal grievance processes, we leave this possibility open to recipients. If recipients were to accept such witnesses, then the Department would expect this possibility to be clearly disclosed to the parties as part of the § 106.45(b)(9)(i) requirement in the final regulations to provide a written notice disclosing any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.

Changes: The Department has made several changes to the informal resolution provision that we proposed in the NPRM. Individuals facilitating informal resolution must be free from conflicts of

interest, bias, and trained to serve impartially.[1504] Informal resolution processes must have reasonably prompt time frames.[1505] The initial written notice of allegations sent to both parties must include information about any informal resolution processes the recipient has chosen to make available.[1506] In the informal resolution provision itself, § 106.45(b)(9), the final regulations now provide that recipients are explicitly prohibited from requiring students or employees to waive their right to a formal § 106.45 grievance process as a condition of enrollment or employment or enjoyment of any other right; recipients are explicitly prohibited from requiring the parties to participate in an informal resolution process; a recipient may not offer informal resolution unless a formal complaint is filed; either party has the right to withdraw from informal resolution and resume a § 106.45 grievance process at any time before agreeing to a resolution; and recipients are categorically prohibited from offering or facilitating an informal resolution process to resolve allegations that an employee sexually harassed a student.

Terminology Clarifications

Comments: A number of commenters expressed concerns regarding the terminology surrounding informal resolution in the NPRM. Commenters stated that calling this process "informal" can cause recipients to underestimate the training, skill, and preparation necessary to successfully execute this resolution method, and it might also lead recipients to treat sexual misconduct claims with greater skepticism than other misconduct. Several commenters argued that mediation is inappropriate in sexual misconduct cases because it suggests both parties are at fault. Many commenters contended that mediation is categorically inappropriate in sexual assault cases, even

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[1504] Section 106.45(b)(1)(iii).
[1505] Section 106.45(b)(1)(v).
[1506] Section 106.45(b)(2)(i).

on a voluntary basis, because of the power differential between assailants and victims, the potential for re-traumatization by having to face the attacker again, the implication that survivors share partial responsibility for their own assault, the seriousness of the offense, and the inadequate punishment imposed on offenders. Other commenters, however, argued that informal resolution of disputed sexual harassment allegations often provides both parties with a preferable outcome to formal adjudication procedures. Some commenters suggested that the Department clearly define what "informal resolution" is in the final regulations and also explain the relationship and possible overlap between informal resolution and the "supportive measures" contemplated in the NPRM. One commenter asked whether the provisions requiring written notice be provided to "parties" refers only to complainants and respondents, or whether parents and/or legal guardians would receive notice instead where the complainant and/or respondent is a minor or legally incompetent person.

Discussion: It is not the intent of the Department in referring to resolution processes under § 106.45(b)(9) as "informal" to suggest that personnel who facilitate such processes need not have robust training and independence, or that recipients should take allegations of sexual harassment less seriously when reaching a resolution through such processes. Indeed, the Department acknowledges the concerns raised by some commenters regarding the training and independence of individuals who facilitate informal resolutions. In response to these well-taken comments, we have extended the anti-conflict of interest, anti-bias, and training requirements of § 106.45(b)(1)(iii) to these personnel in the final regulations. The same requirements that apply to Title IX Coordinators, investigators, and decision-makers now also apply to any individuals who facilitate informal resolution processes. Contrary to the claims made by some commenters that mediation is categorically inappropriate, the Department believes that recipients' good judgment

and common sense should be important elements of a response to sex discrimination under Title IX.

The Department believes an explicit definition of "informal resolution" in the final regulations is unnecessary. Informal resolution may encompass a broad range of conflict resolution strategies, including, but not limited to, arbitration, mediation, or restorative justice. Defining this concept may have the unintended effect of limiting parties' freedom to choose the resolution option that is best for them, and recipient flexibility to craft resolution processes that serve the unique educational needs of their communities.

With respect to the relationship between supportive measures and informal resolution, the Department wishes to clarify that supportive measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party and without constituting punitive or disciplinary actions including by protecting the safety of all parties and the recipient's educational environment or deterring sexual harassment. Unlike informal resolutions, which may result in disciplinary measures designed to punish the respondent, supportive measures must be non-disciplinary and non-punitive. 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. Informal resolutions may reach agreements between the parties, facilitated by the recipient, that include similar measures but that also could include disciplinary measures, while providing finality for both parties in terms of resolving allegations raised in a formal complaint of sexual harassment. Because an informal resolution *may* result in disciplinary or punitive measures agreed to by a

respondent, we have revised § 106.45(b)(9) to expressly state that a recipient may not offer informal resolution unless a formal complaint is filed. This ensures that the parties understand the allegations at issue and the right to have the allegations resolved through the formal grievance process, and the right to voluntarily consent to participate in informal resolution.

Furthermore, the Department wishes to clarify that where the complainant or respondent is a minor or legally incompetent person, then the party's parent or legal guardian will receive the required written notice under § 106.45(b)(9) of the final regulations. The final regulations address the rights of parents and guardians in § 106.6(g), which states that nothing in the final regulations may be read in derogation of the legal rights of a parent or guardian to act on behalf of an individual.

Changes: The Department has added § 106.6(g) to acknowledge the importance of the legal rights of parents or guardians to act on behalf of individuals exercising Title IX rights or involved in Title IX proceedings. We have also revised § 106.45(b)(9) to state that no recipient may require parties to participate in informal resolution, and a recipient may not offer informal resolution unless a formal complaint has been filed.

Written Notice Implications

Comments: One commenter expressed concern that the NPRM requires written notice of the allegations provided to both parties before informal resolution. At public institutions, written notice constitutes a public record; this would frustrate the utility of informal resolution as a confidential forum. The commenter argued that the Department should either withdraw this requirement or instead extend a privilege to records created in informal resolution.

Discussion: The Department acknowledges the confidentiality concerns raised by some commenters regarding informal resolution. Section 106.45(b)(9)(i) provides that the written

notice given to both parties before entering an informal resolution process must indicate what records would be maintained or could be shared in that process. Importantly, records that could potentially be kept confidential could include the written notice itself, which would not become a public record. The Department leaves it to the discretion of recipients to make these determinations. The Department believes this requirement effectively puts both parties on notice as to the confidentiality and privacy implications of participating in informal resolution. Recipients remain free to exercise their judgment in determining the confidentiality parameters of the informal resolution process they offer to parties.

Changes: None.

Voluntary Consent

Comments: Many commenters argued that the NPRM fails to ensure that the parties' consent to informal resolution is truly voluntary. Commenters argued that recipients may have perverse reputational and monetary incentives to downplay sexual misconduct claims and push parties to undergo informal resolution instead of lengthy, costly, complex, and public formal proceedings. Commenters noted these perverse incentives may be particularly strong where the respondent is a star athlete or child of a major donor. Some commenters suggested that the Department failed to consider social pressure and power disparities between parties, such as between children and teachers,[1507] and victims and domestic abusers,[1508] and their effect on the "choice" of informal

[1507] Commenters cited: Samantha Craven *et al.*, *Sexual grooming of children: Review of literature and theoretical considerations*, 12 JOURNAL OF SEXUAL AGGRESSION 3 (2006); Anne-Marie Mcalinden, *Setting 'Em Up': Personal, Familial and Institutional Grooming in the Sexual Abuse of Children*, 15 SOCIAL & LEGAL STUDIES 3 (2006).
[1508] Commenters cited: Karla Fischer *et al.*, *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 S. METHODIST UNIV. L. REV. 2117 (1993); Jacquelyn C. Campbell *et al.*, *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. OF PUB. HEALTH 1089 (2003).

resolution. Commenters argued that all sexual violence situations reflect power dynamics that make mediation or informal resolution not truly voluntary and pose a risk of further harm to victims.[1509] A few commenters noted that the prospect of retraumatizing cross-examination under the NPRM's grievance procedures means many parties have no real choice at all. One commenter asserted that the final regulations should require recipients to ensure the parties first confer with an advisor or counsel of their choice, and if none is available, then one provided by the recipient, so that consent to informal resolution is truly voluntary. Another commenter asserted that, to avoid recipient biases to promote their own interests, the final regulations should specify the circumstances in which recipients can recommend informal resolution. Commenters believed that mediation improperly shifts the burden of resolution to the parties, instead of school professionals. One commenter claimed that informal resolution could also violate a respondent's due process rights because recipients could impose sanctions without formally investigating the case.

Discussion: The Department appreciates the concerns expressed by many commenters regarding whether parties' consent to informal resolution is truly voluntary. 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, § 106.45(b)(9) requires recipients to inform the parties in writing of the allegations, the requirements of the informal resolution process, any consequences

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[1509] Commenters cited: Lois Presser & Cynthia A. Hamilton, *The Micropolitics of Victim-Offender Mediation*, 76 SOCIAL INQUIRY 316 (2006); Helen C. Whittle *et al.*, *A Comparison of Victim and Offender Perspectives of Grooming and Sexual Abuse*, 36 DEVIANT BEHAVIOR 7, 539 (2015); Mary P. Koss & Elise C. Lopez, *VAWA After the Party: Implementing Proposed Guidelines on Campus Sexual Assault Resolution*, 18 CUNY L. REV. 1 (2014); Rajib Chanda, *Mediating University Sexual Assault Cases*, 6 HARV. NEGOTIATION L. REV. 312 (2001); Mori Irvine, *Mediation: Is it Appropriate for Sexual Harassment Grievances*, 9 OHIO STATE J. ON DISPUTE RESOLUTION 1 (1993).

resulting from participating in the informal process, and to obtain both parties' voluntary and written consent to the informal resolution process. The Department acknowledges the concerns expressed by these commenters, and the final regulations go a step further than the NPRM by explicitly prohibiting recipients from requiring the parties to participate in an informal resolution process, and expressly forbidding recipients from making participation in informal resolution a condition of admission or employment, or enjoyment of any other right. We wish to emphasize that consent to informal resolution cannot be the product of coercion or undue influence because coercion or undue influence would contradict the final regulations' prohibitions against a recipient "requiring" parties to participate in informal resolution, obtaining the parties' "voluntary" consent, and/or conditioning "enjoyment of any other right" on participation in informal resolution. In addition, and as discussed above, the Department believes that by extending the robust training and impartiality requirements of § 106.45(b)(1)(iii) to individuals who facilitate informal resolutions, the perverse incentives and biases that may otherwise taint an informal resolution process will be effectively countered. The Department believes these requirements have the cumulative effect of ensuring that the parties' consent to informal resolution is truly voluntary, and that no party is involuntarily denied the right to have sexual harassment allegations resolved through the investigation and adjudication process provided for by the final regulations. Indeed, we believe the cumulative effect of these requirements will help to ensure that parties' consent to informal resolution is truly voluntary, and therefore we decline to mandate that the parties confer with an advisor before entering an informal resolution process, or to mandate that recipients provide the parties with advisors before entering an informal resolution process.

The Department shares commenters' concerns regarding grooming behaviors common in situations where an employee sexually harasses a student, which may result in any ostensibly "voluntary" choice of the student to engage in informal resolution actually being the product of undue influence of the employee. Because the option of informal resolution rests on the premise that no party is ever required to participate, and where each party voluntarily engages in informal resolution only because the party believes such a process may further the party's own wishes and desires, we have removed from the final regulations the option of informal resolution for any allegations that an employee sexually harassed a student. The final regulations leave recipients discretion to make informal resolution available as an option, or not, with respect to sexual harassment allegations other than when the formal complaint alleges that an employee sexually harassed a student.

Subject to the modifications made in these final regulations, described above, the Department believes that informal resolution empowers the parties by offering alternative conflict resolution systems that may serve their unique needs and provides greater flexibility to recipients in serving their educational communities. Thus, the Department concludes that permitting informal resolution is an appropriate policy development subject to the limitations and restrictions in the final regulations, notwithstanding the 2001 Guidance's position on mediation. The 2001 Guidance approved of informal resolution for sexual harassment (as opposed to sexual assault) "if the parties agree to do so," cautioned that it is inappropriate for a school to simply instruct parties to work out the problem between themselves, stated that "mediation will not be appropriate even on a voluntary basis" in cases of alleged sexual assault, and stated that the complainant must be notified of the right to end the informal process at any time and begin the

formal complaint process.[1510] Within the conditions, restrictions, and parameters the final regulations place on a recipient's facilitation of informal resolution, we believe that the concerns underlying the Department's prior position regarding mediation are ameliorated, while providing the benefits of informal resolution as an option where that option is deemed potentially effective by the recipient and all parties to the formal complaint. The Department notes that nothing in § 106.45(b)(9) requires an informal resolution process to involve the parties confronting each other or even being present in the same room; mediations are often conducted with the parties in separate rooms and the mediator conversing with each party separately. The final regulations ensure that only a person free from bias or conflict of interest, trained on how to serve impartially, will facilitate an informal resolution process. Further, we have revised § 106.45(b)(9) to expressly allow either party to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint. These provisions address the concerns about mediation addressed in the 2001 Guidance, without removing informal resolution as an option for cases where informal resolution may present the parties with a more desirable process and outcome than a formal investigation and adjudication.

We believe concerns about perverse institutional incentives to promote informal resolutions will be adequately addressed by the robust requirements contained in the final regulations. Many commenters have asserted that a recipient's student disciplinary process

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[1510] 2001 Guidance at 21 ("Grievance procedures may include informal mechanisms for resolving sexual harassment complaints to be used if the parties agree to do so. OCR has frequently advised schools, however, that it is not appropriate for a student who is complaining of harassment to be required to work out the problem directly with the individual alleged to be harassing him or her, and certainly not without appropriate involvement by the school (e.g., participation by a counselor, trained mediator, or, if appropriate, a teacher or administrator). In addition, the complainant must be notified of the right to end the informal process at any time and begin the formal stage of the complaint process. In some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis.").

traditionally has an educational rather than punitive purpose and thus object to the formal procedures prescribed under the § 106.45 grievance process. The Department believes that the option of informal resolution gives recipients an avenue for using the disciplinary process to educate and change behavior in a way that the adversarial formal grievance process might not, in situations where both parties voluntarily agree to participate. At the same time, the final regulations ensure that recipients cannot require the parties to use informal resolution, the parties must give voluntary consent to informal resolution, and the recipient cannot condition enrollment, employment, or enjoyment of any other right, on participation in informal resolution. Recipients also must not intimidate, threaten, or coerce any person for the purpose of interfering with a person's rights under Title IX,[1511] including the right to voluntarily decide whether or not to participate in informal resolution. These requirements counteract incentives a recipient may have to pressure parties to engage in informal resolution.

We disagree that mediation improperly shifts the burden of resolution to the parties instead of school professionals, and that informal resolution could violate a respondent's due process rights. Informal resolution under the final regulations is not possible without the informed, voluntary consent of all parties, and persons who facilitate informal resolution must be well-trained pursuant to § 106.45(b)(1)(iii). Recipients must explain the parameters and processes, consequences, and confidentiality implications of informal resolution to the parties. Furthermore, the final regulations respond to commenters' concerns by expressly providing that either party can withdraw from the informal resolution process at any time prior to reaching a

[1511] Section 106.71 prohibits retaliation: "No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part[.]"

final resolution and resume the formal grievance process. A benefit of informal resolution may be that parties have a greater sense of personal autonomy and control over how particular allegations are resolved; however, where that avenue is not desirable to either party, for any reason, the party is never required to participate in informal resolution.

Changes: None.

Safety Concerns Based on Confidentiality

Comments: A few commenters expressed concerns that the confidential nature of informal resolution could present safety risks to the survivor and broader campus community because informal resolutions such as mediation often happen behind closed doors and the broader school community and other students may not become aware of the risks posed by the perpetrator and so cannot take precautions.[1512] Further, some commenters believed that confidentiality requirements in resolution agreements could silence survivors who would otherwise raise awareness of the allegations and criticize the recipient's handling of the case.

Discussion: The Department appreciates the concerns raised by some commenters that the confidential nature of informal resolutions may mean that the broader educational community is unaware of the risks posed by a perpetrator; however, the final regulations impose robust disclosure requirements on recipients to ensure that parties are fully aware of the consequences of choosing informal resolution, including the records that will be maintained or that could or could not be shared, and the possibility of confidentiality requirements as a condition of entering

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[1512] Commenters cited: Jennie Kihnley, *Unraveling the Ivory Fabric: Institutional Obstacles to the Handling of Sexual Harassment Complaints*, 25 LAW & SOCIAL INQUIRY 69, 84 (2000); Laurie Rudman *et al.*, *Suffering in Silence: Procedural Justice versus Gender Socialization in University Sexual Harassment Grievance Procedures*, 17 BASIC & APPLIED SOCIAL PSYCHOL. 4 (1995); Stephanie Riger, *Gender Dilemmas in Sexual Harassment Policies and Procedures*, 46 AM. PSYCHOL. 5 (1991); Margaret B Drew, *It's Not Complicated: Containing Criminal Law's Influence on the Title IX Process*, 6 TENN. J. OF RACE, GENDER & SOCIAL JUSTICE 2 (2017).

a final agreement. We believe as a fundamental principle that parties and individual recipients are in the best position to determine the conflict resolution process that works for them; for example, a recipient may determine that confidentiality restrictions promote mutually beneficial resolutions between parties and encourage complainants to report,[1513] or may determine that the benefits of keeping informal resolution outcomes confidential are outweighed by the need for the educational community to have information about the number or type of sexual harassment incidents being resolved.[1514] The recipient's determination about the confidentiality of informal resolutions may be influenced by the model(s) of informal resolution a recipient chooses to offer; for example, a mediation model may result in a mutually agreed upon resolution to the situation without the respondent admitting responsibility, while a restorative justice model may reach a mutual resolution that involves the respondent admitting responsibility. The final regulations permit recipients to consider such aspects of informal resolution processes and decide to offer, or not offer, such processes, but require the recipient to inform the parties of the nature and consequences of any such informal resolution processes.

Changes: None.

[1513] Rajib Chanda, *Mediating University Sexual Assault Cases*, 6 HARV. NEGOTIATION L. REV. 265, 280 (2001) (acknowledging the argument that the confidentiality of mediation is a negative feature but asserting that mediation is still advantageous over litigation or arbitration of sexual harassment cases because empirical evidence suggests that parties not part of a dispute do not learn from the public resolution of the case, and suggesting that the "vast underreporting" of sexual harassment could be "possibly due to the public and adversarial nature of litigation and arbitration" such that the confidentiality of mediation could encourage more reporting).

[1514] *Id.* (acknowledging the argument that the confidentiality of mediation means that people other than the parties "may not even know about the existence of the dispute" and thus "may discount the incidence of sexual harassment, and thus underestimate the seriousness of the problem").

Consistency with Other Law and Practice

Comments: A number of commenters asserted that informal resolution under the NPRM would trigger conflict with other Federal and State law and is inconsistent with best practices. For example, some commenters stated that the Department failed to provide a reasoned explanation for allowing mediation, given that such a position was rejected by both the Bush and Obama Administrations for serious sexual misconduct cases. Several commenters suggested that informal resolutions such as mediation will chill reporting. Commenters urged the Department to preserve the approach to mediation contained in the 2001 Guidance. Commenters asserted that the Department of Justice has traditionally discouraged use of mediation in sexual and intimate partner violence cases and that some Federal programs prohibit grant recipients serving victims from engaging clients in mediation related to their abuse; commenters argued that all sexual violence cases but especially those involving children and domestic abusers, involve power differential dynamics that make mediation high-risk for the complainants.[1515] A few commenters argued that the NPRM's conflicts with State law regarding mediation could trigger enforcement problems, cause confusion for recipients and students, impose additional cost burdens, and prompt lengthy litigation. Commenters argued that since 2000, the American Bar Association (ABA) has recommended that mediation generally not be used in domestic violence cases. And one commenter asserted that the Department should not hold schools to lower standards than U.S. companies, many of which are withdrawing mandatory mediation, arbitration, and other alternative dispute resolution in their employee contracts. Some commenters asserted that

[1515] Commenters cited: Mary P. Koss *et al.*, *Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance*, 15 TRAUMA, VIOLENCE & ABUSE 3 (2014).

smaller recipients may not have adequate resources and staff to handle mediations and other informal resolutions.

Discussion: The Department acknowledges there may be differences between the approach to informal resolution contained in the final regulations and other Federal practices relating to informal resolution. As discussed above, the Department believes that the concerns underlying the position on mediation in the 2001 Guidance are adequately addressed by these final regulations, including modifications in response to commenters' concerns that allegations involving sexual harassment of a student by an employee pose a significant risk of ostensibly "voluntary" consent to mediation (or other informal resolution) being the product of undue pressure by the respondent on the complainant, and thus the final regulations preclude informal resolution as an option with respect to allegations that an employee sexually harassed a student. Because informal resolution is only an option, and is never required, under the final regulations, the Department does not believe that § 106.45(b)(9) presents conflict with other Federal or State laws or practices concerning resolution of sexual harassment allegations through mediation or other alternative dispute resolution processes.[1516]

The Department believes that an *option* of mediation may encourage reporting of sexual harassment incidents,[1517] but reiterates that the final regulations do not require any recipient to

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[1516] *See* discussion under the "Section 106.6(h) Preemptive Effect" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble.

[1517] Rajib Chanda, *Mediating University Sexual Assault Cases*, 6 HARV. NEGOTIATION L. REV. 265, 305 (2001) (a "mediation option for sexual assault victims addresses" each of the three main reasons why sexual assault is underreported – "that victims anticipate social stigmatization, perceive a difficulty in prosecution, and consider the effect on the offender" because mediation is not adversarial, avoids the need to "prove" charges, and gives the victim control over the range of penalties on the offender, all of which likely "encourage [victims] to report the incident").

offer informal resolution and preclude a party from being required to participate in informal resolution.

The Department agrees that informal resolution should not be mandatory, and the final regulations explicitly prohibit recipients from requiring students or employees to waive their right to a § 106.45 investigation and adjudication of formal complaints as a condition of enrollment or continuing enrollment, or employment or continuing employment with the recipient. Recipients cannot force individuals to undergo informal resolution under the final regulations. Furthermore, the Department reiterates that nothing in the final regulations requires recipients to offer an informal resolution process. Recipients remain free to craft or not craft an informal resolution process that serves their unique educational needs; therefore, smaller recipients that may not have adequate resources or staff to handle informal resolution need not offer such processes.

Changes: None.

Training Requirements

Comments: Many commenters contended that the final regulations should impose training and qualification requirements on mediators, facilitators, arbitrators, and other staff involved in informal resolution. For example, these commenters wanted the Department to impose the same training requirements on personnel involved in formal grievance procedures as on personnel handling informal resolution; ensure no conflicts of interest; and minimize the risk of inappropriate questioning during informal process and possible re-traumatization. One commenter suggested that the Department encourage recipients to enter into memoranda of understanding (MOUs) with third-party informal resolution providers.

Discussion: The Department appreciates the well-taken concerns raised by many commenters that the NPRM did not explicitly require informal resolution personnel to be appropriately trained and qualified. As a result, as discussed above, we have revised § 106.45(b)(1)(iii) of the final regulations to require recipients to ensure any individuals who facilitate an informal resolution process must receive training on the definition of sexual harassment contained in § 106.30 and the scope of the recipient's education program or activity; how to conduct informal resolution processes; and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, or bias. As such, the Department believes that it is unnecessary to encourage recipients to enter MOUs with third party informal resolution providers, though the Department notes that the final regulations permit recipients to outsource informal resolutions to third party providers.

Changes: The Department has revised § 106.45(b)(1)(iii) to include persons who facilitate an informal resolution process as persons who must be free from conflicts of interest and bias and receive the same training as that provision requires for Title IX Coordinators, investigators, and decision-makers.

Non-Binding Informal Resolution

Comments: Several commenters asserted that the Department should allow mediation but require recipients to allow parties to return to formal proceedings if they want to; otherwise respondents might have less incentive to mediate in good faith and reach a reasonable outcome. If mediation is binding, respondents may have no incentive to mediate in good faith and reach a reasonable outcome. A few commenters argued that schools must not offer a one-time choice of informal mediation versus formal investigation. Survivors need to be able to change their minds; their access to education can change over time. One commenter asserted that informal resolution

should only be binding where all parties voluntarily agree on a resolution and the agreement's terms are not breached. This commenter suggested that the final regulations should include a provision stating that any agreement reached in informal resolution or mediation must be signed by all parties, clearly specify the terms by which the case is resolved, establish consequences for breaching the agreement, detail how the parties can report breach of agreement, and define how the breach would be addressed.

Discussion: The Department acknowledges that the NPRM proposed to allow recipients to prohibit parties from leaving the informal resolution process and returning to a formal grievance process. As noted above, we have amended our approach to this issue such that § 106.45(b)(9) of the final regulations explicitly permits either party to withdraw from an informal resolution at any time before agreeing to a resolution and resume the grievance process under § 106.45. The Department expects informal resolution agreements to be treated as contracts; the parties remain free to negotiate the terms of the agreement and, once entered into, it may become binding according to its terms. The Department believes the cumulative effect of these provisions will help to ensure that informal resolutions such as mediation are conducted in good faith and that these processes may reach reasonable outcomes satisfactory to both parties. As such, the Department believes the alternative approaches offered by some commenters, such as requiring a new subsection provision that would cover breaches of informal resolution agreements, are unnecessary to address such concerns.

Changes: The Department has revised § 106.45(b)(9) to provide that any party may withdraw from informal resolution at any time prior to agreeing to a resolution, and resume the formal grievance process.

Survivor-Oriented Protections

Comments: A few commenters asserted the final regulations should include explicit protections for survivors in the informal resolution process. For example, the final regulations should prohibit in-person questioning during informal process but allow written submissions by the parties to avoid re-traumatization. Commenters suggested that the final regulations should categorically prohibit schools from requiring complainants to resolve the problem alone with the respondent. Some commenters stated that if mediation is an option, survivors should determine the format, such as having someone sit in on their behalf or requiring the parties to be in separate rooms. Otherwise, the process could become irresponsible and cause more harm than good. A few commenters asserted that the final regulations should require recipients to evaluate all potential risks before proposing informal resolution. One commenter suggested that § 106.44(c) regarding safety and risk analysis for emergency removals could be a model for informal resolutions, such that recipients should thoroughly investigate the situation and parties' relationship to ensure informal resolution is appropriate.

Discussion: The Department appreciates the suggestions offered by some commenters to include explicit survivor-oriented protections in the informal resolution provisions in § 106.45(b)(9) of the final regulations. The Department declines to make these changes because the changes would restrict recipients' flexibility and discretion in satisfying their Title IX obligations and meeting the needs of the members of their educational community. The Department believes that the parties are in the best position to make the right decision for themselves when choosing informal resolution, and that choice will be limited in scope based on what informal processes a recipient has deemed appropriate and has chosen to make available. As such, we believe that to require a safety and risk analysis before recipients may offer informal resolutions would be unnecessary,

though nothing in the final regulations precludes a recipient from following such a practice. Similarly, nothing in § 106.45(b)(9) precludes a recipient from categorically refusing to offer and facilitate an informal process that involves the parties directly interacting, from prohibiting a facilitator from directly questioning parties, or from requiring the parties to be in separate rooms.

Changes: None.

Restorative Justice

Comments: Many commenters opposed mediation but supported expanding access to, and Department funding of, restorative justice. These commenters raised the point that restorative justice requires the perpetrator to admit wrongdoing from the beginning and work to redress the harm caused, whereas mediation requires no admission of guilt, implicitly rests on the premise both parties are partially at fault for the situation and must meet in the middle, and often entails debate over the facts. Commenters cited studies suggesting restorative justice has resulted in reduced recidivism for offenders and better outcomes for survivors.[1518] One commenter stated that many recipients currently implement restorative justice, but only where the respondent is willing to accept responsibility, and stated that the process does not require face-to-face meeting between the parties, and the most severe misconduct is not eligible. One commenter was concerned that because § 106.45(b)(9) suggests informal processes can only be facilitated prior to reaching a determination regarding responsibility this can complicate or end up precluding

[1518] Commenters cited: Clare McGlynn *et al.*, *"I just wanted him to hear me": Sexual violence and the possibilities of restorative justice,* 39 JOURNAL OF L. & SOCIETY 2 (2012); Katherine Mangan, *Why More Colleges Are Trying Restorative Justice in Sex-Assault Cases*, CHRONICLE OF HIGHER EDUCATION (Sept. 17, 2018); Kerry Cardoza, *Students Push for Restorative Approaches to Campus Sexual Assault*, TRUTHOUT (Jun. 30, 2018); Howard Zehr, *The Little Book of Restorative Justice* (Good Books 2002); David R. Karp *et al.*, *Campus Prism: A Report On Promoting Restorative Initiatives For Sexual Misconduct On College Campuses*, SKIDMORE COLLEGE PROJECT ON RESTORATIVE JUSTICE (2016); Margo Kaplan, *Restorative Justice and Campus Sexual Misconduct*, 89 TEMP. L. REV. 701, 715 (2017).

restorative justice, because restorative justice requires admission of responsibility before participation.

Discussion: The Department appreciates commenters' support for restorative justice as a viable method of informal resolution, commenters' concerns regarding mediation, and the common differences between the two resolution processes.[1519] One of the underlying purposes of § 106.45(b)(9) is to recognize the importance of recipient autonomy and the freedom of parties to choose a resolution mechanism that best suits their needs. As such, nothing in § 106.45(b)(9) prohibits recipients from using restorative justice as an informal resolution process to address sexual misconduct incidents.

With respect to the implications of restorative justice and the recipient reaching a determination regarding responsibility, the Department acknowledges that generally a critical feature of restorative justice is that the respondent admits responsibility at the start of the process. However, this admission of responsibility does not necessarily mean the recipient has also reached that determination, and participation in restorative justice as a type of informal resolution must be a voluntary decision on the part of the respondent. Therefore, the language limiting the availability of an informal resolution process only to a time period before there is a determination of responsibility does not prevent a recipient from using the process of restorative justice under §106.45(b)(9), and a recipient has discretion under this provision to specify the

[1519] Mediation does not bar imposition of disciplinary sanctions. *E.g.,* Rajib Chanda, *Mediating University Sexual Assault Cases*, 6 HARV. NEGOTIATION L. REV. 265, 301 (2001) (defining mediation as "a process through which two or more disputing parties negotiate a voluntary settlement with the help of a 'third party' (the mediator) who typically has no stake in the outcome" and stressing that this "does not impose a 'win-win' requirement, nor does it bar penalties. A party can 'lose' or be penalized; mediation only requires that the loss or penalty is agreed to by both parties – in a sexual assault case, 'agreements . . . may include reconciliation, restitution for the victim, rehabilitation for whoever needs it, and the acceptance of responsibility by the offender.'") (internal citations omitted).

circumstances under which a respondent's admission of responsibility while participating in a restorative justice model would, or would not, be used in an adjudication if either party withdraws from the informal process and resumes the formal grievance process. Similarly, a recipient could use a restorative justice model *after* a determination of responsibility finds a respondent responsible; nothing in the final regulations dictates the form of disciplinary sanction a recipient may or must impose on a respondent.

Changes: None.

Avoiding Formal Process

Comments: One commenter expressed concern that recipients could simply offer informal resolution and only informal resolution to get around the NPRM's formal process requirements. To address this, the commenter argued the final regulations should clearly state that recipients must implement a formal resolution process regardless of their choice to facilitate an informal resolution process.

Discussion: The Department acknowledges the concern that under the NPRM it may have appeared that recipients could avoid formal grievance procedures altogether by solely offering informal resolution. To address this concern, we have revised § 106.45(b)(9) to preclude recipients from requiring students or employees to waive their rights to a § 106.45 grievance process as a condition of enrollment or employment, or enjoyment of any other right, include a statement that a recipient may never require participation in informal resolution, and clarify that a recipient may not offer informal resolution unless a formal complaint is filed. As such, recipients must establish a grievance process that complies with § 106.45 to ensure that parties' Title IX rights are realized, and the parties may participate in informal resolution only *after* a formal complaint has been filed, ensuring that the parties are therefore aware of the allegations at

issue and the formal procedures for investigation and adjudication that will apply absent an informal resolution process.

Changes: The Department has revised § 106.45(b)(9) to preclude a recipient from requiring any party to waive the right to a formal grievance process as a condition of enrollment, employment, or enjoyment of any other right, that a recipient may never require participation in informal resolution, and that a recipient may not offer informal resolution unless a formal complaint is filed.

Electronic Disclosures

Comments: One commenter asserted that the Department should allow electronic disclosures and signatures to obtain parties' consent to informal resolution to enhance privacy and security of sensitive documents, and because written notice requirements are costly and unnecessary in 2019.

Discussion: The final regulations do not specify the method of delivery for written notices and disclosures required under the final regulations, including the method by which the recipient must obtain parties' voluntary written consent to informal resolution. The Department acknowledges the potential convenience, privacy, and security benefits of shifting from physical disclosures and signatures to electronic disclosures and signatures but leaves recipients with discretion as to the method of delivery of written notices under § 106.45(b)(9).

Changes: None.

Expulsion Through Informal Resolution

Comments: One commenter argued that expulsion is an inappropriate sanction for informal resolution, and the Department should prohibit schools from expelling students through informal resolution to ensure a fair process for all.

Discussion: The Department believes that the robust disclosure requirements of § 106.45(b)(9), the requirement that both parties provide voluntary written consent to informal resolution, and the explicit right of either party to withdraw from the informal resolution process at any time prior to agreeing to the resolution (which may or may not include expulsion of the respondent), will adequately protect the respondent's interest in a fair process before the sanction of expulsion is imposed. Accordingly, the Department believes that prohibiting recipients from using informal resolution where it results in expulsion is unnecessary; if expulsion is the sanction proposed as part of an informal resolution process, that result can only occur if both parties agree to the resolution. If a respondent, for example, does not believe that expulsion is appropriate then the respondent can withdraw from the informal resolution process and resume the formal grievance process under which the recipient must complete a fair investigation and adjudication, render a determination regarding responsibility, and only then decide on any disciplinary sanction.

Changes: None.

Clarification Requests

Comments: Several commenters raised questions regarding the informal resolution provisions of the NPRM. One commenter inquired as to whether a time frame could apply after which neither party could ask for an ongoing informal resolution process to be set aside and proceed with formal investigation and adjudication. One commenter raised concerns regarding recipients' legal liability if the informal resolution process included a respondent's acknowledgement of a policy violation, but the respondent was allowed to remain on campus and violated that same policy again. One commenter sought clarification as to whether informal resolution could include a respondent taking responsibility and accepting disciplinary action without any meeting or process at all. One commenter raised questions as to what happens to ongoing informal

resolution process where more complaints are brought against the same respondent. One commenter asked whether parties can proceed with informal resolution even where the recipient believes it is inappropriate to resolve the case. One commenter inquired whether the NPRM's informal resolution provisions only apply where a formal complaint was filed against the respondent. And one commenter sought clarification as to whether schools remain free to prohibit informal resolutions under the NPRM.

Discussion: The Department appreciates the questions raised by commenters regarding § 106.45(b)(9). The final regulations clarify that either party can withdraw from the informal resolution process and resume the formal grievance process at any time prior to agreeing to a resolution. The Department appreciates the opportunity to clarify here that informal resolution compliant with § 106.45(b)(9) is a method of resolving allegations in a formal complaint of sexual harassment. Because a recipient *must* investigate and adjudicate allegations in a formal complaint, informal resolution stands as a potential alternative to completing the investigation and adjudication that the final regulations otherwise require. Under the final regulations, a recipient may not offer informal resolution unless a formal complaint has been filed.

With respect to recipients' potential legal liability where the respondent acknowledges commission of Title IX sexual harassment (or other violation of recipient's policy) during an informal resolution process, yet the agreement reached allows the respondent to remain on campus and the respondent commits Title IX sexual harassment (or violates the recipient's policy) again, the Department believes that recipients should have the flexibility and discretion to determine under what circumstances respondents should be suspended or expelled from campus as a disciplinary sanction, whether that follows from an informal resolution or after a determination of responsibility under the formal grievance process. Recipients may take into

account legal obligations unrelated to Title IX, and relevant Title IX case law under which Federal courts have considered a recipient's duty not to be deliberately indifferent by exposing potential victims to repeat misconduct of a respondent, when considering what sanctions to impose against a particular respondent. The Department declines to adopt a rule that would mandate suspension or expulsion as the only appropriate sanction following a determination of responsibility against a respondent; recipients deserve flexibility to design sanctions that best reflect the needs and values of the recipient's educational mission and community, and that most appropriately address the unique circumstances of each case. While Federal courts have found recipients to be deliberately indifferent where the recipient failed to take measures to avoid subjecting students to discrimination in light of known circumstances that included a respondent's prior sexual misconduct,[1520] courts have also emphasized that the deliberate indifference standard is not intended to imply that a school must suspend or expel every respondent found responsible for sexual harassment.[1521]

The Department reiterates that the final regulations do not require recipients to establish an informal resolution process. As such, if recipients believe it is inappropriate, undesirable, or

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[1520] *E.g.*, *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1296-97 (11th Cir. 2007).

[1521] *E.g.*, *id.* at 1297 (suspending or expelling offenders would have been one measure the university could have taken to avoid subjecting the plaintiff to discrimination in the form of further sexual misconduct perpetrated by the offenders, but other measures could also have been pursued by the university, such as removal of the offenders from their housing, or implementing a more protective sexual harassment policy to address future incidents); *Davis v. Monroe Cnty. Bd. of Educ.*, 546 U.S. 629, 648 (1999) ("We thus disagree with respondents' contention that, if Title IX provides a cause of action for student-on-student harassment, 'nothing short of expulsion of every student accused of misconduct involving sexual overtones would protect school systems from liability or damages.' See Brief for Respondents 16; see also [*Davis v. Monroe Cnty. Bd. of Educ.*,] 120 F.3d [1390 (11th Cir. 1997)] at 1402 (Tjoflat, J.) ('[A] school must immediately suspend or expel a student accused of sexual harassment'). Likewise, the dissent erroneously imagines that victims of peer harassment now have a Title IX right to make particular remedial demands. See post, at 34 (contemplating that victim could demand new desk assignment). In fact, as we have previously noted, courts should refrain from second guessing the disciplinary decisions made by school administrators.").

infeasible to use informal resolution to address sexual harassment under Title IX, then recipients may instead offer only the § 106.45 grievance process involving investigation and adjudication of formal complaints.

Changes: We have revised § 106.45(b)(9) to state that recipients may not offer informal resolution unless a formal complaint has been filed.

Recordkeeping

Section 106.45(b)(10) Recordkeeping and Directed Question 8

Comments: Many commenters expressed general support for the recordkeeping requirements in § 106.45(b)(10). Some commenters expressed that this provision would improve the overall transparency and integrity of the Title IX grievance process, discourage colleges and universities from utilizing training materials that employ sex stereotypes, and encourage recipients to adopt a high standard of training that provides investigators with proper trauma training. Many commenters, however, opposed any recordkeeping requirement, arguing that these requirements are not victim-centered or trauma-informed, that it is burdensome, time consuming, and will greatly slow the investigation process.

Some commenters stated that several institutions of higher educations' retention policies dictate keeping records for even longer periods of time than the three years suggested in the NPRM, and that lengthening the retention period in this provision would facilitate the parties' abilities to prepare cases and appeals.

Many commenters opposed the recordkeeping requirement. The commenters stated that a three-year time period fails to take into account that State law may require a longer period of retention, or that three years often does not cover a student's educational tenure at an institution. They also argued that this closely resembles requirements in the criminal justice system, which

will reduce the likelihood of an erroneous finding of guilt. Many of the commenters opposed the three-year period of retention of records as being too short. Because most students take more than three years to graduate from an institution of higher education, a student's record could be erased prior to their graduation. This could limit a recipient's ability to fully address sporadic but repeated sex discrimination that fails to garner the notice of recipients and is lost forever in records discarded from three years prior. Also, such circumstances could trigger the Title IX Coordinator's duty to file a formal complaint under proposed §106.44(b)(2). As the average graduation rate at an institution of higher education is six years, there may be times in which a respondent had a prior allegation in year one, and another allegation in year five. Commenters also asked whether the Title IX Coordinator is required to bring forward a complaint, and if so, what records would be used if this three-year period had passed?

Commenters asserted that freshmen college students are more likely to be involved in a sexual harassment proceeding than upperclassmen and thus by allowing schools to destroy these records before such a freshman student graduates, the recipient and the larger community might be prevented from learning from the earlier incident if the respondent reoffends.

Commenters argued that for students attending schools where they could be present for more than three years, such as a K-8 school, students could outlast the record of their harassment or assault, even within a single institution. Commenters argued that it makes little sense for a student sexually harassed in the third grade to enter the seventh grade, at the same institution, without a record of those past experiences; for example, the perpetrator might be placed in a survivor's class and the relevant teachers might not understand how to implement appropriate supportive measures. Commenters asserted that for elementary and secondary school students, these records are important when students transfer between schools or school districts, and that a

funding recipient must know when a new student at their school has been sexually assaulted or harassed in the past in order to provide appropriate services.

Other commenters opposed the three-year retention period on the grounds that it would impair the legal rights of minor children, and is inconsistent with State statutes of limitations, if evidence surrounding the student's harassment and their schools' response was unavailable because it was older than three years. Commenters stated that many States allow for minors to file civil suits only once they reach the age of majority, and that Federal and State laws consistently toll relevant statute of limitations periods until minors reach the age of majority and have the ability to vindicate their own rights, recognizing that they should not be punished for the failure of a guardian to file a claim on their behalf.

Several commenters stated that, in the case of employee-on-student harassment and "sexually predatory educators," this would allow employee records to be periodically cleansed of evidence of wrongdoing relatively quickly (three years), thereby putting future students at risk.

Other commenters stated that the three-year retention period is so short that it would limit complainants' ability to succeed in a Title IX lawsuit or OCR complaint because it would allow recipients to destroy relevant records before a party has had the opportunity to file a complaint or complete discovery, and therefore escape liability. Commenters recommended the provision be modified to state: "If litigation is pursued before the expiration of the three-year period, records should be kept until the final action is completed." Commenters argued that the Title IX statute does not contain a statute of limitations, so courts generally apply the statute of limitation of the most analogous State laws regarding retention periods or statutes, e.g., a State's civil rights statute or personal injury statute which varies from one to six years.

Many commenters found the three-year retention period confusing and argued that the Department provided no rationale for it. Commenters stated the retention period would conflict with State requirements, or other disciplinary actions (e.g., long-term suspension) that require longer document retention (e.g., in Washington State, districts must retain records related to discrimination complaints for six years.)

Several commenters, in asserting that the three-year retention period is too short, proposed alternate retention periods. One commenter stated, in order to avoid conflict with State requirements, the Department should modify § 106.45(b)(10) to read: "maintain for a minimum of three years or as required by State statute…" or "seven years, or 3 years after all parties graduate, whichever is sooner," or keeping records until one year after a student graduates. Some commenters stated the retention period should not be tied to the Clery Act's limitation period for reporting specific campus crimes in an annual security report. (Clery Act, 20 U.S.C. 1092(f); 34 CFR 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). Other commenters suggested the period be six years, or modified to state "files should be retained for the time the student is involved on campus and extended for a reasonable time period that considers the student may enroll for a graduate degree."

Many commenters proposed that records be kept for a minimum of seven years, instead of three, in keeping with best practices for student record-keeping as well as general accounting practices. Some commenters stated medical and tax records are required to be kept for seven years, so records of sexual abuse should be kept for the same amount of time, if not more. Furthermore, the commenters stated a three-year period would hinder the Department's efforts to ensure compliance, especially if a continuing violation is alleged or class-wide discrimination is

occurring over multiple years, and conflict with the Clery records retention requirement of seven years. Rather, commenters asserted, this section should mirror the Clery Act retention effective time period requirement of seven years to avoid confusion and the potential for documents to be misfiled and destroyed. Commenters recommended this provision be modified to state: "All records must be kept for at least three years following the generation of the last record associated with the report or complaint." Or: "…and maintain for a period of three years from the date the disciplinary proceedings, including any appeals, is completed." Commenters also requested to extend the time period by stating: "…or in the presence of an active investigation by OCR or other court system, until the investigation and determination is completed." Commenters noted that in the past, OCR complaints involving campus sexual assault have taken an average of more than four years to resolve.

Many commenters recommended that the retention period be linked to the parties' attendance in the recipient's program or activity. For example, commenters referenced the FERPA statute in recommending that the standard time period for retention be five to seven years after graduation or separation from an institution. Other commenters recommended the retention period be changed to three years or the point at which any parties are no longer in attendance at the institution, whichever comes later. Commenters stated that three-year retention period should be limited to student-complainants or student-respondents because if one or both parties are staff or faculty, their association with the recipient may extend for many years. Commenters recommended that § 106.45(b)(10) require the recipient to create, gather, and maintain the records for the duration of the students' time in school and then five years after the last student involved has graduated, and to define all important terms in a way that prevents loopholes and misconduct.

Other commenters recommended that recipients be allowed to determine the appropriate amount of time to retain records, in keeping with their own policies. Commenters requested that this requirement be made permissive for elementary and secondary school recipients – that such recipients "may" create records – and may only retain them for one year, stating that some primary or secondary schools are not required to maintain these kinds of records, and may not retain them in excess of one year.

Some commenters recommended that records be maintained for a minimum of ten years, arguing that, if not, the proposed rules would decrease the volume of relevant records, and in turn burden the Federal government because Federal background clearance investigations would become unreliable; agencies would inevitably make a favorable national security clearance or employment suitability determination without being aware of a candidate's past proven sexual assault if it occurred more than three years prior.

Some commenters stated that records should be kept based on the criminal justice systems' statutes of limitations, if not longer, to ensure consistency between institutional standards and State standards and ensuring parties can appropriately represent themselves. The three-year requirement could undermine criminal prosecutions related to the incidents at issue because it would permit recipients to discard vital records that could help the criminal prosecution of sexual assault or rape before the statute of limitations for such crimes has run, thereby potentially letting the perpetrators go free. For example, commenters contended, an elementary and secondary school could have ceased maintaining records of a sexual assault investigation before the student reaches the age of 18 and has the ability to vindicate their own rights. Other commenters argued that, if the underlying offense can still be prosecuted ten years after it occurred, then the recipient has a duty to retain those records for an equal length of time,

especially if any aspect of the school's investigation had to be put on hold for "good cause," e.g., until police and the court system have wrapped up their investigations.

Some commenters asserted that records should be kept at least as long as the educational program at which the events took place exists, if not indefinitely. Otherwise, they argue, it would allow the records of employees, who may have a longer tenure at an institution, to be periodically cleansed of any evidence of wrongdoing. Most students attend the same institution for four or more years during their elementary school, middle school, high school, college, and graduate school experiences. Commenters argued that an indefinite timeline is critical to ensure that complainants have ongoing access to their files and evidence to allow them flexibility to pursue the Title IX or criminal law process when it is safe and appropriate for them. Some commenters argued that if a complainant chooses to access the legal system simultaneously or independently from the institution, their evidence should be accessible to them at any point in time. If someone were to make a report within their first year of enrollment, and waited longer than the proposed three years to go through with a formal investigation or hearing, the complainant would not have access to the information shared when they had a fresher memory of the incident. Commenters stated that complainants may not come forward immediately for various reasons, including trauma, youth, coping mechanisms, lapses in memory, fear of re-assault, escalation, or retaliation.

Commenters asserted that three years is too short a time period to allow OCR to conduct a thorough investigation of the prevalence of sexual harassment in a recipient's programs or activities and that it would also not allow recipients to monitor campus climate, identify trends in sexual misconduct that need to be addressed on a community level, or flag sexual predators. Commenters argued that problematic sexual behavior tends to develop and escalate over time,

and that if school systems keep track of developing behavior patterns, they can both prevent future violations and ensure that the individual with the problematic behavior pattern receive educational intervention to prevent the individual from forfeiting the individual's education by committing, for example, criminal offenses. Recipients, commenters stated, could maintain records indefinitely in a digital cloud account.

Several commenters requested further clarification as to what types of records a recipient should keep. Commenters asked whether the recipient should keep transcripts of hearings or merely a list of steps taken. Other commenters asked when the clock begins to calculate the time at which recipients may destroy records: does the time toll from the date of the incident or the date the incident is reported? Or does the clock begin at the conclusion of the complaint?

Several commenters stated that the requirement about access to records seemed to contradict the provision that requires supportive measures to be kept confidential. Commenters argued that this provision will erode any confidentiality in the Title IX office and create institutional liability. Commenters also queried whether the recordkeeping provision encompasses an investigation of unwelcome conduct on the basis of sex that did not effectively deny the victim equal access to the recipient's program or activity and was not otherwise sexual harassment within the meaning of § 106.30.

Several commenters requested that access to records be limited, that they not be made available through the Freedom of Information Act (FOIA), that access be in accordance with FERPA, and that § 106.45(b)(7)(i)(A) be modified to include "their sexual harassment investigation…" to avoid the burdensome interpretation that complainants and respondents may have access to "each sexual harassment investigation" maintained by the recipient. Similarly, commenters requested that this provision require that any records collected be protected in a

manner that will not permit access to the personal identification of students to individuals or entities other than the authorized representatives of the Secretary; and that any personally identifiable data be destroyed at the end of the retention period.

Some commenters argued that the required access to records is ambiguous and vague. Several commenters requested further clarification on the parameters of this requirement, including whether the access requirement affords the complainant and respondent access to each other's files, or just their own. Another commenter asked whether a recipient who chose to take no action at all in response to a report of sexual harassment must maintain a record of the report. A commenter also asked whether the provision applies only to reports or complaints that were known at the time to an individual with authority to institute corrective measures.

Several commenters who were in overall support of the provision stated that a recipient's Title IX training materials should be made publicly available because this allows the training materials to be assessed for fairness, absence of bias, and respect for the parties. Many commenters stated that training should be available to all students, teachers, parents, and the public because and it may help students decide which college to attend, and that the training needs to incorporate due process protections, be evidence-based, and focused on determining the truth. Commenters stated that public dissemination of the training materials would keep a check on quality of training and promote accountability and confidence in the Title IX grievance system.

Commenters requested that the requirement concerning the retention of training materials only pertain to changes that are of material significance; updates that are proofreading or aesthetic in nature should not require notation. Commenters also recommended that the provision

narrow the required window for archiving of training materials to three years prior to the date of the hearing.

Some commenters found this requirement confusing, unnecessary, and burdensome. Commenters queried about the type of documentation that must be maintained regarding training, and that data and storage requirements to maintain records for three years could become burdensome for smaller recipients. Some commenters suggested that a list of annual training, including topics and who attended, be maintained instead.

Some commenters opposed the provision and requested that recipients keep an internal database of all sexual harassment reports, so that after a second or third independent report from a different complainant, a school can escalate its response to the alleged harassment to prevent further harm. Other commenters requested the entire deletion of subsection (D), asserting that: the provision does not explain what OCR's expectations will be regarding the training, so it is impossible to know what training records to maintain; training is an ongoing process that involves information from informal and formal sources; and at most, recipients should be required to summarize the qualifications of the investigators, Title IX Coordinators, and adjudicators.

Commenters who opposed § 106.45(b)(10) also requested that this provision clarify that recipients should not release information about remedies provided to the complainant as this should be kept as private as possible because remedies are often personal, and may include changes to a complainant's schedule, medical information, counseling, and academic support. Commenters argued that a respondent has little legitimate interest in knowing the complainant's remedies and could exploit such information in a retaliatory manner. Some commenters

requested that if a student then sues, or goes to OCR, the college should hand over all materials without the need for legal action.

Some commenters wanted recipients to collect additional data regarding when the complaint was filed, whether there were any cross complaints, when, how, and to what extent the respondent was notified, demographic information about the parties, the number of complaints that found respondent responsible, and the sanctions.

Other commenters suggested the creation of a new section requiring recipients to send all records once a year to the Department. Some commenters requested that the Department require the collection of additional data: number and names of Title IX staff, consultants and advisors, budget and person hours, the number of Title IX complaints reported, how each complaint was resolved, remedies provided, number of complaints deemed false accusations or where evidence did not support accusation, number of Title IX law suits by both complainants and respondents, ongoing court cases, number and type of settlements, legal costs to an institution of Title IX litigation, settlement costs to the institution and/or the institution's insurance companies. Commenters argued that demographic data on complainants and respondents would help the public evaluate whether discipline has a disparate impact on the basis of race, sex, disability, and other protected statuses, and the fact that recipients already perform such data collection for the CRDC demonstrates that postsecondary institutions could do the same without undue burden; these commenters asserted that the Department has the authority to require such data collection. Other commenters requested that discipline records prior to college must be sealed to avoid excessively harmful or unfair use of juvenile records.

Some commenters requested that the Department remove the requirement that recipients keep records for the bases of their conclusion about deliberate indifference, as this is a determination made by the Department if and when a civil rights complaint is filed.

Other commenters requested that the recordkeeping requirement exempt ombudspersons. These commenters argued that ombudspersons are objective, neutral, and confidential resources who provide information regarding the grievance process, and advocates for equitably administered processes.

Commenters suggested the deletion of the last sentence of 106.45(b)(7)(ii), "The documentation of certain bases or measures . . . ." The commenters argued that the sentence would allow recipients to add *post hoc* alterations and justifications to the record of a formal complaint, which is inconsistent with principles of basic fairness.

Discussion: The Department, having considered the commenters' concerns about the three-year retention period proposed in the NPRM, is persuaded that the three-year retention period should be extended to seven years for consistency with the Clery Act's recordkeeping requirements.[1522] Although elementary and secondary schools are not subject to the Clery Act, the Department desires to harmonize these final regulations with the obligations of institutions of higher education under the Clery Act to facilitate compliance with both the Clery Act and Title IX. At the same time, we do not believe that a seven year period rather than the proposed three-year period will be more difficult for elementary and secondary schools (who are not subject to the Clery Act), because elementary and secondary schools are often under recordkeeping requirements under other laws with retention periods of similar length. The seven-year

[1522] Clery Act, 20 U.S.C. 1092(f); 34 CFR 668.46(c)(1).

requirement also addresses many commenters' concerns about three years being an inadequate amount of time for reasons such as a college freshman's Title IX case file being destroyed before that student has even graduated from a four-year program, or that a young student in elementary school who becomes a party to a Title IX proceeding cannot count on the student's case file being available by the time the student is in junior high, or that three years is too short a time for recipients to benefit from records of sexual harassment where a respondent re-offends years later.

The Department notes that while the final regulations require records to be kept for seven years, nothing in the final regulations prevents recipients from keeping their records for a longer period of time if the recipient wishes or due to other legal obligations. Any recipient that needs or desires to keep records for ten years to facilitate more complete Federal background checks as one commenter requested, or indefinitely as another commenter proposed, may do so. The Department declines to base this record retention provision around the potential need for use in litigation; the Department does not regulate private litigation, and in any event the Department believes that the extension of the retention period in these final regulations to seven years adequately covers the period of most statutes of limitations that apply to causes of action that may derive from the same facts and circumstances as the recipient's handling of a Title IX sexual harassment report or formal complaint. The Department declines to base the retention period around the length of time each student is enrolled by a recipient because a standardized expectation of the minimum time that these Title IX records will be kept by a recipient more easily allows a recipient to meet this requirement than if the time frames were customized to the duration of each student's enrollment.

The Department understands commenters' concerns that records of sexual harassment cases involving employees pose particular reasons supporting a longer retention period, and the

modification to a seven year requirement addresses those concerns while allowing recipients to adopt a policy keeping sexual harassment records concerning employees for longer than the seven year retention period required under these final regulations.

In response to commenters' concerns that this provision giving the parties access to records might contradict the requirement to keep supportive measures confidential, the Department has revised § 106.45(b)(10)(i) to remove the language making records available to parties. Because the parties to a formal complaint receive written notice of the allegations, the evidence directly related to the allegations, the investigative report, and the written determination (as well as having the right to inspect and review the recording or transcript of a live hearing), the Department is persuaded that the parties' ability to access records relevant to their own case is sufficiently ensured without the risk that making records available to parties under proposed § 106.45(b)(10) would have resulted in disclosure to one party of the supportive measures (or remedies) provided to the other party.

Section 106.45(b)(10)(i)(A) requires recipients to maintain records of "each sexual harassment investigation." Any record that the recipient creates to investigate an allegation, regardless of later dismissal or other resolution of the allegation, must be maintained for seven years. Therefore, recipients must preserve all records, even those records from truncated investigations that led to no adjudication because the acts alleged did not constitute sex discrimination under Title IX and the formal complaint (or allegation therein) was dismissed. The Department also wishes to clarify that the date of the record's creation begins the seven year retention period. We reiterate that recipients may choose to keep each record for longer than seven years, for example to ensure that all records that form part of a "file" representing a

particular Title IX sexual harassment case are retained for at least seven years from the date of creation of the last record pertaining to that case.

Regarding the Freedom of Information Act (FOIA),[1523] and similar State laws that require public disclosure of certain records, the Department cannot opine on whether disclosure of records required to be retained under the final regulations would, or would not, be required under FOIA or similar laws because such determinations require fact-specific analysis.

Additionally, as explained in the "Section 106.6(e) FERPA" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble, these final regulations, including § 106.45(b)(10)(i), do not run afoul of FERPA and to the extent possible, should be interpreted consistently with a recipient's obligations under FERPA. To address any concerns, the Department has removed the phrase "make available to the complainant and respondent" in § 106.45(b)(10) out of an abundance of caution and in case this phrase may have created confusion. Accordingly, the requirement to maintain records is separate and apart from the right to inspect and review these records under FERPA, and these final regulations specifically address when the parties must have an opportunity to inspect and review records relating to the party's particular case. For example, § 106.45(b)(5)(vi) requires that the recipient 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. The Department acknowledges that a parent of a student or an eligible student may have the right to inspect and review their education records pursuant to 34 CFR 99.10 through 34 CFR 99.12, and these final regulations do not diminish these rights. As previously explained, FERPA allows a

[1523] 5 U.S.C. 552 *et seq.*

recipient to share information with the parties that is directly related to both parties.[1524] Further, § 106.71 authorizes any party who has suffered retaliation to alert the recipient by filing a complaint according to the prompt and equitable grievance procedures for sex discrimination required to be adopted under § 106.8(c).[1525]

In response to numerous commenters who requested the requirement to publish training materials, the Department agrees with commenters that such publication will improve the overall transparency and integrity of the Title IX grievance process, and thus revises § 106.45(b)(10) to require recipients to publish on their websites training materials referenced in § 106.45(b)(1)(iii). The Department believes the seven-year requirement will not significantly burden recipients, for whom keeping and publishing materials relevant to training its employees is good practice in light of the numerous lawsuits recipients have faced over handling of Title IX allegations. Regarding the request to clarify that recipients need only update published training materials when the recipient makes material changes to the materials, this provision requires the recipient to publish training materials which are up to date and reflect the latest training provided to Title IX personnel.

Although we acknowledge that creating and storing records uses some resources, publishing training materials on a website and retaining the notes, reports, and audio or audiovisual recordings or transcripts from an investigation and any hearing are not cost prohibitive. The Department believes the recordkeeping requirements are practical and

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[1524] 73 FR 74806, 74832-33 (Dec. 9, 2008).

[1525] The Department notes that other laws and regulations may require disclosure of recipient records to the Department, for instance when the Department investigates allegations that a recipient has failed to comply with Title IX. *E.g.*, 34 CFR 100.6 (addressing a recipient's obligation to permit the Department access to a recipient's records and other information to determine compliance with this part).

reasonable. To the extent that commenters' concerns that a recipient may be unable to publicize its training materials because some recipients hire outside consultants to provide training, the materials for which may be owned by the outside consultant and not by the recipient itself, the Department acknowledges that a recipient in that situation would need to secure permission from the consultant to publish the training materials, or alternatively, the recipient could create its own training materials over which the recipient has ownership and control.

The Department disagrees that it is "impossible" to know what training records recipients should maintain. Section 106.45(b)(1)(iii) specifies that recipients must train Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolutions on specific topics for specific purposes, providing sufficient basis for a recipient to understand its obligations regarding retention and publication of materials used to conduct such training.

The Department does not wish to burden recipients with a requirement to send the records it maintains under this provision to the parties. However, parties preparing for a lawsuit or for an OCR complaint are entitled to receive copies of the evidence directly related to the allegations raised in a formal complaint,[1526] the investigative report,[1527] and the written determination regarding responsibility,[1528] and thus parties to a Title IX grievance process have relevant information that they may desire to review or submit as part of a school-level appeal, a lawsuit, or an OCR complaint.

The Department declines to require the data collections requested by commenters concerning Title IX reports and formal complaints. The Department wishes to correct a lack of

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[1526] § 106.45(b)(5)(vi).
[1527] § 106.45(b)(5)(vii).
[1528] § 106.45(b)(7)(iii).

due process and neutrality in the grievance process, among numerous other problems that occurred under previous Title IX guidance, and believes that prescribing a consistent framework for recipient responses to sexual harassment will benefit all individuals involved in reports and formal complaints of sexual harassment without regard to demographics. The Department notes that nothing in the final regulations precludes a recipient from collecting demographic data relating to the recipient's Title IX reports and formal complaints. Additionally, the Department does not believe that the concept of "sealing" records applies in the context of most educational institutions, nor does the Department believe that furthering the purposes of Title IX requires the Department to micromanage the manner in which recipients keep records. Recipients will maintain records of their Title IX investigations aimed at determining a respondent either responsible or not responsible; the Department does not believe that a recipient's retention of such records is the equivalent of keeping records of criminal juvenile delinquency.

The Department disagrees that the provision in § 106.45(b)(10)(ii) requiring a recipient to document the recipient's conclusion that its response to sexual harassment was not deliberately indifferent is useless. Although commenters may correctly assert that recipients "of course" believe their responses have been sufficient, requiring a recipient to document reasons for that conclusion requires the recipient to evaluate how it has handled any report or formal complaint of sexual harassment, documenting reasons why the recipient's response has not been clearly unreasonable in light of the known circumstances. For example, if a Title IX Coordinator decides to sign a formal complaint against the wishes of a complainant, the recipient should document the reasons why such a decision was not clearly unreasonable and how the recipient believes that it met its responsibility to provide that complainant with a non-deliberately indifferent response. To reinforce the obligation imposed on recipients to offer supportive measures (and engage in an

interactive discussion with the complainant about appropriate, available supportive measures) in revised § 106.44(a), we have revised § 106.45(b)(10)(ii) to add that if a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances; for example, where a complainant refuses supportive measures or refuses to communicate with the Title IX Coordinator in order to know of supportive measures the recipient is offering. The Department declines to remove the final sentence of § 106.45(b)(10)(ii) because assuring a recipient that the recipient may provide additional documentation or explanations about the recipient's responses to sexual harassment after creating its initial records does not foreclose the ability of a court or administrative agency investigating a recipient's Title IX compliance to question the accuracy of a recipient's later-added documentation or explanations, and where such a court or agency is satisfied that later-added information was not, for example, fabricated to protect the recipient from exposure to liability, the later-added information helps such a court or agency accurately assess the recipient's response to sexual harassment.

The Department wishes to clarify that, unless ombudspersons have created records that the Department requires the recipient to maintain or publish, ombudspersons do not fall under § 106.45(b)(10). The provision identifies the type of record that must be kept, not the category of persons whose records do or do not fall under this provision.

Changes: The Department has removed from § 106.45(b)(10)(i) the word "create" and the phrase "make available to the complainant and respondent." The Department has also revised the requirement to maintain records from three years to seven years. In § 106.45(b)(10)(i)(A), the Department has added "Title IX" to "Coordinator" and added any audio or audiovisual recording or transcript of a live hearing to the list of records required to be kept. We have revised §

106.45(b)(10)(i)(D) to add persons who facilitate informal resolutions to the list of Title IX personnel, and direct recipients to make materials used to train Title IX personnel available on the recipient's website or if the recipient does not have a website then such training materials must be available for public inspection. We have revised § 106.45(b)(10)(ii) to add the introductory clause "For each response required under § 106.44(a) …" and by increasing the retention period from three years to seven years. We have further revised § 106.45(b)(10)(ii) by replacing "was not clearly unreasonable" with "was not deliberately indifferent" and by adding that if a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances.

Clarifying Amendments to Existing Regulations

Section 106.3(a) Remedial Action

Comments: One commenter stated favorably that § 106.3(a) expands the remedial power of the Assistant Secretary in some cases, such as where a regulatory requirement has been violated, but where no sex discrimination has occurred. The commenter asserted that this is important for students who are deprived of due process in a Title IX proceeding.

Some commenters expressed concern that § 106.3(a) allows the Assistant Secretary to require a school to remedy any violation of the Title IX regulations, as opposed to only violations that constitute sex discrimination. Commenters argued that this will inappropriately shift the Department toward focusing on procedural requirements which will result in more complaints being filed with OCR that do not involve actual sex discrimination but only involve regulatory violations, and that this will unjustifiably expand the Department's jurisdiction over

complaints brought by parties who were the respondents in underlying Title IX sexual harassment proceedings.

Discussion: The Department believes that the final regulations appropriately state that the Assistant Secretary may require recipients to remedy violations of Title IX regulations, even where the violation does not itself constitute sex discrimination. The Department, recipients, and the Supreme Court have long recognized the Department's statutory authority under 20 U.S.C. 1682 to promulgate rules to effectuate the purposes of Title IX even when regulatory requirements do not, themselves, purport to represent a definition of discrimination.[1529] In these final regulations, we revise § 106.3(a) to reflect the Department's statutory authority and longstanding Department practice with respect to requiring recipients to remedy violations both in the form of sex discrimination and other violations of our Title IX implementing regulations, including where the violation does not, itself, constitute sex discrimination. We emphasize that the Department's remedial powers are not intended to benefit only respondents; rather, any party can request that the Department take action against a recipient that has not complied with Title IX implementing regulations, including these final regulations. For example, if a recipient fails to offer supportive measures to a complaint pursuant to § 106.44(a), or fails to send written notice after dismissing a complainant's allegations under § 106.45(b)(3), the recipient is in violation of these final regulations and the Department may require the recipient to take remedial action.

[1529] *E.g.*, *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 291-92 (1998) (refusing to allow plaintiff to pursue a claim under Title IX based on the school's failure to comply with the Department's regulatory requirement to adopt and publish prompt and equitable grievance procedures, stating "And in any event, the failure to promulgate a grievance procedure does not itself constitute 'discrimination' under Title IX. Of course, the Department of Education could enforce the requirement administratively: Agencies generally have authority to promulgate and enforce requirements that effectuate the statute's non-discrimination mandate, 20 U.S.C. 1682, even if those requirements do not purport to represent a definition of discrimination under the statute.").

Changes: We have revised § 106.3(a) to clarify that the Department may require a recipient to take remedial action for discriminating in violation of Title IX or for violating Title IX implementing regulations. We have removed the reference in the proposed regulations to assessment of damages and instead state that remedial action must be consistent with the Title IX statute, 20 U.S.C. 1682.

Comments: Commenters argued that proposed § 106.3(a) was unclear because the line between equitable remedies and monetary damages is sometimes unclear. Commenters asserted that proposed § 106.3(a) left open too many questions and would lead to confusion for students who file Title IX complaints with OCR. Another commenter suggested that the final regulations should unambiguously clarify that a complainant may always bring a Title IX claim in a private right of action.

Discussion: The Department agrees that the line between equitable and monetary relief may be difficult to discern, and is persuaded that attempting to distinguish between damages and equitable relief may cause confusion for students and for recipients. The current regulatory provision at 34 CFR 106.3(a) does not distinguish among various types of remedial action the Department might require of recipients, and the Supreme Court has noted that the current regulations "do not appear to contemplate a condition ordering payment of monetary damages," but the Supreme Court did not indicate what types of remedial action might be contemplated under 20 U.S.C. 1682.[1530] In response to commenters' concerns that proposed § 106.3(a) would

[1530] *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).

cause confusion, we have revised § 106.3(a) in these final regulations to remove the proposed reference to "assessment of damages" and instead indicate that the Department's remedial authority is consistent with 20 U.S.C. 1682.

While the Supreme Court has recognized a judicially implied right of private action under Title IX,[1531] these final regulations pertain to how the Department administratively enforces Title IX, and we therefore decline to reference private Title IX rights of action in these regulations implementing Title IX.

Changes: We have revised § 106.3(a) to clarify that the Department may require a recipient to take remedial action for discriminating in violation of Title IX or for violating Title IX implementing regulations. We have removed the reference to assessment of damages and instead state that remedial action must be consistent with the Title IX statute at 20 U.S.C. 1682.

Comments: Some commenters suggested that monetary damages ought to be available to complainants through the administrative enforcement process, particularly where there is no other means of remedying the sexual harassment that occurred. Commenters argued that damages ought to include damages for pain and suffering caused by a school's deliberate indifference. According to these commenters, depriving a complainant of a damages remedy will leave the complainant – even one who has established a bona fide Title IX violation – less than completely whole. Victims of sexual harassment, stated commenters, might miss work, might incur legal fees, might pay out-of-pocket for treatment expenses, or incur other monetary losses. Some commenters asserted that OCR ought to be able to award damages in cases where monetary relief is necessary to restore a complainant's position.

[1531] *Cannon v. Univ. of Chicago*, 441 U.S. 677, 717 (1979).

Discussion: The Department believes that remedial action should be carefully crafted to restore a victim's equal access to education and ensure that a recipient comes into compliance with Title IX and its implementing regulations. This approach has been cited approvingly by the Supreme Court.[1532] The Department's revisions to § 106.3(a) ensure that the Department may exercise its administrative enforcement authority to fulfill these goals by requiring remedies consistent with 20 U.S.C. 1682, regardless of whether the remedies are deemed necessary due to a recipient's discrimination under Title IX or a recipient's violation of Department regulations implementing Title IX.[1533]

Changes: We have revised § 106.3(a) to clarify that the Department may require a recipient to take remedial action for discriminating in violation of Title IX or for violating Title IX implementing regulations. We have removed the reference to assessment of damages and instead state that remedial action must be consistent with the Title IX statute at 20 U.S.C. 1682.

Comments: Some commenters stated that proposed § 106.3(a) inappropriately narrowed the remedies available for sexual harassment, and that any effort to take rights away from victims was troubling. These commenters asserted that the Department ought to be using its power to

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[1532] *Gebser*, 524 U.S. at 289 ("In *Franklin* [*v. Gwinnett Co. Pub. Sch.*, 503 U.S. 64, fn. 3 (1992)], for instance, the Department of Education found a violation of Title IX but determined that the school district came into compliance by virtue of the offending teacher's resignation and the district's institution of a grievance procedure for sexual harassment complaints.").

[1533] The Title IX statute at 20 U.S.C. 1682 provides in relevant part that any agency that disburses Federal financial assistance to a recipient is "authorized and directed to effectuate the provisions of section 1681 of this title [i.e., Title IX's non-discrimination mandate] 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. . . . 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, . . . 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."

expand protections for victims, not narrow them. Some commenters stated that preventing OCR from awarding monetary damages would reduce the incentive to report sex discrimination, meaning that it was more likely to continue unabated. Other commenters argued that monetary damages serve as an effective deterrent to a school not taking sex discrimination allegations seriously. One commenter asserted that this was part of a nefarious motive on the part of Secretary Betsy DeVos to hurt victims of discrimination, and not an effort to help the American people.

Discussion: The Department's purpose and motive in these final regulations is to implement legally binding obligations governing recipients' responses to sexual harassment so that recipients respond supportively to complainants and fairly to both complainants and respondents and operate education programs and activities free from sex discrimination, including in the form of sexual harassment. The Department intends to continue vigorously enforcing recipients' Title IX obligations. We are persuaded by commenters that specifying the type of remedies that OCR may require of recipients in administrative enforcement risks confusion for students, employees, and recipients, including as to whether the Department intends to continue vigorously enforcing recipients' Title IX obligations. We have therefore revised § 106.3(a) to clarify that the Department may require a recipient to take remedial action, consistent with the Department's regulatory authority under 20 U.S.C. 1682, whenever a recipient has discriminated in violation of Title IX or whenever a recipient has violated the Department's regulations implementing Title IX.

Changes: We have revised § 106.3(a) to clarify that the Department may require a recipient to take remedial action for discriminating in violation of Title IX or for violating Title IX

implementing regulations. We have removed the reference to assessment of damages and instead state that remedial action must be consistent with the Title IX statute at 20 U.S.C. 1682.

Comments: Some commenters asserted that the withdrawal of all Federal funds happens so rarely that the payment of monetary damages is the only true way to get at a school's pocketbook for ignoring sex discrimination. Commenters argued that some schools will read § 106.3(a) too broadly, and deny even equitable relief to complainants, who then may never file with OCR and will simply be denied relief to which they are entitled. One commenter suggested that the Equal Employment Opportunity Commission has made public statements adopting the viewpoint that the best way to ensure compliance with non-discrimination law is to make employers pay damages for violating those laws. Commenters stated that if monetary damages cannot be a part of a resolution agreement, this would have the effect of increasing and encouraging sexual assault. It would also mean, commenters argued, that complainants could not obtain necessary treatment to respond to their trauma from the very misconduct that the recipient caused or exacerbated.

Discussion: The Department acknowledges that the termination of Federal financial assistance is rare, but this is because the statutory enforcement scheme that Congress set forth in 20 U.S.C. 1682 recognized termination of Federal funds as a "severe" remedy that should serve as a "last resort" when other, less severe measures have failed.[1534] Loss of Federal funding to a school

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[1534] *Cannon*, 441 U.S. at 705, fn. 38 ("Congress itself has noted the severity of the fund-cutoff remedy and has described it as a last resort, all else – including 'lawsuits' – failing."); *id.* at 704-05 (describing termination of Federal financial assistance as "severe" and stating that it is not always the appropriate means of furthering Title IX's non-discrimination mandate where "an isolated violation has occurred."); *see also* Nancy Chi Cantalupo, *Burying Our Heads in The Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. UNIV. CHI. L. J. 205, 241 (2011) (referring to the ability of OCR to terminate Federal funding as the "nuclear option").

district, college, or university is a serious consequence that may have devastating results for a recipient and the educational community the recipient exists to serve.[1535] Termination of Federal funds as a remedy is statutorily intended to serve as a "last resort" in order to "avoid diverting education funding from beneficial uses" unless that severe remedy is necessary.[1536] The fact that the severe remedy of terminating Federal funds is appropriately intended and utilized as a last resort does not preclude the Department from effectively enforcing Title IX by securing voluntary resolution agreements with recipients who have violated Title IX or its implementing regulations.[1537] The Department will continue to effectively enforce Title IX, including these final regulations, in furtherance of Title IX's non-discrimination mandate.

The Equal Employment Opportunity Commission enforces non-discrimination laws, including Title VII, that provide specific limits on the amount of compensatory and punitive damages that a person can recover. For example, Title VII expressly limits the amount of compensatory and punitive damages that a person may recover against an employer with more than 500 employees to $300,000, in 20 U.S.C. 1981a(b)(3)(D). Title IX, unlike Title VII, does not expressly include any reference to such compensatory and punitive damages, nor does any

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[1535] "Federal financial assistance" includes, for example, "scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity." 34 CFR 106.4(g)(1)(ii); *see also* Pamela W. Kernie, *Protecting Individuals from Sex Discrimination: Compensatory Relief Under Title IX of the Education Amendments of 1972*, 67 WASH. L. REV. 155, 166 (1992) ("Indeed, the fund-termination remedy, if applied, might actually prove detrimental to the very people Title IX is designed to protect: if an educational program's funds are terminated, future participants in the program will be denied the benefits of much-needed federal financial assistance.").

[1536] *Gebser*, 524 U.S. at 289 ("Presumably, a central purpose of requiring notice of the violation to the appropriate person and an opportunity for voluntary compliance before administrative enforcement proceedings [to terminate Federal funding] can commence is to avoid diverting education funding from beneficial uses where a recipient was unaware of discrimination in its programs and is willing to institute prompt corrective measures.").

[1537] Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L. J. 2038, fn. 102 (2016) (noting that the fact that OCR has not actually terminated a school's Federal funds "only means schools, knowing OCR means business, have complied, not that OCR is unwilling to use this tool.").

statute address the amount of compensatory and punitive damages that may be awarded under Title IX. Instead, Congress expressly references an agency's suspension or termination of Federal financial assistance, which is a severe consequence, and also allows a recipient to secure compliance with its regulations through any "other means authorized by law". The Department will therefore continue to enforce Title IX consistent with 20 U.S.C. 1682, and not by reference to the enforcement schemes set forth in other laws. Remedial action required of a recipient for violating Title IX or these final regulations may therefore include any action consistent with 20 U.S.C. 1682, and may include equitable and injunctive actions as well as financial compensation to victims of discrimination or regulatory violations, as necessary under the specific facts of a case.[1538]

Changes: We have revised § 106.3(a) to clarify that the Department may require a recipient to take remedial action for discriminating in violation of Title IX or for violating Title IX implementing regulations. We have removed the reference to assessment of damages and instead state that remedial action must be consistent with the Title IX statute at 20 U.S.C. 1682.

Comments: Some commenters asserted that proposed § 106.3(a) was inconsistent with the statutory provisions of Title IX, since Title IX does not limit the types of relief that OCR may provide to complainants. Other commenters stated that the proposed rules would shift existing

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[1538] *See* Dana Bolger, *Gender Violence Costs: Schools' Financial Obligations Under Title IX*, 125 YALE L. J. 2106, 2120-21 (2016) (noting that "OCR has required financial reimbursement in a surprisingly small number of its enforcement decisions" and arguing that the Department should more often order schools to financially reimburse survivors for costs incurred due to the school's Title IX violations rather than permitting "the same schools that violated the survivors' rights to determine what remedies are appropriate"); *see also Gebser*, 524 U.S. at 288-89 (noting that while 34 CFR 106.3(a) does not appear to authorize an agency to order monetary damages as a remedy, and agencies generally seem to order equitable relief (for instance, termination of a teacher who committed sexual harassment), the absence of express reference to monetary damages in 20 U.S.C. 20 and in 34 CFR 106.3 did not imply that monetary damages could not be an appropriate remedy in a private lawsuit under Title IX).

policy away from how Congress and the agency have interpreted the current regulatory provisions for the past 50 years, arguing that Title VI contains an express limit on relief, allowing only "preventive relief" under 42 U.S.C. 2000a-3 while Title IX does not contain such limiting language in its remedial provisions, at 20 U.S.C. 1682, which allows for relief by "any other means authorized by law". Commenters referred to resolution agreements where OCR has seemingly awarded monetary damages remedies.

Discussion: As discussed above, the Department is persuaded by commenters' concerns that because Title IX, 20 U.S.C. 1682, does not expressly approve or disapprove of monetary damages as one of the "other means authorized by law" which the Department may use to secure compliance under the Department's administrative enforcement authority, the Department should not differentiate in § 106.3(a) among potential remedies that may be deemed necessary to ensure that a recipient complies with Title IX and its implementing regulations. We have revised § 106.3(a) to expressly provide that discrimination under Title IX, or violations of the Department's Title IX regulations, may require a recipient to take remedial action, and that such remedial action ordered by the Department in an enforcement action must be consistent with 20 U.S.C. 1682. The Department notes that actions that some commenters characterize as OCR requiring a recipient to pay "monetary damages" may be viewed as financial compensation that OCR requires a recipient to pay to a victim of sex discrimination as a form of equitable relief, which does not necessarily constitute "monetary damages." However, the revisions to § 106.3(a) affirm that the Department will continue to enforce Title IX and its implementing regulations vigorously by using all tools at the Department's disposal under 20 U.S.C. 1682.

Changes: We have revised § 106.3(a) to clarify that the Department may require a recipient to take remedial action for discriminating in violation of Title IX or for violating Title IX

implementing regulations. We have removed the reference to assessment of damages and instead state that remedial action must be consistent with the Title IX statute at 20 U.S.C. 1682.

Comments: Some commenters stated that the proposed rules' reliance on Supreme Court case law is faulty, because those cases arose in the context of private rights of action in civil suits, and not the administrative context. Another commenter stated that OCR already does not award monetary damages, and so § 106.3 is unnecessary, but could engender confusion, particularly where equitable remedies involving monetary payments are necessary to make a complainant whole. Another commenter asserted that there is a discord between changing the legal standards in other parts of the proposed rules to more closely mirror the legal standards in civil suits, while expressly barring complainants from obtaining the relief that they would otherwise be entitled to in civil suits.

Discussion: The Department is persuaded by commenters' concerns that proposed § 106.3(a) may have had the unintended effect, or perceived effect, of restricting the Department's ability to vigorously enforce Title IX through all "means authorized by law,"[1539] may have caused unnecessary confusion on topics such as whether the Department's administrative enforcement of Title IX pursues the same goals as private lawsuits under Title IX (i.e., enforcement of Title IX's non-discrimination mandate), whether financial compensation when necessary to remedy a recipient's discrimination against individual victims would no longer be part of the Department's enforcement efforts, and may have indicated tension with the Department's approach to adopting and adapting the three-part *Gebser/Davis* framework[1540] (which the Supreme Court developed in

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[1539] 20 U.S.C. 1682.

[1540] "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble.

the context of private litigation subjecting schools to monetary damages). To address commenters' concerns and clarify the Department's intent to vigorously enforce Title IX, we have revised § 106.3(a) to state that the Department may order remedial action as necessary to correct discrimination under Title IX or violations of the Department's Title IX regulations, consistent with 20 U.S.C. 1682.

Changes: We have revised § 106.3(a) to clarify that the Department may require a recipient to take remedial action for discriminating in violation of Title IX or for violating Title IX implementing regulations. We have removed the reference to assessment of damages and instead state that remedial action must be consistent with the Title IX statute at 20 U.S.C. 1682.

Comments: Commenters stated that because the current regulations need clarity and modification, it is good that the proposed rules addressed the remedies issue. Some commenters stated that the proposed rules set forth a fair and reliable procedure with respect to damages and remedies. Commenters who worked for postsecondary institutions expressed support for proposed § 106.3(a) as a significant improvement upon the current Title IX landscape. Some commenters on behalf of institutions expressed appreciation for the focus on remedial action that does not include the assessment of damages against a recipient because some recipients are small, rural schools with limited resources, and would prefer to use those resources to remedy violations rather than pay damages. Commenters asserted that proposed § 106.3(a) helps recipient institutions avoid unnecessary burdens. Commenters stated that they supported the limitation of remedial action to exclude assessment of damages against the recipient because parties seeking monetary damages may always avail themselves of the courts, which are better equipped than OCR to assess damages to compensate a victim for harms like emotional distress. One commenter asserted that proposed § 106.3(a) would appropriately focus Title IX

enforcement on securing equitable relief and bringing schools into compliance with Title IX. Commenters offered that it is appropriate for OCR to focus exclusively on equitable relief and bringing schools into compliance, as opposed to compensating victims.

Discussion: The Department appreciates some commenters' support for the intention of proposed § 106.3(a), to distinguish between monetary damages and equitable relief in determining remedial action the Department should pursue in its administrative enforcement actions. However, for the reasons discussed above, the Department is persuaded by the concerns of other commenters and we have revised § 106.3(a) to remove reference to assessment of damages.

Changes: We have revised § 106.3(a) to clarify that the Department may require a recipient to take remedial action for discriminating in violation of Title IX or for violating Title IX implementing regulations. We have removed the reference to assessment of damages and instead state that remedial action must be consistent with the Title IX statute at 20 U.S.C. 1682.

Comments: Some commenters argued that proposed § 106.3(a) conveyed that the Department will not be enforcing Title IX at all and will look the other way at a recipient's failure to respond to allegations of sexual harassment. Another commenter suggested that the proposed rules ought to state that all remedial action should be dedicated to minimizing, to the extent possible, harm done to the complainant. One commenter argued that proposed § 106.3 would create an inconsistency with other laws and regulations that OCR enforces, such as Title VI or Section 504.

One commenter argued that § 106.3(a) is a change in position from prior Department guidance that contemplates monetary relief, is in tension with a Department of Justice manual

about Title IX,[1541] and could potentially put the Department's Title IX enforcement practices in tension with other executive branch agencies that enforce Title IX. The commenter asserted that it is strange for a complainant's scope of relief to change depending on the agency with which the complaint is filed. The commenter asserted that such a significant shift ought to be more fulsomely explained by the Department. Additionally, the commenter stated that the commenter had filed a Freedom of Information Act (FOIA) request but had not yet received a response, and that the proposed rules ought to be withdrawn until the commenter had opportunity to review the FOIA response and comment further. The same commenter argued that the proposed rules would pose anomalous situations that would strain OCR's ability to separate equitable relief involving payments of money, from non-equitable relief in the form of monetary damages. The commenter raised the scenario of a complainant that suffers damages caused by a third party; in the hypothetical, a student is sexually harassed at their school and reports the incident, and later the student obtains a scholarship at another school, and if the first school retaliates against the reporting student by interfering with the scholarship so the student loses the scholarship, the first school may or may not be liable for the loss of the scholarship under revised § 106.3(a), depending on whether OCR construes that relief as monetary damages or equitable relief.

Discussion: For reasons discussed above, the Department is persuaded by commenters' concerns that proposed § 106.3(a) could cause unnecessary confusion, such as about how the Department intends to enforce Title IX and whether the Department intends to continue vigorously enforcing Title IX administratively. We have revised § 106.3(a) to clarify that the Department will require

[1541] Commenters cited: U.S. Dep't. of Justice, *Title IX Legal Manual* "VIII Private Right of Action and Individual Relief through Agency Action, C. Recommendations for Agency Action."

remedial action for a recipient's discrimination under Title IX or a recipient's violations of Title IX regulations, in a manner consistent with 20 U.S.C. 1682. In light of these revisions, the Department does not believe it is necessary to analyze prior Department guidance as to whether the Department's past practice has, or has not, been to impose monetary damages for Title IX violations, and for similar reasons there is no conflict between § 106.3(a) in the final regulations, and the Department of Justice Title IX Manual referenced by commenters, or among the Department's approach to remedial action and the approach of other Federal agencies, each of which is subject to the same provision in the Title IX statute (20 U.S.C. 1682) regarding administrative enforcement of Title IX, to which § 106.3(a) now refers. We note that the sufficiency of the Department's response to any individual FOIA request is beyond the scope of this rulemaking, and decline to comment on the content of such a request or its relationship to these final regulations. The revisions to § 106.3(a) additionally ameliorate the commenter's concern raised in a hypothetical, that a dividing line between equitable relief and monetary damages could lead to the Department being constrained from requiring a recipient to, for example, reimburse a student for the value of a lost scholarship under circumstances where such remedial action is necessary to remediate the effects of a recipient's discrimination against an individual student.

Changes: We have revised § 106.3(a) to clarify that the Department may require a recipient to take remedial action for discriminating in violation of Title IX or for violating Title IX implementing regulations. We have removed the reference to assessment of damages and instead state that remedial action must be consistent with the Title IX statute at 20 U.S.C. 1682.

Comments: Some commenters suggested that if changes to § 106.3 are made at all, the changes ought to strengthen the penalties that can be adjudicated against actual perpetrators of sexual

harassment, including students. One commenter suggested that students who engage in sexual harassment ought to themselves be liable for monetary damages as part of OCR's enforcement practices. Additionally, this commenter argued that OCR ought to make students who engage in sexual harassment repay grants given to them by the Federal government, and permanently bar such students from applying for any financial assistance in the future. Another commenter suggested that the Department ought to bar students who commit sexual harassment from attending any other postsecondary institution in the future.

Discussion: Title IX applies to recipients of Federal financial assistance operating education programs or activities.[1542] Title IX does not apply as a direct bar against perpetration of sexual harassment by individual respondents; rather, Title IX requires recipients to operate education programs and activities free from sex discrimination. When a recipient knowingly, deliberately refuses to respond to sexual harassment, such response is a violation of Title IX's non-discrimination mandate, and a recipient's failure to respond appropriately in other ways mandated by these final regulations constitutes a violation of the Department's regulations implementing Title IX.[1543] The Department will vigorously enforce Title IX's non-discrimination mandate and the obligations contained in these final regulations to ensure recipients' compliance.

These final regulations clarify the conditions that trigger a recipient's legal obligations with respect to sexual harassment and enforcement of Title IX, and these final regulations are focused on remedial actions the recipient must take, rather than on punitive actions against

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[1542] 20 U.S.C. 1681(a).

[1543] *See* discussion in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble.

individuals who perpetrate sexual harassment.[1544] These final regulations explain the circumstances under which a recipient must provide remedies to victims of sexual harassment, and leave decisions about appropriate disciplinary sanctions imposed on respondents found responsible for sexual harassment within the sound discretion of the recipient.[1545] These final regulations do not impact eligibility of a student for Federal student aid or the eligibility of an individual to apply for Federal grants. The Title IX statute authorizes the Department to enforce Title IX by terminating Federal financial assistance provided to a recipient operating education programs or activities – not by terminating Federal financial aid to individual students. As discussed previously, these final regulations leave sanctions and punitive consequences that a recipient chooses to take against a respondent found responsible for sexual harassment in the sound discretion of the recipient. Nothing in these final regulations precludes a recipient from barring such a respondent found responsible for sexual harassment from continuing enrollment or from re-enrolling with the recipient, or from including a notation on the student's transcript with the intent or effect of prohibiting the respondent from future enrollment with a different recipient.[1546]

Changes: We have revised § 106.3(a) to clarify that the Department may require a recipient to take remedial action for discriminating in violation of Title IX or for violating Title IX implementing regulations. We have removed the reference to assessment of damages and instead state that remedial action must be consistent with the Title IX statute at 20 U.S.C. 1682.

[1544] *Id.*
[1545] *Id.*
[1546] For further discussion of transcript notations, see the "Transcript Notations" subsection of the "Determinations Regarding Responsibility" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble.

Comments: Some commenters asserted that the proposed rules ought to eliminate the ability of a recipient to engage in affirmative action absent any finding of a violation; commenters referenced a provision under 34 CFR 106.3(b) that the proposed rules did not propose to alter. Additionally, some commenters stated that the proposed rules ought to more clearly define what monetary damages are, since monetary payments may nevertheless be equitable in nature, in some circumstances. Commenters suggested that the Assistant Secretary for Civil Rights ought to be more constrained in assessment of remedies than proposed § 106.3(a) set forth and should not require that schools engage in disciplinary or exclusionary processes in order to remedy sexual harassment. Commenters argued that the Assistant Secretary should only have jurisdiction to require supportive measures for victims of sexual harassment in order to restore access to education and bring a recipient into compliance with Title IX.

Discussion: In the NPRM, the Department proposed revisions to § 106.3(a), which concerns remedial action, and did not propose changing the provisions of 34 CFR 106.3(b), which concerns affirmative action, and the Department declines to revise 34 CFR 106.3(b) in these final regulations.

The Department disagrees that the Department lacks authority to require recipients to investigate and adjudicate sexual harassment allegations in order to determine whether remedies are necessary to restore or preserve the equal educational access of a victim of sexual harassment, including deciding whether disciplinary sanctions are warranted against a respondent found responsible for sexual harassment. Since 1975, Department regulations have required recipients to adopt and publish grievance procedures to address student and employee

complaints of sex discrimination,[1547] and through guidance since 1997 the Department has interpreted this regulatory requirement to apply to complaints of sexual harassment. Adopting and publishing a grievance process to address sexual harassment as a form of sex discrimination prevents instances in which a recipient violates Title IX by failing to provide remedies to victims of sexual harassment, falling squarely within the Department's authority to promulgate rules that further Title IX's non-discrimination mandate.[1548] As previously discussed, with respect to disciplinary sanctions, the Department, like the courts, will "refrain from second guessing the disciplinary decisions made by school administrators"[1549] because school administrators are best positioned to determine the appropriate discipline to be imposed. The final regulations remove reference to "assessment of damages" in § 106.3(a), and thus the Department declines to provide a definition of "monetary damages" in order to clarify when payments of money are part of equitable relief, versus damages.

Changes: We have revised § 106.3(a) to clarify that the Department may require a recipient to take remedial action for discriminating in violation of Title IX or for violating Title IX implementing regulations. We have removed the reference to assessment of damages and instead state that remedial action must be consistent with the Title IX statute at 20 U.S.C. 1682.

Section 106.6(d)(1) First Amendment

Comments: A number of commenters expressed support for § 106.6(d) generally, including § 106.6(d)(1) regarding the First Amendment. Other commenters argued the provision is necessary

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[1547] *Compare* 34 CFR 106.9 *with* § 106.8(c).
[1548] "Role of Due Process in the Grievance Process" section of this preamble.
[1549] *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 648 (1999). Disciplinary sanctions, however, cannot be retaliatory or discriminatory on the basis of sex. § 106.71(a); § 106.45(a).

to prevent a chilling effect on free speech. Other commenters supported this provision because they believed that Title IX should conform with Supreme Court rulings on free speech. Commenters argued that the protection of free speech on campuses is important and that this provision helps prevent Title IX enforcement from chilling free speech. Commenters argued that § 106.6(d) is necessary in light of the growing number of instances in which institutions have violated students' rights in campus Title IX adjudications. Commenters expressed support for the saving clause nature of this provision because of concerns that Title IX has a disproportionate impact on men of color and other disadvantaged demographic groups.

Some commenters requested more clarity on the application of the saving clause to specific situations. Commenters requested that OCR "provide additional guidance or clarity on what responsibilities school districts have with respect to the First Amendment and other constitutional protections." One commenter requested guidance on the parameters of free speech protections. Other commenters supported the saving clause but requested that the Department modify the language to provide greater protection for free speech, such as providing explicit protection of academic freedom, or such as changing the provision to not just state that the regulations do not require a recipient to restrict constitutional rights, but that the regulations do not permit deprivations of constitutional rights. Some commenters expressed confusion as to whether the saving clauses in 106.6(d) cover recipients that are not government actors.

A number of commenters opposed the saving clause because they believed it is unnecessary.

One commenter opposed the saving clause due to the concern that it could be seen as calling for the courts to give greater weight to the listed constitutional protections than a court may have given otherwise. As an example, the commenter posed a hypothetical case where First

Amendment rights are implicated; without the addition of § 106.6(d)(1), a court could give different weight to factors in its factored-analysis as to whether a constitutional violation occurred but with the saving clause in the proposed rules, the court may conclude that the Department has determined that greater weight should be given to First Amendment protections than the other factors used in its making of a determination of a constitutional violation.

One commenter argued that the saving clause is an unwarranted and harmful restriction on Title IX. The commenter reasoned that under Title IX's non-discrimination mandate the Department could, for example, reasonably determine that Title IX requires that a trigger warning be given to students before the start of any academic class discussing topics involving sexual violations, so that students could avoid being subjected to the traumatizing class discussion; the commenter argued that such a requirement is constitutional and could be necessary under Title IX, yet because of § 106.6(d) such a reasonable, constitutional requirement (because even First Amendment speech rights are not unlimited, inasmuch as yelling "fire" in a crowded theater has long been deemed unprotected speech) to promote Title IX's purposes might be forgone by the Department. On the other hand, another commenter argued that classroom discussions about sensitive topics involving sex and sexuality are protected by academic freedom – in the teacher or professor's judgment – even if such topics are offensive and uncomfortable to some students.

Discussion: The Department added § 106.6(d)(1) to act as a saving clause.[1550] Its purpose is to ensure the Department is promoting non-discrimination enforcement consistent with

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[1550] "Saving Clause," *Black's Law Dictionary* (11th ed. 2019) ("A statutory provision exempting from coverage something that would otherwise be included. A saving clause is generally used in a repealing act to preserve rights and claims that would otherwise be lost.").

constitutional protections, and with First Amendment protections of free speech and academic freedom in particular. Due to significant confusion regarding the intersection of individuals' rights under the U.S. Constitution with a recipient's obligations under Title IX, the proposed regulations clarify that these regulations do not require a recipient to infringe upon any individual's rights protected under the First Amendment.

The Department disagrees with the commenter who argued that § 106.6(d)(1) will chill Title IX enforcement without more precise language. Rather, stating that nothing in regulations implementing Title IX requires restriction of constitutional rights protects robust Title IX enforcement by clarifying that furthering Title IX's non-discrimination mandate does not conflict with constitutional protections. Failure to recognize and respect principles of free speech and academic freedom has led to overly broad anti-harassment policies that have resulted in chilling and infringement of constitutional protections.[1551]

The Department disagrees with commenters who argued that additional language or guidance is necessary in § 106.6(d)(1). We believe that § 106.6(d)(1) is clear without further explanation. The Department also includes an explanation of First Amendment law and the interaction of First Amendment law with these final regulations throughout the preamble; for example, in the "*Davis* standard generally" subsection of the "Prong (2) *Davis* standard" subsection of the "Sexual Harassment" subsection in the "Section 106.30 Definitions" section, the Department includes discussion about how the second prong of the definition of sexual harassment in § 106.30, with language from *Davis*, interacts with the First Amendment. The Department will abide by courts' rulings as to the scope of the First Amendment.

[1551] "Sexual Harassment" subsection of the "Section 106.30 Definitions" section of this preamble.

In response to requests from commenters for stronger First Amendment protections in these final regulations, the Department has added additional language in the final regulations, addressing circumstances under which First Amendment concerns often intersect with Title IX policies and procedures. For example, the Department has added § 106.71 (prohibiting retaliation) to state that the exercise of rights protected under the First Amendment does not constitute retaliation. The final regulations also add language in § 106.44(a) to state that the Department may not deem a recipient to have satisfied the recipient's duty to not be deliberately indifferent based on the recipient's restriction of rights protected under the U.S. Constitution, including the First Amendment. The Department reinforces § 106.6(d) in the context of a recipient's non-deliberately indifferent response in § 106.44(a) and evaluation of retaliation under new § 106.71 to caution recipients that the Department will not require a recipient to restrict constitutional rights as a method of Title IX compliance. Because academic freedom is well understood to be protected under the First Amendment, the Department declines to expressly reference "academic freedom" in § 106.6(d)(1), but that provision applies to all rights protected under the First Amendment.

Title IX, including § 106.6(d), applies to all recipients of Federal financial assistance, including private actors. The language is intended to clarify that, under Title IX regulations, recipients – including private recipients – are not obligated by Federal law under Title IX to restrict free speech or other rights that the Federal government could not restrict directly. Accordingly, the government may not compel private actors to restrict conduct that the government itself could not constitutionally restrict.[1552]

[1552] *Peterson v. City of Greenville*, 373 U.S. 244, 248 (1963); *Truax v. Raich*, 239 U.S. 33, 38 (1915).

The Department agrees with commenters who stated that § 106.6(d)(1) will ensure that nothing in these final regulations is interpreted to violate the First Amendment to the U.S. Constitution, and we agree that this provision is important to prevent a chilling effect on free speech. As discussed in more detail in the "Sexual Harassment" subsection of the "Section 106.30 Definitions" section of this preamble, overly broad definitions applied in anti-harassment codes of conduct have led to confusion about how to enforce non-sex discrimination laws like Title IX consistent with First Amendment protections, and we therefore disagree that § 106.6(d)(1) is unnecessary.

The Department disagrees that § 106.6(d)(1) will change the way courts interpret the Constitution or Title IX. These types of clauses are routinely included in regulations to note similar issues, and we have no reason to believe including a saving clause such as § 106.6(d) would encourage courts to apply the Constitution differently or more broadly than they otherwise would. The Department believes that § 106.6(d)(1) acts as a saving clause to ensure that institutions do not violate the First Amendment's requirements, but the scope and meaning of First Amendment rights and protections are not affected by these final regulations.

The Department disagrees that these final regulations including § 106.6(d)(1), unnecessarily and harmfully prohibit the Department from promulgating regulations under Title IX that are constitutionally permissible. Contrary to the commenter's assertions, these final regulations clarify that part 106 of title 34 of the Code of Federal Regulations in no way requires the restriction of rights that would otherwise be protected from government action by the First Amendment. The U.S. Constitution applies to the Department as a Federal government agency, and the Department cannot enforce Title IX (e.g., interpret Title IX and promulgate rules enforcing the purposes of Title IX) in a manner that requires restricting constitutional rights

protected from government action by the First Amendment. These final regulations neither require nor prohibit a recipient from providing a trigger warning prior to a classroom discussion about sexual harassment including sexual assault; § 106.6(d)(1) does assure students, employees (including teachers and professors), and recipients that ensuring non-discrimination on the basis of sex under Title IX does not require restricting rights of speech, expression, and academic freedom guaranteed by the First Amendment. Whether the recipient would like to provide such a trigger warning and offer alternate opportunities for those students fearing renewed trauma from participating in such a classroom discussion is within the recipient's discretion. However, nothing in § 106.6(d) restricts *the Department* from issuing any rule effectuating the purpose of Title IX that the Department would otherwise be permitted to issue; in other words, with or without § 106.6(d), the Department as a Federal government agency is required to abide by the First Amendment, and would not be permitted to issue a rule that restricts constitutional rights, whether or not a saving clause such as § 106.6(d) exists to remind recipients that Title IX enforcement never requires any recipient to restrict constitutional rights.

Changes: None.

Section 106.6(d)(2) Due Process

Comments: A number of commenters expressed general support for § 106.6(d)(2) and the protection of due process of law. Commenters supported the provision because they asserted that there is confusion now as to how Title IX affects individual rights, and that this provision provides clarity. Commenters supported this provision in light of actions of educational institutions that commenters believed have violated the constitutional rights of students in Title IX proceedings; some commenters asserted that due process deprivations were caused by policies implemented under the withdrawn 2011 Dear Colleague Letter.

Some commenters expressed confusion as to whether the saving clauses in §106.6(d) cover recipients that are not government actors.

Commenters requested clarification of § 106.6(d)(2), asserting that the Department must comply with Executive Order 13563, which calls for regulations to reduce uncertainty and be written in plain language.

A number of commenters opposed § 106.6(d)(2). Commenters opposed the saving clause, arguing that it is unnecessary. Other commenters opposed this provision because they argued that it inappropriately pits Title IX's civil rights mandate against the Constitution, when no such conflict exists. Other commenters opposed this provision, asserting that schools are not courts of law.

Other commenters argued that § 106.6(d)(2) could be seen by the courts as calling for the courts to give greater weight to the listed constitutional protections than courts may give without this provision.

Other commenters opposed this provision stating that it would be burdensome on institutions.

Discussion: The Department added § 106.6(d)(2) to act as a saving clause. The Department included this provision to promote enforcement of Title IX's non-discrimination mandate consistent with constitutional protections.[1553] Due to significant confusion regarding the intersection of individuals' rights under the U.S. Constitution with a recipient's obligations under Title IX, the Department believes that this provision will help clarify that nothing in regulations

[1553] 83 FR 61480.

implementing Title IX requires a recipient to infringe upon any individual's rights protected under the Due Process Clauses of the U.S. Constitution.

As noted previously, some commenters expressed confusion as to whether the saving clauses in § 106.6(d) cover recipients that are not government actors. The Department reiterates that Title IX, including § 106.6(d), applies to all recipients of Federal funding, including private actors. The language is intended to make clear that, under Title IX regulations, recipients – including private recipients – are not obligated to choose between complying with Title IX and respecting constitutional rights. Section 106.6(d)(2) clarifies that no recipient, including a private recipient, is required to take actions constituting deprivation of rights secured by the Constitution that the Federal government could not take directly. The government may not compel private actors to restrict conduct that the government itself could not constitutionally restrict.[1554]

The Department believes it has complied with Executive Order 13563 with respect to § 106.6(d)(2).[1555] We believe that this provision is clear, uses plain language, and is tailored to the objective of clarifying that nothing in these regulations requires a recipient to infringe upon any individual's rights protected under the Due Process Clauses of the Fifth or Fourteenth Amendments. We intend for § 106.6(d)(2) to reduce uncertainty about the interaction between these final regulations and recipients' due process obligations. The Department agrees with commenters who supported § 106.6(d)(2) as necessary to protect the constitutional rights of complainants and respondents in Title IX proceedings. The Department also disagrees that § 106.6(d)(2) pits Title IX's civil rights mandate against the Constitution; to the contrary, this

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[1554] *Peterson v. City of Greenville*, 373 U.S. 244 (1963); *Truax v. Raich*, 239 U.S. 33, 38 (1915).
[1555] 83 FR 61462, 61483-84.

provision helps clarify that there is no conflict between enforcement of Title IX and respect for constitutional rights.

The Department disagrees that § 106.6(d)(2) could be seen by the courts as calling for giving greater weight to the listed constitutional protections than courts may have otherwise given. These types of saving clauses are routinely included in regulations to note similar issues, and we have no reason to believe including one here would encourage courts to apply the Constitution differently or more broadly than they otherwise would. Nothing in these final regulations alters the meaning or scope of constitutional rights or protections, but rather acknowledges that whatever the meaning and scope of a constitutional right, that right never needs to be restricted to comply with Title IX regulations.

We agree that schools are not courts of law; however, the Due Process Clauses of the Fifth and Fourteenth Amendments do not just apply in judicial proceedings. Constitutional protections such as the right to due process of law apply to the actions of governmental actors, including governmental decisions in administrative hearings which deprive individuals of liberty or property interests.[1556] For example, when a State university imposes a serious disciplinary sanction, it must comply with the terms of the Due Process Clause of the Fourteenth Amendment.[1557] For private institutions receiving Federal financial assistance, the Department cannot require such institutions to deprive persons of rights protected under the U.S. Constitution in order to comply with these final regulations implementing Title IX.[1558]

[1556] *E.g.*, *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).
[1557] *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 192 (1988).
[1558] *Adickes v. S.H. Kress & Co*., 398 U.S. 144, 170 (1970) (government is responsible for discriminatory act of private party when government, by its law, has compelled the act).

Changes: None.

Section 106.6(d)(3) Other Constitutional Rights

Comments: A number of commenters expressed support for § 106.6(d)(3). One commenter who opposed the NPRM in general agreed with § 106.6(d)(3). Commenters supported § 106.6(d)(3) due to their own experiences with Title IX procedures and adjudications, stating that such processes lacked basic due process protections. Several commenters supported § 106.6(d)(3), asserting that constitutionally-guaranteed due process rights trump any guidance or requirements established under Title IX. Other commenters argued that the Department should add additional specific constitutional saving clauses, similar to § 106.6(d)(1)-(3), to protect individual liberty from government overreach, such as Sixth Amendment and Seventh Amendment protections.

Several commenters opposed § 106.6(d)(3). Commenters opposed § 106.6(d)(3) because they believed the provision is unnecessary. Some commenters opposed § 106.6(d)(3) asserting it was inapplicable to private institutions. Commenters opposed this provision asserting it would be burdensome for recipients. Commenters opposed this provision arguing that the provision implies that there has been past fault by institutions depriving constitutional rights. Commenters opposed this provision arguing that it could be seen by courts as calling for the courts to give greater weight to constitutional protections than a court may otherwise give.

Discussion: The purpose of § 106.6(d)(3) is to ensure that regulations implementing Title IX promote the non-discrimination mandate of Title IX consistent with all constitutional rights and protections. To avoid confusion regarding the intersection of individuals' rights under the U.S. Constitution, and a recipient's obligations under Title IX, § 106.6(d)(3) clarifies that nothing in regulations implementing Title IX requires a recipient to infringe upon any rights guaranteed by the U.S. Constitution. This provision also makes it clear that, under Title IX regulations,

recipients – including private recipients – are not obligated by Title IX to restrict rights 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.[1559]

The Department agrees that constitutionally-guaranteed due process rights trump any guidance or requirements established by Title IX, and disagrees that § 106.6(d)(3) may be interpreted by courts to give greater weight to constitutional protections than a court may otherwise give. Congress authorized and directed the Department to promulgate regulations to effectuate Title IX.[1560] The Department, thus, has the authority to promulgate regulations that further Title IX's non-discrimination mandate, though such regulations must not require restriction of constitutional rights. Section 106.6(d)(3) states that position. Nothing in the final regulations alters the meaning or scope of constitutional rights or protections. Section 106.6(d)(3) is in the nature of a saving clause, and such clauses are routinely included in regulations to note similar issues; we have no reason to believe including one here would encourage courts to apply the Constitution differently or more broadly than courts otherwise would.

With respect to the suggestion to list additional constitutional rights specifically in § 106.6(d), the Department believes the concerns raised by the commenters are already sufficiently addressed by this provision, which covers "any other rights guaranteed against government action by the U.S. Constitution" and by § 106.6(d)(1)-(2) which specifically refer to

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[1559] *Peterson v. City of Greenville*, 373 U.S. 244 (1963); *Truax v. Raich*, 239 U.S. 33, 38 (1915).
[1560] 20 U.S.C. 1682.

constitutional rights that most often intersect with Title IX enforcement – First Amendment rights, and the right to due process of law.

The Department disagrees that this provision is unnecessary or burdensome. The Department's goal is to ensure that non-discrimination provisions are enforced in a manner that is consistent with the entire U.S. Constitution. Although the First Amendment and Due Process Clauses tend to be the most directly relevant provisions to these final regulations concerning responses to sexual harassment, the Department believes a catch-all saving clause regarding constitutional rights is necessary and appropriate. In addition, emphasizing and clarifying that these final regulations do not require a recipient to restrict rights, should not pose a burden.

We do not believe that inclusion of § 106.6(d)(3) in these final regulations implies "fault" on the part of particular recipients or indicates a belief regarding the extent to which recipients may, or may not, have regarded Title IX obligations as necessitating restriction of constitutional rights, but we believe that including this provision will help ensure that constitutional rights are properly respected in all efforts to enforce Title IX.

Changes: None.

Section 106.6(e) FERPA

Background

These final regulations, including § 106.45(b)(5)(vi) (giving the parties access to all evidence directly related to the allegations in the formal complaint) and § 106.45(b)(5)(iv) (allowing the parties to bring an advisor of choice to all meetings in the Title IX proceeding), help protect a party's, including an employee-respondent's, procedural due process rights under the Fifth and Fourteenth Amendments to the U.S. Constitution. Procedural due process requires

notice and a meaningful opportunity to respond.[1561] The Department is precluded from administering, enforcing, and interpreting statutes, including Title IX and FERPA, in a manner that would require a recipient to deny the parties, including employee-respondents, their constitutional right to due process because the Department, as an agency of the Federal government, is subject to the U.S. Constitution. The Department's position is consistent with the principle articulated in the Department's 2001 Guidance that the "rights established under Title IX must be interpreted consistent with any federally guaranteed due process rights involved in a complaint proceeding."[1562]

The Department expressly stated in the 2001 Guidance that "[FERPA] does not override federally protected due process rights of persons accused of sexual harassment" in the context of public school employees or other recipients that are public entities, and the 2001 Guidance will continue to constitute the Department's interpretation of the intersection of Title IX and FERPA even after these final regulations become effective.[1563] The Department's NPRM addresses private schools and expressly states:

> 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 [] 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*

[1561] *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) (stating that the "essence of due process is the requirement that 'a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it'") (internal citations omitted).
[1562] 2001 Guidance at 22.
[1563] *Id*.

> *not required by Title IX or its regulations to restrict speech or other behavior that would be protected against restriction by governmental entities*.[1564]

The Department acknowledged in the NPRM that it cannot interpret Title IX to compel a private school to deprive employee-respondents of their due process rights, specifically the opportunity to review the evidence that directly relates to the allegations against that employee and to bring an advisor to help defend against the allegations. Similarly, the Department cannot interpret FERPA to compel a private school to apply the Department's Title IX regulations in a manner that deprives parties, including any respondent-employees, of due process. In *Peterson v. City of Greenville*, the U.S. Supreme Court held that the City of Greenville through an ordinance could not compel a private restaurant to operate in a manner that treated patrons differently on the basis of race in violation of the Equal Protection Clause of the Fourteenth Amendment.[1565] Similarly, in *Truax v. Raich*, the Supreme Court held that Arizona cannot use a State statute to compel private entities to employ a specific percentage of native-born Americans as employees in violation of the Equal Protection Clause of the Fourteenth Amendment.[1566] Like the City of Greenville and the State of Arizona, the Department cannot compel private schools that apply FERPA and Title IX, as interpreted by the Department, to violate a party's due process rights, including an employee's due process rights.

(The Department sometimes uses the terms "alleged victim" and "alleged perpetrator" in responding to comments about the intersection between Title IX and FERPA because FERPA,

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[1564] 83 FR 61480-81 (emphasis added).
[1565] 373 U.S. 244, 247-48 (1963).
[1566] 239 U.S. 33, 38 (1915).

e.g., 20 U.S.C. 1232g(b)(6), and its implementing regulations, e.g., 34 CFR 99.31(a)(13)-(a)(14) and 34 CFR 99.39, use these specific terms.)

Comments, Discussion, and Changes

Comments: Some commenters commended the proposed rules for appropriately balancing Title IX protections with FERPA, suggesting that both are important laws but that in most cases, the proposed rules and FERPA can co-exist without conflict.

Some commenters argued that nothing in FERPA prevents parties from accessing information or evidence that directly relates to their case, particularly if the evidence could potentially be used against them to establish responsibility for sexual harassment. Commenters suggested that one way to protect privacy might be to provide only a hard copy of relevant documents, or a hard copy and ongoing electronic access that was limited. Some commenters also stated that all parties should have a hard copy of the evidence and ongoing electronic access. Commenters asserted that the proposed rules protect the rights of students who attend school and will calm the fears of parents who are concerned about their children being falsely accused of sexual harassment. One commenter, anticipating criticism, argued that "victim-centered" approaches do not work in a context where both parties have a right to present their case, and where schools have a duty to fairly determine whether a party is responsible. Another commenter suggested that FERPA's provision allowing the production of student records in connection with a law enforcement action might also reduce tension between the proposed rules and FERPA.

Commenters also noted that the proposed rules are good for providing predictability and certainty when a conflict between Title IX and FERPA does arise, which is what recipients need in order to comply with both. One student expressed appreciation that the proposed rules expressly recognized and considered FERPA in its provisions. Some commenters noted that it

was appropriate to favor due process in cases where that principle conflicts with FERPA, since due process is a constitutional right, while FERPA is a Federal statute. Several commenters suggested that the proposed rules would ensure justice for victims and protections for those falsely accused.

Discussion: The Department appreciates the comments in support of its proposed regulations and agrees that a recipient may comply with both these final regulations and FERPA. The Department does not believe that the proposed or final regulations offer a "complainant-centered" (or "victim-centered") or "respondent-centered" approach. The Department's final regulations provide a fair, impartial process for both complainants and respondents.

The Department acknowledges that a recipient may use, but is not required to use, a file sharing platform that restricts the parties and advisors from downloading or copying evidence. In the final regulations, the Department has removed the specific reference to such a file sharing platform to emphasize that using such a platform is discretionary and not mandatory.

A recipient must 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, as described in § 106.45(b)(5)(vi). The Department also specifies in § 106.45(b)(5)(vi) that 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. The Department neither requires nor prohibits a recipient from providing parties with a hard copy of the investigative report in § 106.45(b)(5)(vii) or any evidence obtained as part of an investigation that is directly related to the allegations raised in a formal complaint as described in § 106.45(b)(5)(vi). To clarify the Department's position in this regard, the Department revised § 106.45(b)(5)(vi)-(vii) to allow a recipient to provide a hard copy of the evidence and investigative report to the party

and the party's advisor of choice, or to provide the evidence and investigative report in an electronic format. The Department discusses this revision in the "Section 106.45(b)(5)(vi) Inspection and Review of Evidence Directly Related to the Allegations, and Directed Question 7" subsection and the "Section 106.45(b)(5)(vii) An Investigative Report that Fairly Summarizes Relevant Evidence" subsection of the "Investigation" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble.

The Department does not fully understand how the provision in FERPA allowing the production of student records in connection with a law enforcement action might also reduce tension between the proposed rules and FERPA. These final regulations do not directly implicate law enforcement, and it is not clear how these final regulations directly implicate or address any exemptions under FERPA that allow for the disclosure of personally identifiable information from an education record without consent in relation to a law enforcement action.

The Department is not "favoring" due process over FERPA. As explained earlier in this section, the Department is bound by the U.S. Constitution, including the Due Process Clause in the Fifth and Fourteenth Amendment. The Department, thus, cannot administer Title IX or FERPA in a manner that deprives persons of due process of law.

Changes: The Department revised § 106.45(b)(5)(vi)-(vii) to allow a recipient to provide a hard copy of the evidence and investigative report to the party and the party's advisor of choice or to provide the evidence and investigative report in an electronic format.

Comments: Many commenters thought that the proposed rules appropriately balanced student privacy with the need for students to obtain evidence during the Title IX grievance process. One commenter stated that the provisions of the proposed rules are necessary to ensure that respondents have the evidence that they need to defend themselves from false accusations, and

that schools occasionally deprive respondents of relevant evidence under the guise of student privacy. Some commenters argued that because schools have had a negative track record in providing relevant evidence to respondents, it was important for the proposed rules to avoid giving schools too much flexibility in applying Title IX, which ensures that schools cannot abuse the process in order to disadvantage respondents. One commenter asserted that without the proposed rules, most parents could not in good conscience send their sons to college, given the possibility of being denied due process when defending against an accusation of sexual harassment.

Discussion: The Department appreciates the commenters' support of its proposed regulations and agrees that the grievance process in § 106.45 for formal complaints of sexual harassment provides sufficient due process protections for both complainants and respondents.

Changes: None.

Comments: Many commenters suggested that there was no true conflict between FERPA and Title IX in terms of the requirements surrounding evidence production. According to the commenters, this is because there is nothing in FERPA that prevents the parties from gaining access to the evidence that directly relates to their case, and which may be used against them in the Title IX process. One commenter stated that FERPA includes provisions that relate to the disclosure of information related to a sexual assault allegation, and the commenter cited a provision that specifically allows schools to disclose to the alleged victim of any crime of violence or rape and other sexual assaults, the final results of any disciplinary proceedings conducted by the institution against the alleged perpetrator of the offense.[1567] This commenter

[1567] 20 U.S.C. 1232g(b)(6).

stated that FERPA's limits on redisclosure of information do not apply to information that institutions are required to disclose under the Clery Act.[1568] The commenter also stated that institutions may not require a complainant to abide by a nondisclosure agreement in writing or otherwise in a way that would prevent the re-disclosure of this information.

Discussion: The Department agrees that there is no inherent conflict between these final regulations implementing Title IX, and FERPA and its implementing regulations with respect to the Title IX requirements concerning evidence production. The Department acknowledges that provisions in FERPA, e.g. 20 U.S.C. 1232g(b)(6), address the conditions permitting the disclosure, without prior written consent, to an alleged victim of a crime of violence or a nonforcible sex offense, among others, of the final results of any disciplinary proceeding conducted by an institution against the alleged perpetrator of such crime or offense with respect to such crime or offense.[1569] The Department also acknowledges § 99.33(c), concerning the inapplicability of the general limitations in FERPA on the redisclosure of personally identifiable information contained in education records that the Clery Act and its implementing regulations require to be disclosed.

The Department does not interpret Title IX as either requiring recipients to, or prohibiting recipients from, using a non-disclosure agreement, as long as such non-disclosure agreement does not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence under § 106.45(b)(5)(iii). Any non-disclosure agreement, however, must comply with all applicable laws.

[1568] 34 CFR 99.33(c).

[1569] The Department uses the terms "alleged victim" and "alleged perpetrator" in this section because these terms are in FERPA, 20 U.S.C. 1232g(b)(6).

Changes: None.

Comments: Some commenters suggested that concerns regarding the private information of complainants were either overstated or outweighed by the need to reach a fair conclusion in the Title IX process. One commenter stated that there is no way to provide adequate due process while still avoiding the discomfort complainants may feel having to review the investigative report that contains summaries of traumatic incidents which include private details about the complainant. This commenter suggested that while recipients may be allowed to redact highly sensitive information, or threaten parties with punitive action for publicly disclosing private information in the investigative report or evidence collected by the investigator, both parties need to be able to review the evidence and the investigative report. The commenter believed that exchange of evidence, and reviewing the investigative report, is necessary to provide due process for both parties.

Discussion: The Department appreciates the comments in support of its proposed regulations. The Department acknowledges that sharing information may be uncomfortable and that sharing such information in a grievance process under § 106.45 is necessary to provide adequate due process to both parties. Each party should be able inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, as this evidence may be used to support or challenge the allegations in a formal complaint.

Changes: None.

Comments: Some commenters opposed most of the proposed rules but stated their appreciation that the proposed rules acknowledged FERPA and that schools had a duty to comply with FERPA to the extent compliance was consistent with Title IX. One commenter stated the proposed rules were workable so long as a recipient itself has sole discretion to determine what

evidence is directly related to sexual harassment allegations. The commenter suggested that any process where OCR second guesses a recipient's determination as to whether documents are directly related to the allegations raised in a formal complaint will significantly impair a recipient's ability to provide a prompt and equitable resolution and will effectively turn disputes among the recipient and the parties about evidence into Federal matters. Other commenters supported the proposed rule, noting that even in cases of private medical or behavioral information, if that information is relevant to an allegation of sexual harassment, then the party needing access to the records should have it.

Discussion: The Department appreciates the comments in support of these final regulations. A recipient has some discretion to determine whether evidence obtained as part of an investigation is directly related to allegations raised in a formal complaint as described in § 106.45(b)(5)(vi), and the Department is required to enforce both FERPA and Title IX. The Department previously noted that the "directly related to" requirement in § 106.45(b)(vi) aligns with FERPA. For example, the regulations implementing FERPA define education records as records that are "directly related to a student" pursuant to § 99.3. Accordingly, the Department in enforcing both FERPA and Title IX is well positioned to determine whether records constitute education records and also whether records are directly related to the allegations in a formal complaint. The Department has a responsibility to administer both FERPA and Title IX and cannot shirk its responsibility. If a party files a complaint that the recipient did not provide the party with 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, then the Department will investigate and must determine whether the recipient complied with § 106.45(b)(5)(vi).

In the final regulations, the Department has clarified in § 106.45(b)(5)(i) that a recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained, in connection with provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for the grievance process under § 106.45(b).[1570] This provision prevents the recipient from accessing, considering, disclosing, or otherwise using such records without the party's knowledge for a grievance process under § 106.45(b). If the party would like the recipient to access, consider, disclose, or otherwise use such records in a grievance process under § 106.45(b), then the party must give the recipient voluntary, written consent to do so. If the party is not an "eligible student," as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a "parent," as

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[1570] While the Department based this regulatory provision on the exemption for treatment records in the definition of the term "education records," as set forth in FERPA at 20 U.S.C. 1232g(a)(4)(B)(iv), we made two minor modifications to the FERPA exemption to better align the provision in these final regulations with the purpose of protecting the privacy of such treatment records in a grievance process under § 106.45, rather than the purpose of the exemption for treatment records in FERPA, which is to disallow college students from being able "directly to inspect" such treatment records, although allowing college students to have "a doctor or other professional of their choice inspect their records." "Joint Statement in Explanation of the Buckley / Pell Amendment [to FERPA]," 120 CONG. REC. 39858, 39862 (Dec. 13, 1974). For this reason, we removed the limitation in the FERPA definition of treatment records narrowing the applicability of the exemption to students who are 18 years of age or older or in attendance at an institution of postsecondary education because this provision should apply to any party in a grievance process under § 106.45, regardless of that party's age. We also revised the phrase used in the FERPA exemption, "made, maintained, or used only in connection with the provision of treatment to the student," to "made and maintained in connection with the provision of treatment to the party" so that this provision will apply where a recipient has the discretion under FERPA to use treatment records for other than treatment purposes, such as billing or litigation purposes. Thus, under these final regulations a recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for a grievance process under § 106.45. Also, if the party is not an "eligible student," as defined in 34 CFR 99.3 (FERPA regulations), then the recipient must obtain the voluntary, written consent of a "parent," as defined in 34 CFR 99.3.

defined in 34 CFR 99.3. Absent such voluntary, written consent, a recipient may not access, consider, disclose, or otherwise use such records in a grievance process under § 106.45(b). If a party provides such voluntary, written consent and if such records are directly related to the allegations raised in a formal complaint, then the recipient must provide both parties an equal opportunity to inspect and review the records pursuant to § 106.45(b)(5)(vi).

Changes: The Department clarified in § 106.45(b)(5)(i) that a recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent. If the party is not an "eligible student," as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a "parent," as defined in 34 CFR 99.3.

Comments: One commenter cautioned the Department that the proposed rules would not garner as many supportive comments as critical comments, but that the Department should pay more attention to reason and logic, as opposed to sheer numbers. The commenter argued that opponents of the proposed rules are better funded, and that there is less of a stigma to openly criticizing the Department than there is in saying that one was accused of sexual harassment, even if wrongly accused, and openly supporting the Department's proposed rules. Another commenter argued that depriving respondents of relevant evidence only created more victims, not fewer.

Discussion: The Department appreciates the commenters' perspectives.

Changes: None.

Comments: Several commenters opposed the requirement in § 106.45(b)(5)(v) (written notice of investigative interviews, meetings, and hearings) because they stated it generally conflicts with FERPA. One commenter suggested adding a FERPA compliance clause to § 106.45(b)(5)(v) due to concerns about student privacy.

One commenter argued specifically that the requirement in § 106.45(b)(5)(v) that recipients disclose the identities of all the parties' conflicts with FERPA. One commenter specifically argued that requiring a recipient to disclose all sanctions imposed on the respondent conflicts with the school's responsibilities under FERPA. Several commenters specifically suggested that the Department remove from the documentation of the recipient's response to a Title IX complaint any requirement to include information regarding remedies and supportive measures accessed by a complainant who is a student.

Several commenters stated that the parties should not be informed of the remedies given to the complainant, or to the disciplinary sanctions imposed on the respondent, in cases where the allegation involves assault, stalking, dating violence, or other violent crimes. Not only does disclosure of these items violate FERPA, but it would be troubling, for instance, to inform a respondent that after they were found responsible, the complainant was given remedies like moving to other classes, counseling, and so on. Commenters also asserted that the respondent who is found responsible should not have any knowledge about what safety measures the school is taking to protect the complainant, since those very measures will be undermined if the respondent learns of them. In support of these arguments, some commenters cited the Clery Act, arguing that it requires less than the proposed rule, and that the final regulations should map Clery specifically. These commenters asserted that when such results become final, §

668.46(k)(2)(v) of the Clery Act regulations further clarify that the "result" must include any sanctions and rationale for results and sanction, notwithstanding FERPA.

Discussion: The Department disagrees that § 106.45(b)(5)(v) inherently or directly conflicts with FERPA. A recipient should interpret Title IX and FERPA in a manner to avoid any conflicts. To the extent that there may be rare and unusual circumstances, where a true conflict between Title IX and FERPA exists, the Department includes a provision in § 106.6(e) to expressly state that the obligation to comply with these final regulations under Title IX is not obviated or alleviated by the FERPA statute or regulations. Section 106.45(b)(5)(v) requires 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. The Department notes that this provision is similar to the provision in the Department's regulations, implementing the Clery Act, which requires timely notice of meetings at which the accuser or accused, or both, may be present and provides timely and equal access to the accuser, the accused, and appropriate officials to any information that will be used during informal and formal disciplinary meetings and hearings under § 668.46(k)(3)(1)(B). The Department has not interpreted its regulations, implementing the Clery Act, to violate FERPA and will not interpret similar regulations in these final regulations to violate FERPA.

There is no need to add a FERPA compliance clause in this particular section, as a recipient is always required to comply with all applicable laws. Adding a FERPA compliance clause would contradict the General Education Provisions Act (GEPA), 20 U.S.C. 1221(d), which is reflected in § 106.6(e). GEPA provides in relevant part: "Nothing in this chapter shall be construed to affect the applicability of title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, title V of the Rehabilitation Act of 1973, the Age

Discrimination Act, or other statutes prohibiting discrimination, to any applicable program."[1571] Since at least 2001, the Department has interpreted "this provision to mean that FERPA continues to apply in the context of Title IX enforcement, but if there is a direct conflict between the requirements of FERPA and the requirements of Title IX, such that enforcement of FERPA would interfere with the primary purpose of Title IX to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions."[1572] Section 106.6(e) reflects the Department's longstanding interpretation of GEPA and provides that the "obligation to comply with this part is not obviated or alleviated by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99."

A party such as a complainant or respondent must know who the other parties in a formal complaint are in order to support or challenge the allegations in the formal complaint. With respect to recipients that are State actors, constitutional due process would require as much. As previously stated, the Department interprets these final regulations in a manner that will not require a recipient to violate a person's constitutional due process rights, whether the recipient is private or public.

Additionally, FERPA and its implementing regulations define the term "education records" as meaning, with certain exceptions, records that are directly related to a student and maintained by an educational agency or institution, or by a party acting for the agency or institution.[1573] The Department previously stated: "Under this definition, a parent (or eligible student) has a right to inspect and review any witness statement that is directly related to the

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[1571] 20 U.S.C. 1221(d).
[1572] 2001 Guidance at vii.
[1573] 20 U.S.C. 1232g(a)(4); 34 CFR 99.3.

student, even if that statement contains information that is also directly related to another student, if the information cannot be segregated and redacted without destroying its meaning."[1574] The Department made this statement in response to comments regarding impairing due process in student discipline cases in its notice-and-comment rulemaking to promulgate regulations to implement FERPA.[1575] Written notices under § 106.45(b)(5)(v) may pertain to students who are complainants or respondents, in which case they would need to know who is being interviewed as a witness in an investigation of the formal complaint of harassment.

FERPA, 20 U.S.C. 1232g(b)(6), and its implementing regulations, 34 CFR 99.31(a)(13)-(a)(14) and 34 CFR 99.39, address the conditions permitting the disclosure, without prior written consent, to an alleged victim of a crime of violence or a nonforcible sex offense, among others, of the final results of any disciplinary proceeding conducted by an institution against the alleged perpetrator of such crime or offense with respect to such crime or offense. Similarly, the Clery Act, 20 U.S.C. 1092(g)(8)(B)(ii), and its implementing regulations, 34 CFR 668.46(k)(3)(iv), require an institution to provide the result of a proceeding, including any sanctions imposed by the institution, to both parties. The Department believes that both parties should receive the same information about the result as to each allegation, including a determination regarding responsibility, the reasons for the determination, any sanctions the recipient imposes on the respondent, and whether remedies will be provided by the recipient to the complainant, under §

[1574] U.S. Dep't. of Education, Office of Planning, Evaluation, and Policy Development, Final Regulations, Family Educational Rights and Privacy, 73 FR 74806, 74832-33 (Dec. 9, 2008).
[1575] *Id*.

106.45(b)(7)(ii)(E) as revised in the final regulations.[1576] The Department believes that the result as to each allegation in a formal complaint of sexual harassment concerns both parties and clarifies in the final regulations that the result includes both sanctions and whether remedies will be provided. The result of each determination, including listing any sanctions and stating whether remedies will be provided, should help ensure that no person is excluded from participation in, denied the benefits of, or subjected to discrimination under any education program or activity receiving Federal financial assistance without unnecessarily disclosing to the respondent the details of remedies provided to the complainant. The details of remedies provided to the complainant remain part of the complainant's education record and not the respondent's education record, unless the remedy also imposes requirements on the respondent. We acknowledge that sanctions may at times overlap with remedies. For example, the recipient may impose a unilateral no-contact order on the respondent as part of a sanction that also may constitute a remedy. Under the final regulations, the written determination should list the one-way no-contact order as a sanction against the respondent and state that the recipient will provide

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[1576] The Department's position is consistent with the 2001 Guidance, that FERPA does not conflict with the Title IX requirement "that the school notify the harassed student of the outcome of its investigation, i.e., whether or not harassment was found to have occurred, because this information directly relates to the victim." 2001 Guidance at vii. The Department, however, departs from the 2001 Guidance inasmuch as that guidance document stated, "FERPA generally prevents a school from disclosing to a student who complained of harassment information about the sanction, or discipline imposed upon a student who was found to have engaged in that harassment." *Id*. The Department acknowledged in the 2001 Guidance that exceptions "include the case of a sanction that directly relates to the person who was harassed (e.g., an order that the harasser stay away from the harassed student), or sanctions related to offenses for which there is a statutory exception, such as crimes of violence or certain sex offenses in postsecondary institutions." *Id*. at fn. 3. Through these final regulations, the Department takes the position that sanctions always directly impact the victim, as to sanctions imposed for any conduct described in § 106.30 as "sexual harassment," irrespective of whether the sanction is for a crime of violence or certain sex offenses, for *quid pro quo* sexual harassment, or for the *Davis* definition of sexual harassment in § 106.30. Irrespective of whether the sexual harassment rises to the level of a crime of violence, the sanction directly relates to the victim who should know what to expect after the conclusion of the grievance process. For example, the victim should know whether the perpetrator was expelled, or whether the perpetrator was suspended for a period of time, as such information will inevitably impact the victim. The sanction represents part of the recipient's response to addressing sexual harassment, and the victim should know how the sexual harassment which the victim suffered, was addressed.

remedies to the complainant. Thus, even where the no-contact order constitutes both a sanction and a remedy, the written determination would only list the measure insofar as it constitutes a sanction, preserving as much confidentiality as possible around the particular nature of a complainant's remedies. By way of further example, if a recipient wishes to change the housing arrangement of the complainant as part of a remedy, the written determination should simply state that remedies will be provided to the complainant; the complainant would then communicate separately with the Title IX Coordinator to discuss remedies,[1577] and the decision to change the complainant's housing arrangement as part of a remedy would not have been disclosed to the respondent in the written determination. That remedy (which does not directly affect the respondent) must not be disclosed to the respondent.

Changes: The Department revised § 106.45(b)(7)(ii)(E) to state that the written determination must include any sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant.

Comments: Commenters objected to the proposed rule, stating that Title IX should not control over FERPA, but vice versa – FERPA should take precedence over Title IX in cases of a conflict. Some commenters suggested that the 2001 Guidance more effectively handled these types of FERPA issues, and better avoided blanket statements about whether FERPA ought to be superseded by Title IX. One suggested an express statement that Title IX overrides FERPA,

[1577] To clarify this, the final regulations additionally revise § 106.45(b)(7)(iv) to state that the Title IX Coordinator is responsible for the effective implementation of remedies. Thus, where a written determination states that remedies will be provided, the complainant may contact the Title IX Coordinator to discuss the nature and implementation of such remedies.

arguing that the 2001 Guidance states as much unambiguously. Commenters stated that the proposed rules exacerbate the conflict between FERPA and Title IX. Several commenters stated that the final regulations ought to specify that complainants have the right to keep their education records private. Some commenters even stated that the Department lacked the authority to tell schools that Title IX controls over FEPRA, and that schools have an independent duty to comply with FERPA. Some commenters suggested removing any mention of FERPA, since it might confuse recipients to mention it, but say that Title IX supersedes FERPA in the case of a conflict. Other commenters asserted it might be confusing because FERPA does not apply to the types of information likely to be shared under the grievance procedures. These commenters contended that the proposed rules were not "trauma-informed," inasmuch as they are overly focused on addressing the minor problem of false accusations, as opposed to remedying sexual harassment.

Many commenters argued that FERPA does not authorize one student – or an employee, for that matter – to review the education records of a student merely because the student complains of sexual harassment. One commenter expressed concern that the proposed rules would require the sharing of student records with employees who would otherwise not be authorized to view records without the student's consent.

Some commenters suggested that the preamble's justification for records that relate to a student being construed as an exception to FERPA is wrong. Commenters contended that not every document that relates to a complainant or to an incident relates to the respondent. Schools, if they comply with the rule, asserted commenters, will be held accountable for their FERPA violations. Commenters stated the Department should reconsider whether the parties ought to be entitled to physical, mental, and academic performance records of other students.

Other commenters argued that the proposed rules would force schools to violate State law, for which they also have an independent legal duty to comply. For instance, commenters asserted that the Department cannot require schools to provide recordings that were obtained in violation of a State's two-party consent law for recordings. Commenters cited Florida and Washington law for these arguments. They argued that Washington State protects IEPs (individualized education plans) and Section 504 plans from production, but the proposed regulations would likely allow the production of these records in some cases. One commenter asserted that Florida law protects records related to sexual harassment until a finding is made, so the proposed rules will force schools to violate Florida law. A few commenters proposed that the Department should indicate whether it thinks that Title IX reports and files should be subject to a public records request, and if so, the scope and extent of such requests.

Discussion: The Department disagrees that § 106.45(b)(5)(v) inherently or directly conflicts with FERPA. A recipient should interpret Title IX and FERPA in a manner to avoid any conflicts. To the extent that there may be unusual circumstances, where a true conflict between Title IX and FERPA may exist (such as a student's formal complaint against an employee), the Department includes a provision in § 106.6(e) to expressly state that the obligation to comply with these final regulations under Title IX is not obviated or alleviated by the FERPA statute or regulations. In addressing conflicts between FERPA and Title IX, the Department in the Preamble of the 2001 Guidance states:

> 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 . . . ." The Department interprets this provision to mean that FERPA continues to apply in the context of Title IX enforcement, but if there is a direct conflict between requirements of FERPA and requirements of Title IX, such that enforcement of FERPA would interfere with the

> primary purpose of Title IX to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions.[1578]

The General Education Provisions Act (GEPA), of which FERPA is a part, states: "Nothing in this chapter shall be construed to affect the applicability of title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, title V of the Rehabilitation Act of 1973, the Age Discrimination Act, or other statutes prohibiting discrimination, to any applicable program."[1579] The legislative history underlying this provision in GEPA demonstrates that Congress did not intend for GEPA to limit the implementation or enforcement of the Civil Rights Act of 1964. There is not much legislative history with respect to the 1994 amendment to GEPA,[1580] adding Title IX, but the legislative history with respect to the 1974 amendment to GEPA,[1581] concerning Title VI of the Civil Rights Act, is instructive. The legislative history reveals the Senate was concerned that certain provisions in GEPA may limit the Civil Rights Act of 1964.[1582] Consequently, the Senate specifically stated that "in order to make clear that the provisions in the [GEPA] do not conflict with the Civil Rights Act of 1964, subparagraph (B) expressly states that such Civil Rights Act is not an applicable statute and therefore subject to limitations on interpretations of such a statute which may occur in [GEPA]."[1583] The Senate's proposed amendment was slightly revised in the conference committee, but there was no mention of any change in purpose or scope. Specifically, the Conference Report from the House notes

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[1578] 2001 Guidance at vii.
[1579] 20 U.S.C. 1221(d).
[1580] The 1994 amendment to GEPA was part of § 211, title II of Improving America's Schools Act, Pub. L. 103-382, 108 Stat 3518.
[1581] The 1974 amendment to GEPA was part of § 505(a)(1), title V of the Education Amendments of 1974, Pub. L. 93-380, 88 Stat 484.
[1582] S. Rep. No. 93-763, at 233 (1974).
[1583] *Id*.

that the final amendments to GEPA include language that expressly addresses the conflict between GEPA and Title VI.[1584] This Conference Report provides in relevant part:

> The Senate amendment, but not the House bill, clarifies that for the purposes of the General Education Provisions Act, the Civil Rights Act shall not be considered an applicable statute, but shall continue to have full force and effect over education programs. . . . The conference substitute contains these provisions of the Senate amendment, except that the provision relating to the Civil Rights Act of 1964 states that nothing in the General Education Provisions Act shall be construed to affect the applicability of such [Civil Rights Act of 1964] to any program subject to the provisions of the General Education Provisions Act.[1585]

The legislative history thus supports the Department's 2001 interpretation that Congress intended the Civil Rights Act of 1964 to override GEPA, which includes FERPA, if there was a direct conflict between the two statutes. When Congress amended GEPA to also include Title IX in the same section and context as Title VI, Congress presumably intended that Title IX, like Title VI, override GEPA, including FERPA, if there was a direct conflict. The Department's position is consistent with its 2001 Guidance, and the Department is not departing from this position.

The Department has the authority to enforce both Title IX under 20 U.S.C. 1681 and 34 CFR Part 106 and FERPA under 20 U.S.C. 1232g and 34 CFR Part 99. Whether FERPA applies to a particular record is a fact-specific determination that FERPA and its implementing regulations address, not these final regulations.

The Department disagrees that the proposed regulations are not "trauma-informed" insofar as the Department recognizes and acknowledges the traumatic impact of sexual harassment and aims to hold recipients accountable for legally binding obligations throughout these final regulations in part because the experience of sexual harassment can traumatize

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[1584] H.R. Rep. No. 93-1211, at 177 (1974).
[1585] *Id*.

victims in a way that jeopardizes the victim's equal access to education. The Department disagrees that these final regulations are overly focused on addressing false allegations instead of remedying sexual harassment. The Department notes that under § 106.44(a), the Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. Accordingly, complainants have more control over the process to address their allegations of sexual harassment.

As previously explained, FERPA and its implementing regulations define the term "education records" as meaning, with certain exceptions, records that are directly related to a student and maintained by an educational agency or institution, or by a party acting for the agency or institution.[1586] The Department previously stated: "Under this definition, a parent (or eligible student) has a right to inspect and review any witness statement that is directly related to the student, even if that statement contains information that is also directly related to another student, if the information cannot be segregated and redacted without destroying its meaning."[1587] The Department's statement was made in response to a comment about FERPA impairing due process in student disciplinary proceedings. The Department does not think that evidence obtained as part of an investigation pursuant to these final regulations that *is directly related to the allegations raised in a formal complaint* can be segregated and redacted because

[1586] 20 U.S.C. 1232g(a)(4); 34 CFR 99.3.
[1587] 73 FR 74806, 74832-33 (Dec. 9, 2008).

the evidence directly relates to allegations by a complainant against a respondent and, thus, constitutes an education record of both the complainant and a respondent. A formal complaint that raises allegations against a student-respondent is directly related to that student. The Department is bound by the U.S. Constitution and must interpret Title IX and FERPA in a manner that does not violate a person's due process rights, including notice and an opportunity to respond. If a complainant or respondent provides sensitive records such as medical records as part of an investigation, then the parties must have an equal opportunity to inspect and review information that constitutes evidence directly related to the allegations raised in a formal complaint. If some of the information in the medical records is not directly related to the allegations raised in a formal complaint, then these final regulations do not require a recipient to share the information that is not directly related to the allegations raised in the formal complaint. As previously explained, the Department has clarified in § 106.45(b)(5)(i) that a recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for the grievance process under § 106.45(b). Accordingly, a recipient would not have access to a party's medical records unless that party gave the recipient voluntary, written consent to do so for a grievance process under § 106.45(b). If the party is not an "eligible student," as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a "parent," as defined in 34 CFR 99.3.

The Department is not persuaded that these final regulations require a recipient to violate State law. If a recipient knows that a recording is unlawfully created under State law, then the

recipient should not share a copy of such unlawful recording. The Department is not requiring a recipient to disseminate any evidence that was illegally or unlawfully obtained. Similarly, the Florida laws that the commenter cites, Florida Statutes §§ 119.071(2)(g)(1) and 1012.31(3)(a)(1) concern public disclosure of records under sunshine laws, and the Department is not requiring that a recipient widely disseminate public records upon request. The Department's requirement concerns disclosure solely to the other party to provide sufficient notice and an opportunity to respond. Similarly, the Department takes no position in these final regulations on whether records generated during a Title IX grievance process must, or should, become subject to disclosure under State sunshine laws. The Department also is not regulating on FERPA in this rulemaking and takes no position in this rulemaking as to FERPA's potential restrictions on the nonconsensual disclosure of student's education records in the context of sunshine law. Sunshine laws vary among states. Additionally, the manner in which a request under State sunshine laws is handled depends on the unique context and circumstances of the particular request. A recipient also would not be required to release an IEP or Section 504 plan that is in the recipient's possession. A recipient is required to provide any evidence "obtained as part of the investigation that is directly related to the allegations raised in a formal complaint" under § 106.45(b)(5)(vi); however, the final regulations revise § 106.45(b)(5)(i) to restrict a recipient from accessing, considering, disclosing, or otherwise using a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for a grievance process under § 106.45(b). If the party is not an "eligible student," as defined in 34 CFR 99.3, then the recipient must obtain

the voluntary, written consent of a "parent," as defined in 34 CFR 99.3. When a party offers an IEP or Section 504 plan as part of the evidence that a recipient should consider, or has granted the recipient consent to use those records in a Title IX grievance process, then the other party should be able to inspect and review this evidence, if that evidence is directly related to the allegations raised in a formal complaint.

Changes: None.

Comments: Several commenters argued that the proposed rules would put schools in direct conflict with FERPA, and that FERPA does not maintain an exception that would be applicable for all Title IX grievance proceedings. Some noted that there is no express carve-out under FERPA for such proceedings, and that schools will quickly be caught trying to navigate the legal boundaries of their obligations. The need to hire legal counsel to figure out these issues will be immediate, asserted some commenters, and schools will have difficulty believing that they really ought to be reviewing and potentially sharing with other students one student's medical records, therapy notes, or documents that contain information about prior sexual history.

One commenter argued that there is an internal contradiction, given that supportive measures are supposed to remain confidential, with § 106.45(b)(7), the provision regarding disclosure of the results of grievance process.[1588]

One commenter stated that the proposed rules leave ambiguity about whether FERPA will apply to conduct that is not covered by these proposed regulations under Title IX because it does not rise to the level of the definition of sexual harassment in § 106.30, which this commenter characterizes as narrower than the Department's past definition.

[1588] Commenter cited: § 106.45(b)(7)(ii)(E).

Another commenter stated that the proposed rules give students more rights than does FERPA, since time frames for production are shorter, which the commenter believed to be bad policy. Several commenters stated that schools need flexibility on which information is private and which information is relevant to a claim of sexual harassment.

Discussion: As explained above, the Department disagrees that there is any inherent conflict between FERPA and these final regulations, which address sexual harassment under Title IX. The Department administers both Title IX and FERPA and expressly provides in § 106.6(e) that the obligation to comply with Part 106 of Title 34 of the Code of Federal Regulations "is not obviated or alleviated by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99." The Department offers technical assistance and will address compliance with FERPA and Title IX, and recipients may consult with their own counsel about compliance with various laws. As the Department administers both FERPA and Title IX, the Department will not interpret compliance with its regulations under Title IX to violate requirements in its regulations under FERPA.

If a party (or the parent of a party) gives voluntary, written consent to a recipient under § 106.45(b)(5) to use the party's medical records that are directly related to the allegations raised in a formal complaint as part of its investigation, then the recipient must provide both parties with an equal opportunity to inspect and review such evidence. If some of the information in the medical records is not directly related to the allegations raised in a formal complaint, then these final regulations do not require a recipient to share the information that is not directly related to the allegations raised in the formal complaint. With respect to evidence of prior sexual behavior, the Department revised § 106.45(b)(6) to prohibit evidence about the complainant's sexual predisposition or prior sexual behavior unless such evidence is offered to prove that someone

other than the respondent committed the conduct alleged by the complainant or to prove consent. If a recipient obtains evidence about a party's sexual predisposition or prior sexual behavior that is directly related to the allegations raised in a formal complaint, the recipient should allow both parties an equal opportunity to inspect and review such evidence to be able to prepare to respond to it or object to its introduction in the investigative report or at the hearing.

There is no internal contradiction that supportive measures should be confidential and that the result of a grievance process under § 106.45 should be made known to both parties. A complainant must be offered and may receive supportive measures irrespective of whether the complainant files a formal complaint, and the supportive measures that a complainant or a respondent receives typically relate only to them and must be kept confidential pursuant to § 106.30. The definition of supportive measures in § 106.30 clarifies that it may be necessary to notify the other party of a supportive measure if the supportive measure requires both the complainant and the respondent's cooperation (i.e., mutual restrictions on contact between the parties). The result at the end of a grievance process under § 106.45, including any sanctions and whether remedies will be provided to a complainant, impact both parties and can, and should, be part of the written determination simultaneously sent to both parties. The complainant should know what sanctions the respondent receives because knowledge of the sanctions may impact the complainant's equal access to the recipient's education program and activity. The Department revised § 106.45(b)(7)(ii)(E) to require a recipient to state whether remedies will be provided to the complainant but not what remedies will be provided. Thus, the recipient may note in the written determination only that a complainant will receive remedies but should not note in the written determination that the recipient, for example, will change the complainant's housing arrangements as part of a remedy. A respondent should know whether the recipient will

provide remedies to the complainant because the respondent should be aware that the respondent's actions denied the complainant equal access to the recipient's education program or activity. Similarly, the parties should both know the rationale for the result as to each allegation, including a determination regarding responsibility, as provided in § 106.45(b)(7)(ii)(E), because due process principles require the recipient to provide a basis for its determination. The rationale also will reveal whether there was any unlawful bias such that there may be grounds for appeal under § 106.45(b)(8)(i)(C).

As to the commenter's question about the applicability of FERPA to conduct that is not defined in § 106.30, FERPA applies to all education records as defined in 20 U.S.C. 1232g(a)(4)(A) and 34 CFR 99.3. Whether FERPA applies does not depend on whether the conduct at issue satisfies the definition defined in § 106.30. Accordingly, there is no inherent conflict between FERPA, and these final regulations addressing sexual harassment under Title IX.

The Department does not believe that these final regulations give students more rights than FERPA due to short time frames for production. The Department acknowledges that under 20 U.S.C. 1232g(a)(1)(A) and § 99.10(b) in the FERPA regulations, an educational agency or institution must comply with a request for access to covered education records within a reasonable period of time, but not more than 45 days after it has received the request. FERPA, however, was only intended to establish a minimum Federal standard for access to education records[1589] and thus other laws may require access to education records in a shorter time frame

[1589] "Joint Statement in Explanation of the Buckley / Pell Amendment [to FERPA]," 120 CONG. REC. 39858, 39863 (Dec. 13, 1974).

than FERPA does. A recipient, moreover, has an obligation to include reasonably prompt time frames for the conclusion of a grievance process as described in § 106.45(b)(1)(v). Taking 45 days to respond to a request for access to records would not provide a reasonably prompt time frame for the conclusion of a grievance process. The ten-day time frame in these final regulations governs the minimum length of time that the parties have to submit a written response to the recipient after the recipient sends to each party and the party's advisor, if any, the evidence subject to inspection and review. These final regulations do not require a recipient to obtain evidence within a specific time frame, although a recipient is required to include reasonably prompt time frames for the conclusion of a grievance process pursuant to § 106.45(b)(1)(v) and to respond promptly under § 106.44(a). Additionally, the school has some discretion to determine what evidence is directly related to the allegations in a formal complaint.

Changes: None.

Comments: Some commenters expressed concern about the fact that private information would be readily shared with another party. One commenter asserted that the proposed regulations facilitate—rather than discourage—retaliation by having an opposing party learn confidential information about the complainant. One commenter argued that giving students access to other students' files would lead to bullying and intimidation. Commenters suggested that even if one minor portion of a document is relevant—perhaps a medical examination that occurred on the night of an alleged rape—the rest of the medical information may include a wealth of information that is totally irrelevant to the complaint, and should be redacted. A commenter argued that some documents may involve non-parties such that disclosing a complainant's documents to a respondent could reveal private information that has nothing to do with the

complainant. The commenter suggested that the Department modify the proposed regulations to insist that schools redact irrelevant information from information produced to the parties.

Similarly, commenters suggested that the disadvantage to the privacy issues would always fall, asymmetrically, on complainants. These commenters stated respondents will typically have little information in their student file that is relevant to the accusation—no rape kits, no medical or counseling information, etc.—so providing student files is asymmetrically damaging to a complainant.

Many commenters contended that there will be a chilling effect on student-complainants obtaining counseling services, if counseling records must be disclosed to a respondent. Some commenters stated that even victims who do report will often dismiss their own complaints once they realize that there is a chance of being humiliated by their records being disclosed to their harasser, and for those records to go public. One commenter stated that this effect would be particularly damaging to women of color, arguing that these women report sexual harassment at very low rates, and would be deterred from reporting if their privacy were at stake.

Some contended that even student-witnesses will be unwilling to come forward, believing that their student records might also be subject to discovery by the respondent. These commenters stated that student-witnesses will be subject to threats and intimidation, as well as potential witness tampering.

Discussion: The Department disagrees that these final regulations will lead to retaliation. As a precaution, the Department adopts a provision in § 106.71 to expressly prohibit retaliation to address the commenter's concerns. This retaliation provision is broad and would prohibit threats and intimidation as well as interfering with potential witnesses.

The Department also disagrees that the parties will be able to obtain information that is unrelated to the allegations raised in a formal complaint. Section 106.45(b)(5)(vi) only requires a recipient to provide both parties an equal opportunity to inspect and review any evidence that is directly related to the allegations raised in a formal complaint as part of the investigation. Accordingly, if there is information in a medical record that is not directly related to the allegations raised in a formal complaint, these final regulations do not require a recipient to share such information. Consistent with FERPA, these final regulations do not prohibit a recipient from redacting personally identifiable information from education records, if the information is not directly related to the allegations raised in a formal complaint. Accordingly, the Department does not need to revise the final regulations to specifically address redactions. A recipient, however, should be judicious in redacting information and should not redact more information than is necessary under the circumstances so as to fully comply with obligations under § 106.45.

The Department disagrees that its final regulations asymmetrically affect complainants, as respondents may have sensitive information too. For example, the recipient may obtain information from a criminal investigation of a respondent. Additionally, the rape shield provisions in § 106.45(b)(6) apply only to complainants.

The Department disagrees that these final regulations will have a chilling effect on reporting. A complainant is not required to submit counseling records to a recipient as part of an investigation. If the complainant does not want a respondent to inspect and review any counseling records that are directly related to allegations raised in a formal complaint, then the complainant is not required to release such counseling records to the recipient under § 106.45(b)(5)(i). (The Department notes that the same is true for respondents.) These final regulations do not foster complainants or respondents being humiliated and certainly do not

result in their records being made public. The recipient is simply giving 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 so that each party can meaningfully respond to the evidence prior to the conclusion of the investigation. This provision is critical for a complainant to provide evidence in support of allegations and for a respondent to provide evidence to challenge allegations. This provision also allows each party an opportunity to meaningfully respond to the evidence that is directly related to the allegations.

The Department disagrees that these final regulations, including the provision about an equal opportunity to inspect and review any evidence, will result in increased harm to women of color. These final regulations apply to all persons, irrespective of race, national origin, or color. Some commenters suggested that respondents who are persons of color have been more severely impacted by the lack of due process protections in a grievance process. These final regulations provide everyone the same fair and impartial grievance process described in § 106.45.

Changes: The Department adopts a provision in § 106.71 to expressly prohibit retaliation.

Comments: Some commenters were not concerned about privacy issues for respondents who have been found responsible for sexual harassment. Some suggested that if a student is found responsible, that finding should follow a student if they try to enroll in a new school so as to help keep students safe in the new school. Some commenters asserted using FERPA to protect these students is unfair and endangers students at other schools when respondents who have been found responsible transfer schools. Other commenters stated that the final regulations should provide that a student's disciplinary measures cannot be conveyed to another college under FERPA, so as to avoid destroying their lives by having a finding of responsibility follow them to other schools.

Discussion: FERPA and its implementing regulations, 20 U.S.C. 1232g(b)(6) and 34 CFR 99.31(a)(13), 99.31(a)(14), and 99.39, address the conditions permitting the disclosure, without prior written consent, to an alleged victim of a crime of violence or a nonforcible sex offense and to the general public of the final results of any disciplinary proceeding conducted by an institution against the alleged perpetrator of such crime or offense with respect to such crime or offense. Recipients may have the discretion to disclose, without prior written consent, personally identifiable information from education records of student-respondents who have been found responsible for a violation of Title IX to other third parties under other exceptions to consent in FERPA. The Department notes that such disclosures of personally identifiable information are permissive and not mandatory under FERPA, and the Department takes no position in these final regulations as to whether a recipient should disclose any personally identifiable information under FERPA. For example, an exception in FERPA and its implementing regulations at 20 U.S.C. 1232g(b)(1)(B) and 34 CFR 99.31(a)(2) and 99.34 permits a school to disclose, without prior, written consent, personally identifiable information contained in a student's education records to another school in which the student seeks or intends to enroll, or where the student is already enrolled so long as the disclosure is for purposes related to the student's enrollment or transfer. The sending school may make the disclosure if it has included in its annual notification of FERPA rights a statement that it forwards education records in such circumstances. Otherwise, the sending school must make a reasonable attempt to notify the parent or eligible student in advance of making the disclosure, unless the parent or eligible student has initiated the disclosure. The school also must provide a parent or an eligible student with a copy of the records that were released, if requested by the parent or eligible student, and an opportunity to seek to amend the education records. FERPA and its implementing regulations also provide that

an educational agency or institution may include and disclose, without prior, written consent, appropriate information in a student's education records concerning disciplinary information taken against such student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community to teachers and school officials, within the agency or institution or in other schools, who have legitimate educational interests in the behavior of the student.[1590] Similarly, the Clery Act, 20 U.S.C. 1092(g)(8)(B)(ii), and its implementing regulations, 34 CFR 668.46(k)(3)(iv), require an institution to provide the result of a proceeding, including any sanctions imposed by the institution, to both parties. In this manner, a recipient has discretion as to whether to share information with another school about a respondent.

The Department does not regulate what information schools must share when a student transfers to a different school and declines to do so here. Requiring institutions to share information goes beyond the mandate of Title IX to prohibit discrimination on the basis of sex in a particular recipient's education program or activity. Recipients may share such information as long as doing so is permissible under other applicable Federal, State, and local laws.

Changes: None.

Comments: Some commenters expressed concern that in cases where a formal complaint must be opened by a Title IX Coordinator, as opposed to by a student or employee reporting sexual harassment, that the victim's confidential information will be subject to discovery despite

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[1590] 20 U.S.C. 1232g(h) and 34 CFR 99.36(b). As explained in the "Section 106.44(c) Emergency Removal" subsection in the "Additional Rules Governing Recipients' Response" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment," section of this preamble, the Department revised § 106.44(c), which concerns emergency removal, to better align with the disclosure, without prior written consent, of personally identifiable information from education records in a health and safety emergency under FERPA and its implementing regulations. *Compare* § 106.44(c) *with* 20 U.S.C. 1232g(h) *and* 34 CFR 99.36.

declining to file a formal complaint. This leaves students and employees with no way to protect their privacy and would lead to a dramatic chilling effect on reporting.

Discussion: The Department notes that the final regulations entirely removed proposed provision § 106.44(b)(2) that would have required a Title IX Coordinator to file a formal complaint upon receiving multiple reports against the same respondent. The final regulations do not mandate circumstances where a Title IX Coordinator is required to sign a formal complaint; rather, the final regulations leave a Title IX Coordinator with discretion to sign a formal complaint. If the Title IX Coordinator signs a formal complaint against the wishes of the complainant, then the recipient likely will have difficulty obtaining evidence from the complainant that is directly related to the allegations in a formal complaint. As previously explained, the Department revised § 106.45(b)(5)(i) to specifically state that the recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for a grievance process under this section (if a party is not an "eligible student," as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a "parent" as defined in 34 CFR 99.3). Accordingly, a recipient will not be able to access, consider, disclose or otherwise use such confidential records without a party's consent.

The complainant is not required to participate in the process or to provide any information to the Title IX Coordinator and in fact, the final regulations expressly protect a complainant (or other person's) right *not* to participate in a Title IX proceeding by including

such refusal to participate in the anti-retaliation provision in § 106.71. If the recipient has commenced a § 106.45 grievance process without a cooperating complainant, the recipient must still obtain evidence about the allegations, and the complainant and respondent must have an opportunity to inspect, review, and respond to such evidence. Such evidence would be directly related to the respondent under FERPA's definition of "education records"[1591] because it is related to the allegations against the respondent. The respondent would have access to such education records under both FERPA and these final regulations implementing Title IX, and the Department interprets both FERPA and Title IX consistent with constitutionally guaranteed due process rights. A respondent should have notice of and a meaningful opportunity to respond to the evidence about the allegations against the respondent. Full and fair adversarial procedures increase the probability that the truth of allegations will be accurately determined,[1592] and reduce the likelihood that impermissible sex bias will affect the outcome. Accordingly, the respondent, like the complainant, must have the opportunity to inspect, review, and respond to such evidence. Even if a complainant chooses not to participate in a § 106.45 grievance process initiated by the Title IX Coordinator's signing of a formal complaint, the complainant is still treated as a party[1593] entitled to, for example, the written notice of allegations under § 106.45(b)(2), notice of meetings or interviews to which the complainant is invited under § 106.45(b)(5)(v), and a copy

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[1591] 20 U.S.C. 1232g(a)(4); 34 CFR 99.3.

[1592] The adversarial "system is premised on the well-tested principle that truth – as well as fairness – is 'best discovered by powerful statements on both sides of the question.'" *Penson v. Ohio*, 488 U.S. 75, 84 (1988) (quoting Irving R. Kaufman, *Does the Judge Have a Right to Qualified Counsel?*, 61 AM. BAR ASS'N J. 569, 569 (1975)).

[1593] *See* § 106.30 defining a "complainant" as "an individual who is alleged to be the victim of conduct that could constitute sexual harassment." The final regulations removed the phrase "or on whose behalf the Title IX Coordinator filed a formal complaint" to reduce the likelihood that a complainant would feel pressured to participate in a grievance process against the complainant's wishes. Thus, even where the Title IX Coordinator signs the formal complaint that initiates the grievance process (as opposed to the complainant filing the formal complaint), the complainant is treated as a party during the grievance process yet the complainant's right not to participate is protected (for example, under the anti-retaliation provision in § 106.71).

of the evidence subject to inspection and review under § 106.45(b)(5)(vi). Thus, the complainant would at least know what evidence was obtained and have the opportunity to respond to that evidence, if the complainant so desired.[1594]

The Department disagrees that these final regulations will chill reporting. These final regulations will encourage complainants to report allegations of sexual harassment because complainants must be offered supportive measures irrespective of whether they choose to file a formal complaint under § 106.44(a).[1595] These final regulations provide a fair, impartial, and transparent grievance process for formal complaints that helps ensure that all parties receive the opportunity to inspect and review any evidence obtained as part of an investigation that is directly related to the allegations in a formal complaint.

Changes: The Department revised § 106.45(b)(5)(i) to specifically state that the recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for a grievance process under

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[1594] The final regulations protect a complainant's right to seek the kind of response from a recipient that best meets the complainant's needs (i.e., supportive measures, a grievance process, or both) and nothing in the final regulations requires a complainant to participate in a grievance process against the complainant's wishes, even where the Title IX Coordinator signed a formal complaint initiating a grievance process against the respondent. Commenters pointed out the importance of respecting complainant autonomy and asserted that for a variety of reasons a complainant may not wish to file a formal complaint, yet may decide later to file a formal complaint or to participate in a grievance process initiated by the Title IX Coordinator. The final regulations balance these interests in deference to a complainant's autonomy and control as to whether initiating or participating in a grievance process best serves the complainant's needs.

[1595] § 106.71, prohibiting retaliation, protects any person's right *not* to participate in a Title IX grievance process, thereby buttressing a complainant's right under § 106.44(a) to receive supportive measures regardless of whether the complainant files a formal complaint or otherwise participates in a grievance process.

this section (if a party is not an "eligible student," as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a "parent" as defined in 34 CFR 99.3).

Comments: Commenters expressed concerns about schools producing information to students. Some contended that the proposed rules contained provisions regarding the content of the required notice that directly conflict with FERPA. Other commenters argued that the right to appeal is generally a safety net against a lack of evidence, such that there is no need for schools to produce literally all evidence directly related to the allegation. One commenter suggested that the proposed rules would likely create an inconsistency with all other forms of student misconduct investigations, where schools generally do not provide FERPA-protected education records to the accused student. Some argued that this would put Title IX in "least-favored nation" status, such that only Title IX allegations were likely to trigger these privacy concerns, as opposed to allegations based on race or disability harassment.

With respect to production of documents, many commenters expressed concern that the proposed rules did not sufficiently clarify what is discoverable and what is confidential. Commenters stated that schools may opt to collect as much information as possible in their investigations, out of fear that OCR will find them in violation of the new Title IX rules, but that will also mean access to a host of irrelevant information being given to the parties. Once in the hands of students, asserted commenters, the information is totally unprotected. The proposed rule, commenters argued, does not prohibit parties from photographing and texting even highly confidential information about the other party, even when young children are involved. One commenter suggested that there should be some exceptions on production, such as nude photos or other photos of a graphic sexual nature. Even the effort to ensure that technological platforms do not allow sharing is inadequate, commenters asserted, because smart phones are ubiquitous,

and because many schools will simply operate out of compliance with this requirement, due to a lack of funds for technological updates. Other commenters disagreed, however, stating that it would be better to allow easier access to electronic documents, since the inability to cut and paste from materials would make preparing one's defense more difficult.

Some commenters argued that a school having to review so much evidence prior to production will increase the cost of attorneys and advisors who need to be paid to review all evidence, turning the Title IX process into an expensive one. Some commenters stated that the natural result of this process is that students and employees in Title IX proceedings will try to hire attorneys to redact their own evidence before giving it to schools.

By way of contrast, some commenters argued that the proposed rules offer respondents more disclosure of exculpatory evidence than the *Brady* case does in the criminal context, which is anomalous for a noncriminal proceeding in a school setting. These commenters stated that under *Brady*, criminal prosecutors only have to disclose exculpatory evidence. They also stated that prosecutors do not have to produce evidence about sexual contact with the alleged perpetrator in the past, which is contrary to the proposed rule. Apart from prosecutors, commenters argued that police officers need not circulate draft reports to the people involved in a crime scene investigation, which is seemingly what commenters believed has to happen in the Title IX context.

One commenter stated that the production of so much evidence will jeopardize law enforcement investigations. Another commenter suggested that Title IX administrators will tell complainants not to submit certain evidence, out of fear that it will be produced to the respondent. One commenter stated that parties would strategically introduce evidence of academic performance and perhaps sexual history in order to embarrass the other party, and deter

them from continuing the process; the commenter also suggested that introducing such evidence might bias an adjudicator against the other party. Even in the best cases, asserted commenters, adjudicators would be forced to weigh whether evidence was relevant, and forced to spend time and energy on making rulings on the admissibility of documents.

Discussion: As previously explained, there is no inherent conflict between these final regulations and FERPA. An appeal right does not address the concern that parties should have access to the universe of evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint. Having such evidence will help parties adequately prepare for a hearing. These final regulations do not require disclosing education records in violation of FERPA as the Department has previously interpreted FERPA to allow for the disclosure of records that are directly related to a particular student in the context of impairing due process in student disciplinary proceedings where the information could not be segregated and redacted without destroying the meaning of the education records. These final regulations require disclosure of evidence that is directly related to the allegations raised in a formal complaint. As previously stated, these final regulations do not require a recipient to share information in a record that does not directly relate to the allegations in a formal complaint.

These final regulations address sexual harassment, and the Department acknowledges that recipients may use a different grievance process to address sex discrimination that is not sexual harassment just as a recipient may use a different grievance process to address allegations related to race and disability. A grievance process to address race or disability concerns different considerations than a grievance process to address sexual harassment.

The Department disagrees that these final regulations require a recipient to provide completely irrelevant evidence because § 106.45(b)(5)(vi) expressly states that the recipient must

provide "any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint." The only evidence that a recipient should be providing is evidence that is directly related to the allegations raised in a formal complaint. These final regulations neither require nor prohibit a recipient to use a file sharing platform that restricts the parties and advisors from downloading or copying the evidence. Recipients also may specify that the parties are not permitted to photograph the evidence or disseminate the evidence to the public. Recipients thus have discretion to determine what measures are reasonably appropriate to allow the parties to respond to and use the evidence at a hearing, while preventing the evidence from being used in an impermissible manner as long as such measures apply equally to both parties under § 106.45(b). Such measures may be used to address sensitive materials such as photographs with nudity.

The Department agrees that a recipient will need to review all the evidence obtained as part of the investigation and determine what evidence is directly related to the allegations raised in a formal complaint. The Department disagrees that attorneys must conduct this review as lay persons also may determine what evidence is directly related to the allegations raised in a formal complaint.

Irrespective of what information is available in a criminal case, the Department believes that both parties should have the opportunity to inspect and review any evidence obtained as part of an investigation that is directly related to the allegations raised in a formal complaint. The grievance process in § 106.45 does not have all of the same protections as a court proceeding in a criminal case. For example, these final regulations do not contain a comprehensive set of rules of evidence. Neither party may issue a subpoena to gather information from each other or the recipient for purposes of the grievance process under § 106.45. Neither of the parties has a right

to effective assistance of counsel under these final regulations, whereas a criminal defendant does have that right throughout the criminal proceeding. Under these final regulations, the parties only receive an advisor, who does not need to be an attorney, to conduct cross-examination on behalf of that party so as to ensure that the parties do not directly cross-examine each other. The parties should have an equal opportunity to review and inspect evidence that directly relate to the allegations raised in a formal complaint as these allegations necessarily relate to both parties. Even if these final regulations did not exist, parties who are students would have a right to inspect and review records directly related to the allegations in a formal complaint under FERPA, 20 U.S.C. 1232g(a)(1)(A)-(B), and its implementing regulations, 34 CFR 99.10 through 99.12, because these records would directly relate to the parties in the complaint.[1596]

With respect to evidence of prior sexual behavior, the Department revised § 106.45(b)(6) to prohibit all evidence (and not just questions) about the complainant's sexual behavior or predisposition unless such evidence is offered to prove that someone other than the respondent committed the conduct alleged by the complainant or to prove consent. If a recipient obtains evidence about a party's sexual behavior or predisposition that is directly related to the allegations raised in a formal complaint, the recipient should allow both parties an equal opportunity to inspect and review such evidence to be able to prepare to respond to it or object to its inclusion in the investigative report and its use at the hearing.

These final regulations will not jeopardize or delay a law enforcement investigation, which is a completely separate process. If there is a concurrent law enforcement investigation, then a recipient may temporarily delay or extend the grievance process under § 106.45(b)(1)(v),

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[1596] 73 FR at 74832-33.

as long as the recipient documents the good cause for the temporary delay or extension. A Title IX Coordinator should not encourage or discourage a party from submitting evidence and should inform both parties that the grievance process will provide them with an 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. These final regulations do not allow a Title IX Coordinator to restrict a party's ability to provide evidence. If a Title IX Coordinator restricts a party from providing evidence, then the Title IX Coordinator would be violating these final regulations and may even have a conflict of interest or bias, as described in § 106.45(b)(1)(iii).

If the academic record of a party is directly related to the allegations of sexual harassment, then the recipient may obtain, access, use, and disclose such evidence as part of the investigation under § 106.45. For example, if a complainant alleges that the complainant frequently missed classes as a result of the sexual harassment, then the attendance records of the complainant for that class are directly related to these allegations. Accordingly, a recipient may obtain or a party may request the recipient to obtain such attendance records as part of an investigation under § 106.45, if such records are directly related to the allegations in the formal complaint. Similarly, if a student-complainant alleges that an employee-respondent sexually harassed them on a field trip and the employee-respondent or that student-complainant did not attend the field trip, then the employee-respondent may provide the attendance records for the field trip, as these attendance records are directly related to the allegations of sexual harassment. Decision-makers should be able to determine what evidence is relevant at a hearing. Decision-makers also are capable of objectively considering the evidence without developing a bias for or against a complainant or respondent and will receive training about conflicts of interest and bias from the recipient under § 106.45(b)(1)(iii).

Changes: None.

Comments: Some commenters raised questions about procedural aspects of the grievance procedures. One stated that a single rule for the number of days before certain steps of the process occurs is arbitrary. Some cases will take longer than others to review the evidence, asserted a commenter. One commenter asked whether, if evidence is not adequately uploaded and available to the parties ten days before a hearing, must the hearing be delayed, or can the parties agree to keep the hearing date in place, and mutually waive whatever requirements the proposed rules implement? The same commenter asked whether, if no waiver occurs and one of the parties objects to holding the hearing but the school insists on proceeding, must the evidence that was produced only nine days prior to the hearing be struck?

One commenter argued the proposed rules are highly prescriptive, and that is inconsistent with the 2018 Report issued by the Federal Commission on School Safety,[1597] which stated that overly prescriptive Federal standards burdened local schools.

Discussion: These final regulations require that the parties have at least ten days to submit a written response to the evidence that is directly related to the allegations raised in a formal complaint under § 106.45(b)(5)(vi) and that the parties have the investigative report at least ten days prior to a hearing under § 106.45(b)(5)(vii). The Department does not define whether these ten days are calendar days or business days, and recipients have discretion as to whether to calculate "days" by calendar days, business days, school days, or other reasonable method. Recipients also may give the parties more than ten days in each circumstance.

[1597] Commenters cited: Dep't. of Education *et al.*, *Final Report of the Federal Commission on School Safety* (Dec. 18, 2018), https://www2.ed.gov/documents/school-safety/school-safety-report.pdf.

If the investigative report that fairly summarizes relevant evidence is not ready at least ten days prior to a hearing, then the recipient should wait to hold the hearing until the parties have at least ten days with the investigative report pursuant to § 106.45(b)(6)(i). If a recipient does not give the parties at least ten days with the investigative report prior to a hearing, the recipient will be found in violation of these final regulations, irrespective of whether the parties waive the requirements in these final regulations.

The Department disagrees that these final regulations are overly prescriptive because recipients still have ample discretion. For example, recipients determine what supportive measures to offer, the standard of evidence, how to weigh the evidence to reach the determination regarding responsibility, the sanction, and any remedies.

Changes: None.

Comments: Several commenters suggested that there was tension between the proposed rules and FERPA, and argued that there is a conflict between the proposed rules and 20 U.S.C. 1232g(b)(1), since records would need to be disclosed as part of the grievance process even without the written consent of the parties involved. One commenter suggested that the final regulations expressly state that "nothing in this part shall be read in derogation of the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99." In support of that argument, commenters stated that schools know FERPA well, that FERPA guidance is well-established, and should control so that schools do not have to modify their existent knowledge of privacy issues. One commenter suggested that schools and students should be bound not to disclose any information if the disclosure would be inconsistent with FERPA's provisions.

Discussion: As explained earlier, the Department disagrees that there is an inherent conflict between these final regulations and FERPA. FERPA and its implementing regulations define the

term "education records" as meaning, with certain exemptions, records that are directly related to a student and maintained by an educational agency or institution, or by a party acting for the agency or institution.[1598] The Department previously stated: "Under this definition, a parent (or eligible student) has a right to inspect and review any witness statement that is directly related to the student, even if that statement contains information that is also directly related to another student, if the information cannot be segregated and redacted without destroying its meaning."[1599] The Department made this statement in response to comments regarding impairing due process in student discipline cases in its notice-and-comment rulemaking to promulgate regulations to implement FERPA.[1600] The evidence and investigative report that is being shared under these final regulations directly relate to the allegations in a complaint and, thus, directly relate to both the complainant and respondent.

As explained earlier, the Department's interpretation in the 2001 Guidance still stands that "if there is a direct conflict between requirements of FERPA and requirements of Title IX, such that enforcement of FERPA would interfere with the primary purpose of Title IX to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions."[1601]

Changes: None.

Comments: Several commenters suggested that the final regulations ought to model their FERPA language on the Clery Act regulations, namely 34 CFR 668.46(l), because the Clery Act

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[1598] 20 U.S.C. 1232g(a)(4); 34 CFR 99.3.
[1599] 73 FR 74806, 74832-33 (Dec. 9, 2008).
[1600] *Id*.
[1601] 2001 Guidance at vii.

regulations clearly state that compliance with the Clery Act does not violate FERPA but, commenters argued, proposed § 106.6(e) does not clearly assure recipients that complying with these Title IX regulations does not violate FERPA. Other commenters cited to 34 CFR 668.46(k)(3)(B)(3) and suggested that the final regulations should clearly state that medical records would not be released without the written authorization required in 45 CFR 164.508(b), implementing the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Pub. L. 104-191, to mirror VAWA. In addition, commenters suggested that any release of medical records be consistent with 45 CFR 164.508(b), which is part of the Standards for Privacy of Individually Identifiable Health Information ("Privacy Rule") adopted under HIPAA. Other commenters suggested that the Department require a data security standard benchmarked to HIPAA. This commenter stated that information about sexual assault may include medical information as sensitive Protected Health Information (PHI). Information about sexual history and abuse would be valuable to criminals and State adversaries. The commenter argued that because HIPAA is a known standard, familiar to technical support professionals, and has allowances for anonymization for research, using the data security standard as provided for in HIPAA will allow anonymized data for use in secure research that may inform policies and that absent a data security standard, information technology (IT) personnel will not be aware of any obligation to make sure that computers being used to create and store the sensitive information contained in evidence and investigative reports in Title IX grievance processes need to meet data security protocols.

Other commenters stated that even given these confines, FERPA's definition of "directly related to" is too broad. These commenters expressed concern that schools will get it wrong

when trying to determine which evidence is directly related to certain allegations, which means that some highly sensitive student records will be produced, even when they should not be.

Other commenters disagreed, stating that the Department should add a sentence after the "directly related to" language that reads as or similar to the following: "In determining whether evidence is 'directly related to the allegations obtained as part of the investigation,' the recipient must construe the phrase 'directly related to' broadly and in favor of production of any evidence obtained."

Discussion: The Department disagrees that it needs to adopt language in § 668.46(l) and expressly state that "compliance [with these final regulations] does not constitute a violation of FERPA." The Department does not believe that there is any inherent conflict between these final regulations and FERPA. Additionally, these final regulations expressly state in § 106.6(e) that the obligation to comply with these final regulations "is not obviated or alleviated by the FERPA statute, 20 U.S.C. 1232g or FERPA regulations, 34 CFR part 99." Such a statement sufficiently addresses concerns that compliance with these final regulations does not violate FERPA.

The Department does not enforce HIPAA, which protects the privacy and security of certain health information. The regulations, implementing HIPAA, which include the Privacy Rule and its provisions at 45 CFR 164.508(b), apply to "covered entities," and a recipient may or may not be a covered entity. Accordingly, a recipient may not be required to comply with HIPAA, and the Department will not require recipients to comply with HIPAA through these final regulations. A recipient must comply with all laws that apply to it and is best positioned to determine whether and how HIPAA may apply to it. A recipient's grievance procedures and grievance process, which are required to be published pursuant to § 106.8(c), should provide notice to the parties that they will receive an equal opportunity to inspect and review any

evidence obtained as part of an investigation that is directly related to the allegations raised in a formal complaint of sexual harassment. Indeed, § 106.8(c) requires the recipient to notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient notice of the recipient's grievance procedures and grievance process. If a party does not want the other party to receive any of the party's medical records, then the party (or the party's parent, if applicable) is not required to provide such medical records to the recipient as part of the investigation, nor to provide consent to the recipient with respect to medical and other treatment records for which a recipient is required to obtain voluntary, written consent before accessing or using such records, under § 106.45(b)(5)(i). Recipients do not have subpoena power, and as the commenter implies, a recipient will not be able to receive a party's medical records from a covered entity under the regulations implementing HIPAA without the party's consent.

The Department also does not wish to require that recipients use a data security standard benchmarked to HIPAA or its Privacy Rule because the Department does not administer HIPAA and does not wish to add yet another set of regulations governing the same type of information that HIPAA may cover. Recipients that are subject to both HIPAA and these final regulations would then be subject to two different sets of data security standards governing the same type of information, as the Department may interpret its data security provisions differently than other Federal agencies such as the U.S. Department of Health and Human Services, which administers HIPAA. Although the Department encourages recipients to use secure data systems, Title IX does not directly concern data security, and the Department's proposed regulations did not directly address data security requirements.

The Department disagrees that "directly related to" is too broad or not broad enough. The Department purposefully chose "directly related to," as such a requirement aligns with FERPA, and recipients that are subject to FERPA will understand how to apply such a requirement. The Department also acknowledges that recipients have discretion to determine what constitutes evidence directly related to the allegations in a formal complaint. The purpose of the provision in § 106.45(b)(5)(vi) is to give parties an opportunity to inspect, review, and respond to evidence that may be used to support or challenge allegations made in a formal complaint prior to the investigator's completion of the investigative report. The recipient certainly cannot exclude any evidence that the investigator intends to use in the investigative report.

Changes: None.

Comments: Several commenters had concerns about privacy with respect to the evidence-sharing provisions of the grievance procedures. Commenters stated, for instance, that only "non-privileged" materials ought to be shared during the process, and suggested that medical records ought to be considered privileged. Similarly, some commenters suggested that financial records of students should be considered privileged, and therefore not produced.

Commenters asserted that the final regulations should clarify that under no circumstances will a school access campus medical and counseling records. These records, stated commenters, would include the results of medical tests, rape kits, and forensic evidence that is covered by HIPAA and FERPA.

Discussion: Nothing in these final regulations requires a recipient to share materials subject to the attorney-client privilege in the recipient's possession with a party as part of a § 106.45 grievance process. If a party holds the attorney-client privilege and chooses to waive the privilege to share records protected by the attorney-client privilege, then the party may do so. To

clarify this point, the Department added § 106.45(b)(1)(x) to expressly state that a recipient's grievance process must not: "require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege."

Medical records may be subject to other Federal and State laws that govern recipients, and recipients should comply with those laws. The Department believes that the final regulations, and specifically § 106.45(b)(5)(i), protect a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party. Pursuant to § 106.45(b)(5)(i), a recipient cannot access, consider, disclose or otherwise use such records unless the party gives the recipient voluntary, written consent.[1602] This restriction applies even where HIPAA or any State-law equivalent do not apply.

The Department does not wish to create more complexity and confusion by creating yet another set of regulations that apply to medical records by incorporating by reference HIPAA or attorney-client privilege rules. These final regulations, and specifically § 106.45(b)(1)(x) and § 106.45(b)(5)(i), appropriately protect medical records and attorney-client privileged information.

With respect to medical and counseling records to which a recipient does not have access, whether a recipient may access such medical and counseling records would be governed by other laws that typically require a party's consent. A recipient should comply with all applicable laws

[1602] Pursuant to § 106.45(b)(5)(i), if the party is not an "eligible student," as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a "parent," as defined in 34 CFR 99.3. § 106.45(b)(5)(i).

governing medical and counseling records. For purposes of these final regulations, the recipient should not obtain as part of an investigation any evidence, directly relating to the allegations in a formal complaint, that cannot legally be shared with the parties.

Changes: The Department added § 106.45(b)(1)(x) to expressly state that a recipient's grievance process must not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

Comments: Several commenters addressed the evidence-sharing provisions of the grievance procedures in other ways, stating that the final regulations ought to discourage schools from providing electronic access to documents. Many noted that students generally live close to the school itself, such that in-person access exclusively would likely be adequate, and would prevent the documents from being shared with outside parties or the press. Commenters also noted that electronic access may pose difficulties for students who lack a computer, or who lack internet access. Even for students who have access to these technologies, reliable access may not always be easily obtainable. Some might have to view evidence on a shared computer in a public library or a computer lab.

Some commenters contended that some students with disabilities would have difficulty accessing and reviewing all evidence in a digital format, particularly given how much material is likely to be produced under the final regulations. One commenter suggested limiting production to hard copy documents, unless the parties all agree to consent to electronic production as well. Some noted that hard copies of evidence will have to be made in many cases anyway, since those documents may need to be submitted as exhibits during the proceeding. Some commenters

suggested not even providing the parties with the evidence, but instead just describing the evidence verbally, in the hopes of encouraging dialogue and discourse.

Some commenters asserted that the final regulations should only require supervised access to all material available to the decision-makers. Other commenters disagreed with the idea of only providing supervised hard-copy access to relevant documents, arguing that parties need private access to the documents, to be able to discuss information with their advisors. Some commenters asked the Department not to allow schools to give documents directly to party advisors, asserting that a party ought to have control over what they give to their own advisor.

Some commenters suggested that schools should have flexibility to provide information in the way they see fit, accounting for the expense of some technology. One commenter suggested that the final regulations should eliminate language that dictates the manner in which records will be shared, and instead state that the files should be shared "in a manner that will prevent either party from copying, saving, or disseminating the records."

Commenters contended that the time frames for providing evidence are too short, and therefore unduly burdensome for schools. These commenters argued that the ruling in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), provides schools and school administrators with flexibility and is not designed to make the process rigid and one-size-fits-all.

Discussion: The Department disagrees that parties should only be provided with hard copies of the evidence, as directly providing the parties with a hard copy of the evidence will prevent a recipient from being able to provide "view only" access, if the recipient would like to provide "view only" access. The Department also does not wish to require recipients to provide parties the opportunity only to inspect and review hard copies of the evidence because the parties may have obligations that prevent them from inspecting and reviewing the evidence during the hours

when the recipient's operations are open to allow for such inspection and review. Nothing in these final regulations prevents a recipient from providing a hard copy of the evidence in addition to the evidence in an electronic format. Indeed, the Department revised § 106.45(b)(5)(vi)-(vii) to allow the recipient to provide a party and the party's advisor of choice with either a hard copy of the evidence and the investigative report or the evidence and the investigative report in an electronic format. Allowing the recipient to send the parties the evidence in an electronic format gives the recipient sufficient discretion to determine whether to use a file sharing platform that restricts the parties and advisors from downloading or copying the evidence, and the recipient also may opt to provide a hard copy of the evidence for the parties.[1603] The Department also fully encourages recipients to provide whatever reasonable accommodations are necessary for students with disabilities; recipients must comply with applicable disability laws while also complying with these final regulations. The Department also reiterates that a recipient may require parties to agree not to photograph or otherwise copy the evidence that the recipient provides for inspection and review. The Department also takes no position on nondisclosure agreements that comply with these final regulations. The Department, however, will not impose a uniform approach for recipients and would like recipients to have discretion in this regard. A recipient may choose to share records in a manner that will prevent either party from copying, saving, or disseminating the records, but the Department will not require the recipient to do so. Finally, the Department disagrees that describing the evidence verbally will provide the parties with a sufficient opportunity to respond to the evidence.

[1603] In response to many commenters concerned that requiring recipients to provide the evidence to parties by using a digital platform that restricts users from downloading the information would be unnecessarily costly or burdensome, the final regulations revised § 106.45(b)(5)(vi) to remove that requirement.

Descriptions of evidence may not be accurate and even the best description will not always capture the nuances of the actual evidence.

The Department agrees with commenters that providing hard copy access under and subject to the recipient's supervision may prevent the parties from freely discussing the evidence with their advisors. If a party does not want a recipient to provide a copy of the evidence or investigative report to the party's advisor, then the recipient should honor such a request. These final regulations simply prevent a recipient from refusing to provide evidence or an investigative report to a party's advisor, if the party would like the advisor to have access to the evidence or investigative report.

Changes: The Department revised § 106.45(b)(5)(vi)-(vii) to allow a recipient to provide a hard copy of the evidence and investigative report to the party and the party's advisor of choice or to provide the evidence and investigative report in an electronic format.

Comments: Several commenters had concerns about the grievance proceeding itself, and how student privacy ought to be protected in that context. Some contended that the proposed rules needed more clarity as to the content of the investigative report. The assumption by schools, asserted the commenter, will be that facts, interview statements, a credibility analysis, and the school's policy are the only components of such a report, so any other items that ought to be included, asserted the commenter, should be expressly mentioned.

Commenters asked whether, if there are multiple complainants and one respondent, are the complainants entitled to the disciplinary results for allegations related to other complainants' complaints?

Discussion: The Department does not wish to impose specific requirements for the investigative report other than the requirement that the investigative report must fairly summarize relevant

evidence, as described in § 106.45(b)(5)(vii). A recipient may include facts and interview statements in the investigative report. If a recipient chooses to include a credibility analysis in its investigative report, the recipient must be cautious not to violate § 106.45(b)(7)(i), prohibiting the decision-maker from being the same person as the Title IX Coordinator or the investigator. Section 106.45(b)(7)(i) prevents an investigator from actually making a determination regarding responsibility. If an investigator's determination regarding credibility is actually a determination regarding responsibility, then § 106.45(b)(7)(i) would prohibit it. Otherwise, the Department does not wish to be overly prescriptive with respect to the contents of the investigative report, and the recipient has discretion as to what to include in it.

If there are multiple complainants and one respondent, then the recipient may consolidate the formal complaints where the allegations of sexual harassment arise out of the same facts or circumstances, under § 106.45(b)(4). The requirement for the same facts and circumstances means that the multiple complainants' allegations are so intertwined that their allegations directly relate to all the parties. Accordingly, if the allegations of sexual harassment arise out of the same facts or circumstances, the parties must receive the same written determination regarding responsibility under § 106.45(b)(7), although the determination of responsibility may be different with respect to each allegation depending on the facts. Section 106.45(b)(7)(iii) requires the recipient to provide the written determination regarding responsibility to both parties simultaneously, and a recipient may not redact or withhold any part of the written determination regarding responsibility from the parties. If a recipient consolidates formal complaints, a recipient must issue the same written determination regarding responsibility to all parties because the allegations of sexual harassment must arise out of the same facts or circumstances such that the written determination directly relates to all the parties. If a recipient does not consolidate the

formal complaints, then the recipient must issue a separate written determination regarding responsibility for each formal complaint. If the formal complaints are not consolidated, then each complainant would receive the written determination regarding responsibility with respect to that complainant's formal complaint.

Changes: None.

Comments: Some commenters were skeptical that the proposed rules could adequately protect privacy, given work-arounds that allow parties to share information easily. Other commenters suggested that the final regulations should avoid specifying how information should be shared, given how obsolete technology can quickly become. Another commenter stated that the final regulations should require that a school provide the parties only with a log of all documents – and not the documents themselves – so that if certain documents in the log are protected by FERPA, the parties can argue over whether the document is relevant or not.

Discussion: The Department acknowledges that recipients have some discretion to determine how privacy should best be protected while fully complying with these final regulations. The Department permitted but never required that a recipient use a file sharing platform that restricts the parties and advisors from downloading or copying the evidence in the proposed regulations. The Department is removing the phrase "such as a file sharing platform, that restricts the parties and advisors from downloading or copying the evidence" in § 106.45(b)(5)(vi) to help alleviate any confusion that the proposed regulations required such a platform.

The Department disagrees that a log of all documents in an investigation will provide the parties with the same benefit as inspecting and reviewing all evidence directly related to the allegations in a formal complaint prior to the completion of an investigative report. The purpose of this provision in § 106.45(b)(5)(vi) is for parties to respond to the evidence prior to the

completion of the investigative report to help recipients provide a fair and accurate investigative report. A log of documents will not allow the parties to respond to the evidence, and the parties may not always be able to determine whether a record is an education record and whether FERPA prohibits the disclosure of personally identifiable information contained in an education record merely by reviewing a log of documents.

Changes: The Department removed the phrase "such as a file sharing platform, that restricts the parties and advisors from downloading or copying the evidence" in § 106.45(b)(5)(vi).

Comments: Some commenters expressed concern that the proposed rules would allow employees accused of sexual assault to review the private medical records of the complainant, and that it would be strange for staff members or employees of a school to have access to private student records.

Discussion: As previously stated, the Department is bound by the U.S. Constitution and must administer its final regulations in a manner that would not require any person to be deprived of due process or other constitutional rights. If an employee is a respondent, then the employee must be able to respond to any evidence that directly relates to the allegations in a formal complaint. With respect to medical records, in order for the medical record to be used in the grievance process, a complainant must either offer the recipient medical records for such use, or provide voluntary, written consent for the recipient to access and use the medical records.[1604] In the written notice of allegations required under § 106.45(b)(2), a recipient will notify the parties of the grievance process under § 106.45, including the requirement that both parties be able to review and inspect evidence obtained as part of the investigation that is directly related to the

[1604] § 106.45(b)(5)(i).

allegations raised in a formal complaint. If a complainant does not wish for the respondent to inspect and review any medical record or any part of any medical record that is directly related to the allegations, then the complainant does not have to provide that medical record to the recipient for use in the grievance process or provide consent for the recipient to otherwise access or use that medical record.

Changes: The final regulations revise § 106.45(b)(5)(i) to restrict a recipient from accessing, considering, disclosing, or otherwise using a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for a grievance process under § 106.45(b). If the party is not an "eligible student," as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a "parent," as defined in 34 CFR 99.3.

Comments: Some commenters made more general suggestions for modifying the proposed rule. One suggested that the final regulations ought to clarify that FERPA does not require that hearings be closed off to the press and to the public. The same commenter argued that in fact all hearings needed to be open to the press and the public under the First Amendment. One other commenter stated that the final regulations ought to specify whether final adjudication determinations can be publicized and published by either of the parties, or by the school itself. One commenter suggested that the final regulations state that it is not retaliation or a FERPA violation to contest or discuss allegations or to criticize dishonest allegations of sexual harassment.

Discussion: The Department disagrees that hearings under § 106.45(b)(6) must be open to the press and the public under the First Amendment, as the First Amendment does not require that a hearing to adjudicate allegations of sexual harassment in an education program or activity of a recipient of Federal financial assistance be made open to the public and the press. FERPA would preclude hearings to be open to the press and the public if the hearings would require disclosure, without prior written consent, of personally identifiable information from an education record. FERPA and its implementing regulations may govern whether the final adjudication determinations can be publicized and published by a recipient to which FERPA applies, and these final regulations do not address whether the final adjudication determinations may be publicized or published other than providing the written determination to the parties pursuant to § 106.45(b)(7)(iii). Additionally, some recipients may have non-disclosure agreements that comply with other laws, and these final regulations neither require nor prohibit such non-disclosure agreements. The final regulations provide that the recipient cannot restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence in § 106.45(b)(5)(iii). To address the commenter's concerns, the final regulations also provide that the exercise of rights protected under the First Amendment does not constitute retaliation pursuant to § 106.71. Threatening to publicize or make a written determination public for the purpose of retaliation, however, is strictly prohibited under § 106.71 of these final regulations.

Changes: The Department included a retaliation provision in § 106.71 that expressly states that the exercise of rights protected under the First Amendment does not constitute retaliation.

Comments: Some commenters offered suggestions to improve the rule. One suggested that police investigation files ought to also be made available to the parties, in addition to student

records. One commenter argued that social media profiles and materials ought to be relevant to any grievance proceeding as well, particularly for accusers who claim trauma but then post contrary items on social media. Another commenter argued that the Department should offer technical assistance to schools to ensure that the platforms for sharing information are created appropriately and that they work.

One commenter suggested that the final regulations ought to specify that records created as part of the grievance process are themselves protected by FERPA. Some commenters suggested that the final regulations should require that grievance process records containing personally identifiable information in them ought to be destroyed at the conclusion of the grievance process. One commenter asked that the Department clarify that schools have a right to redact documents, so long as the redactions are not relevant to the proceeding and the redactions are consistent with providing the parties due process. At the very least, argued commenters, a school should be allowed to place certain restrictions on students repeating information learned as part of the evidentiary production or hearing process. In the same vein, commenters asked that the Department state clearly that parties are not entitled to evidence that is not relevant to a determination of responsibility.

Commenters argued that the final regulations ought to include meaningful consequences for parties who violate the confidentiality of information. One suggested that the final regulations ought to include some statement about retaliation, which is also covered under Title IX, in terms of confidential documents.

One commenter suggested that the final regulations ought to include meaningful consequences for schools that fail to implement privacy safeguards. One stated that the final

regulations ought to instruct schools to follow the guidance issued by the Department in the Letter to Wachter (signed by Michael Hawes).[1605]

Discussion: These final regulations do not prevent a recipient from making police investigation files available to the parties. If a recipient obtains police investigation files as part of its investigation of a formal complaint under § 106.45(b)(5) and some of the evidence in the police investigation files is directly related to the allegations raised in a formal complaint as described in § 106.45(b)(5)(vi), then the recipient must provide that evidence to the parties for their inspection and review. A recipient may use social media profiles, assuming that these social media profiles are lawfully obtained, as part of the investigation. The Department will continue to provide recipients with technical assistance and as previously explained, does not require recipients to use a specific platform for sharing information.

Whether FERPA applies to records that are part of a § 106.45 grievance process depends on the circumstances. For example, education records under FERPA may not be implicated at all in a formal complaint of sexual harassment by a non-student complainant against a non-student respondent. The requirement to destroy records with personally identifiable information at the conclusion of the grievance process violates the record-keeping requirements in these final regulations. Such a requirement also may violate record-keeping requirements under the Clery

[1605] *See* Letter from Michael Hawes, Director of Student Privacy Policy, U.S. Dep't. of Education, Off. of Mgmt., to Timothy S. Wachter, Knox McLaughlin Gornall & Sennett, P.C. (Dec. 7, 2017), https://studentprivacy.ed.gov/sites/default/files/resource_document/file/Letter%20to%20Wachter%20%28Surveillance%20Video%20of%20Multiple%20Students%29_0.pdf.

Act, which provides for a seven-year retention period for sexual assault, dating violence, domestic violence, and stalking.[1606]

As previously explained, these final regulations do not require a recipient to share any information in records obtained as part of an investigation that is not directly related to the allegations in a formal complaint, and FERPA may even require redaction of such information. The Department disagrees with the statement that parties are not entitled to evidence that is not relevant to a determination of responsibility. The parties must receive all evidence obtained as part of an investigation that is directly relevant to the allegations in a formal complaint. Such evidence may not always be directly relevant to a determination regarding responsibility. The purpose of these final regulations is to provide both parties with the opportunity to respond to any evidence that directly relates to the allegations in a formal complaint, which is why the parties should have the opportunity to inspect and review such evidence prior to the hearing or prior to when a determination regarding responsibility is made if no hearing is required.

A recipient may require restrictions or use a non-disclosure agreement for confidential information as long as doing so does not violate these final regulations or other applicable laws. These final regulations do not address confidential information or how to safeguard confidential information because the Department cannot begin to identify what the universe of confidential information or records may constitute. A recipient is better able to identify what constitutes confidential records and how these records should be protected in a manner that complies with these final regulations. The Department includes a retaliation provision in § 106.71, but this

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[1606] 34 CFR 668.24(e)(2)(ii); *see* U.S. Dep't. of Education, Office of Postsecondary Education, *The Handbook for Campus Safety and Security Reporting* 9-11 (2016), https://www2.ed.gov/admins/lead/safety/handbook.pdf.

provision does not specifically address confidential documents. Nonetheless, if confidential documents are used for retaliation as defined in § 106.71, then these final regulations would prohibit such retaliation.

The Department notes that the Department's Letter to Wachter (signed by Michael Hawes),[1607] may be helpful to recipients in determining how to comply with the regulations implementing FERPA.

Changes: None.

Comments: Some commenters argued that parties ought to have access to all evidence—not just evidence that the school deems relevant—that is gathered during the course of investigating a formal complaint. Commenters argued that schools cannot be trusted to appropriately review and determine which evidence is "directly relevant," as opposed to merely "relevant" or "irrelevant." Commenters contended that schools would under-produce evidence that might be directly relevant, out of a bias toward finding a respondent to be responsible for sexual harassment. The commenters argued that schools like it when respondents are found responsible, since that will facilitate their efforts of showing that they are complying with Title IX. One commenter suggested that any evidence not produced to a party be logged, such that the parties have sufficient information to dispute the characterization as not directly relevant.

Discussion: The Department requires the recipient to provide the parties an equal opportunity to inspect and review any evidence obtained as part of an investigation that is directly related to

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[1607] *See* Letter from Michael Hawes, Director of Student Privacy Policy, U.S. Dep't. of Education, Off. of Mgmt., to Timothy S. Wachter, Knox McLaughlin Gornall & Sennett, P.C. (Dec. 7, 2017), https://studentprivacy.ed.gov/sites/default/files/resource_document/file/Letter%20to%20Wachter%20%28Surveillance%20Video%20of%20Multiple%20Students%29_0.pdf.

allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source under § 106.45(b)(vi). Even though a recipient has some discretion as to what evidence is directly related to allegations raised in a formal complaint, the Department may determine that a recipient violated § 106.45(b)(vi) if a recipient does not provide evidence that is directly related to allegations raised in a formal complaint to the parties for review and inspection. A recipient may choose to log information that it does not produce and allow the parties to dispute whether the information is directly related to the allegations. Although the Department does not impose a requirement to produce such a log during an investigation under § 106.45, recipients are welcome to do so and may use such a log to demonstrate that both parties agreed certain evidence is not directly related to the allegations raised in a formal complaint.

Changes: None.

Comment: One commenter asked how the recordkeeping requirement in § 106.45(b)(10) complies with FERPA. On the issue of records retention, one commenter suggested that seven years was slightly different than FERPA, stating that FERPA contemplated a range of five to seven years.

Discussion: The recordkeeping requirement in § 106.45(b)(10) does not conflict with FERPA. FERPA and its implementing regulations do not require recipients of Federal financial assistance to keep records for a specific amount of time. FERPA's implementing regulations only require that an educational agency or institution not destroy any education records if there is an

outstanding request to inspect and review the records.[1608] Accordingly, the seven-year retention period that the Department adopts in § 106.45(b)(10) does not in any way impact a recipient's obligations under FERPA.

Changes: None.

Section 106.6(f) Title VII and Directed Question 3 (Application to Employees)

Comments: A few commenters expressed support for applying the proposed rules to employees because it would ensure fairness and help to safeguard a level playing field.

Several commenters expressed general opposition to the NPRM itself but asserted that Title IX should apply to employees because it is necessary for student safety. Commenters stated that no unique circumstances justify treating students and faculty differently under Title IX. One commenter emphasized that employees in the workplace who are accused of sexual harassment may face life-altering consequences. This commenter asserted that recipients may have perverse incentives, due to pressure from media and the general public in the current #MeToo environment, not to provide adequate due process absent a government mandate. The commenter asserted that the NPRM's due process protections, including a clear definition of sexual harassment, with adequate notice and opportunity for a live hearing with cross-examination, also should extend to employees. The commenter also identified a risk that campus administrators may selectively promote or ignore certain Title IX claims to help or undermine the careers of certain faculty. And the commenter described a risk that a complainant faculty with seniority could coerce witnesses to provide favorable testimony.

[1608] 34 CFR 99.10(e) ("The educational agency or institution, or SEA or its component shall not destroy any education records if there is an outstanding request to inspect and review the records under this section.").

One commenter asserted that the Department enforces Title VII, while other commenters concluded that the Department does not have authority to regulate complaints that do not involve students at all, such as employee-on-employee cases. Commenters urged the Department to explicitly state that the final regulations, including the adjudication processes contained therein, only apply to "students." These commenters reasoned that Congress did not intend Title IX's protections for equal access to education to apply to employees, because employees do not receive education. According to these commenters, the Department lacks jurisdiction to regulate how recipients handle employee-related matters. One commenter requested that the Department supplement the final regulations with a clarification of the relationship between claims that contain the potential to be adjudicated under either, or both, Title VII and Title IX.

Another commenter requested further explanation of the intersection of Title VII and Title IX in the context of the respondent being a student-employee on campus.

One commenter stated that the location of the definition of "formal complaint" and the procedures themselves (§ 106.45) were located in Subpart D of the NPRM, which implied that they do not apply to employee complaints alleging sexual harassment in employment. The commenter asserted that it is unclear if recipients are expected to handle employee complaints under § 106.8 instead, which would require two different processes with different definitions of sexual harassment, and inquired as to how complaints by student-employees should be handled.

Several commenters opposed the written notice requirements in § 106.45(b)(5)(v) because they believe the provision is unclear as to how it will apply to a recipient's employees.

Several commenters noted that the deliberate indifference standard is lower than the standard imposed on employers under Title VII and/or the standard articulated by the 2001 guidance. One commenter asserted that the obligation to dismiss the formal complaint with

respect to conduct that does not constitute sexual harassment as defined in § 106.30 or that did not occur within the recipient's program or activity undercuts an employer's ability to take proactive steps to investigate and sanction unwelcome conduct of a sexual nature *before* it becomes sexual harassment as defined in the proposed Title IX regulations or sexual harassment prohibited under the Title VII standard.

One commenter argued that the Department should avoid taking a position on whether Title IX applies to employees. This commenter reasoned that the Department should limit this rulemaking to student-complainant cases because of a split among Federal circuit courts regarding whether Title VII provides the exclusive remedy for employee discrimination claims. Similarly, other commenters noted that because some Federal courts have held Title VII preempts Title IX regarding employment claims, extending the proposed rules in this context may be ineffective. Similarly, another commenter urged the Department to clarify that § 106.6(f) is not intended to create a new Title IX private right of action for employees.

Discussion: The Department appreciates support for its final regulations, which apply to employees. Congress did not limit the application of Title IX to students. Title IX, 20 U.S.C. 1681, expressly states: "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 . . . ." Title IX, thus, applies to any person in the United States who experiences discrimination on the basis of sex in any education program or activity receiving Federal financial assistance. Similarly, these final regulations, which address sexual harassment, apply to any person, including employees, in an education program or activity receiving Federal financial assistance.

The Department also notes that Title VII is not limited to employees and may apply to individuals other than employees. Title VII prohibits "unlawful employment practices" against "an individual" by employers, labor unions, employment agencies, joint-labor management committees, apprenticeship programs and, thus, protects individuals other than employees such as job and apprenticeship applicants.[1609] As Title VII protects more than just employee's rights, the Department revises § 106.6(f) to state that nothing in Part 106 of Title 34 of the Code of Federal Regulations may be read in derogation of any individual's rights rather than just any employee's rights under Title VII. The Department recognizes that employers must fulfill their obligations under Title VII and also under Title IX. There is no inherent conflict between Title VII and Title IX, and the Department will construe Title IX and its implementing regulations in a manner to avoid an actual conflict between an employer's obligations under Title VII and Title IX.

The Department agrees that students and employees, including faculty and student workers, should not be treated differently under its final regulations.[1610] Employees should receive the same benefits and due process protections that students receive under these final regulations, and these final regulations, including the due process protections in § 106.45, apply to employees. The Department notes that its regulations have long addressed employees. For example, 34 CFR part 106, subpart E expressly addresses discrimination on the basis of sex in areas unique to employment. Prior to the establishment of the Department of Education, the

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[1609] 42 U.S.C. 2000e-2(a)-(d).

[1610] As discussed in the "Section 106.44(d) Administrative Leave" subsection of the "Additional Rules Governing Recipients' Responses to Sexual Harassment" section of this preamble, the exception in the final regulations under which employees are treated differently from students, is that a "non-student employee" may be placed on administrative leave during the pendency of a grievance process that complies with § 106.45.

Supreme Court noted that the Department of Health, Education, and Welfare's "workload [was] primarily made up of 'complaints involving sex discrimination in higher education academic employment.'"[1611]

The split among Federal courts relates to whether an implied private right of action exists for damages under Title IX for redressing employment discrimination by employers.[1612] These Federal cases focus on whether Congress intended for Title VII to provide the exclusive judicial remedy for claims of employment discrimination.[1613] Courts have not precluded the Department from administratively enforcing Title IX with respect to employees. The Supreme Court also expressly recognized the application of Title IX to redress employee-on-student sexual harassment in *Gebser*.[1614]

The Department's longstanding position is that its Office for Civil Rights (OCR) addresses, under Title IX, sex discrimination in the form of sexual harassment, including by or against employees. For example, the Department's 2001 Guidance specifically addressed the sexual harassment of students by school employees.[1615] The Department also has enforced its

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[1611] *Cannon v. Univ. of Chicago*, 441 U.S. 677, 708 fn. 42 (1979).
[1612] *See Doe v. Mercy Catholic Med. Ctr.*, 850 F.3d 545 (3d Cir. 2017); *Lakosi v. James*, 66 F.3d 751, 755 (5th Cir. 1995); *Burrell v. City Univ. of N.Y.*, 995 F. Supp. 398, 410 (S.D.N.Y. 1998); *Cooper v. Gustavus Adolphus Coll.*, 957 F. Supp. 191, 193 (D. Minn. 1997); *Bedard v. Roger Williams Univ.*, 989 F. Supp. 94, 97 (D.R.I. 1997); *Torres v. Sch. Dist. of Manatee Cnty., Fla.*, No. 8:14-CV-1021-33TBM, 2014 WL 418364 at *6 (M.D. Fla. Aug. 22, 2014); *Winter v. Pa. State Univ.*, 172 F. Supp. 3d 756, 774 (M.D. Pa. 2016); *Uyai v. Seli*, No. 3:16-CV-186, 2017 WL 886934 at *6 (D. Conn. Mar. 6, 2017); *Fox v. Pittsburg State Univ.*, 257 F. Supp. 3d 1112, 1120 (D. Kan. 2017).
[1613] *See id*.
[1614] *Gebser v. Lago Vista Ind. Sch. Dist*., 524 U.S. 274, 277 (1998).
[1615] 2001 Guidance at iv-v, 3, 5, 8-12.

Title IX regulations, including regulations interpreted to address sexual harassment, as to employees.[1616]

Contrary to the commenter's assertion, the Department does not have the authority to create a Title IX private right of action for employees through these final regulations. The Department has the authority to administratively enforce Title IX. Accordingly, these final regulations do not need to expressly state that the Department is not intending to create a new Title IX private right of action for employees. The commenter accurately notes that the definition of "formal complaint" and the grievance process for a formal complaint are in 34 CFR part 106, subpart D, which addresses sex discrimination on the basis of sex in education programs and activities, and not subpart E, which addresses discrimination on the basis of sex in employment in education programs and activities. Subpart D applies to all sex discrimination on the basis of sex and not just sex discrimination on the basis of sex with respect to students. Subpart D is the only subpart that directly addresses sexual harassment through these final regulations. The Department expressly states in § 106.51(b) that subpart E applies to recruitment, advertising, and the process of application for employment, the rate of pay or any other form of compensation, and change in compensation, and other matters that specifically concern employment, but subpart E does not apply to allegations of sexual harassment by or against an employee. Only

[1616] *See, e.g.*, U.S. Dep't. of Education, Office for Civil Rights, Resolution Letter to Univ. of Va. 18-20 (Sept. 21, 2015), https://www2.ed.gov/documents/press-releases/university-virginia-letter.pdf; U.S. Dep't. of Education, Office for Civil Rights, Title IX Resolution Letter to Yale Univ. 3 (June 15, 2012) ("The Title IX regulation, at 34 C.F.R. Section 106.8(a), specifically requires that each recipient designate at least one employee to coordinate its responsibilities to comply with and carry out its responsibilities under Title IX, including any investigation of any complaint communicated to it alleging noncompliance with Title IX (including allegations that the recipient failed to respond adequately to sexual harassment). This provision further requires that the recipient notify all its students and *employees* of the name (or title), email and office address and telephone number of the employee(s) so designated.") (emphasis added), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/01112027-a.pdf.

subpart D addresses sexual harassment, and these final regulations in subpart D apply to any person who experiences sex discrimination in the form of sexual harassment in an education program or activity of a recipient of Federal financial assistance. To help clarify these points, the Department has revised the final regulations so that the definitions in § 106.30 apply to the entirety of 34 CFR part 106 and not just to subpart D of 34 CFR part 106.[1617] Accordingly, recipients are expected to handle any formal complaints of sexual harassment in an education program or activity against a person in the United States through the grievance process in § 106.45. The grievance process in § 106.45 applies irrespective of whether the complainant or respondent is a student or employee. The Department is aware that Title VII imposes different obligations with respect to sexual harassment, including a different definition, and recipients that are subject to both Title VII and Title IX will need to comply with both sets of obligations. Nothing in these final regulations, however, shall be read in derogation of an individual's rights, including an employee's rights, under Title VII, as expressly stated in § 106.6(f). Similarly, nothing in these final regulations precludes an employer from complying with Title VII. The Department recognizes that employers must fulfill both their obligations under Title VII and Title IX, and there is no inherent conflict between Title VII and Title IX.

The Department does not share the commenter's concerns about the application of § 106.45(b)(5)(v) to a recipient's employees. Section 106.45(b)(5)(v) requires a recipient to provide to the party whose participation is invited or expected written notice of the date, time,

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[1617] Consistent with these clarifications regarding the coverage of sexual harassment under subpart D, including with respect to employees, we also revised § 106.44(d) (authorizing a recipient to place a non-student employee on administrative leave during the pendency of a § 106.45 grievance process) to state that nothing in subpart D precludes administrative leave, instead of stating that nothing in § 106.44 precludes administrative leave.

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. Employees that go through the grievance process described in § 106.45 deserve the same written notice as other individuals who go through this grievance process. Nothing precludes the recipient from providing such written notice to its employees.

The Department acknowledges that the final regulations deviate from the standard articulated in its 2001 Guidance, by which recipients must respond to allegations of sexual harassment. We explain the rationale for our departure from prior policy positions earlier in this preamble in the section on "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment." Additionally, the Department acknowledges that the standard for responding to sexual harassment under Title VII is different than the standard under Title IX. The deliberate indifference standard in § 106.44(a) is the most appropriate standard under Title IX as recipients are in the business of education where people are engaged in a marketplace of ideas that may challenge their own. To avoid restrictions on the speech, conduct, and other expressive activity that helps provide a robust education for students and academic freedom for faculty and staff, the Department adopts the standard that the Supreme Court articulated for Title IX cases rather than the standard that the Supreme Court has articulated for Title VII or other statutory schemes.

With respect to § 106.45(b)(3)(i), which requires mandatory dismissal in certain circumstances, the Department has revised this provision to clarify that such a dismissal does not

preclude action under a non-Title IX provision of the recipient's code of conduct. [1618] If a recipient has a code of conduct for employees that goes beyond what Title IX and these final regulations require (for instance, by prohibiting misconduct that does not meet the definition of "sexual harassment" under § 106.30, or by prohibiting misconduct that occurred outside the United States), then a recipient may enforce its code of conduct even if the recipient must dismiss a formal complaint (or allegations therein) for Title IX purposes. These regulations do not preclude a recipient from enforcing a code of conduct that is separate and apart from what Title IX requires, such as a code of conduct that may address what Title VII requires. Accordingly, recipients may proactively address conduct prohibited under Title VII, when the conduct does not meet the definition of sexual harassment in § 106.30, under the recipient's own code of conduct, as these final regulations apply only to sexual harassment as defined in § 106.30.

Campus administrators will not be able to ignore or promote certain reports of sexual harassment to help or undermine the careers of certain faculty. These final regulations apply to all reports of sexual harassment, and a recipient cannot ignore or promote certain reports. In response to these and other comments, the Department has added a provision to expressly prohibit retaliation in § 106.71. Under § 106.71, a faculty member with seniority could not coerce witnesses to provide favorable testimony. No recipient or other person may intimidate,

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[1618] § 106.45(b)(3)(i) (providing that 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, did not occur in the recipient's education program or activity, or did not occur against a person in the United States, then the recipient must dismiss the formal complaint with regard to that conduct for purposes of Title IX but "such a dismissal does not preclude action under another provision of the recipient's code of conduct.").

threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this part.

Contrary to the commenter's assertion, the Department does not have authority to enforce, implement, or administer Title VII. While we appreciate the commenter's interest in supplementing the final regulations to clarify the relationship between Title VII and Title IX, we decline to include such an explanation at this time. As previously stated, there is no inherent conflict between Title VII and Title IX, and the Department will construe Title IX and its implementing regulations, including these final regulations, in a manner to avoid an actual conflict between an employer's obligations under Title VII and Title IX.

Changes: The Department revises § 106.6(f) to state that nothing in 34 CFR part 106 may be read in derogation of any individual's rights under Title VII. The Department has added § 106.71 to expressly prohibit retaliation. Additionally, the Department has revised § 106.30 to clarify that aside from the definitions of "elementary and secondary school" and "postsecondary institution," the definitions in § 106.30 apply to all of 34 CFR part 106 and not just to subpart D of part 106.[1619] For similar clarity we have revised § 106.44(d) to refer to subpart D of 34 CFR part 106

[1619] The NPRM proposed that the definitions in § 106.30 apply only to Subpart D, Part 106 of Title 34 of the Code of Federal Regulations. 83 FR 61496. Aside from the words "elementary and secondary school" and "postsecondary institution," the words that are defined in § 106.30 do not appear elsewhere in Part 106 of Title 34 of the Code of Federal Regulations. Upon further consideration and for the reasons articulated in this preamble, the Department would like the definitions in § 106.30 to apply to Part 106 of Title 34 of the Code of Federal Regulations, except for the definitions of the words "elementary and secondary school" and "postsecondary institution." The definitions of the words "elementary and secondary school" and "postsecondary institution" in § 106.30 will apply only to §§ 106.44 and 106.45. This revision is not a substantive revision because this revision does not change the definitions or meaning of existing words in Part 106 of Title 34 of the Code of Federal Regulations. Ensuring that the definitions in § 106.30 apply throughout Part 106 of Title 34 of the Code of Federal Regulations will provide clarity and consistency for future application. We also have clarified in § 106.81 that the definitions in § 106.30 do not apply to 34 CFR 100.6-100.11 and 34 CFR part 101, which are procedural provisions applicable to Title VI. Section 106.81 incorporates these procedural provisions by reference into Part 106 of Title 34 of the Code of Federal Regulations.

rather than solely to § 106.44. With respect to a mandatory dismissal under § 106.45(b)(3)(i), the Department has revised this provision to clarify that such a dismissal is only for Title IX purposes and does not preclude action under another provision of the recipient's code of conduct.

Comments: Another commenter urged the Department to explicitly require that all of a recipient's employees be aware of the possibly criminal nature of employee-on-student sexual misconduct under State laws and to comply with State mandatory reporting requirements. One commenter stated that elementary and secondary school recipients must ensure that if a student discloses information about sexual misconduct by another student or employee, that all employees must report the information to the Title IX Coordinator.

Discussion: The Department encourages all recipients to comply with all laws applicable to the recipient. The Department, however, does not have the authority to enforce or administer State laws or State mandatory reporting requirements. Additionally, it would be a huge burden for the Department to keep track of all the possibly criminal nature of employee-on-student sexual misconduct under State laws and State mandatory reporting requirements to make certain that recipients are aware of such State law requirements or are complying with such requirements.

The Department agrees with the commenter's sentiment that any employee in the elementary and secondary context should be responsible for instituting corrective measures on behalf of the recipient if these employees have notice of sexual harassment or allegations of sexual harassment, and the Department has revised the definition of "actual knowledge" in § 106.30 to include notice to all employees of an elementary or secondary school. Although an elementary or secondary school may require employees to report the information to the Title IX Coordinator, a student's report of sexual harassment or notice of sexual harassment or allegations

of sexual harassment to any employee of the elementary or secondary school is sufficient to hold the school district liable for a proper response under these final regulations.

Changes: The Department has revised the definition of actual knowledge in § 106.30 to include notice of sexual harassment to any employee in the elementary or secondary school context.

Comments: Some commenters proposed that the Department apply the proposed rules to employees but with some modifications. Commenters asserted that overzealous Title IX enforcement and a broad conception of "harassment" has undermined faculty rights, free speech, and academic inquiry. One commenter requested that the Department not adopt the student-on-student harassment definition for faculty, but to instead adopt a "severe or pervasive" standard for the employment context. This commenter also suggested that the final regulations clearly state they do not preclude recipients' obligation to honor additional rights negotiated by faculty in any collective bargaining agreement or employment contract. Another commenter contended that, unlike employees, students can be protected during an investigation by a no-contact order. But employees presumably have ongoing relationships with other community members and are likely to continue working together throughout the investigation period. The commenter expressed concern that employees may risk their jobs by acting as a complainant or witness.

Discussion: As explained above, the Department's final regulations apply to employees, and the Department cannot discern any meaningful justification to treat employees, including faculty, differently than students with respect to allegations of sexual harassment. The Department believes that students and employees should have the same protections with respect to regulations addressing sexual harassment. The Department notes that employees, including faculty, sometimes sexually harass students. It would be difficult to reconcile how regulations would apply to employee-on-student sexual harassment, if the Department had a different set of

regulations that apply to employees than to students such that a student-complainant's rights depended on the identity of the respondent as a student or employee.

The Department does not wish to adopt a "severe or pervasive" standard for the reasons explained throughout this preamble, including in the "Definition of Sexual Harassment" subsection of the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section, and these reasons include guarding against the infringement of First Amendment freedoms such as academic freedom. The Department recognizes that other laws such as Title VII may have a different standard and impose different requirements. There is no inherent conflict between Title VII and Title IX, and employers may comply with the requirements under both Title VII and Title IX.

These final regulations do not preclude a recipients' obligation to honor additional rights negotiated by faculty in any collective bargaining agreement or employment contract, and such contracts must comply with these final regulations. In the Department's 2001 Guidance, and specifically in the context of the due process rights of the accused, the Department recognized that "additional or separate rights may be created for employees . . . by . . . institutional regulations and policies, such as faculty or student handbooks, and collective bargaining agreements."[1620] The Department has never impeded a recipient's ability to provide parties with additional rights as long as the recipient fulfils its obligations under Title IX. The Department has never suggested otherwise, and we believe it is unnecessary to expressly address this concern in the regulatory text. Although recipients may give employees additional or separate rights, recipients must still comply with these final regulations, which implement Title IX.

[1620] 2001 Guidance at 22.

A recipient may provide a mutual restriction on contact between the parties, including when an employee is a party, under the final regulations. The final regulations do not restrict the availability of supportive measures, as defined in § 106.30, to only students. Rather, supportive measures are available to any complainant or respondent, including employee-complainants and employee-respondents.

In response to commenters' concerns, the Department has added a provision to expressly prohibit retaliation in § 106.71. Under § 106.71, no recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. The Department will not tolerate retaliation against anyone, including an employee who is a complainant or a witness.

Changes: The Department has added a provision to § 106.71 to expressly prohibit retaliation.

Comments: Many commenters argued that application of the proposed rules to employees is problematic because it would conflict with Federal law and congressional intent. Commenters noted that Title VII already prohibits sex discrimination, including sexual harassment, in the employment context, and that other Federal laws prohibit harassment based on other protected characteristics such as race, age, and disability in the employment context. Commenters contended that it would be illogical for the Department to establish protections for respondents accused of sexual harassment that do not exist for respondents accused of race, age, or disability discrimination. A few commenters proposed that the final regulations explicitly state that they apply only to allegations involving student-respondents, and that sexual allegations against employees are governed by Title VII and State and local non-discrimination in employment

laws. Similarly, another commenter asked that the final regulations explicitly state that Title VII and similar State and local laws apply where the respondent is an employee, and that Title IX does not require any process in such cases. Some commenters also expressed concern that if the proposed rules apply in the employment context, then recipients would face the impossible situation of having to comply with contradictory Title IX and Title VII standards. Commenters described specific conflicting elements of Title IX and Title VII, including the NPRM's formal complaint requirement, notice requirement, deliberate indifference standard, sexual harassment definition, and the live hearing requirement. Commenters argued these Title IX provisions, which they alleged conflict with Title VII, are less protective than Title VII, and that the Department should not provide less protection to children in school than adults in the workplace. Some commenters also suggested that conflicts between Title IX and Title VII may create confusion and expose recipients to liability. One commenter asserted that the Department should proceed carefully when affecting a recipient's personnel decisions because Congress expressed concern about the potential for Federal overreach when creating the Department in 1979 and included a clear statutory prohibition that the Department may not exercise direction, supervision, or control over any recipient's administration or personnel.

Some commenters expressed confusion about the applicability of the proposed grievance process provisions (specifically, § 106.45) to employees and asked the Department to clarify the scope of the grievance procedure requirements with respect to employees. These commenters argued that applying the grievance process required under the final regulations to complaints against all faculty and staff would be an expansion of Title VII and is outside of the Department's jurisdiction. They also noted that employers already have well-established policies

and procedures informed by decades of Title VII jurisprudence which drive their responses to allegations of sexual harassment and differ greatly from the requirements in § 106.45.

Discussion: The Department disagrees that applying these final regulations to employees conflicts with Federal law and congressional intent. Congress enacted both Title VII and Title IX to address different types of discrimination. Congress enacted Title IX to address sex discrimination in any education program or activity receiving Federal financial assistance, whereas Congress enacted Title VII to address sex discrimination in the workplace. As commenters also acknowledge, the Supreme Court in interpreting Title IX and Title VII has held that different definitions of and standards for addressing sexual harassment apply under Title IX than under Title VII. Although there may be some overlap between Title VII and Title IX, it is not illogical for the Department to establish protections for parties who are reporting sexual harassment or defending against allegations of sexual harassment that are not the same as for parties who are dealing with race, age, or disability discrimination because Title IX, unlike Title VII, solely concerns sex discrimination in an education program or activity that receives Federal financial assistance. Allegations of sexual harassment may implicate a person's reputation, for example, in ways that allegations of race, age, or disability discrimination may not, even though all of these types of discrimination are prohibited. For instance, false statements about a person's sexual activity may be actionable as defamation *per se*.[1621]

The Department acknowledges that Title VII and Title IX impose different requirements and that some recipients will need to comply with both Title VII and Title IX. Although

[1621] *E.g.*, *Rose v. Dowd*, 265 F. Supp. 3d 525, 541 (E.D. Pa. 2017) (noting that statements imputing serious sexual misconduct constitute defamation *per se* under multiple State laws).

recipients have noted that Title VII and Title IX have different standards for sexual harassment, recipients have not explained why they cannot comply with both standards. The Department's view is that there is no inherent conflict between Title VII and Title IX, including these final regulations. For example, Title VII defines sexual harassment as severe or pervasive conduct, while Title IX defines sexual harassment as severe and pervasive conduct. Nothing in these final regulations precludes a recipient-employer from addressing conduct that it is severe or pervasive, and § 106.45(b)(3)(i) provides that a mandatory dismissal under these final regulations does not preclude action under another provision of the recipient's code of conduct. Thus, a recipient-employer may address conduct that is severe or pervasive under a code of conduct for employees to satisfy its Title VII obligations. Courts impose different requirements under Title VII and Title IX, and recipients comply with case law that interprets Title VII and Title IX differently. Similarly, recipients may comply with different regulations implementing Title VII and Title IX. For example, nothing in Title VII precludes an employer from allowing employees to file formal complaints or from providing notice to an employee such as notice of the allegations against the employee or notice of the dismissal of any allegations as required in these final regulations. These final regulations require all recipients with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, to respond promptly in a manner that is not deliberately indifferent, irrespective of whether the complainant and respondent are students or employees.

The Department is not exercising direction, supervision, or control over any recipient's administration or personnel. Indeed, § 106.44(b)(2) specifically states that the Assistant Secretary will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient, or otherwise evidence of discrimination under Title IX

by the recipient, solely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence. Accordingly, the Department will not dictate what the recipient's determination regarding responsibility should be for a respondent who is an employee. Similarly, the Department will not require a recipient to impose a specific type of disciplinary sanction on a respondent who is an employee. The Department only requires a recipient to describe the range of possible disciplinary sanctions in § 106.45(b)(1)(vi) and does not otherwise require a recipient to include specific disciplinary sanctions.

The Department acknowledges that the grievance process in § 106.45 may apply to employees and disagrees that applying such a grievance process to employees is an expansion of Title VII. The grievance process in § 106.45 does not contradict Title VII or its implementing regulations in any manner and at most may provide more process than Title VII requires. These final regulations, however, do not expand Title VII, as these final regulations are promulgated under Title IX. As previously explained, Title IX prohibits discrimination on the basis of sex in a recipient's education program or activity against a person in the United States. Title IX and these implementing regulations do not necessarily apply in all circumstances, and there may be circumstances in which Title VII but not Title IX applies. For example, if the alleged sexual harassment did not occur in an education program or activity of the recipient, then Title IX and these final regulations would not apply.

Changes: None.

Comments: A handful of commenters argued that application of the proposed rules to employees is problematic because it would conflict with State laws, collective bargaining agreements, and other employee contracts. Commenters asserted several State employment statutes and local

policies covering issues including the definition of sexual harassment, retaliation, complaint processes, discovery and cross-examination, and other related matters that may conflict with the proposed standards and grievance procedures.

Commenters also noted the proposed rules would conflict with many collective bargaining agreements covering unionized employee groups that cover matters such as employee pay, working conditions, and disciplinary processes such as the applicable standard of evidence. Application of the NPRM to these employee groups, they contended, could violate existing multi-year agreements, undermine parties' expectations, and would likely require recipients to undergo a lengthy and complex renegotiation of union contracts. Commenters expressed concern about Federal intrusion on freedom of contract. One commenter argued that a collective bargaining agreement providing for notice to the accused employee and availability of a post-termination grievance procedure and evidentiary hearing before a neutral and experienced arbitrator satisfies an employee's constitutional due process rights under U.S. Supreme Court case law and is superior to the NPRM's hearing process because, among other things, the arbitration process preserves the employer's decision-making role and is more efficient because the union cannot initiate arbitration if misconduct is clear in its judgment.

One commenter asserted that the live hearing requirement for postsecondary institutions creates an unnecessary and duplicative process for employees who are subject to a collective bargaining agreement. According to this commenter, the collective bargaining agreement between a recipient and a union usually requires "just cause" for discipline, and "just cause" requires the employer to have evidence of guilt and make decisions after a fair investigation.[1622]

[1622] Kenneth May *et al.*, *Elkouri & Elkouri: How Arbitration Works* 15-4 to 15-6 (8th ed. 2017 Supp.).

This commenter further asserts that a hearing is typically not part of the determination of "just cause" unless the recipient and the union specifically bargain for such a pre-termination hearing. This commenter stated that unions that do not require a pre-termination hearing often bargain to provide a grievance procedure that concludes with an arbitration of the dismissal through a hearing with cross-examination. This commenter is concerned that a live hearing with cross-examination under § 106.45(b)(6)(i) will create a significant disincentive for an employee to complain about harassment because that employee may be subject to a pre-termination live hearing as well as an arbitration that requires a hearing with cross-examination. This commenter also asserts that employers will resolve employment disputes with employees and unions through resolution agreements to avoid an additional hearing.

Another commenter expressed concern that applying the proposed rules to unions or members of unions with collective bargaining agreements may cause unrest, strikes, and increase litigation risk under Federal and State labor laws. One commenter asserted that applying the NPRM to non-student employees may conflict with State tort law requirements, which impose liability on employers for actions of their employees in certain circumstances. A few commenters emphasized that the relationship between recipients and employees is fundamentally different than the relationship between recipients and students; recipients may have a strong interest in maintaining privacy for parties and witnesses in workplace investigations because those individuals may continue working within the campus community. Another commenter asked whether the NPRM requires disclosure of all related evidence in employee matters, including potentially confidential employment information regarding other employees.

Discussion: The Department acknowledges that some collective bargaining agreements may need to be renegotiated for a recipient to comply with these final regulations, and the Department

understands that some recipients have concerns about strikes and unrest as well as increased litigation risk under Federal and State labor laws. The Department also acknowledges concerns about a recipient's obligation to comply with various State employment laws and other laws as well as these final regulations. The Department reminds recipients that recipients *choose* to receive Federal financial assistance and that these final regulations are a condition of that Federal financial assistance. Recipients may wish to forego receiving Federal financial assistance if the recipients do not wish to renegotiate a collective bargaining agreement or are concerned about complying with State employment laws or other laws. The Department is not intruding on the freedom of contract, as recipients remain free to choose whether to enter into an agreement with the Department to comply with these final regulations as a result of receiving Federal financial assistance.

The Department disagrees with the commenter who recommends adopting an arbitration process for employees for the purpose of responding to sexual harassment. We believe that the process in § 106.45 to address formal complaints of sexual harassment provides robust due process protections and are not certain whether these same due process protections will be offered in an arbitration process. With respect to the arbitration process described by the commenter, the union cannot initiate arbitration if misconduct is clear in its judgment. Such an arbitration provision gives great authority to the union to determine whether the employee is even eligible to receive the opportunity to enjoy the alleged due process protections in the arbitration process. Unlike the arbitration process that the commenter describes, these final regulations provide a formal complaint process that any complainant may initiate. Additionally, recipients may facilitate an informal resolution process under § 106.45(b)(9).

The Department appreciates the commenter's concerns about collective bargaining agreements that require a post-termination grievance procedure. The commenter acknowledges that requirements in collective bargaining agreements differ and that some agreements provide a pre-termination hearing, while other agreements provide a post-termination hearing. The commenter further acknowledges that the hearing required in a collective bargaining agreement is a result of a negotiation or bargain between unions and recipients. If a recipient chooses to accept Federal financial assistance and thus become subject to these final regulations, then the recipient may negotiate a collective bargaining agreement that requires a pre-termination hearing consistent with the requirements for a hearing under § 106.45(b)(6). Nothing precludes a recipient and a union from renegotiating agreements to preclude the possibility of having both a pre-termination live hearing that complies with § 106.45(b)(6) and a post-termination arbitration that requires a hearing with cross-examination. These final regulations do not require both a pre-termination hearing and a post-termination hearing, and recipients have discretion to negotiate and bargain with unions acting on behalf of employees for the most suitable process that complies with these final regulations.

The Department agrees that employers have a strong interest in maintaining privacy for parties and witnesses in workplace investigations. In response to concerns regarding privacy and confidentiality, the Department has added a provision in § 106.71 that requires the recipient to keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute or regulations, 20 U.S.C. 1232g and 34 CFR part 99, or as required by law, or to

carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

Changes: The Department has added a provision to § 106.71 that requires the recipient to keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute or regulations, 20 U.S.C. 1232g and 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

Comments: Commenters cautioned that the Department should not disrupt school processes. One commenter contended that the NPRM is too prescriptive and wrongly imposes a one-size-fits-all system, thus ignoring the reality that recipients employ a wide variety of workers with different relationships to their employer, such as temporary, part-time, and full-time employees; or at-will, unionized, and tenured employees. These different roles often have unique applicable grievance procedures, and the commenter contended that the Department is wrongly considering imposing the same process on all of them.

Some commenters believed the NPRM interferes with the at-will employment doctrine. Commenters asserted the NPRM should not address harassment by employees; under the at-will doctrine, absent a specific contract term to the contrary, an employee can quit or be fired without liability on the employer or employee, with or without cause. One commenter asserted that the Department failed to provide a principled reason why sex discrimination and harassment cases, but not other types of discrimination or harassment, justify overruling the at-will doctrine.

Another commenter emphasized that while Title VII also prohibits sex discrimination, it does not require the type of detailed disciplinary proceedings under the NPRM. However, private employers can presumably fire employees for sexual harassment after simply conducting an internal investigation. This commenter concluded that it would be illogical for private employees in every industry except for higher education to be subject to general rules governing at-will employees, while the Department suddenly vests employees at private universities with certain "due process" rights.

Commenters discussed specific aspects of the NPRM such as the live hearing requirement and the possibility that recipients would have to supply legal advisors for employees and described these provisions as dramatically altering the nature of the relationship between the employee and recipient.

Discussion: The Department realizes that recipients, like most employers, may have different types of employees, including temporary, part-time, full-time, tenured, and at-will employees. The presence of different types of employees does not require that these employees be treated any differently for purposes of sexual harassment. A recipient should not be able to treat an allegation of sexual harassment differently based on the type of employee who is reporting the sexual harassment or who is the subject of the report. The Department believes that irrespective of position, tenure, part-time status, or at-will status, no employee should be subjected to sexual harassment or be deprived of employment as a result of allegations of sexual harassment without the protections and the process that these final regulations provide.

Employers also may not take an adverse employment action against at-will employees, if such an adverse employment action constitutes discrimination under Title VII, which includes sex discrimination. Thus, these final regulations are not imposing obligations that unduly burden

recipient-employers. Contrary to the commenters' assertions, the Department is not "overruling" the at-will employment doctrine or requiring private employees in every industry except for higher education to be subject to general rules governing at-will employees. These final regulations do not apply only to postsecondary institutions but also to elementary and secondary schools as well as other recipients of Federal financial assistance such as some museums. These final regulations apply to any education program or activity of a recipient receiving Federal financial assistance. If recipients do not wish to become subject to these final regulations, then recipients may choose not to receive Federal financial assistance. If the commenter's argument is followed to its logical conclusion, then a recipient may terminate an at-will employee for reporting sexual harassment and not offer any protections to such employees to come forward with allegations of sexual harassment under Title IX. The Department finds it concerning that recipients would wish to terminate any employee, including an at-will employee, for reporting sexual harassment and not offer any protections to such employees to come forward with allegations of sexual harassment. Similarly, the Department finds it concerning that recipients may wish to terminate a person's employment based on an allegation of sexual harassment without any investigation or other fact-finding activity. We believe that these final regulations provide the most appropriate protections and process for both employees reporting sexual harassment and employees accused of sexual harassment. As explained earlier in this section, allegations of sexual harassment have different consequences than allegations of other types of discrimination. For example, allegations of sexual harassment may lead to a criminal conviction.

Contrary to the commenter's assertions, these final regulations would not require a recipient to provide legal advisors for employees. Advisors do not have to be attorneys, and the Department has revised the final regulations to clarify that the advisors may be, but are not

required to be, attorneys.[1623] These final regulations do not otherwise dramatically alter the relationship between the recipient and the employee, as employers have always had to address sexual harassment in the workplace under either Title IX or Title VII. These final regulations simply provide greater clarity and consistency with respect to the recipient's obligations to respond to allegations of sexual harassment under Title IX.

Changes: The Department has revised § 106.45(b)(5)(iv) and § 106.45(b)(6)(i) to clarify that an advisor may be, but is not required to be, an attorney.

Comments: One commenter requests clarification on whether the definition of student as a person who has gained admission implies that one also becomes an employee at the time of a job offer as opposed to at the time the offer is signed and accepted.

Discussion: The Department appreciates the opportunity to clarify whether the definition of the term "student" as "a person who has gained admission"[1624] implies that one also becomes an employee at the time of a job offer as opposed to at the time the offer is signed and accepted. The Department notes that the definition of "student" in 34 CFR 106.2(r) only refers to that term and does not affect the definition of the term "employee" under the final regulations. The Department defers to State law with respect to employees, and State law will govern whether a person is an employee as opposed to an independent contractor. State law also will govern whether a person is an employee at the time of a job offer as opposed to the time when that person accepts the job offer. The Department notes, however, that employment status may not always be the most

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[1623] The final regulations include language clarifying that party advisors may be, but need not be, attorneys, in § 106.45(b)(5)(iv) (regarding both parties' equal opportunity to select an advisor of choice), § 106.45(b)(2) (initial written notice of allegations must advise parties of their right to select an advisor of choice), and § 106.45(b)(6)(i) (requiring recipients to provide a party with an advisor to conduct cross-examination on behalf of a party if the party does not have an advisor at the hearing).

[1624] *See* 34 CFR 106.2(r) ("*Student* means a person who has gained admission.") (emphasis in original).

relevant determination as a complainant must be participating in or attempting to participate in an education program or activity of the recipient at the time of filing a formal complaint as explained in the definition of "formal complaint" in § 106.30.

Changes: None.

Comments: One commenter argued the NPRM is unconstitutional under U.S. Supreme Court case law as applied to religiously-affiliated institutions insofar as it would preclude recipients from immediately terminating employment of any employee whose duties include ministerial tasks.

Discussion: An educational institution that is controlled by a religious organization is exempt from complying with Title IX and these final regulations to the extent that Title IX or its implementing regulations would not be consistent with the religious tenets of such organization under 20 U.S.C. 1681(a)(3). These final regulations, thus, are not unconstitutional, and a recipient may assert an exemption under § 106.12 of these final regulations, if applicable.

Changes: None.

Comments: A few commenters expressed concern about applying the NPRM to student complaints against employees because it could increase unfairness and chill reporting. Commenters noted that employee-respondents generally have funding to pay for private, skilled attorneys with experience in cross-examination, whereas students may be more likely to hire non-attorneys or less talented low-cost attorneys as advisors. This would only exacerbate a power differential between employees tied to the campus and students who stand to lose a degree for which they invested significant time, energy, and money. Commenters also stated that it can be extremely challenging for student-complainants to be subjected to cross-examination by employee-respondents, especially if the respondent is a prominent faculty member.

Discussion: We disagree that these final regulations will chill reporting as applied to employee-on-student sexual harassment. These final regulations provide a complainant with various options, including the guarantee that the recipient must offer supportive measures, irrespective of whether the complainant files a formal complaint. These final regulations also contain robust retaliation protections. It is unfair and inaccurate to assume that an employee will always have more resources than a student and that an employee will be able to hire a skilled attorney as an advisor. Employees include all levels of employees, and an employee who is a janitor may not earn as much as an employee who is a tenured professor. Additionally, some students may come from wealthy families who will provide an attorney as an advisor for the student. The status of a party as a student or an employee is not always indicative of the resources available to that party. Both parties will be subjected to cross-examination through a party's advisor, and parties have the option of being in separate rooms during the live hearing pursuant to § 106.45(b)(6)(i).

Changes: None.

Comments: Some commenters stated that the NPRM's requirements, as applied to employees, are unduly burdensome on recipients, would unnecessarily lengthen resolution time frames, and would increase compliance costs. In particular, commenters noted, the NPRM's live hearing with cross-examination requirement would lengthen complaint resolution time, impede recipients' ability to take action against employees who violated policy, and add substantial compliance costs as recipients must ensure those overseeing hearings and conducting cross-examination are competent and qualified to do so. Commenters urged the Department not to turn recipients into arms of the criminal justice system.

Discussion: The Department believes that these final regulations provide a balanced approach to responding to a complainant's report of sexual harassment, while also affording both parties due

process protections. These final regulations provide that a recipient must respond promptly in a manner that is not deliberately indifferent under § 106.44(a). The Department further notes that under § 106.45(b)(1)(v), a recipient must include reasonably prompt time frames for the conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes, if the recipient offers informal resolution processes. These final regulations require a recipient-employer to respond promptly including when a respondent is an employee. For the reasons stated earlier in this preamble and earlier in this section, these final regulations should apply to both students and employees. Recipients should be willing to respond in a manner that is not deliberately indifferent irrespective of the cost of compliance of providing hearing officers and advisors to conduct cross-examination. Additionally, a recipient has more discretion under these final regulations than under the Department's past guidance. For example, a recipient may offer an informal resolution process to resolve sexual harassment allegations as between two employees under § 106.45(b)(9). A recipient, however, cannot offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student because as explained more fully in the "Informal Resolution" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble, the power dynamic and differential between an employee and a student may cause the student to feel coerced into resolving the allegations.

Changes: None.

Comments: One commenter argued that the NPRM's application to academic medical centers is problematic because these institutional structures typically have thousands of employees uninvolved with any education program or activity, who work entirely in clinical care and do not interact with students. The commenter asserted that the Department should not establish broader

due process protections for these employees than for similarly situated employees at non-academic medical centers or for students alleging sexual misconduct outside an education program or activity. The commenter proposed that the Department allow these entities to develop their own disciplinary processes.

Another commenter suggested that case law is split as to whether medical residents and post-graduate fellows, who meet the definition of "employees" under Title VII and most statutes, are covered by Title IX at all. This uncertainty exposes academic medical centers to litigation risk from both complainants and respondents. The commenter contended that if the Department concludes medical residents are covered by Title IX, then the final regulations should not apply to sexual harassment complaints by patients against medical residents because the formal grievance process would be unworkable for cases involving only non-students.

Discussion: The Department understands that academic medical centers are unique entities, but Congress did not exempt academic medical centers that receive Federal financial assistance from Title IX.[1625] Title IX and these final regulations require recipients to respond to sexual harassment in the recipient's education program or activity, as defined in § 106.30. The Department is not creating broader due process protections for employees at these academic medical centers than at non-academic medical centers. The Department is providing adequate due process protections in this context for employees of any recipient of Federal financial assistance, irrespective of the nature or character of the recipient. The recipient remains free to

[1625] The Department notes that academic medical centers also may fall under the jurisdiction of the Office for Civil Rights at the U.S. Department of Health and Human Services.

choose not to receive Federal financial assistance and, thus, not become subject to these final regulations.

The Department realizes that the live hearing required for postsecondary institutions in § 106.45(b)(6)(i) may prove unworkable in a different context. Accordingly, as to recipients that are not postsecondary institutions, the Department has revised § 106.45(b)(6)(ii) to provide that the recipient's grievance process *may* require a live hearing and *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. Academic medical centers are not postsecondary institutions, although an academic medical center may be affiliated with a postsecondary institution or even considered part of the same entity as the postsecondary institution. Through this revision the Department is giving entities like academic medical centers greater flexibility in determining the appropriate process for a formal complaint.

Academic medical centers may develop their own disciplinary processes as long as these processes comply with these final regulations. These final regulations address sexual harassment as defined in § 106.30, and nothing in these final regulations precludes a recipient, including an academic medical center, to respond to conduct that is not sexual harassment under another provision of the recipient's code of conduct.

The Department is not categorically exempting any person, including medical residents, from Title IX and these final regulations. Whether these final regulations apply to a person, including a medical resident, requires a factual determination as each incident of sexual harassment is unique. If a medical resident is accused of sexual harassment in an education program or activity of the recipient against a person in the United States, the recipient must respond promptly in a manner that is not deliberately indifferent. The Department notes that the

Title IX statute[1626] and existing Title IX regulations,[1627] already contain detailed definitions of "program or activity" that, among other aspects of such definitions, include "all of the operations of" a postsecondary institution or local education agency. The Department will interpret "program or activity" in these final regulations in accordance with the Title IX statutory (20 U.S.C. 1687) and regulatory definitions (34 CFR 106.2(h)) as well as the statement (based on Supreme Court language in *Davis*[1628]) added in the final regulations to § 106.44(a) that "education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the context of the harassment and the respondent.[1629]

The Department disagrees that the formal complaint process would be unworkable for cases involving only non-students. A recipient may make supportive measures available to patients and medical residents. For example, patients may be assigned to a different physician, and a medical resident's schedule may be changed to avoid interaction with a complainant or a respondent. Patients may choose to resolve any report of sexual harassment against a medical resident through an informal resolution process, if the recipient provides such an informal resolution process. The Department acknowledges that a person, including a patient, must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed. The Department realizes that the recipient may not

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[1626] 20 U.S.C. 1687.
[1627] 34 CFR 106.2(h); 34 CFR 106.2(i) (defining "recipient"); 34 CFR 106.31(a) (referring to "any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance").
[1628] *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 646 (1999).
[1629] "Education program or activity" in § 106.44(a) also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

require a patient to participate in a formal complaint process, but a patient who is participating in or attempting to participate in the education program or activity of the recipient must have the option to file a formal complaint under these final regulations.

The Department realizes that the live hearing required for a postsecondary institution in § 106.45 may prove unworkable in a different context. Accordingly, for recipients that are not institutions of higher education, the recipient's grievance process *may* require a live hearing and *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 under § 106.45(b)(6)(ii). As previously stated, academic medical centers are not postsecondary institutions, although an academic medical center may be affiliated with a postsecondary institution or even considered part of the same entity as the institution of higher education. Through this revision the Department is giving entities like academic medical centers greater flexibility in determining the appropriate process for a formal complaint.

Changes: The Department has revised § 106.45(b)(6)(ii), which concerns the type of process a recipient must provide in response to a formal complaint, to apply to recipients that are not postsecondary institutions.

Comments: One commenter asserted that aspects of § 106.45(b) are unworkable for U.S. medical schools because medical students typically participate in clinical clerkships with preceptors located at separate facilities far from the medical school building. The commenter emphasized that it is not feasible to ask preceptive physicians at separate hospital systems who are parties or witnesses to participate in interviews, hearings, and cross-examination at the home institution.

Discussion: Recipients, including medical schools, must determine what constitutes an education program or activity. If a medical student experiences sexual harassment or is accused of sexual

harassment in an education program or activity of the recipient against a person in the United States, the recipient must respond promptly in a manner that is not deliberately indifferent. The Title IX statute[1630] and existing Title IX regulations,[1631] already contain detailed definitions of "program or activity" that, among other aspects of such definitions, include "all of the operations of" a postsecondary institution or local education agency. The Department will interpret "program or activity" in these final regulations in accordance with the Title IX statutory (20 U.S.C. 1687) and regulatory definitions (34 CFR 106.2(h)) as well as the statement (based on Supreme Court language in *Davis*[1632]) added in the final regulations to § 106.44(a) that "education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the context of the harassment and the respondent. The commenter's description of the clinical clerkships with preceptors located at separate facilities far from the medical school building may or may not be part of the recipient's education program or activity. The recipient must consider whether the recipient exercised substantial control over both the respondent and the hospital or medical clinic where the clinical clerkship is held. The Department also notes that we have revised § 106.45(b)(1)(iii) to require recipients to train Title IX personnel on the scope of the recipient's education program or activity.

If the clinical clerkship is part of the education program or activity of the recipient, the recipient may always ask preceptive physicians at separate hospital systems to participate in

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[1630] 20 U.S.C. 1687.
[1631] 34 CFR 106.2(h); 34 CFR 106.2(i) (defining "recipient"); 34 CFR 106.31(a) (referring to "any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance").
[1632] *Davis*, 526 U.S. at 646.

interviews, hearings, and cross-examination remotely. The Department realizes that the recipient may not have any control over physicians at separate hospital systems and allows a recipient to dismiss a formal complaint if specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein under § 106.45(b)(3)(ii). Even if a recipient cannot gather evidence sufficient to reach a determination, the recipient must still offering supportive measures to its students or employees who are complainants under § 106.44(a), which may include the opportunity to participate in a different clinical clerkship to fulfill an academic requirement.

Changes: None.

Comments: Many commenters offered suggestions to the Department regarding the application of the NPRM to employees. One commenter requested that the final regulations explicitly endorse the important role of shared governance in an institution of higher education's development of Title IX policies, as faculty are in the best position to make responsibility determinations regarding faculty-respondents. This commenter argued that any Title IX investigation of faculty should start with a referral to the established faculty governance committee or, if it does not exist, the final regulations should mandate its creation.

The commenter also proposed that the final regulations explicitly require equal due process protections for faculty employees at all levels. Another commenter proposed that the Department define "employee" as including all adults, staff, and volunteers working under the school's purview. One commenter argued that the final regulations should not apply to third parties who do not have a formal affiliation with the recipient.

One commenter requested that the Department make deliberately false accusations by students against employee-respondents a Title IX violation as gender discrimination and, if not, then at least require recipients to take action under other civil rights laws or recipient policy.

One commenter asserted that the NPRM requires "equitable" procedural elements and "equal" treatment of parties, but that Title IX's mandate is for "equitable" not "equal" access. This commenter recommended that the Department revise the final regulations to address the need for "equitable" treatment of parties. According to this commenter, equitable treatment might not be exactly the same treatment due to the parties' different circumstances, and this commenter asserted that equity and equality are not synonymous.

Discussion: The Department is aware that many postsecondary institutions require faculty-governance, and these final regulations do not preclude participation of a faculty-governance committee for reports of sexual harassment against faculty members. Indeed, the hearing officers may be faculty members as long as these hearing officers are trained, do not have any conflict of interest, do not have bias for or against complainants or respondents generally or for an individual complainant or respondent, and comply with the other requirements in § 106.45(b)(1)(iii). The Department need not mandate such a faculty-governance committee, as recipients have discretion to determine how best to deal with reports or formal complaints of sexual harassment against faculty members. The Department will defer to the discretion of the recipient in this regard.

As previously stated, Congress did not limit the application of Title IX to students. Title IX, 20 U.S.C. 1681, expressly states: "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 . . . ." Title IX,

thus, applies to any person in the United States who experiences discrimination on the basis of sex under any education program or activity receiving Federal financial assistance. Similarly, these final regulations, which address sexual harassment, apply to any person, including an employee, in an education program or activity receiving Federal financial assistance. The Department does not define the level and type of employee, as the Department may not be able to adequately capture all the possible types of employees who work for a recipient of Federal financial assistance.

These final regulations also may apply to volunteers, if the volunteers are persons in the United States who experience discrimination on the basis of sex under any education program or activity receiving Federal financial assistance. As previously stated, each incident of sexual harassment presents unique facts that must be considered to determine the recipient's obligations under these final regulations.

These final regulations recognize that a party may make deliberately false accusations, and the retaliation provision in § 106.71(b)(2) expressly states in relevant part: "Imposing sanctions for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation . . . ." A recipient may take action against a party who makes a materially false statement in bad faith in the course of a grievance proceeding. Such a materially false statement may but does not always constitute discrimination on the basis of sex. A recipient would need to examine the content, purpose, and intent of the materially false statement as well as the circumstances under which the statement was made to determine whether the statement constitutes sex discrimination.

The Department has made revisions to address the need to treat the parties equitably. The Department revised § 106.44(a) to require that recipients treat complainants and respondents

equitably, specifically to mean offering supportive measures to a complainant and a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures, as defined in § 106.30, for a respondent. Similarly, we have revised § 106.45(b)(1)(i) to require equitable treatment of complainants by providing remedies where a respondent is found responsible, and equitable treatment of respondents by applying a grievance process that complies with § 106.45 before imposing disciplinary sanctions or other actions that are not "supportive measures," as defined in § 106.30. In this manner, the final regulations more clearly define where equal treatment of parties, versus equitable treatment of parties, is required.

Changes: The Department has revised § 106.44(a) to require recipients to treat complainants and respondents equitably by offering supportive measures to a complainant and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. Similarly, we have also revised § 106.45(b)(1)(i) to require equitable treatment of the parties by providing remedies to a complainant where a respondent is found responsible and requiring a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent.

Comments: Many commenters requested clarification from the Department on matters relating to the application of Title IX to employees. Commenters asked whether the NPRM only applies to complaints by students against students, employees, and third parties or whether it also applies to complaints by employees against students and other employees. One commenter inquired whether the proposed rules applies to third-party complaints against students.

Another commenter asserted that Title VII deems employers responsible for harassment by non-supervisory employees or non-employees over whom it has control if the employer knew about the harassment and failed to take prompt and appropriate corrective action; however, the commenter asserted, the NPRM stated that recipients are only liable for conduct over which they "have control." This commenter requested that the Department clarify this intersection of Title VII and Title IX.

One commenter asked whether the Title VII or Title IX sexual harassment definition applies where employees allege harassment by students. One commenter asked whether the NPRM's deliberate indifference standard or the Title VII standard regarding employer liability applies for employee-on-employee cases that occur on campus. Another commenter asked whether the NPRM applies to students who are also full-time employees of the recipient.

One commenter expressed concern that the NPRM's live hearing requirement for sex discrimination, whether involving faculty, staff, or students, may create confusion and conflict between Title IX, Title VI, and Title VII. For example, this commenter stated, if allegations also involve racial discrimination then it is unclear whether the recipient must carve out the non-sex discrimination issue and proceed without a live hearing yet address the sex-related claims with a hearing.

Discussion: These final regulations may apply to reports and formal complaints by employees against students and other employees, and also may apply to third-party complaints against students. These final regulations also may apply to students who are full-time employees. As explained earlier, Title IX, 20 U.S.C. 1681 prohibits discrimination on the basis of sex against a person in the United States in an education program or activity and does not preclude application to specific groups of people such as employees. Similarly, these final regulations require a

recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States to respond promptly and in a manner that is not deliberately indifferent, under § 106.44(a). If a recipient has actual knowledge of a student sexually harassing an employee or a third party in a recipient's education program or activity in the United States, then the recipient must respond in a manner that is not deliberately indifferent.[1633] With respect to the whether a grievance process is initiated against a respondent, at the time of filing a formal complaint, a complainant, whether an employee or a third party or a student, must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.[1634] The Department acknowledges that a third party may be less likely to participate in a grievance process under § 106.45 than a party who is a student or employee of the recipient,[1635] but nothing prevents a recipient from complying with these final regulations by promptly responding when the recipient has actual knowledge of sexual harassment or allegations of sexual harassment under § 106.44(a), including by offering supportive measures to a complainant.

The Department recognizes that Title VII and Title IX may impose different obligations, but the Department does not administer or oversee the administration of Title VII. Accordingly, the Department will not opine on how Title VII should be administered or a recipient's

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[1633] Any person may be a complainant (i.e., a person alleged to be the victim of sexual harassment), including a student, employee, or third party. § 106.30 (defining "complainant"). Any person may report sexual harassment – whether the person reporting is the alleged victim themselves, or a third party – and trigger the recipient's response obligations. *E.g.*, § 106.8(a); § 106.30 (defining "actual knowledge").

[1634] § 106.30 (defining "formal complaint"). *See also* § 106.45(b)(3)(ii) (authorizing discretionary dismissal of a formal complaint in certain circumstances, including when the respondent is no longer enrolled or employed by the recipient, or where specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination regarding responsibility).

[1635] We reiterate that a recipient is prohibited from retaliating against any person for participating, or refusing to participate, in a Title IX grievance process. § 106.71(a).

obligations under Title VII, including when the sexual harassment definition or reasonableness standard under Title VII applies. To the extent that the commenters seek clarity on a recipient's responsibilities under Title IX, these final regulations provide such clarity. The Department adopts a deliberate indifference standard in § 106.44(a). The Department recognizes that an employer may have a different standard under Title VII, and nothing in these final regulations or in 34 CFR part 106 precludes an employer from satisfying its legal obligations under Title VII. There is no inherent conflict between Title VII and Title IX, and the Department will construe Title IX and its implementing regulations in a manner to avoid an actual conflict between an employer's obligations under Title VII and Title IX. The Department also clarifies in § 106.44(a) that education program or activity includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs.

These final regulations may impose different requirements than Title VI and Title VII, but they do not present an inherent conflict with these other statutory schemes. The Department also administers Title VI and acknowledges that a recipient has discretion to determine whether the non-sex discrimination issue such as race discrimination should go through a process like the process described in § 106.45. If allegations of sexual harassment arise out of the same facts and circumstances as allegations of race discrimination under Title VI, the recipient has the discretion to use the process described in § 106.45 to address sex and race discrimination or choose a different process that complies with the Department's regulations implementing Title VI to address the allegations of race discrimination.

Changes: None.

Comments: One commenter expressed support for § 106.6(f), and asserted that the provision appropriately clarifies that Title IX cannot deprive individuals of their Title VII rights.

Another commenter argued that § 106.6(f) fails to clearly distinguish application of Title IX from Title VII. This commenter urged the Department to clarify § 106.6(f) by identifying which specific employee Title VII rights Title IX will not derogate, and to also explicitly state that the NPRM does not create a new Title IX right of action for employees. Another commenter requested that Title VII be the exclusive remedy for complainants alleging sex discrimination in employment, and that the final regulations should explicitly state that Title VII preempts Title IX in such cases. One commenter argued that the Department lacks regulatory authority under Title IX to override statutory rights provided by Title VII. This commenter provided no further explanation. One commenter suggested that if § 106.6(f) states that employee rights under Title VII will not be impinged by Title IX regulations, then the final regulations should similarly state that Title IX rights will not be impinged by Title VII regulations.

Discussion: The Department appreciates the comment in support of its final regulations. The Department does not have the authority to administer or oversee the administration of Title VII and, thus, will not opine on any specific rights under Title VII that an employee has.

The Department does not have the power to create a "new Title IX right of action for employees." The courts will determine what rights of action employees have under Title IX and Title VII. As previously noted, the split among Federal courts is whether an implied private right of actions exists for damages under Title IX for redressing employment discrimination by

employers.[1636] These cases focus on whether Congress intended for Title VII to provide the exclusive judicial remedy for claims of employment discrimination.[1637] Courts, however, have not precluded the Department from administratively enforcing Title IX with respect to employees. Indeed, the Supreme Court expressly recognized the application of Title IX to redress employee-on-student sexual harassment in *Gebser*.[1638] The Department notes that its regulations have long addressed employees. For example, 34 CFR part 106, subpart E expressly addresses discrimination on the basis of sex in areas unique to employment. When the Department was formerly part of the Department of Health, Education, and Welfare, the Supreme Court noted that the Department's "workload [was] primarily made up of 'complaints involving sex discrimination in higher education academic employment.'"[1639]

The Department is not overriding statutory rights provided by Title VII, and the commenter does not explain how these final regulations override any statutory rights under Title VII.

These final regulations do not need to state that Title IX rights will not be impinged by Title VII regulations, as nothing suggests that Title VII may impinge on Title IX rights under these final regulations. As previously noted, the Department does not administer or oversee the administration of Title VII and will not issue regulations to administer Title VII.

[1636] *See Lakosi v. James*, 66 F.3d 751, 755 (5th Cir. 1995); *Burrell v. City Univ. of N.Y.*, 995 F. Supp. 398, 410 (S.D.N.Y. 1998); *Cooper v. Gustavus Adolphus Coll.*, 957 F. Supp. 191, 193 (D. Minn. 1997); *Bedard v. Roger Williams Univ.*, 989 F. Supp. 94, 97 (D.R.I. 1997); *Torres v. Sch. Dist. of Manatee Cnty., Fla.*, No. 8:14-CV-1021-33TBM, 2014 WL 418364 at *6 (M.D. Fla. Aug. 22, 2014); *Winter v. Penn. State Univ.*, 172 F. Supp. 3d 756, 774 (M.D. Pa. 2016); *Uyai v. Seli*, No. 3:16-CV-186, 2017 WL 886934 at *6 (D. Conn. Mar. 6, 2017); *Fox v. Pittsburg State Univ.*, 257 F. Supp. 3d 1112, 1120 (D. Kan. 2017).
[1637] *See id*.
[1638] *Gebser*, 524 U.S. at 277.
[1639] *Cannon*, 441 U.S. at 708 fn.42.

Changes: None.

Comments: Several commenters contended that establishing different Title IX standards than other non-discrimination laws will send the wrong message. Commenters emphasized that all forms of discrimination are wrong, and the Department should not create different standards for Title IX with different levels of protection that do not apply to Title VII and other non-discrimination statutes schools must follow. One commenter asserted that telling employees to report sexual harassment under Title IX may confuse people and lead them to believe that sexual harassment wasn't already illegal prior to Title IX or prior to the existence of a Title IX office on campus.

Discussion: The Department respectfully disagrees that establishing different requirements under Title IX than other non-discrimination laws will send the wrong message. Sex discrimination and the handling of sex discrimination claims differ in some important ways from other types of discrimination, such as discrimination on the basis of race. For example, a person may be criminally charged with some forms of sexual harassment such as sexual assault. The Department discusses the differences among various non-discrimination statutes, such as Title VI, Title IX, and Section 504, in greater detail in the "Different Standards for Other Harassment" subsection of the "Miscellaneous" section of this preamble.

The Department acknowledges that these final regulations share some similarities with Title VII but also differ from Title VII. As previously explained, an employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on the individual's participation in unwelcome sexual conduct, which is commonly referred to as *quid pro quo* sexual harassment, also remains a part of the Department's definition. *Quid pro quo* sexual

harassment is also recognized under Title VII.[1640] As discussed in greater detail, below, some commenters requested that the Department more closely align its definition of sexual harassment with the definition that the Supreme Court uses in the context of discrimination based on sex in the workplace under Title VII. The Supreme Court declined to adopt the definition of sexual harassment in the workplace for Title IX, and the Department is persuaded by the Supreme Court's reasoning in *Davis* that "schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults."[1641] Similarly, a postsecondary institution also differs from the workplace. The sense of Congress is that institutions of higher education should facilitate the free and robust exchange of ideas,[1642] but such an exchange may prove disruptive, undesirable, or impermissible in the workplace. The Department, like the Supreme Court, does not wish to extend the definition of sexual harassment in Title VII to Title IX because such an extension would broaden the scope of prohibited speech and expression and may continue to cause recipients to infringe upon the First Amendment freedoms of students and employees.

The Department does not believe that allowing employees to report sexual harassment or other sex discrimination under Title IX or to the Title IX Coordinator or a Title IX office will somehow lead people to believe that sexual harassment was lawful until Title IX was enacted or until these final regulations take effect. As many commenters have noted, Title VII also prohibits discrimination based on sex in employment, and employees should know that Congress has prohibited sex discrimination in the workplace.

[1640] *E.g.*, *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 752-53 (1998).
[1641] *Davis*, 526 U.S. at 651-52 (citing *Meritor Sav. Bank, FSB v. Vinson*, 277 U.S. 57, 67 (1986)).
[1642] 20 U.S.C. 1101a(a)(2)(C).

Changes: None.

Comments: Many commenters stated that establishing different standards in Title IX than in other non-discrimination law will reduce recipient flexibility. One commenter argued that the NPRM appears to require schools to establish a more complainant-hostile process for employee sexual harassment matters than other discrimination-related and employee misconduct matters. According to this commenter, this may expose schools to potential Title VII liability for sex discrimination.

One commenter asserted that § 106.45(b)(6)(i), as proposed in the NPRM, requires a recipient to permit a party's advisor to ask any questions that are relevant and that the rape shield provision does not preclude. This commenter was concerned that a wide range of cross-examination questions may deter victims of sexual harassment, including employees, from filing a formal complaint.

Commenters also sought clarity as to what extent application of the proposed rules would impede employers' affirmative defense to harassment claims under Title VII or be evidence of negligence in responding to sexual harassment. At least two commenters opined that these final regulations diminish a recipient's affirmative defense under *Faragher v. City of Boca Raton*[1643] and *Burlington Industries, Inc. v. Ellerth*[1644] commonly referred to as the *Faragher-Ellerth* defense. These commenters noted that under the *Faragher-Ellerth* defense, an employer must demonstrate that the employee unreasonably failed to utilize the employer's internal corrective mechanism. One commenter expressed concern that an employee may successfully argue that it

[1643] 524 U.S. 775, 777-78 (1998).
[1644] 524 U.S. 742, 765 (1998).

was reasonable to refuse to participate in a process that requires a live hearing with cross-examination because such a process actually deters complaints of sexual harassment. Another commenter asserted that the *Faragher-Ellerth* defense requires the employer to exercise reasonable care and noted that an employer is vicariously liable for the actions of its supervisors under Title VII. This commenter contended that vicarious liability is at odds with the requirement of actual knowledge, as defined in § 106.30.

A few commenters suggested that the Department is perversely imposing more stringent standards for students, including minors, than adults to get help. These commenters argued that there should not be a more demanding standard to take care of children than adults. One commenter generally stated that the Department should be mindful of the existing Trump Administration policy against creating duplicative or conflicting regulations.

Another commenter asserted that while one might argue that the boilerplate language in the proposed rules indicating that nothing therein derogates an employee's Title VII rights means that schools may disregard the requirements set out in the proposed rules when considering employee complaints of sexual harassment, schools choosing this path would run significant risks. According to this commenter, such schools would invite OCR complaints or lawsuits by respondents alleging that their Title IX rights under the proposed regulations had been violated. This commenter asserted that such a legal challenge by respondents would no doubt rely heavily upon the Department's suggestion that any deviation from the proposed rules may constitute sex discrimination against respondents in violation of Title IX. This commenter contended that the confusion and potential litigation created by the proposed rules threatens harm to employees and employers, serving no one's interest.

Discussion: The Department disagrees that establishing unique obligations under Title IX than under other non-discrimination law will reduce flexibility for recipients. Instead, these final regulations will provide consistency and clarity as to what a recipient's obligations are under Title IX and how a recipient must respond to allegations of sexual harassment under Title IX. These final regulations provide a recipient discretion through the deliberate indifference standard in § 106.44(a) and through other provisions such as the provision in § 106.44(b) that the Assistant Secretary will not second-guess the recipient's determination regarding responsibility.

These final regulations do not establish a more complainant-hostile process for employee sexual harassment matters than other discrimination-related and employee misconduct matters that may expose schools to potential Title VII liability for sex discrimination. These final regulations do not favor either complainants or respondents and require a recipient's response to treat complainants and respondents equitably under § 106.44(a) and § 106.45(b)(1)(i) by offering a complainant supportive measures (or remedies where a determination of responsibility for sexual harassment has been made against the respondent), and both § 106.44(a) and § 106.45(b)(1)(i) preclude the imposition of disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent unless the recipient first applies a grievance process that complies with § 106.45. These final regulations do not require a recipient to violate Title VII, and the commenter does not explain how these final regulations may expose recipients to liability under Title VII for sex discrimination. Recipients should comply with both Title VII and Title IX, to the extent that these laws apply, and nothing in these final regulations precludes a recipient from complying with Title VII.

The Department appreciates the commenters' concerns about a live hearing with cross-examination that allows all relevant questions that the rape shield provision in § 106.45(b)(6)

does not preclude. Allowing all relevant questions provides a robust process where decision-makers may make informed decisions regarding responsibility after hearing all the facts, and these decision-makers receive training on how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias pursuant to § 106.45(b)(1)(iii). Such a fulsome process does not necessarily deter complainants from coming forward with allegations of sexual harassment and filing a formal complaint. Complainants receive the same opportunity to ask any and all relevant questions, including questions about a respondent's sexual behavior or predisposition, as the rape shield provision applies only to the complainant's sexual behavior or predisposition. A live hearing with cross-examination provides both parties with a fair, equitable process that results in more accurate and reliable outcomes. Additionally, the Department added a strong retaliation provision in § 106.71 which will protect any individual involved in a Title IX matter, including employees, from intimidation, threats, coercion, or other discrimination for participating or refusing to participate in any manner in an investigation, proceeding, or hearing.

These final regulations would not impede an employer's affirmative defenses to sexual harassment claims under Title VII, nor do these final regulations provide evidence of negligence in responding to sexual harassment under Title VII. These final regulations provide in § 106.6(f) that nothing in this part shall be read in derogation of an individual's rights, including an employee's rights, under Title VII or its implementing regulations. Employers may not be able to use affirmative defenses to sexual harassment under Title VII for the purposes of Title IX, but these final regulations do not in any way derogate an employers' affirmative defenses to sexual harassment under Title VII. What constitutes sexual harassment and how a recipient is required to respond to allegations of sex harassment may be different under Title VII and Title IX.

The Department acknowledges that employers may invoke the *Faragher-Ellerth* affirmative defense under Title VII. The *Faragher-Ellerth* affirmative defense essentially allows an employer to avoid strict or vicarious liability for a supervisor's harassment of an employee, when it does not result in a tangible employment action.[1645] The defense requires "(a) that the employer exercised reasonable care to prevent and correct promptly any . . . harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid harm otherwise."[1646] The Department acknowledges that the definition and standard of sexual harassment under Title VII is different than under Title IX, and an employer may need to implement policies to address conduct that goes beyond the definition of sexual harassment in § 106.30 to fulfill its obligations under Title VII.

For example, the *Faragher-Ellerth* affirmative defense requires an employer to exercise reasonable care with respect to supervisor-on-employee harassment, while Title IX requires a recipient not to be deliberately indifferent. As one commenter stated, Title VII also requires a negligence standard if a co-worker harasses another co-worker. Title VII defines sexual harassment as severe or pervasive conduct, while Title IX defines sexual harassment as severe and pervasive. Under Title VII, an employer may be held vicariously liable for its supervisors' actions, whereas Title IX requires a recipient to have actual knowledge of sexual harassment. Employers are aware that complying with Title IX and its implementing regulations does not satisfy compliance with Title VII. These final regulations expressly provide that nothing in this

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[1645] *Ellerth*, 524 U.S. at 765.
[1646] *Id*.

part may be read in derogation of an individual's rights, including an employee's rights, under Title VII, and these final regulations do not prevent or preclude a recipient from complying with Title VII.

Additionally, these final regulations clearly provide that a complainant need not file a formal complaint for the recipient to provide supportive measures. Indeed, § 106.44(a) requires a recipient to offer supportive measures to a complainant, irrespective of whether the complainant files a formal complaint. Nothing in these final regulations prevents an employer from asserting that the consideration and provision of supportive measures may fulfill an employer's obligation to take preventive or corrective measures for purposes of the *Faragher-Ellerth* affirmative defense. Similarly, these final regulations do not prevent an employer from asserting that an employee's opportunity to file a formal complaint and initiate a grievance process under § 106.45 may fulfill an employer's obligation to provide a preventive or corrective opportunity for purposes of the *Faragher-Ellerth* affirmative defense, especially as recipients are required under § 106.8 to notify all employees and applicants for employment of the Title IX Coordinator's contact information and the grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond. Employers will not have to choose between asserting the *Faragher-Ellerth* affirmative defense or complying with these final regulations.[1647]

[1647] The Department has revised § 106.45(b)(3)(i), which requires a mandatory dismissal in certain circumstances, to clarify that such a dismissal is solely for Title IX purposes, and does not preclude action under another provision of the recipient's code of conduct. If a recipient has a code of conduct for employees that goes beyond what Title IX requires and these final regulations require, then a recipient may proceed to enforce its code of conduct despite dismissing a formal complaint (or allegations therein) for Title IX purposes. These regulations do not preclude a recipient from enforcing a code of conduct that is separate and apart from what Title IX requires; for example, with respect to investigating and adjudicating misconduct that does not meet the definition of "sexual harassment" as defined in § 106.30.

Although employers may have different obligations and be subject to different standards under Title VII and Title IX, these final regulations may be implemented in a manner that complements these similar yet different obligations.

The Department disagrees that it is providing more stringent standards for students, including minors, than adults to get help. As previously noted, a recipient must offer supportive measures to any complainant who reports sexual harassment, which will help ensure that all complainants receive help. These final regulations also contain some greater protections in the elementary and secondary context, where there are more minors, than in the higher education context. For example, the Department's definition of actual knowledge in § 106.30 includes all employees working in the recipient's education program or activity in the elementary and secondary context, and a recipient with actual knowledge of sexual harassment in an education program or activity against a person in the United States is required to respond promptly in a manner that is not deliberately indifferent under § 106.44(a).

The Department is mindful of President Trump's Executive Orders, and these final regulations are not duplicative. The Department is finally providing regulations that address sexual harassment as sex discrimination in education programs or activities under Title IX. The Department has the authority to issue these final regulations and is clearly stating in these final regulations that these regulations do not derogate an employee's rights under Title VII.

Finally, at least one commenter misunderstands what the Department means in § 106.6(f). The Department is not stating in § 106.6(f) that these final regulations do not apply to employees or that recipients who receive Federal financial assistance must only comply with Title VII with respect to employees. To the extent that Title IX may apply to a recipient's employees, a recipient must comply with Title IX. If a recipient does not comply with Title IX,

then a recipient may be liable under these final regulations and may be the subject of a complaint to OCR. As explained earlier, Title IX may apply to a recipient's employees. The Department simply clarifies, through § 106.6(f), that individuals, including employees, also may have rights under Title VII, and these final regulations do not derogate those rights.

Changes: None.

Comments: Several commenters requested that the Department issue joint guidance with the EEOC to ensure Title VII and Title IX are interpreted consistently with each other and to minimize potential conflicts between the two frameworks. One such commenter argued that the Title IX grievance process should not apply to any adverse *employment* action against a student-employee where the job in question is not an integral part of the recipient's educational program (for example, where the student accused of sexual harassment is fired from working at the campus cafeteria).

Discussion: The Department appreciates the commenters' desire for guidance on Title VII and Title IX. The Department acknowledges that the Supreme Court has interpreted Title VII and Title IX differently and we encourage people to rely on case law to understand the different legal frameworks for Title VII and Title IX. For example, adverse employment actions are a concept that exist under Title VII case law, but not Title IX case law. The Department of Education also cannot bind the EEOC to act or respond in a certain manner through this notice-and-comment rulemaking on Title IX.

As previously explained, these final regulations require a recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States to respond promptly in a manner that is not deliberately indifferent. It is irrelevant whether the student-respondent is an employee if the sexual harassment occurs in an education

program or activity of the recipient against a person in the United States. Depending on the facts and circumstances of such an incident of sexual harassment, the recipient may have obligations under both Title VII and Title IX.

Changes: None.

Comments: One commenter raised the specific issue of a potential conflict between § 106.44(b)(2) and Title VII implementing regulations. This commenter asserted that § 106.44(b)(2) would provide that the Department ordinarily accepts the recipient's factual determinations regarding responsibility and would not deem it as deliberately indifferent solely because the Assistant Secretary would have reached a different outcome. This commenter asserted that § 106.44(b)(2) may conflict with the Title VII requirement that employee complaints or complaints solely alleging employment discrimination against an individual filed with the Department must be referred to the EEOC for their own investigation and evaluation under 28 CFR 42.605. The commenter emphasized that the EEOC would never simply defer to an employer's conclusion that its officials did nothing wrong. According to this commenter, the EEOC conducts its own investigation and makes an independent assessment of the facts. This commenter stated that in some circumstances a referring agency, such as the Department, is required to "give due weight to EEOC's determination that reasonable cause exists to believe that Title VII has been violated" under 28 CFR 42.610(a). The commenter urged the Department to clarify which set of regulations apply in this context to avoid recipient confusion.

Discussion: The Department appreciates the commenter's concerns but disagrees that a conflict exists. The Department acknowledges that the Assistant Secretary will not second-guess a recipient's determination regarding responsibility under § 106.44(b)(2). These final regulations, however, do not apply to the EEOC and do not dictate how the EEOC will

administer Title VII or its implementing regulations. If the Assistant Secretary refers a complaint to the EEOC under Title VII or 28 CFR 42.605, then the EEOC will make a determination under its own regulations and not the Department's regulations. Even if the Department is required in some circumstances to give due weight to the EEOC's determination regarding Title VII under 28 CFR 42.610(a), the Department does not have authority to administer or enforce Title VII. There may be incidents of sexual harassment that implicate both Title VII and Title IX, and this Department will continue to administer Title IX and its implementing regulations and will defer to the EEOC to administer Title VII and its implementing regulations.[1648]

Changes: None.

Comments: Several commenters raised a number of issues that did not directly relate to the provision in § 106.6(f) regarding Title VII. One commenter suggested that the Department collect racial data from campuses to ensure we know how many persons of color have been expelled under Title IX "campus kangaroo courts." This commenter expressed concern that the Department may be inadvertently encouraging racial discrimination while trying to eliminate sex discrimination. Another commenter sought to remind the Department that, in addition to enforcing Title IX, the Department enforces Title VII and other civil rights laws and should vigorously enforce all of them to protect individual rights. One commenter asserted that the proposed regulations would apply to sexual harassment complaints and investigations involving more than eight million employees in primary and secondary schools, and more than four million

[1648] 28 CFR 42.610(c) also states: "If the referring agency determines that the recipient has not violated any applicable civil rights provision(s) which the agency has a responsibility to enforce, the agency shall notify the complainant, the recipient, and the Assistant Attorney General and the Chairman of the EEOC in writing of the basis of that determination." Accordingly, these regulations contemplate that each agency enforces the civil rights provisions that the agency has the responsibility to enforce.

employees at institutions of higher education, including a disproportionately female workforce in elementary and secondary schools and almost half of faculty in degree-granting institutions of higher education who are women.

Discussion: The Department did not propose any reporting requirements from postsecondary institutions or other recipients in the NPRM and does not think that such reporting requirements are necessary to address any racial discrimination that may occur in proceedings under these final regulations. Students who experience racial discrimination in a proceeding under Title IX may file a complaint under Title VI with OCR, and the Department will vigorously enforce Title VI's racial discrimination prohibitions. With respect to concerns about the number of students of color who may be expelled from school, we believe that the grievance process in § 106.45 will provide all parties, including persons of color, with sufficient due process protections.

Contrary to the commenter's assertions, the Department does not have the authority to enforce Title VII. The Department is committed to rigorously enforcing the civil rights laws that it is legally authorized to enforce.

The Department is aware that these final regulations will impact recipients and the people in a recipient's education program or activity and appreciates the commenter's references to statistics about the people whom these final regulations will affect.

Changes: None.

Section 106.6(g) *Exercise of Rights by Parents/Guardians*

Comments: Some commenters expressed concern about whether the proposed regulations allowed parents, on behalf of their child, to report sexual harassment, file a formal complaint, request particular supportive measures, review the evidence during a grievance process, and exercise similar rights given to a party under the proposed rules. Commenters wondered if a

minor student's parent would be permitted to attend interviews, meetings, and hearings during a grievance process or whether that would be allowed only if the minor student's parent was also the party's advisor of choice under § 106.45(b)(5)(iv).

Discussion: The Department recognizes that when a party is a minor or has a guardian appointed, the party's parent or guardian may have the legal right to act on behalf of the party. For example, if the parent or guardian of a student has a legal right to act on behalf of a student, then the parent or guardian must be allowed to file the formal complaint on behalf of the student, although the student would be the "complainant" under the proposed regulation. In such a situation, the parent or guardian must be permitted to exercise the rights granted to the party under these final regulations, whether such rights involve requesting supportive measures or participating in a grievance process. Similarly, the parent or guardian must be permitted to accompany the student to meetings, interviews, and hearings during a grievance process to exercise rights on behalf of the student, while the student's advisor of choice may be a different person from the parent or guardian. Whether or not a parent or guardian has the legal right to act on behalf of an individual would be determined by State law, court orders, child custody arrangements, or other sources granting legal rights to parents or guardians. Additionally, FERPA and its implementing regulations address the circumstances under which a parent or guardian is accorded certain rights granted thereunder, such as the opportunity to inspect and review a student's education records as set forth at 34 CFR 99.10 and 99.12.[1649] Thus, FERPA generally would address a parent's or guardian's opportunity to inspect and review evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint pursuant to § 106.45(b)(5)(vi),

[1649] 20 U.S.C. 1232g; 34 CFR Part 99.

provided such evidence constitutes a student's education record. However, in circumstances in which FERPA would not accord a party the opportunity to inspect and review such evidence, these final regulations do so and provide a parent or guardian who has a legal right to act on behalf of a party with the same opportunity.[1650] To clarify that these final regulations respect all legal rights of parents or guardians, we have added § 106.6(g) to address this issue; this provision applies not only to sexual harassment proceedings under Title IX but also to any issue of sex discrimination arising under Title IX.

Changes: We have added § 106.6(g), which addresses exercise of rights by parents or guardians, and states that nothing in part 106 may be read in derogation of any legal right of a parent or guardian to act on behalf of a complainant, respondent, party, or other individual, subject to paragraph (e) of this section, including but not limited to filing a formal complaint.

Section 106.6(h) Preemptive Effect

Comments: Commenters requested that the final regulations clearly state whether these final regulations supersede enforcement of State non-discrimination or civil rights laws with respect to provisions concerning sexual harassment. Some commenters reasoned that the final regulations should be a floor that does not preclude States from supplementing the legal requirements in these final regulations. Another commenter expressed concern that these final regulations will preempt State laws that the commenter described as designed to protect survivors of sexual violence. One commenter asserted that at least ten States have State laws that would conflict with

[1650] § 106.6(e) (providing that the obligation to comply with this part is not obviated or alleviated by the FERPA statute or regulations).

the Department's proposed rules.[1651] One commenter argued that Virginia law is more protective of victims than the proposed rules, including prompt review of any sexual violence report by a university committee within 72 hours of the report, mandatory notification of law enforcement, robust privacy protections, extensive outside support for victims, annual review of sexual violence policies with certification to the Virginia Secretary of Education, provisions for transcript notations on perpetrators' academic transcripts, and requiring certain injuries to children be reported by physicians, nurses, and teachers.

Another commenter requested that the Department implement the Title IX regulations in a manner that allows institutions of higher education in Colorado to retain their existing processes and procedures; while this commenter did not assert that the proposed regulations directly conflict with the processes and procedures that institutions of higher education in Colorado use, the commenter asserted that changing current Title IX policies and procedures would be costly and Colorado institutions of higher education already have policies and procedures in place that address due process concerns and protect survivors. A commenter from Hawaii expressed concerns that a "2018 state Title IX bill" shows that Hawaii constituents take Title IX very seriously and argued that the NPRM makes it unclear how Hawaii would implement its State law if the NPRM were to take effect.

At least one commenter advised the Department to include an explicit preemption clause in the final regulations, given the likelihood of conflict with State laws, unclear case law, and

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[1651] Commenter cited: California (Cal. Educ. Code § 67386, Cal. Educ. Code § 66290.1); Connecticut (Conn. Gen. Stat. Ann. § 10a-55m); Hawaii (Haw. Rev. Stat. Ann. § 304A-120), Illinois (110 Ill. Comp. Stat. Ann. 155); Maryland (Md. Code Ann., Educ. § 11-601); New Jersey (N.J. Stat. Ann. § 18A:61E-2); New York (N.Y. Educ. Law §§ 6439-49); Oregon (Or. Rev. Stat. Ann. § 350.255, Or. Rev. Stat. Ann. § 342.704); Texas (Tex. Educ. Code Ann. § 51.9363); and Virginia (Va. Code Ann. § 23.1-806).

because education is an area where the Federal government does not occupy the entire field. This commenter relied for its arguments on the Tenth Amendment, and the Supreme Court's ruling in *National Federation of Independent Business v. Sebelius*.[1652] This commenter specifically noted that there is a provision in the Department's current regulations implementing Title IX, which addresses preemption. Current 34 CFR 106.6(b) provides "The obligation to comply with this part is not obviated or alleviated by any State or local law or other requirement which would render any applicant or student ineligible, or limit the eligibility of any applicant or student, on the basis of sex, to practice any occupation or profession." This commenter contended that 34 CFR 106.6(b) may cause a court to question why the regulations implementing Title IX contain only one provision that specifically addresses preemption.

Discussion: The Department reiterates that nothing in these final regulations, including the provisions concerning sexual harassment with which commenters expressed concern, inherently prevents recipients from complying with State and local laws or policies. With respect to aspects of State laws that commenters asserted "diverge from" the NPRM, the Department disagrees that commenters identified an actual conflict between State law and these final regulations, as explained throughout this section of the preamble.

Virginia law, as described by the commenter, does not conflict with these final regulations. These final regulations do not prohibit extensive outside support for victims, notations on academic transcripts, annual review of sexual violence policies, or any of the other aspects of Virginia law that the commenter described. Similarly, these final regulations may not conflict with processes and procedures used by institutions of higher education in Colorado; to

[1652] 567 U.S. 519 (2012).

the extent that the commenter was asserting that Colorado institutions should not be required to expend resources changing aspects of their Title IX policies and procedures because Colorado law already ensures that Colorado institutions appropriately support survivors while addressing due process concerns, the Department has determined that a standardized Title IX grievance process and uniform requirements that recipients offer supportive measures to complainants constitute the most effective procedures and requirements to further Title IX's non-discrimination mandate. While institutions may find it necessary to expend resources to come into compliance with these final regulations, the benefits of ensuring that every student, in every school, college, and university that receives Federal funds, can rely on predictable, transparent, legally binding rules for how a recipient responds to sexual harassment, outweigh the costs to recipients of altering procedures to come into compliance with the requirements in these final regulations. Recipients may continue to comply with State law to the extent that it does not conflict with the requirements in these final regulations addressing sexual harassment. The Department appreciates that many States have laws that address sexual harassment, sexual violence, sex offenses, sex discrimination, and other misconduct that negatively impacts students' equal educational access. Nothing in these final regulations precludes a State, or an individual recipient, from continuing to address such matters while also complying with these final regulations.

In the event of an actual conflict between State or local law and the provisions in §§ 106.30, 106.44, and 106.45, which address sexual harassment, the latter would have preemptive effect. Under conflict preemption, "a federal statute implicitly overrides state law . . . when state law is in actual conflict with federal law" either because it is "impossible for a private party to comply with both state and federal requirements" or because "state law stands as an obstacle to

the accomplishment and execution of the full purposes and objectives of Congress."[1653] It is well-established that "state laws can be pre-empted by federal regulations as well as by federal statutes." [1654] The Supreme Court has held: "Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation."[1655] The Department is acting within the scope of its congressionally delegated authority in promulgating these final regulations under Title IX to address sexual harassment as a form of sex discrimination.

In response to commenters' requests for a regulation that expressly addresses whether these final regulations concerning sexual harassment preempt State or local law and to generally address commenters' concerns about preemption, the Department has added § 106.6(h) which provides that to the extent of a conflict between State or local law and Title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law. The Department acknowledges that its current regulations in 34 CFR 106.6(b) expressly address preemption with respect to any State or local law or other requirement which would render any applicant or student ineligible, or limit the eligibility of any applicant or student, on the basis of sex, to practice any occupation or profession. The Department does not wish for any recipient or court to conclude that 34 CFR 106.6(b) constitutes the only instance in which the Department intended to give preemptive

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[1653] *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (internal quotation marks and citations omitted). The U.S. Department of Justice previously expressed a similar position with respect to the preemptive effect of other regulations promulgated by the Department. Statement of Interest by the United States, *Massachusetts v. Pa. Higher Educ. Assistance Agency, d/b/a FedLoan Servicing*, No. 1784-CV-02682 (Mass. Super. Ct. filed Jan. 8, 2018).
[1654] *Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) ("state laws can be pre-empted by federal regulations as well as federal statutes"); *see Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 873 (2000).
[1655] *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 396 (1986).

effect to its regulations promulgated under Title IX. By adding § 106.6(h), the Department clearly and unequivocally states its intention that these final regulations concerning sexual harassment preempt State and local law to the extent of a conflict.

The Department cannot state categorically that the final regulations concerning sexual harassment are always a "floor" because in some cases these final regulations may require more protections with respect to sexual harassment as a form of sex discrimination than what State law may require. Similarly, some State laws may require recipients to provide additional protections for both complainants and respondents that exceed these final regulations.[1656] As long as State and local laws do not conflict with the final regulations concerning sexual harassment, recipients should comply with the State and local laws as well as these final regulations.

Changes: The Department has added § 106.6(h), which provides that to the extent of a conflict between State or local law, and Title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law.

Comments: One commenter argued that the Department has no right to invade the police powers of a State like New York, which has already regulated extensively on the topic of campus sexual harassment and assault, and the NPRM would inappropriately "lessen the effectiveness" of New York's "Enough is Enough" law as well as the New York's Dignity for all Students Act (DASA), if not outright contradict it. For example, some commenters noted that New York's

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[1656] The Department in its 2001 Guidance and specifically in the context of the due process rights of the accused, acknowledged that "additional or separate rights may be created for employees or students by State law." 2001 Guidance at 22. In both the 2001 Guidance and these final regulations, the Department takes the position that any additional or separate rights do not relieve the recipient of complying with Title IX and its implementing regulations. *See id*.

"Enough is Enough" law requires extensive information outlining requirements that cover content, training, and distribution of specific information, requires postsecondary institutions to adopt a uniform definition of affirmative consent, requires ongoing training year-round to address topics related to sexual harassment, and requires periodic campus climate assessments, among other requirements. Other commenters also described aspects of New York's "Enough is Enough" law. One commenter asserted that the proposed regulations require a recipient to dismiss a complaint if alleged misconduct did not occur within the institution's program or activity, whereas New York law may still require a recipient to address such misconduct. One commenter stated that New York law requires affirmative consent for sexual activity. At least one commenter urged the Department to adopt the provisions in New York's "Enough is Enough" law.

Some commenters expressed concerns about the proposed rules permitting delays in a grievance process for longer than what is permitted under State law. According to one commenter, New York's law specifies that ten days is the maximum number of days for a temporary delay when law enforcement action is taking place concurrently with a campus disciplinary process.

Discussion: The Department does not believe that these final regulations generally conflict with State and local laws. To address commenters' questions about preemption and for the reasons explained above, the Department has added § 106.6(h) which provides that to the extent of a conflict between State or local law and Title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law.

With respect to New York's "Enough is Enough" law and DASA, these final regulations do not appear to directly conflict with the commenters' description of State law requirements. These final regulations do not prevent a postsecondary institution from engaging in ongoing or year-round training (of employees, or students), conducting campus climate assessments, or adopting a particular definition of consent. Indeed, § 106.30 expressly states that the Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault, a provision that specifically addresses the issue raised by commenters, that some State laws require institutions to use an affirmative consent definition. Similarly, these final regulations acknowledge in revised §106.45(b)(3)(i) that even though a recipient may be required to dismiss a formal complaint in certain circumstances, such a dismissal is only for Title IX purposes and does not preclude the recipient from action under another provision of the recipient's code of conduct. Accordingly, if New York law requires a recipient to respond to conduct that these final regulations do not deem covered under Title IX, a recipient may do so. The Department has considered the provisions for addressing sexual harassment and sexual assault contained in various State laws, including in New York, and in use by various individual institutions. However, the Department does not wish to adopt wholesale New York's "Enough is Enough" law or other State laws or institutional policies and explains throughout this preamble why these final regulations provide the best means for effectuating Title IX's non-discrimination mandate.

These final regulations do not require a recipient to delay a grievance process for longer time periods than what is permitted under State law. The Department emphasizes that a recipient must respond "promptly" when it has actual knowledge of sexual harassment in its education program or activity pursuant to § 106.44(a). Section 106.45(b)(1)(v) regarding reasonably

prompt time frames for the conclusion of the grievance process would not necessarily conflict with State laws by allowing delays during a grievance process, for good cause, including concurrent law enforcement activity. For example, there is no inherent conflict with a temporary ten-day delay, which according to a commenter is permissible under New York State law when a concurrent law enforcement action is taking place, as long as a recipient responds promptly when it has actual knowledge of sexual harassment in its education program or activity and also meets the requirement in § 106.45(b)(1)(v) to conclude its grievance process under reasonably prompt time frames the recipient has designated. Accordingly, the commenter's example of a potentially conflicting State law does not in fact present an inherent conflict with these final regulations.

Changes: None.

Comments: Other commenters expressed concern that the proposed regulations may conflict with a union's duty to provide representation during the grievance process. One commenter asserted that many State labor laws already provide that an employee subject to investigatory interviews is allowed to have a union representative present for a meeting that might lead to discipline.

Discussion: There is no inherent conflict between these final regulations and any requirement that a union representative must be present for an investigatory interview that might lead to discipline. These final regulations require a recipient to provide a written notice upon receipt of a formal complaint of sexual harassment, to both parties, that the parties may have "an advisor of their choice, who may be, but is not required to be, an attorney" pursuant to § 106.45(b)(2)(i)(B), and also require (in § 106.45(b)(5)(iv)) a recipient to provide the parties with the same opportunities to have an advisor present during any grievance proceeding, without limiting the choice or presence of advisor for either the complainant or respondent. Nothing in these final

regulations precludes a recipient from complying with the State laws that the commenter describes; § 106.45(b)(5)(iv) means that a recipient cannot preclude a party from selecting a union representative as the party's advisor of choice during a Title IX grievance process. Furthermore, while § 106.71 requires a recipient to keep confidential the identity of parties to a Title IX grievance process, which limits the discretion of a recipient to permit parties to have persons *other than the party's advisor of choice* present during the grievance process, that provision limits the confidentiality obligation by expressly stating that the recipient must keep party identities confidential except as required by law. If a State law requires a recipient to permit a union representative to be present during a disciplinary proceeding, the recipient may not be in violation of these final regulations by permitting a party to a Title IX grievance process from being accompanied by both an advisor of choice and a union representative. We reiterate, however, that a party is always entitled under these final regulations to select a union representative as the party's advisor of choice to advise and assist the party during the grievance process.

In the event of an actual conflict between State labor laws or union contracts and the final regulations, then the final regulations would have preemptive effect. To generally address commenters' questions about preemption and for the reasons explained above, the Department has added § 106.6(h) which provides that to the extent of a conflict between State or local law and Title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law.

Changes: None.

Comments: One commenter asserted that § 106.8(d) conflicts with Minnesota State law, under which Minnesota institutions of higher education can address sexual misconduct occurring

outside the United States. This commenter argued that, because study abroad programs are educational and approved by the home campus (located in the United States), the Department should ensure that recipients have the ability to protect students and employees by providing remedial services and imposing discipline over campus activities occurring outside the United States.

Discussion: The final regulations, by recognizing the jurisdictional limitation in the Title IX statute, 20 U.S.C. 1681(a) (which states that "no person in the United States" may be discriminated against on the basis of sex), do not conflict with State laws that allow or require a recipient to address discrimination or misconduct that falls outside Title IX. Nothing in the final regulations precludes recipients from addressing sexual misconduct that occurs in a recipient's study abroad programs. The Department has revised § 106.45(b)(3)(i) to clarify that a mandatory dismissal of allegations in a formal complaint of sexual harassment because the allegations concern sexual harassment that occurred outside the United States is a dismissal only for Title IX purposes and does not preclude action under another provision of the recipient's code of conduct. Accordingly, a recipient may address conduct that occurs outside of the United States pursuant to its own code of conduct, including where a recipient is required to address such conduct under a State law.

Changes: None.

Comments: Some commenters argued that ending the single investigator model would conflict with State laws. Commenters stated that ending the single investigator model conflicts with State law requirements governing elementary and secondary school administrators because in the elementary and secondary school context, a site administrator typically has final responsibility for Title IX compliance. These commenters argued that the Department should not preclude a

site administrator from being the Title IX Coordinator, the investigator, and the decision-maker, because the typical job description for a site administrator requires that person to be a knowledgeable investigator familiar with school district policy and the school community best positioned to fulfill the functions of a Title IX Coordinator, investigator, and decision-maker. Commenters asserted that under State laws, site administrators must respond to, investigate, and intervene regarding discrimination complaints, including following established disciplinary procedures as applicable. One commenter reasoned that if the respondent is an employee then the site administrator with line authority may be in the best position to investigate due to confidentiality with personnel issues, and the Department should not create a conflicting process.

Discussion: With respect to potential conflict with State laws regarding the prohibition of the single investigator model contained in § 106.45(b)(7)(i) of the final regulations, the final regulations preclude the decision-maker from being the same person as the Title IX Coordinator or the investigator, but do not preclude the Title IX Coordinator from also serving as the investigator. Further, the final regulations do not prescribe which of the recipient's administrators are in the most appropriate position to serve as a Title IX Coordinator, investigator, or decision-maker, and leave recipients discretion in that regard, including whether a recipient prefers to have certain personnel serve in certain Title IX roles when the respondent is an employee. Finally, although the final regulations, § 106.45(b)(7)(i) precludes the decision-maker from being the same person as the Title IX Coordinator or investigator, this provision does not preclude the investigator from, for instance, making recommendations in an investigative report, so long as the decision-maker exercises independent judgment in objectively evaluating relevant evidence to reach a determination regarding responsibility. Thus, the Department does not believe that the commenter's description of the typical job duties of a site

administrator under State laws poses an actual conflict with the final regulations. To generally address commenters' questions about preemption and for the reasons explained above, the Department has added § 106.6(h) which provides that to the extent of a conflict between State or local law and Title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law.

Changes: None.

Comments: Some commenters contended that the NPRM's jurisdictional approach conflicts with State laws, which may pose enforcement problems, create confusion, impose additional cost burdens, and trigger lengthy litigation. These commenters noted, for example, that California explicitly requires institutions of higher education to have policies addressing sexual violence involving students both on campus and off campus and that New Jersey law includes a broader definition of sexual misconduct that includes conduct occurring in certain off-campus locations.

Discussion: With respect to potential conflict with State laws that may have different jurisdictional schemes, the Department reiterates that nothing in the final regulations prevents recipients 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, and that the final regulations do not distinguish between off-campus and on-campus conduct. Instead, these final regulations require a recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States to respond promptly in a manner that is not deliberately indifferent. The Department has revised § 106.45(b)(3)(i) to clarify that a mandatory dismissal of allegations in a formal complaint of sexual harassment because the alleged conduct did not occur in the recipient's

education program or activity is only for purposes of Title IX and does not preclude action under another provision of the recipient's code of conduct. A recipient may address conduct that Title IX and these final regulations do not require a recipient to address, pursuant to its own code of conduct, including where the recipient is obligated to address the conduct under a State law. To generally address commenters' questions about preemption and for the reasons explained above, the Department has added § 106.6(h) which provides that to the extent of a conflict between State or local law and Title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law.

Changes: None.

Comments: Some commenters argued that the proposed rules should not require school districts to adopt and publish a grievance procedure that aligns with the proposed regulations, and that instead the Department should permit school districts to adopt and publish grievance procedures that align with their State's requirements where States have acted on their own authority to require school districts to adopt grievance procedures related to non-discrimination, sexual harassment, and due process in the context of student discipline. Commenters argued that if the Department does not permit school districts to do this, the final regulations will create uncertainty and impose an unnecessary burden on school districts, potentially conflicting with State laws.

Discussion: Nothing in the final regulations inherently prevents school districts from adopting and publishing grievance procedures, and a grievance process that complies with § 106.45 for resolution of formal complaints of sexual harassment, that align with their State's requirements where States have acted on their own authority to require school districts to adopt grievance

procedures related to non-discrimination, sexual harassment, and due process in the context of student discipline. However, in the event of an actual conflict between these final regulations concerning sexual harassment and State laws or local laws, the final regulations would have preemptive effect over conflicting State or local law. To generally address commenters' questions about preemption and for the reasons explained above, the Department has added § 106.6(h) which provides that to the extent of a conflict between State or local law and Title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law.

Changes: None.

Comments: A few commenters argued that the NPRM proposes to set a national standard on various matters related to the investigation and adjudication of claims of sexual harassment, including sexual assault, by school districts and public and private institutions of higher education, that those same topics are the subject of State, local, and Tribal laws, but that the NPRM contains no discussion of preemption, contrary to both Executive Order 13132 and Executive Order 12988, and the 2009 Presidential Preemption Memorandum.

A few commenters asserted that it is inappropriate for the Department to intrude on areas of traditional State and local control, such as regulation of education. Commenters argued that, under Executive Order 13132, the Department should have consulted with State and local officials before issuing the proposed rules because the Department is formulating policy that will have federalism implications and may limit States' ability to protect their own constituents' safety. One commenter contended that the Department is leaving States with an impossible choice between accepting Federal funding and protecting students' full access to their education. This commenter also asserted that the NPRM could keep States from regulating in an area of

traditional State authority without good cause, thus amounting to a constructive revocation of States' power beyond the Department's authority under statute.

Another commenter asserted that the impact of the Supreme Court's *Sebelius* decision[1657] on Title IX is unclear and argued that a law enacted under the Spending Clause may be analyzed for constitutionality under a contract theory or the unconstitutional conditions doctrine. This commenter contended that the Department is favoring a contract theory and that if the unconstitutional conditions doctrine is applied, then the impact of these final regulations on State laws, recipients, and students will require a State-by-State fact-intensive inquiry. According to this commenter, the uncertainty of how constitutional law will apply to these final regulations will create confusion for recipients who must comply with State laws as well as these final regulations.

Discussion: As an initial matter, some commenters' characterization of Executive Order 13132, 64 FR 43255 (Aug. 10, 1999) is inaccurate. That Order's goal was "to guarantee the Constitution's division of governmental responsibilities between the Federal government and the states" by "further[ing] the policies of the Unfunded Mandates Reform Act".[1658] The purpose of that statute is "to end the imposition, in the absence of full consideration by Congress, of Federal mandates on State, local, and Tribal governments without adequate Federal funding, in a manner that may displace other essential State, local, and tribal governmental priorities."[1659] In other words, when the Federal government proposes to impose an *unfunded mandate* on the States (including local governments) and Tribal governments with federalism implications and effects

[1657] Commenter cited: *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).
[1658] 2 U.S.C. 1501 *et seq.*
[1659] 2 U.S.C. 1501(2).

on State and local laws, Executive Order 13132 requires the Federal government to consult with State and local authorities. However, application of these final regulations is entirely dependent on whether an education program or activity receives Federal financial assistance; these final regulations are not a mandate (unfunded or otherwise).[1660]

Furthermore, as this preamble's discussion pertaining to the Spending Clause of the U.S. Constitution demonstrates,[1661] Title IX was enacted pursuant to that constitutional provision. "Congress may use its spending power to create incentives for States to act in accordance with Federal policies."[1662] "[W]hen 'pressure turns into compulsion,'" – such as undue influence, coercion or duress – "the legislation runs contrary to our system of federalism."[1663] As the Spending Clause analysis demonstrates, the Federal government is not coercing recipients to comply with these final regulations. Title IX and its implementing regulations fall within the authority of the Federal government: operators of education programs or activities must comply with Title IX's non-discrimination mandate, if an education program or activity receives Federal financial assistance. By statute, Congress has conferred authority to the Department to promulgate regulations under Title IX to effectuate the purposes of Title IX.[1664] Nor is there any support for the argument that the Federal government is precluding the States from regulating in an area of traditional State authority without good cause. Compliance with Title IX and its implementing regulations is "much in the nature of a contract: in return for Federal funds, the States agree to comply with federally imposed conditions."[1665] The commenter's assertion that

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[1660] *See* 20 U.S.C. 1681(a).
[1661] *See* the "Spending Clause" subsection of the "Miscellaneous" section of this preamble.
[1662] *Sebelius*, 567 U.S. at 577-78.
[1663] *Id*. (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).
[1664] 20 U.S.C. 1682.
[1665] *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

protection of students' equal access to education is an area of traditional State control indicates that these final regulations are not invalid even under the unconstitutional conditions doctrine of the Spending Clause analysis, because the States themselves are at liberty to enact these regulations.[1666] Nothing in these final regulations prevents States from continuing to address discrimination on the basis of sex in education, or equal educational access on the basis of sex, in a manner that also complies with these final regulations. Moreover, these final regulations do not require the relinquishment of a constitutional right and expressly provide in § 106.6(d) that these final regulations do not require the restriction of any rights guaranteed against government action by the U.S. Constitution, including but not limited to the First, Fifth, and Fourteenth Amendments of the U.S. Constitution. Irrespective of whether a court applies a contract theory or the unconstitutional conditions doctrine, these final regulations pass constitutional muster. These final regulations are in pursuit of the general welfare, are unambiguous, and are related to a national concern.[1667] Sexual harassment as a form of sex discrimination is an issue that is national in scope and significance, and Congress enacted Title IX to address sex discrimination on a Federal level.

Nor does the 2009 Presidential Preemption Memorandum ("2009 Obama Memorandum") support the commenters' argument.[1668] The objective of that 2009 Obama Memorandum was to proclaim the "general policy" that "preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the

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[1666] *See South Dakota v. Dole*, 483 U.S. 203, 209-12 (1987).
[1667] *See id.* at 206-09.
[1668] *See* 74 FR 24693 (2009).

States and with a sufficient legal basis for preemption."[1669] The 2009 Obama Memorandum asserted that the States do have a potent role in protecting the health and safety of citizens and the environment.[1670] The 2009 Obama Memorandum stated that Federal overreach through preemption obstructs States from "apply[ing] to themselves rules and principles that reflect their own particular circumstances and values."[1671] On this ground, President Obama directed executive branch agencies not to include preemption statements in "regulatory preambles . . . except where preemption provisions are also included in the codified regulation" or in "codified regulations except where such provisions would be justified under legal principles governing preemption, including the principles outlined in Executive Order 13132."[1672] President Obama also directed agencies to "review regulations issued in the last 10 years that contain statements in regulatory preambles or codified provisions intended . . . to preempt State law, in order to decide whether such statements are justified under applicable legal principles governing preemption."[1673] Even assuming that the 2009 Obama Memorandum applies, the Department has in fact complied with it, with respect to promulgation of these final regulations.

Furthermore, Executive Order 12988, a Clinton Administration executive order (to which the 2009 Obama Memorandum does not cite), requires agencies, when promulgating regulations, to "make every reasonable effort . . . [to] specif[y] in clear language the preemptive effect, if any, to be given to the regulation." The Department has complied with Executive Order 12988 as well, and these final regulations clearly state in § 106.6(h) that to the extent of a conflict between

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[1669] *Id.*
[1670] *Id.*
[1671] *Id.*
[1672] *Id.*
[1673] *Id.*

State or local law, and Title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law.

These final regulations also do not violate the Tenth Amendment. That Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[1674] The Supreme Court's position is sufficiently clear on this topic. "[W]hile [the Federal government] has substantial power under the Constitution to encourage the States to provide for [a set of new rules concerning a national problem], the Constitution does not confer upon [the Federal government] the ability simply to compel the States to do so."[1675] The Tenth Amendment "states but a truism that all is retained which has not been surrendered."[1676] As the constitutional commenter and chronicler, the Honorable Joseph Story, Associate Justice, Supreme Court of the United States, explained, "[t]his amendment is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution. Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities."[1677] The Supreme Court always has maintained that "[t]he States unquestionably do retai[n] a significant measure of sovereign authority . . . to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government."[1678] Just as in *New York v. United States*, in which the "Petitioners d[id] not

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[1674] U.S. CONST. amend. X.
[1675] *New York v. United States*, 505 U.S. 144, 149 (1992).
[1676] *United States v. Darby*, 312 U.S. 100, 124 (1941).
[1677] 3 J. Story, *Commentaries on the Constitution of the United States* 752 (1833).
[1678] *Garcia v. San Antonio Metro. Transit Auth*., 469 U. S. 528, 549 (1985) (citations and internal quotation marks omitted).

contend that [the Federal government] lacks the power to regulate the disposal of low level radioactive waste,"[1679] here too there can be no dispute that the Federal government retains the authority to regulate sexual harassment and assault, a national problem, in education programs or activities that receive Federal financial assistance, even though the same matters also fall within the traditional police powers of the States. The Department, through these final regulations, is not compelling the States to do anything. In exchange for Federal funds, recipients – including States and local educational institutions – agree to comply with Title IX and regulations promulgated to implement Title IX as part of the bargain for receiving Federal financial assistance, so that Federal funds are not used to fund sex-discriminatory practices. As a consequence, the final regulations are consistent with the Tenth Amendment.

Although a commenter's assertion that States possess general police powers is correct,[1680] the Supreme Court also has held that Congress's authority to act can be quite expansive under the powers granted to Congress under the U.S. Constitution, and such exercise of enumerated powers by Congress does not convert Federal government authority into general police powers.[1681] The Department disagrees with a commenter's assertion that these final regulations alter the nature of the bargain recipients accept in exchange for Federal financial assistance in violation of Congress's Spending Clause authority, notwithstanding the Supreme Court's holding in *Sebelius* that congressional expansion of the Medicaid program violated the Spending Clause. The *Sebelius* Court reasoned that the Affordable Care Act at issue in that case expanded the

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[1679] *New York*, 505 U.S. at 159-60.
[1680] *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 535-36 (2012) (affirming that States have general police powers).
[1681] *Id.* at 536-37 (analyzing the Affordable Care Act under Congress's enumerated powers to regulate interstate commerce and "tax and spend" and noting that the latter authority gives "the Federal Government considerable influence even in areas where it cannot directly regulate.").

Medicaid program in a manner that "accomplishes a shift in kind, not merely degree."[1682] The *Sebelius* Court explained that Congress exceeded its Spending Clause authority because it attempted to "transform[]" the original Medicaid program from a program "to cover medical services for four particular categories of the needy [individuals with disabilities, the blind, elderly, and needy families with dependent children]" into part of a "comprehensive national plan to provide universal health insurance coverage."[1683] By contrast, the Department's Title IX regulations do not expand or stray from the original purpose and scope of the Title IX statute enacted by Congress. The subject of these final regulations remains the same as that described in the Title IX statute – ensuring 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. These final regulations do not expand the category of persons protected under Title IX (i.e., any person in the United States participating in or benefiting from an education program or activity). As discussed elsewhere in this preamble, the final regulations adopt and adapt the Supreme Court's interpretation of Title IX recognizing sexual harassment as a form of sex discrimination. Furthermore, the Department's Title IX regulations have, for decades, required recipients to adopt and publish grievance procedures for the prompt and equitable resolution of complaints of sex discrimination. Thus, the final regulations are akin to the Medicaid program amendments

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[1682] *Id.* at 583 ("The Medicaid expansion, however, accomplishes a shift in kind, not merely degree. The original program was designed to cover medical services for four particular categories of the needy: the disabled, the blind, the elderly, and needy families with dependent children. See 42 U.S.C. 1396a(a)(10). Previous amendments to Medicaid eligibility merely altered and expanded the boundaries of these categories. Under the Affordable Care Act, Medicaid is transformed into a program to meet the health care needs of the entire nonelderly population with income below 133 percent of the poverty level. It is no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage.").
[1683] *Id.* at 583-84.

acknowledged by the *Sebelius* Court to have constituted an appropriate exercise of Spending Clause authority,[1684] rather than the "transformation" of Title IX into coverage of subjects outside the scope of the original statute or an expansion of Title IX obligations "in kind" rather than "in degree."

The NPRM provided that this regulatory action does not unduly interfere with State, local, or tribal governments in the exercise of their governmental functions.[1685] For example, the NPRM acknowledged 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 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.[1686] The final regulations set forth this proposition more clearly in § 106.6(g). These final regulations also provide significant flexibility to recipients; for example, the final regulations in § 106.30 expressly provide that the Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault, such that States are free to prescribe a definition of consent for use in sexual assault cases in educational institutions without conflict with these final regulations. Similarly, these final regulations do not prohibit recipients from addressing conduct that is not covered under these final regulations, such that States are free to require recipients to address conduct that, for instance, did not occur in an education program or activity, or that does not meet the § 106.30 definition of sexual harassment. Finally, the NPRM

[1684] *Id.* at 583 (noting previous amendments affecting, and expanding, the Medicare program that constituted an expansion "in degree" and not "in kind").
[1685] 83 FR 61484.
[1686] 83 FR 61482.

also "encouraged State and local elected officials to review and provide comments on the[] proposed regulations," and the Department has carefully considered and responded to such comments.[1687]

Recipients do not need to choose between Federal financial assistance and protecting students' equal access to their education because these final regulations help ensure that students have equal access to a recipient's education program or activity. For example, § 106.44(a) requires a recipient to treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. Supportive measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party. Where a respondent is found responsible for sexually harassing a complainant, the recipient must effectively implement remedies for the complainant, which must be designed to restore or preserve equal access to the recipient's education program or activity, pursuant to § 106.45(b)(1)(i) and § 106.45(b)(7)(iv).

Changes: None.

Comments: Many commenters identified substantive areas of potential conflict between State and local laws and the NPRM. Commenters noted that Illinois law requires Illinois IHEs to address, investigate, and resolve sexual misconduct complaints regardless of location; whereas the NPRM only applies to conduct within an education program or activity against a person in

[1687] 83 FR 61495.

the United States. New Jersey law explicitly includes harassment occurring online and in certain off-campus locations.

A few commenters generally asserted that the proposed rules appeared to be inconsistent with other laws such as the Clery Act and VAWA. Other commenters argued that conflict regarding geographical application may also arise under VAWA and the Clery Act. One commenter stated that the NPRM may conflict with VAWA and the Clery Act regarding evidentiary standards.

Some commenters noted that States such as California, Connecticut, Illinois, and New Mexico have laws requiring that school disciplinary boards use the preponderance of the evidence standard to evaluate sexual misconduct on campus. One commenter asserted that applying the same standard of evidence for complaints against students as it does for complaints against employees, including faculty, is problematic because the Connecticut General Statutes require that for cases of sexual assault, stalking, and intimate partner violence, the institution must use the preponderance of the evidence standard. Additionally, one commenter stated that Connecticut requires "affirmative consent."

One commenter generally argued that the NPRM would undermine State efforts to require or encourage schools to provide more robust supportive measures to students. This commenter did not explain further. One commenter stated that the NPRM would preempt State laws that include broader sexual harassment definitions, such as New Jersey law.

Commenters raised the issue that Illinois law prohibits parties from cross-examining each other and permits only indirect questioning at the presiding school officials' discretion, whereas the proposed rules require cross-examination through advisors. One commenter also argued that this provision conflicts with or is inconsistent with Illinois State law Preventing Sexual Violence

in Higher Education, 110 ILCS 155, which requires all higher education institutions in Illinois to adopt a comprehensive policy concerning sexual violence, domestic violence, dating violence, and stalking consistent with governing Federal and State law, regarding the standard of evidence because Illinois State law requires use of the preponderance of the evidence standard to determine whether the alleged violation of the comprehensive policy occurred.[1688] Another commenter expressed concern about providing documentation to both parties as part of the grievance process and noted that such a provision conflicts with practices in Illinois courts where the State prevents the reporting party from providing the defendant with a copy of a police report, and the police report can only be provided to an attorney due to safety concerns.

One commenter asserted that in Kentucky, evidence offered to provide that the reporting party engaged in other sexual behavior or evidence offered to prove the reporting party's sexual disposition is inadmissible and opined that allowing this type of evidence to be introduced within a Title IX proceeding is a clear conflict between the proposed rules, and State law.

Commenters asserted substantive conflicts with State law may arise regarding grievance procedures under the proposed rules, including with respect to privacy protections, equal opportunity for the parties to inspect and review evidence, admissibility of past sexual history, and the presumption of non-responsibility.

One commenter opined that it would be confusing for school and university officials to conform to Federal regulations that conflict with local and State laws.

Discussion: For some of the State laws that the commenters cited (such as Illinois and New Jersey laws that may include sexual misconduct complaints of conduct that occurs outside of an

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[1688] 110 Ill. Comp. Stat. 155/25(5).

education program or activity, State laws encouraging more robust supportive measures, and the broader definition of sexual harassment in New Jersey's law), there is no actual conflict because nothing in these final regulations prohibits a recipient from complying with these particular State laws. For example, if a State law contains stricter requirements such as stricter reporting requirements and timelines, and also addresses anti-bullying, then there is no inherent conflict with these final regulations. Similarly, if a State law requires a recipient to investigate and address conduct that these final regulations do not address, then these final regulations do not prevent a recipient from doing so. Indeed, the Department revised § 106.45(b)(3)(i), which concerns mandatory dismissals, to expressly state that such a dismissal is only for Title IX purposes and does not preclude action under another provision of the recipient's code of conduct. Accordingly, recipients may continue to respond to conduct even if Title IX and these implementing regulations do not require a recipient to do so. Similarly, the Department revised the definitions in § 106.30 to address "Consent," and § 106.30 expressly states that the Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault and, thus, there is no conflict with any State law that requires a particular definition of consent with respect to sexual assault.

The Department disagrees that these final regulations conflict with State laws that require the use of the preponderance of the evidence standard because recipients are free to adopt the preponderance of the evidence standard under these final regulations. There also is nothing problematic with requiring that the same standard be used for complaints against employees as complaints against students. Indeed, if a State's laws require institutions to use a preponderance of the evidence standard, then using that same standard for complaints against employees as complaints against students may level the field when a student files a formal complaint against

an employee. Students should not be subject to a higher burden of proof for complaints against employees than complaints against students, especially as the power dynamic is typically skewed in favor of an employee in these circumstances.

With respect to the Illinois law requiring higher education institutions to adopt policies, no conflict appears to exist because, as the commenter explains, such policies must be consistent with Federal law, which includes these final regulations. Also, with respect to Illinois law, these final regulations do not require the parties to directly cross-examine each other; instead, the cross-examination is conducted by a party's advisor and personal questioning by one party of another is expressly prohibited under § 106.45(b)(6)(i). These final regulations also do not appear to conflict with court practices in Illinois regarding sharing documents with complainants and respondents. The commenter appears to reference a practice by Illinois courts and does not indicate that the State mandates that postsecondary institutions or elementary and secondary schools comply with a court practice to provide documents to an attorney rather than to a defendant. To the extent that these final regulations present an actual, direct conflict with Illinois State law, then these final regulations preempt State law pursuant to § 106.6(h). A recipient may choose not to accept Federal financial assistance, if the recipient does not wish to be subject to Title IX and these final regulations.

The Department notes that these final regulations provide a robust rape shield provision in § 106.45(b)(6)(i)-(ii) that provides: "Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the

respondent and are offered to prove consent." To the extent that this rape shield provision directly conflicts with Kentucky State law, then these final regulations preempt State law.

To generally address commenters' questions about preemption and for the reasons explained above, the Department has added § 106.6(h) which provides that to the extent of a conflict between State or local law and Title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law.

These final regulations do not conflict with the Clery Act and VAWA or the Department's regulations implementing the Clery Act and VAWA, in any aspect, including with respect to geographic requirements and the standard of evidence. If the Department interprets these final regulations as consistent with the Clery Act and VAWA, then recipients that are subject to these final regulations must be able to comply with these final regulations as well as the Department's regulations implementing the Clery Act and VAWA. The Department addresses comments about the Clery Act in the "Clery Act" subsection of the "Miscellaneous" section. These final regulations do not conflict with the Clery Act, as amended by VAWA, and even incorporate the definitions of "dating violence," "domestic violence," and "stalking" in VAWA as part of the definition of sexual harassment in § 106.30.

Recipients have been able to navigate the art of complying with numerous Federal regulations promulgated by various executive agencies while also complying with State laws. School and university officials will determine how to comply with the State and Federal legal obligations. The Department will provide technical assistance with respect to the obligations under these Federal regulations.

Changes: None.

Comments: Many commenters contended that there would be negative consequences from conflicts between the NPRM and other Federal and State law. Commenters argued against imposing a one-size-fits-all approach, given the vast diversity among recipients in terms of size, resources, missions, and communities, and urged the Department to give recipients flexibility to tailor their own systems. Commenters expressed concern that the interaction between the NPRM and FERPA, the Clery Act, Title VI, and Title VII may be confusing and unclear.

One commenter generally argued the NPRM would provide narrower protections and preempt many State anti-harassment laws, which would unfairly benefit respondents over complainants. Another commenter stated that the Department is jeopardizing recipients' access to State funding because schools would be in an impossible position of having to comply with both State and Federal law. Commenters emphasized the widespread nature of the NPRM's conflict with State laws across the country including laws in at least ten States, arguing that these conflicts could chill reporting, pose enforcement problems, impose additional cost burdens, and prompt lengthy litigation battles. One commenter asserted that the NPRM is so overly prescriptive that it would be difficult for institutions of higher education to simultaneously comply with it and the State of Washington's Administrative Procedure Act (Washington's APA) which, among other things, requires the presiding officer to be free of bias, prejudice, or other interest in the case, permits representation, contains notice procedures, allows the opportunity to respond and present evidence and argument, permits cross-examination, prohibits *ex parte* communications with the decision-maker, prohibits the investigator from being the presiding officer at the hearing, requires written orders, and permits appeal. Another commenter raised similar concerns about what the State of Washington requires and requested that the

Department clarify these final regulations do not preclude a determination that a recipient's actions constitute discrimination under State civil rights laws.

Discussion: The Department acknowledges that State laws may impose different requirements than these final regulations and asserts that in most circumstances, compliance with both State law and the final regulations is feasible. State laws that have a different definition of sexual harassment or require a recipient's response regardless of where misconduct occurs do not necessarily conflict with the final regulations. As previously explained, § 106.45(b)(3)(i), concerning mandatory dismissals of formal complaints, expressly provides that such a dismissal is only for Title IX purposes and does not preclude action under another provision of the recipient's code of conduct. Accordingly, recipients are free to respond to conduct that these final regulations do not address.

Similarly, the requirements in Washington's APA, as described by the commenter, do not conflict with and may complement these final regulations. The requirements that the commenter describes in Washington's APA actually mirror many of the requirements in these final regulations. For example, the final regulations require the Title IX Coordinator, investigator, and decision-maker to be free from bias and conflicts of interest just as Washington's APA requires the presiding officer to be free of bias, prejudice, or other interest in the case. The final regulations allow the parties to have an advisor (who may be, but is not required to be, an attorney), and Washington's APA permits representation. Both these final regulations and Washington's APA contain notice procedures, allow the opportunity to respond and present evidence and argument, permit cross-examination, prohibit the investigator from also being a decision-maker, and permit appeal.

We seek to provide recipients flexibility to tailor their systems as they see fit where we believe such flexibility is appropriate. These final regulations do not preclude a State from determining whether a recipient's actions constitute discrimination under State civil rights laws. To generally address commenters' questions about preemption and for the reasons explained above, the Department has added § 106.6(h) which provides that to the extent of a conflict between State or local law and Title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law.

In various sections of this preamble, we explain how these final regulations are consistent with FERPA and other Federal statutory provisions.[1689]

Changes: None.

Comments: Some commenters argued the NPRM may exceed the Department's authority under Title IX and the Administrative Procedure Act ("APA"). A few commenters argued the NPRM is inconsistent with Title IX and its legislative purpose. This commenter requested that the Department not move forward with the proposed regulations until it publishes a substantive analysis addressing federalism and conflict of law issues created by it. This commenter also noted that the constitutional authority for Title IX could be either or both the Spending Clause and the Fourteenth Amendment. According to this commenter, the Fourteenth Amendment does not require a recipient to consent to conditions and, thus, reliance on such consent is misplaced to

[1689] *E.g.*, the "Section 106.6(e) FERPA" subsection and the "Section 106.6(f) Title VII and Directed Question 3 (Application to Employees)" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble.

mitigate federalism concerns. However, this commenter cited case law suggesting that preemption and federalism analyses vary depending on which authority the Department is invoking. This commenter urged the Department to prove it has not exceeded its authority in issuing the proposed regulations.

Discussion: Throughout the preamble and specifically in the "Miscellaneous" section (e.g., "Executive Orders and Other Requirements," "Length of Public Comment Period/Requests for Extension," "Conflicts with First Amendment, Constitutional Confirmation, and International Law," "Different Standards for Other Harassment," and "Spending Clause" subsections) the Department has thoroughly explained why it believes the final regulations are consistent with the APA[1690] and other Federal statutes. The Department adhered to the notice-and-comment rulemaking process required under the APA. The Department also already noted that with respect to these final regulations' relationship with State law, the final regulations are not an unfunded mandate that implicate federalism and conflict of law issues, but rather condition Federal financial assistance on compliance with these final regulations. To generally address commenters' questions about preemption and for the reasons explained above, the Department has added § 106.6(h) which provides that to the extent of a conflict between State or local law and Title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law.

The Department agrees that these final regulations could be justified under the Federal government's Fourteenth Amendment authority, in addition to the straightforward Spending Clause authority. The Fourteenth Amendment's Enforcement Clause, in § 5 of the Amendment,

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[1690] 5 U.S.C. 701 *et seq.*

authorizes the Federal government to enforce it by appropriate legislation. That power includes "the authority both to remedy and to deter violation of rights guaranteed [by the Fourteenth Amendment] by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text."[1691] The Supreme Court often has stated that "Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct."[1692] "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress's enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States."[1693] In *Hibbs*, in which the Supreme Court considered whether a male State employee could recover money damages against the State because of its failure to comply with the family-care leave provision of the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2601 *et seq*., the Court upheld the FMLA as a legitimate exercise of Congress's § 5 power to combat unconstitutional sex discrimination, "even though there was no suggestion that the State's leave policy was adopted or applied with a discriminatory purpose *that would render it unconstitutional*" under the Equal Protection Clause.[1694] The Court explained that when the Federal government seeks to remedy or prevent discrimination on the basis of sex "§ 5 authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause" including in the sphere of private discrimination.[1695] After all, the

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[1691] *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000).
[1692] *Nev. Dep't. of Human Resources v. Hibbs*, 538 U.S. 721, 727-728 (2003).
[1693] *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976) (citations and internal quotation marks omitted).
[1694] *Tennessee v. Lane*, 541 U.S. 509, 519-20 (2004) (emphasis added).
[1695] *Id*. at 520.

Fourteenth Amendment's enforcement power is a "broad power indeed."[1696] These final regulations could thus be justified under this power, in addition to the Federal government's Spending Clause powers.[1697] And in all events, these regulations are consistent with the APA, Title IX, and other Federal statutory provisions.

Changes: None.

Comments: A number of commenters asserted that informal resolution under the NPRM would conflict with State law. Commenters argued that the NPRM's conflicts with State law regarding mediation could trigger enforcement problems, cause confusion for recipients and students, impose additional cost burdens, and prompt lengthy litigation.

Discussion: The final regulations allow but do not require recipients to provide an informal resolution process pursuant to § 106.45(b)(9). If State law prohibits informal resolution, then a recipient does not need to offer an informal resolution process. Additionally, § 106.45(b)(9) provides that a recipient may not require the parties to participate in an informal resolution process. The Department believes that § 106.45(b)(9) leaves substantial flexibility with recipients as to whether to adopt informal resolution processes and how to structure and administer such processes, decreasing the likelihood that a recipient's compliance with these final regulations causes conflict with the recipient's compliance with any State law addressing mediations for campus sexual assault.

To generally address commenters' questions about preemption and for the reasons explained above, the Department has added § 106.6(h) which provides that, to the extent of a

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[1696] *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 732 (1982).
[1697] *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 637 (1999); *South Dakota v. Dole*, 483 U.S. 203 (1987).

conflict between State or local law and Title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law.

Changes: None.

Section 106.8(a) Designation of Coordinator

Comments: Several commenters expressed general support for § 106.8(a), noting that it codifies good practices already implemented at many schools, standardizes the importance of the Title IX Coordinator's role, and explicitly clarifies the independent compliance and investigatory responsibilities of the Title IX office. One commenter specifically appreciated the addition of the Title IX Coordinator's e-mail address to the required notification, and another appreciated that this provision requires institutions to specify the Title IX Coordinator's "name or title" because recipients experience high turnover rates in the position of Title IX Coordinator. At least one commenter appreciated that this provision allows the Title IX Coordinator to delegate responsibilities to other staff members including the responsibility for implementing supportive measures.

Some commenters requested clarification that Title IX Coordinators can delegate certain responsibilities or play more of a coordinating role rather than a direct role in certain circumstances. Many of these commenters asserted that the current regulations provide for this interpretation, but that proposed § 106.8(a) did not afford the same flexibility to Title IX Coordinators. For instance, commenters asked whether a Title IX Coordinator's delegated employee can evaluate reports to determine whether they are covered by Title IX, determine which reports require formal proceedings, coordinate responses to all reports, or sign formal complaints on behalf of the Title IX Coordinator. Some commenters asked the Department to

include an express list of nondelegable functions which the Title IX Coordinator must carry out personally.

Some commenters recommended that the Department add language requiring a minimum standard of "at least one full-time, dedicated" employee for recipients with student populations under 10,000, and for recipients with student populations over 10,000 to employ one full-time Title IX Coordinator, at least one full-time investigator, and a full-time administrative assistant to ensure minimum capacity. Several commenters suggested that more than one Title IX Coordinator may be necessary to fulfill all the required functions of the office, further suggesting that the number of Title IX Coordinators or size of the office should be proportionate to the size of the student body. One commenter stated that § 106.8(a) made the Title IX Coordinator more inaccessible and invisible to complainants because it situated the Title IX Coordinator as an administrator at the school district level.

Some commenters suggested that the Department should provide additional financial resources to institutions so that institutions can develop a more efficient and decentralized Title IX office under the direction of the Title IX Coordinator.

Discussion: We appreciate the comments received in support of § 106.8(a). Based on the widespread use by commenters of the term "Title IX Coordinator," the Department revised this provision to specifically label the employee designated under § 106.8(a) as the "Title IX Coordinator," specify that recipients must refer to that person as the "Title IX Coordinator," and we use that label throughout the final regulations. Uniformity in the label by which the person designated in § 106.8(a) is referred will further the Department's interest in ensuring that students in schools, colleges, and universities know that notifying their school's "Title IX Coordinator" triggers their school's legal obligations to respond to sexual harassment under these

final regulations. The final regulations require recipients to identify the designated individual by the official title, "Title IX Coordinator," as well as require recipients to notify students and employees (and others) of the electronic mail address of the Title IX Coordinator, in addition to providing their office address and telephone number, to better ensure that students and employees have accessible options for contacting a recipient's Title IX Coordinator.[1698] We have also revised § 106.8(a) to state that the recipient must not only designate but also "authorize" at least one Title IX Coordinator, to further reinforce that a recipient's Title IX Coordinator (and/or any deputy Title IX Coordinators or other personnel to whom a Title IX Coordinator delegates tasks) must be authorized to coordinate the recipient's obligations under these final regulations. Nothing in the final regulations restricts the tasks that a Title IX Coordinator may delegate to other personnel, but the recipient itself is responsible for ensuring that the recipient's obligations are met, including the responsibilities specifically imposed on the recipient's Title IX Coordinator under these final regulations, and the Department will hold the recipient responsible for meeting all obligations under these final regulations.[1699]

Nothing in the final regulations precludes a recipient from designating multiple Title IX Coordinators, nor from designating "deputy" or "assistant" coordinators to whom a Title IX

[1698] We have also revised § 106.8(a) to expressly provide that every person has clear, accessible reporting channels to the Title IX Coordinator, by stating that any person may report sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sexual harassment), in person, by mail, by telephone, or by e-mail, using the listed contact information for the Title IX Coordinator (or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report), and that a report may be made at any time (including during non-business hours) by using the listed telephone number or e-mail address, or by mail to the listed office address.

[1699] For example, under § 106.44(a) the recipient must respond to sexual harassment promptly in a non-deliberately indifferent manner, and as part of this obligation the recipient's Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.

Coordinator delegates responsibilities, nor is a Title IX Coordinator prevented from working with other administrative offices and personnel within a recipient institution in order to "coordinate" the recipient's efforts to comply with Title IX. Ultimately, the recipient itself is responsible for compliance with obligations under Title IX and these final regulations, and § 106.8(a) requires at least one recipient employee to serve as a Title IX Coordinator. If a recipient enrolls so many students that a single Title IX Coordinator is unable to coordinate the recipient's Title IX compliance then the recipient may need to hire additional personnel, but the Department declines to require that result. The Department's interest is in the recipient's compliance with Title IX obligations, but the Department desires to leave recipients as much flexibility as possible to decide how to achieve compliance so that a recipient's funds and resources are most efficiently allocated to achieve fulfilment of a recipient's Title IX obligations as well as a recipient's educational purpose and mission. Similarly, the Department declines to mandate that recipients with larger student populations employ more Title IX staff or that a Title IX Coordinator must be a full-time or dedicated position. The Department does not wish to prescribe a recipient's administrative or personnel affairs; the Department's interest is in prescribing each recipient's obligations under Title IX. To emphasize that the recipient's Title IX Coordinator must not be designated "in name only" to merely technically comply with this provision, we have revised § 106.8(a) to state that the recipient must designate "and authorize" a Title IX Coordinator to coordinate the recipient's efforts to comply with Title IX.

The Department recognizes that the position of Title IX Coordinator tends to be a high-turnover position, and that this creates challenges for recipients and their educational

communities.[1700] We believe that revisions to § 106.8(a) in these final regulations help ensure that a recipient provides constant access to a Title IX Coordinator, without forcing recipients to divert educational resources to Title IX personnel unless the recipient has determined that the recipient needs additional personnel in order to fulfill the recipient's Title IX obligations.

The Department disagrees that proposed § 106.8(a) modified existing 34 CFR 106.8(a) in any manner that would result in the Title IX Coordinator being less accessible to students because a recipient's Title IX Coordinator may be a single coordinator for an entire school district; the existing regulations, proposed regulations, and final regulations consistently and appropriately recognize that Title IX governs each "recipient"[1701] of Federal financial assistance which "operates an education program or activity,"[1702] not each individual school building. In order to better address the accessibility of a recipient's Title IX Coordinator for all students (as well as employees and others), we have revised § 106.8(a) in these final regulations to expressly provide that any person may use the Title IX Coordinator's contact information (which must include an office address, telephone number, and e-mail address) to report sexual harassment. Therefore, even if the Title IX Coordinator's office location is in an administrative building that is not easily accessible to all students, any person may contact the Title IX Coordinator (in person, by mail, telephone, or e-mail) including in ways that allow reporting during non-business

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[1700] *E.g.*, Sarah Brown, *Life Inside the Title IX Pressure Cooker*, CHRONICLE OF HIGHER EDUCATION (Sept. 5, 2019) ("Nationwide, the administrators who are in charge of dealing with campus sexual assault and harassment are turning over fast. Many colleges have had three, four, or even five different Title IX coordinators in the recent era of heightened enforcement, which began eight years ago. Two-thirds of Title IX coordinators say they've been in their jobs for less than three years, according to a 2018 survey by the Association of Title IX Administrators, or ATIXA, the field's national membership group. One-fifth have held their positions for less than a year."); Jacquelyn D. Wiersma-Mosley & James DiLoreto, *The Role of Title IX Coordinators on College and University Campuses*, 8 BEHAVIORAL. SCI. 4 (2018) (finding that most Title IX Coordinators have fewer than three years of experience, and approximately two-thirds are employed in positions in addition to serving as the Title IX Coordinator).
[1701] 34 CFR 106.2(i) (defining "recipient").
[1702] 34 CFR 106.2(i) (defining "recipient"); 34 CFR 106.2(h) (defining "program or activity").

hours (i.e., by mail, telephone, or e-mail).[1703] Furthermore, if a recipient designates or authorizes employees to serve as deputy or assistant Title IX Coordinators (perhaps with the goal of having Title IX office personnel located on various satellite campuses, or in individual school buildings, to make Title IX personnel more accessible to students), then such employees are officials with authority to institute corrective measures on behalf of the recipient[1704] and notice to such employees conveys actual knowledge to the recipient, requiring the recipient's prompt response under § 106.44(a).

If the Title IX Coordinator is located in an administrative office or building that restricts, or impliedly restricts, access only to certain students (e.g., a women's center), such a location could violate § 106.8(a) by not "authorizing" a Title IX Coordinator to comply with all the duties required of a Title IX Coordinator under these final regulations (for example, a Title IX Coordinator must intake reports and formal complaints of sexual harassment from any complainant regardless of the complainant's sex).

These final regulations are focused on clarifying recipients' legal obligations under Title IX and do not address grants or funding that a recipient might use to hire Title IX personnel.

We have revised § 106.8, for clarity and ease of reference, by describing the group of individuals and entities entitled to receive notice of the recipient's non-discrimination policy, and

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[1703] We have added § 106.71 prohibiting retaliation against any individual for exercising rights under Title IX, and we emphasize that *any person* has the right to report sexual harassment to the recipient's Title IX Coordinator. Thus, for example, a recipient may not intimidate, threaten, coerce, or discriminate against an employee who reports sexual harassment allegations (whether as the alleged victim or as a third party) to the Title IX Coordinator, even if the recipient's code of conduct or employment policies state that such an employee is not permitted to report directly to the Title IX Coordinator (e.g., states that such an employee must only report "up" the employee's chain of command.)

[1704] Section 106.30 (defining "actual knowledge" to include notice to any official of the recipient who has authority to institute corrective measures on behalf of the recipient).

notice of the recipient's Title IX Coordinator's contact information, in paragraph (a) rather than (as in the NPRM) in § 106.8(b)(1); thus, in provisions such as § 106.8(b)(2) reference is made to "persons entitled to a notification under paragraph (a)" rather than the NPRM's reference to "persons entitled to a notification under paragraph (b)(1)." We have further revised § 106.8(a) by requiring reference to the recipient's employee(s) designated to coordinate the recipient's Title IX responsibilities as the recipient's "Title IX Coordinator," and references throughout § 106.8 (and throughout the entirety of these final regulations), including § 106.8(b)(1), now reference the "Title IX Coordinator" instead of "the employee designated pursuant to paragraph (a)." We have further revised § 106.8(b)(2)(i) to require the recipient to prominently display the contact information required to be listed for the Title IX Coordinator under paragraph (a) of this section, and the notice of non-discrimination described in paragraph (b)(1) of this section, on the recipient's website, if any, and in each handbook or catalog that the recipient makes available to persons entitled to a notification under § 106.8(a).

Changes: We have revised §106.8(a) to clarify that the individual designated by the recipient is referred to as the "Title IX Coordinator" and added that the Title IX Coordinator must not only be designated but also "authorized" to coordinate the recipient's Title IX obligations. We have moved the list of persons whom a recipient must notify of the recipient's non-discrimination policy, and of the Title IX Coordinator's contact information, to § 106.8(a) rather than listing those persons in § 106.8(b)(1). We have revised § 106.8(a) to state that any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be victimized by sex discrimination or sexual harassment) by using the listed contact information for the Title IX Coordinator, and stating that such a report may be made at any time (including during non-business hours) by using the telephone number or e-mail address,

or by mail to the office address, listed for the Title IX Coordinator. We have revised § 106.8(b)(2)(i) to require the recipient to prominently display on the recipient's website the Title IX Coordinator's contact information required to be listed under § 106.8(a), as well as the recipient's notice of non-discrimination required under § 106.8(b)(1).

Section 106.8(b) Dissemination of Policy

Removal of 34 CFR 106.9(c)

Comments: Some commenters discussed the removal of 34 CFR 106.9 and the way the Department incorporated, but modified, provisions found in 34 CFR 106.9 into the final regulations at § 106.8(b). One commenter stated that for elementary and secondary schools, which are not subject to subpart C of the current part 106 (admissions and recruitment) and which do not solicit applicants for admission, proposed § 106.8(b) created confusion as to how to implement such a provision. The commenter believed that notice on the recipient's website would be sufficient notice to stakeholders within the recipient's community.

Some commenters objected to removing the requirement in 34 CFR 106.9 that recipients take specific, continuing steps to notify specified people of the recipient's non-discrimination policy, and removal of the requirement that recipients distribute publications without discrimination on the basis of sex. Some commenters noted the Department expected that the availability of websites would address the removal of "taking continuing steps" but these commenters were not convinced that posting on websites achieves the same purpose. Other commenters asserted that changing the language around publications is not sufficient to ensure, as 34 CFR 106.9(c) did, that publications will be distributed without discrimination on the basis of sex. One commenter asserted that for example, under 34 CFR 106.9(c) a school district could

not send school catalogs to parents of girls but not parents who have only boys, yet this would be allowed under the NPRM.

At least one commenter stated that the Department failed to mention or justify the removal of the requirement to train recruiters on its non-discrimination policy, which the commenter argued is an important requirement to ensure that such a policy is not diluted in the field. One commenter generally expressed that 34 CFR 106.9 contains important mechanisms to prevent discrimination based on sex and their removal only makes Title IX protections weaker.

Discussion: The Department appreciates commenters' support for, and other commenters' concerns about, removing 34 CFR 106.9 and incorporation of many of its provisions into § 106.8(b). As discussed further below, the Department believes that § 106.8(b) now more clearly and reasonably describes recipients' obligations to notify its educational community of a recipient's obligation not to engage in sex discrimination under Title IX. The Department appreciates commenters' concerns that requiring the recipient's non-discrimination policy to be posted on a recipient's website is not the same as requiring notice to each of the categories of persons and organizations listed under now-removed 34 CFR 106.9(a)(1).[1705] However, the Department believes that recipients and their educational stakeholders should benefit from the technological developments (such as wide use of websites) that have emerged in the decades since promulgation of Title IX regulations in 1975, to more efficiently and cost-effectively communicate important notices, including the required notice of non-discrimination. The

[1705] Now-removed 34 CFR 106.9(a)(1) refers to the following group of persons: applicants for admission and employment, students and parents of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient. Section § 106.8(a) alters this list by removing "sources of referral of applicants for admission and employment" and adding "legal guardians" of elementary and secondary school students.

Department believes that § 106.8(b)(1) now appropriately requires recipients to notify an appropriately broad list of persons and organizations of, as well as to post on its website and in handbooks and catalogs (in § 106.8(b)(2)), the recipient's non-discrimination policy (as well as the Title IX Coordinator's contact information). The Department believes that these requirements reasonably reduce the burden on recipients to take "specific and continuing steps" to notify relevant persons of the recipient's non-discrimination policy, without diminishing the goal of ensuring that a recipient's educational community understands that the recipient has a policy of non-discrimination in accordance with Title IX (as well as knowing the contact information for the Title IX Coordinator so that any person may report sex discrimination, including sexual harassment).

The Department understands commenters' concerns that 34 CFR 106.9(c) specifically prohibited recipients from distributing publications on the basis of sex. Although similar language does not appear in § 106.8(b), the Department believes that such language is not necessary because if a commenter's example did occur (e.g., a school sent a school catalog only to male students but not to female students), Title IX already prohibits different treatment on the basis of sex.

The Department understands a commenter's concern that removing reference to "sources of referral" (language that appears in 34 CFR 106.9(a)) from the group of persons and entities who must be notified of a recipient's non-discrimination policy could dilute the understanding of a recipient's non-discrimination policy "in the field." We disagree, however, that recipients should continue to be required to send separate notice to all persons who act as recruiters for a recipient, because such persons are not always easily identifiable, and will have the benefit of the publicly available notice that § 106.8(b)(2) requires to be prominently displayed on each

recipient's website. Additionally, 34 CFR 106.51(a)(3) continues to prohibit a recipient from entering into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination, including "relationships with employment and referral agencies" such that Title IX regulations continue to clearly prohibit a recipient from indirectly discriminating in employment by, for instance, working with a referral source that discriminates on the basis of sex.[1706] Similarly, 34 CFR 106.21(a) continues to prohibit recipients from discriminating on the basis of sex with respect to admissions, and the Department will continue to hold recipients responsible for sex discriminatory admissions policies and practices regardless of whether any individual or entity recruits applicants on the recipient's behalf.

Changes: To more clearly acknowledge that the reference to "employment" in § 106.8(b)(1) is unrelated to the provision's reference to "subpart C of this part" (which applies to admissions), the word "employment" is moved to follow reference to "subpart C" instead of appearing as "admissions and employment" preceding that reference. The list of persons whom a recipient must notify of the recipient's non-discrimination policy has been moved from § 106.8(b)(1) to § 106.8(a) so that § 106.8(b)(1) now references "persons entitled to a notification under paragraph (a)."

List of Publications

Comments: Some commenters discussed the way that § 106.8(b)(2)(i) changes the provision in removed 34 CFR 106.9(b)(1) regarding the list of types of publications and other materials where recipients must publish the recipient's non-discrimination policy required under §

[1706] *See also* § 106.53(a) ("A recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees.").

106.8(b)(1). One commenter supported proposed § 106.8(b)(2)(i), stating that the provision streamlines the list of types of publications and asserted that requiring the recipient's non-discrimination policy to be published on the recipient's website, and in handbooks and catalogs, is more consistent with the ways institutions of higher education disseminate important information to students and employees. The commenter stated that the Department previously issued guidance on notices of non-discrimination in 2010 and recommended that if the proposed rules are adopted, the Department should clarify any parts of the sample notice provided in the 2010 guidance that have changed as a result.

Other commenters opposed these changes. One commenter stated that the Department failed to provide a reason for why the list of publications needed to be streamlined or why particular materials were removed from the list in 34 CFR 106.9(b) (e.g., application forms).[1707] The commenter also argued that the Department failed to explain why it added handbooks to the list and how that item overlaps or not with items removed from that list, such as announcements and bulletins. The commenter stated that if the scope of handbooks is the same as, for instance, announcements and bulletins, then there is no reason for this change and if it is different than the practical effect will be to increase burden on recipients because the prior list of publications and materials remains in the Title IX regulations of 25 other Federal agencies.

Discussion: The Department appreciates commenters' support for, and concerns regarding, § 106.8(b). The Department streamlined the list of types of publications that must contain the

[1707] Now-removed 34 CFR 106.9(b)(1) listed the following types of publications in which a recipient needed to include the recipient's non-discrimination policy: announcement, bulletin, catalog, or application form. Section 106.8(b)(1)(i) removes reference to announcements, bulletins, and application forms, retains reference to catalogs, adds handbooks, and § 106.8(b)(2)(i) adds a requirement to post the non-discrimination policy on the recipient's website, if any.

recipient's non-discrimination policy (and, under the final regulations, must also contain the Title IX Coordinator's contact information) because the Department believes that the items listed in 34 CFR 106.9(b) that do not appear in § 106.8(b) were superfluous; for example, applicants for admission are required to receive notification of the recipient's non-discrimination policy, so including "application forms" as a listed type of publication is unnecessary. As to "announcements" and "bulletins," such items lack a clear definition, and as described below, the Department believes that the streamlined list of types of publications, combined with the new requirement to post on the recipient's website, ensures that the recipient's educational community is aware of the recipient's non-discrimination policy (and Title IX Coordinator's contact information). The Department added "handbooks" and retained "catalogs" on the list to reflect the reality of what types of publications schools most frequently use that ought to contain the recipient's non-discrimination policy (and Title IX Coordinator's contact information). In addition, § 106.8(b)(2) requires that the non-discrimination policy must be posted prominently on the recipient's website. The Department believes this list of types of publications is broad enough to achieve the purpose of ensuring that relevant individuals and organizations (i.e., the list of persons entitled to notice under § 106.8(a)) see the recipient's non-discrimination policy on pertinent recipient materials without also retaining reference to "announcements," "bulletins" and "application forms" from now-removed 34 CFR 106.9(b)(1). The Department does not agree with commenters who asserted that the Department is increasing the burden on recipients because the list of publications in removed 34 CFR 106.9(b)(1) (i.e., announcements, bulletins, catalogs, application forms) remains in the Title IX regulations of 25 other Federal agencies. The Department believes that these final regulations appropriately update relevant Title IX regulations enforced by the Department regardless of whether other agencies also adopt the same

regulations, and nothing in § 106.8 makes it difficult for a recipient to comply with other agency regulations.

The Department appreciates a commenter's request to clarify whether § 106.8 changes anything in the sample notice of non-discrimination contained in the fact sheet on non-discrimination policies published by the Department in 2010.[1708] These final regulations, including § 106.8, apply and control over any statements contained in Department guidance, and recipients should be aware that the sample notice contained in that 2010 fact sheet does not require reference to a "Title IX Coordinator" or an e-mail address listed for a Title IX Coordinator, while § 106.8 does require that information.

Changes: We have revised § 106.8(b)(2)(i) to require recipients to publish on their websites, if any, the contact information for their Title IX Coordinator required under § 106.8(a).

Professional Organizations

Comments: One commenter objected to the requirement in § 106.8(b)(1) to notify professional organizations, asserting that such organizations do not have much bearing at the elementary and secondary school level. The commenter further asserted that the proposed rules did not clarify how to identify appropriate professional organizations, nor whether the organization has a right of action or standing that warrants the need to provide it with separate notice. Finally, the

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[1708] U.S. Dep't. of Education, Office for Civil Rights, Fact Sheet, "Notice of Non-discrimination" (August 2010), https://www2.ed.gov/about/offices/list/ocr/docs/nondisc.pdf. The 2001 Guidance at 20 encourages recipients to ensure that the school community has adequate notice of the school's non-discrimination policy, and of the procedures for filing complaints of sex discrimination, by having copies available at various locations throughout the school or campus, including a summary of the procedures in handbooks and catalogs sent to students and parents, and identifying personnel who can explain how the procedures work. These final regulations at § 106.8(b)-(c) similarly require notice of the recipient's non-discrimination policy, and notice of the recipient's grievance procedures for complaints of sex discrimination, and grievance process for formal complaints of sexual harassment, to members of the recipient's educational community, as well as the contact information for the Title IX Coordinator.

commenter stated that the proposed rules did not clarify whether publishing the recipient's non-discrimination policy on the recipient's website as required under § 106.8(b)(2)(i) also fulfils the requirement under § 106.8(b)(1) that the recipient "must notify" the group of persons listed in that provision, which would include any applicable professional organizations.

Discussion: The Department does not agree that the reference to "professional organizations" has little or no bearing in elementary and secondary schools, because the phrase appears in § 106.8(b)(1) as part of describing "all unions or professional organizations holding collective bargaining agreements or professional agreements with the recipient" and the Department believes that the persons and organizations in this description do have need to receive notice of a recipient's non-discrimination policy. Whether an organization describes itself as a "union" or uses a different label, the term "or professional organizations holding collective bargaining agreements or professional agreements" encompasses the reality that many elementary and secondary schools have employees who are unionized or otherwise collectively bargain or hold professional agreements with the recipient. Such unions or similar organizations should receive notice that the recipient does not discriminate under Title IX (and should receive notice of the recipient's Title IX Coordinator's contact information), both for the protection of union or similar organization members as employees of the recipient with rights under Title IX, and because such employees may have duties and responsibilities flowing from a recipient's Title IX obligations. For these reasons, the Department disagrees that "professional organizations" should be removed from the list of persons whom a recipient must notify of the recipient's non-discrimination policy (and of the Title IX Coordinator's contact information).

The Department appreciates the opportunity to clarify that posting the recipient's non-discrimination policy (and the Title IX Coordinator's contact information) prominently on a

recipient's website (required under § 106.8(b)(2)(i)) does *not* satisfy the recipient's obligation to "notify" the persons listed in § 106.8(a) (i.e., applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, unions and similar organizations) of the non-discrimination policy and Title IX Coordinator's contact information. These final regulations do not prescribe a particular form or method by which recipients "must notify" the foregoing group of persons and entities, in recognition that existing regulations at 34 CFR 106.9(a)(2), which became effective in 1975 and constituted the Department's first Title IX implementing regulations, were concerned with prescribing the form of "initial" notice (within 90 days after the effective date of the 1975 regulations) of a recipient's non-discrimination policy (and thus prescribed that notice could occur via publication in local newspapers, alumni or other recipient-operated newspapers or newsletters, and other written communications to students and employees). Most recipients have already complied with the regulatory requirement to send an "initial" notice within 90 days of the effective date of the 1975 regulations. As to every recipient, regardless of when the recipient first becomes subject to Title IX, the recipient under these final regulations "must notify" the list of persons and entities in § 106.8(a) by some effective method separate and apart from also complying with § 106.8(b)(2)(i) by posting required information on the recipient's website.

Changes: None.

Parents of Elementary and Secondary School Students

Comments: Commenters expressed concerns about the removal of parents of elementary and secondary school students from the list in proposed § 106.8(b)(1)[1709] of persons to whom recipients must send notice of their non-discrimination policy (and Title IX Coordinator's contact information). Commenters asserted that the Department did not provide a reason for why the list of individuals and entities needs to be streamlined, and argued that streamlining the list will not reduce the burden on school districts because the requirement to notify parents of elementary and secondary school students remains in the Title IX regulations of 25 other Federal agencies. Commenters expressed concern that eliminating parents of elementary and secondary school students from this list would lead to underreporting of sexual harassment because if parents are not informed of the school's non-discrimination policy, parents will be deprived of the tools they need to protect their children's rights under Title IX.

One commenter was concerned with omitting parents of elementary and secondary school students from the list in proposed § 106.8(b)(1) in light of the fact that per the proposed rules, elementary and secondary school students could be subject to cross-examination and their parents would not have knowledge of the procedures involved in reporting sexual harassment. Commenters argued that most elementary and secondary school students are minors and rely on their parents in making decisions related to school. Commenters expressed concern that by removing parents of elementary and secondary school students from the list, the Department would be placing a large burden on minor students to be aware of a complex policy regarding

[1709] As discussed previously, the list of persons whom a recipient "must notify" of the recipient's non-discrimination policy, and of the Title IX Coordinator's contact information, has been moved in the final regulations to § 106.8(a) instead of in proposed § 106.8(b)(1).

sex discrimination. Commenters argued that the lack of notice to parents limits the potential for legal remedies because the proposed rules require actual knowledge of sexual harassment via notice to the Title IX Coordinator or an official with the authority to institute corrective measures on behalf of the recipient, and young students cannot be expected to know how to contact those officials. Commenters asserted that since the parents of elementary and secondary school students would no longer be required to receive notice of the non-discrimination policy, children would have the task of providing notice to these individuals and would have to understand that what they have experienced is sexual harassment and feel comfortable sharing the experience with a stranger.

Discussion: The Department is persuaded by commenters' arguments that streamlining the list of persons who must be notified of the recipient's non-discrimination policy (described in § 106.8(b)(1)) should not include eliminating "parents of elementary and secondary school students" from that list.[1710] The Department is further persuaded by commenters' concerns that neglecting to include parents on this list places young students at unnecessary risk of not knowing their Title IX rights, and not having an effective means of asserting their rights because their parent has not been notified of the recipient's non-discrimination policy (and of the Title IX Coordinator's contact information). Therefore, the final regulations not only restore "parents" to this list, but add "parents *and legal guardians*" of elementary and secondary school students (emphasis added), to ensure that a responsible adult with the ability to exercise rights on behalf of elementary and secondary school students receives notice of the recipient's non-

[1710] As noted above, we have revised § 106.8 to move this list of persons whom a recipient "must notify" of the recipient's non-discrimination policy and of the recipient's Title IX Coordinator's contact information to § 106.8(a), such that § 106.8(b)(1) now refers back to the "persons entitled to a notification" listed in § 106.8(a).

discrimination policy as well as notice of the recipient's Title IX Coordinator's contact information. We have also added § 106.6(g) to these final regulations, to expressly acknowledge the legal rights of parents and guardians to act on behalf of individuals with respect to exercise of rights under Title IX, including but not limited to filing a formal complaint of sexual harassment.

Changes: The final regulations revise § 106.8(a) to add to the list of persons receiving notice of the recipient's non-discrimination policy, and notice of the recipient's Title IX Coordinator's contact information, "parents or legal guardians of elementary and secondary school students." We have also added § 106.6(g) to these final regulations, to expressly acknowledge the legal rights of parents and guardians to act on behalf of individuals with respect to exercise of rights under Title IX.

Subjectivity in Publications' Implication of Discrimination

Comments: Several commenters discussed the change in language from removed 34 CFR 106.9(b)(2) to § 106.8(b)(2)(ii).[1711] One commenter expressed support for the change in language. The commenter stated that 34 CFR 106.9 is not sufficiently detailed to allow a school to know if a publication meets the Department's standards and may lead to inconsistency in enforcement across OCR's field offices. Some commenters opposed the change and asserted that the Department's rationale for the change in language was to remove subjective determinations so that the requirement would be clearer for those enforcing it and for recipients seeking to comply with it but did not believe more clarity was needed. Some of these commenters asserted

[1711] 34 CFR 106.9(b)(2) ("A recipient shall not use or distribute a publication of the type described in this paragraph which suggests, by text or illustration, that such recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by this part."); *cf.* § 106.8(b)(2)(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 title IX or this part.").

that the Department had yet to respond to a commenter's Freedom of Information Act (FOIA) request for records about the subjectivity or lack of clarity in 34 CFR 106.9(b)(2) and argued that once the Department responds to the FOIA request the Department should reopen the public comment period to allow for additional evidence and arguments. Some commenters also contended that the elimination of the word "illustration" from 34 CFR 106.9(b)(2) is contrary to the Title IX regulations of 25 other Federal agencies (many of whom fund the same recipients as the Department) and is in tension with regulations issued by Federal agencies under other statutes prohibiting sex discrimination, which do extend to non-textual components of communications. Commenters argued that there is no indication in the NPRM or otherwise that any of these agencies have had difficulty enforcing such regulations, or that covered entities have sought greater clarity because such standards are too subjective.

Discussion: The Department appreciates commenters' arguments that 34 CFR 106.9(b)(2)'s phrasing that a recipient cannot use or distribute any publication that "suggests, by text or illustration" that the recipient treats people differently based on sex is superior to the phrasing in § 106.8(b)(2)(ii) that a recipient must not use or distribute a publication "stating that the recipient" treats people differently based on sex. The Department believes, however, that requiring recipients to (a) have a non-discrimination policy, (b) notify relevant persons and entities of that policy, and (c) post that policy on the recipient's website and in handbooks and catalogs, sufficiently ensures that a wide pool of people affiliated with the recipient, and the general public, understand a recipient's obligation to not discriminate based on sex.[1712] The

[1712] We have revised § 106.8(b)(2)(ii) to refer to "title IX or this part" rather than simply "this part" to acknowledge that Title IX, 20 U.S.C. 1681 *et seq.* contains exemptions and exceptions to Title IX's non-discrimination mandate, not all of which are reflected expressly in the Department's implementing regulations.

Department does not believe that recipients' graphic or pictorial illustrations that appear on a recipient's various publications (e.g., pictures of children in a classroom in a recipient's catalog, or photos of students in caps and gowns on a recipient's website) should be scrutinized by the Department for the purpose of deciding whether by virtue of such graphics, photos, or illustrations the recipient is "suggesting" that the recipient discriminates in violation of the recipient's clearly stated policy that the recipient does *not* discriminate. Rather, the Department believes that recipients' publications should take care not to "state" different treatment based on sex in contravention of the recipient's required non-discrimination policy.

The sufficiency of the Department's response to any individual FOIA request is beyond the scope of this rulemaking. Further, the Department does not believe that evidence of specific instances in which a recipient or the Department actually found the "suggests, by text or illustration" language in 34 CFR 106.9(b)(2) to be confusing or unfairly subjective is necessary in order to justify the Department's reconsideration of this language and the Department's conclusion that the better policy is to evaluate "statements" made in recipient's publications rather than "suggestions" made via illustrations.

The Department acknowledges that § 106.8(b)(2)(ii) uses different language than the Title IX regulations of other Federal agencies. The Department believes that these final regulations appropriately update the Title IX regulations enforced by the Department, regardless of whether other agencies also adopt the same language in each provision, and nothing in § 106.8 creates a conflict with, or makes it difficult for a recipient to comply with, other agencies' regulations.

Changes: None.

Judicial Requirements for Sex Discrimination

Comments: One commenter stated that for more than 30 years, courts and agencies enforcing Title IX have applied the language in 34 CFR 106.9(b)(2) to address sex stereotyping without apparent difficulty and asserted that not including in § 106.8(b)(2)(ii) the language from 34 CFR 106.9(b)(2) regarding a publication that "suggests, by text or illustration" different treatment on the basis of sex (and replacing that language with language in § 106.8(b)(2)(ii) referencing a publication "stating" different treatment on the basis of sex) runs 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. This commenter further asserted that for the same reason, § 106.8 is fundamentally inconsistent with the plain language of the Title IX statute (20 U.S.C. 1681) because the Supreme Court has held that a school can violate Title IX where a student is denied access to educational benefits and opportunities on the basis of sex, even in the absence of a facially discriminatory policy. This commenter also contended that § 106.8 is inconsistent with the Title IX statute and applicable case law because the language in § 106.8 prohibits explicit intentional discrimination yet allows implicit discrimination, which can deny students a fair and equal education. In support of this, the commenter stated that courts have consistently recognized and upheld Title IX regulations that prohibit policies found to have a discriminatory effect on one sex.

Discussion: The Department does not believe that the reference in § 106.8(b)(2)(ii) to a recipient's publication as "stating" that the recipient does not treat people differently based on sex instead of a publication that "suggests, by text or illustration" that a recipient treats people differently based on sex, constitutes rejection or modification of the way that Federal courts have applied sex stereotyping as a theory of sex discrimination. Nothing in the language of §

106.8(b)(2)(ii) restricts or changes the Department's ability to evaluate a recipient's publication for statements of different treatment on the basis of sex, including on a theory of sex stereotyping. Whether a publication "states" different treatment on the basis of sex, including based on a theory of sex stereotyping, is an inquiry distinct from whether the publication might be viewed as "suggesting" or implying different treatment on the basis of sex, including based on a theory of sex stereotyping. For reasons explained above, the Department does not believe it is reasonable or useful for the Department to scrutinize every graphic, picture, and illustration in a recipient's publications to discern whether such illustrations suggest, or imply, different treatment that is not intended, not applied, and not reasonably perceived as such.

Changes: None.

Implicit Forms of Sex Discrimination

Comments: A number of commenters offered examples of ways schools could suggest that they discriminate on the basis of sex without explicitly stating it, to explain commenters' concerns regarding the proposed rules' replacement of language from 34 CFR 106.9(b)(2) with the language in § 106.8(b)(2)(ii). One commenter argued that the Department provided no statistical or other evidence to show that the rationale for the provision has changed, or that sex stereotyping no longer needs to be remedied. The commenter contended that published policies and materials of a school can be susceptible to suggestions of sex stereotyping even where the publications do not "state" discriminatory practices. The commenter argued that both male and female students continue to be subjected to sex stereotyping in the forms of visual images, statements, and conduct that limits or denies their access to career and technical education paths based on sex. Commenters asserted that male students are discouraged from engaging in dance or theater because these occupations are not sufficiently "masculine," and female students are

discouraged from participating in science or engineering based on stereotypical conceptions of a woman's ability to do math and science. One commenter asserted that it is rare for an entity to directly state that it discriminates and that there are many other ways a discriminatory message can come across; for example, a brochure used to recruit applicants to a nursing school should not contain 40 photos of female students and no photos of male students.

Another commenter expressed concern that there are numerous symbols that get a point across as well as, if not better than, actually stating something (e.g., burning a cross on one's lawn). One commenter asserted that overt racism and sexism are less common in the modern era and that statements hinting at a policy of sex discrimination are used in lieu of explicit statements. The commenter asserted that for example, instead of a recipient stating that it reserves Advanced Placement classes for college-bound men because a woman's place is in the home, the recipient might state "we promote traditional gender roles and encourage women to take appropriate coursework to prepare for those roles." The commenter argued that while both statements have the same message and refer to a school's pattern of violating Title IX by forbidding women from taking the same classes as men, only one is explicit enough to contravene the proposed regulations. One commenter stated that while the commenter appreciated the Department's efforts to instill objectivity into § 106.8(b)(2)(ii), the commenter was concerned that the provision would allow schools to send discriminatory messages and then hide behind the fact that those messages did not explicitly state the schools were discriminating on the basis of sex. The commenter asserted that for example, a school may post a sign relating to sexual misconduct which includes images of a male student and the statement "don't be that guy," which suggests that the school thinks only men commit sexual assault even though the school may state that it has a policy of non-discrimination. The commenter suggested that the

Department use an objective standard that also prohibits non-textual indications of sex discrimination.

Some commenters stated that the only example of the Department's application of 34 CFR 106.9(b)(2) that they could locate was a case in which OCR determined that a school handbook describing a club as "open to all boys" violated 34 CFR 106.9(b)(2), even though the language did not state the club was "not open to all girls" because the description indicated that the club was intended for students of a particular sex. These commenters expressed concern that proposed § 106.8(b)(2)(ii) could overrule this decision, which would enable recipients to steer students into programs and activities based on sex.

Discussion: For reasons described above, the Department does not believe it is appropriate to scrutinize the graphics, photos, and illustrations chosen by a recipient in its publications in order to determine whether a recipient's publication "suggests" different treatment based on sex. The Department disagrees with the commenter who argued that a recipient should not be allowed to use a picture on a nursing school brochure depicting a group of women, without additional context about the brochure asserting that men were treated differently in such a nursing program. The Department does not believe that examining illustrations used in a recipient's publications yields a reasonable, fair, or accurate assessment of whether a recipient engages in sex discrimination, and does not believe that expecting a proportionality requirement in the illustrative, graphic, and photographic depictions of all the kinds of students to whom a recipient's programs are available bears a reasonable relation to whether the recipient treats students or employees differently on the basis of sex contrary to the recipient's policy of non-discrimination. To the extent that a commenter accurately describes an OCR enforcement action as concluding that a recipient's publication violated 34 CFR 106.9 because the publication

described a program as "open to all boys," such a result could also follow from application of § 106.8 because the publication could be found to "state" different treatment on the basis of sex. Thus, the enforcement action described by the commenter may not reach a different result under the final regulations. Similarly, a commenter's example of a recipient publication showing a picture of a male with text stating "Don't be that guy" and referring to sexual assault prevention could be evaluated under § 106.8 as to whether the publication states different treatment on the basis of sex, without using the language "suggests, by text or illustration" used in 34 CFR 106.9.

Changes: None.

Analogous Provisions in Other Laws

Comments: Some commenters asserted that proposed § 106.8(b)(2)(ii) is not aligned with analogous provisions that Congress has enacted in laws prohibiting sex discrimination to address the problem of entities attempting to exclude a protected group by indicating they are not welcome; commenters referred to, for example, Title VII and the Fair Housing Act which prohibit notices, statements, or advertisements that indicate preference, limitation, or discrimination. The commenters argued that the word "indicate" used in these statutes is much closer to the word "suggest" in 34 CFR 106.9(b)(2) and asserted that it is unclear why the Department would want to create a regime where a recipient could not indicate that it did not hire or rent to women, but could suggest that it did not admit women to its education program.

Discussion: The Department acknowledges commenters' references to non-Title IX statutes that use words like "indicate" to prohibit discrimination on prescribed bases. However, for the reasons described above, the Department believes that under Title IX, prohibiting recipients from using publications "stating" that the recipient discriminates under Title IX sufficiently advises recipients not to make such statements in publications, without unnecessarily scrutinizing

recipients' publications' pictures, graphics, and illustrations for a "suggestion" of discrimination where none is actually practiced by the recipient, and where statements in a publication do not convey different treatment on the basis of sex. Section 106.8(b)(2)(ii) allows the Department to analyze the context of such a publication and require a recipient to change such statements as necessary to promote the purposes of Title IX.

Changes: None.

Suggested Modifications

Comments: One commenter suggested that the Department require a recipient's non-discrimination policy to be published in multiple locations on the website where appropriate, including for example, the recipient's human resources page and admissions page. Another commenter suggested that the Department require recipients to post all of a recipient's Title IX policies and procedures on their website in one easily accessible PDF document and located at a single website link. One commenter stated that the Department did not provide an adequate definition of the characteristics of display that would qualify as "prominent" and recommended that the Department clarify the definition of "prominent display" as that phrase is used in § 106.8(b)(2)(i). The commenter also recommended that the Department reiterate Federal standards regarding translation of materials into languages other than English.

One commenter urged the Department to require recipients that have identified conflicts between the application of Title IX and the religious tenets of religious organizations that controls such recipients to include such information in their non-discrimination policy. The commenter asserted that requiring this information would promote consumer choice and is consistent with all other information that Federal law requires a school to disclose, particularly in higher education, and would enable a student to make a knowing and voluntary choice about

whether to attend the school. The commenter also argued that requiring recipients to disclose inapplicability of Title IX to some or all of their programs in their non-discrimination policy should not be limited to religious institutions, and that it should also apply, for example, to an educational institution that receives Federal funds and believes that it is exempt from Title IX because it is training people for the merchant marines, or to a voluntary youth services organization or social fraternity or sorority whose membership practices are not subject to Title IX.

One commenter requested clarification regarding the language in § 106.8(b)(2)(ii) that recipients must not use publications stating that they treat applicants, students, or employees differently "on the basis of sex" except as such treatment is permitted "by this part." One commenter asked whether an educational institution within the scope of § 106.12(a) is required to (a) notify applicants, students, employees, and others that it does not discriminate on the basis of sex, even though that is not true, or (b) notify applicants, students, employees, and others that it does not discriminate on the basis of sex, except in circumstances identified in that notification that are permissible because of § 106.12(a).

Discussion: The Department appreciates commenters' suggestions for modifications to the way notice and publication of a recipient's non-discrimination policy is given in § 106.8. The Department notes that nothing in the final regulations prevents a recipient from choosing to adopt commenters' suggestions, for example that the policy is placed on multiple, specific pages of the recipient's website; ensuring the policy appears as a PDF linked document on the website; and that the notice appears in multiple languages. However, the Department believes that § 106.8 sets forth reasonable, enforceable requirements that achieve the purpose of ensuring that relevant persons and organizations know the recipient's non-discrimination policy, without prescribing

how the recipient must organize its website. There is no exemption for a recipient's non-discrimination policy required under § 106.8, from laws, regulations, Federal standards, and recipient policies regarding translation of materials and information into languages other than English.

The Department does not believe that recipients with religious or other exemptions to Title IX are making false representations by complying with § 106.8, because (a) a recipient's non-discrimination policy must state that the requirement not to discriminate extends to admission "unless subpart C of this part does not apply" and (b) the final regulations add "by title IX or this part" instead of just "by this part" in § 106.8(b)(2)(ii). These qualifiers encompass the reality that some recipients are exempt from Title IX in whole or in part due to the various statutory and regulatory exemptions, including the religious exemption whereby a recipient is exempt from Title IX to the extent that application of Title IX is inconsistent with a religious tenet of a religious organization that controls the recipient. Moreover, nothing in the final regulations precludes a recipient from stating on its website, in publications, and elsewhere that the recipient has a particular statutory or regulatory exemption under Title IX. Further, under § 106.8(b)(1) any person can inquire about application of Title IX to the recipient by referring inquiries to the recipient's Title IX Coordinator, the Assistant Secretary, or both.

Changes: The final regulations use the phrase "permitted by title IX or this part" instead of "permitted by this part" to more comprehensively reference Title IX exemptions contained in the Title IX statute, as well those exemptions contained in Title IX regulations.

Section 106.8(c) Adoption and Publication of Grievance Procedures

Comments: Some commenters expressed support for § 106.8(c), asserting that it would bring clarity to the regulatory requirement that formal complaints of sexual harassment must use "prompt and equitable" grievance procedures.

One commenter expressed concern that the proposed rules did not address "totalitarian" reporting methods such as third-party reporting, bystander intervention, and posting fliers all over campus that encourage students to make reporting a habit.

Discussion: The Department appreciates commenters' support for the proposed rules' intention in § 106.8(c) to clarify that recipients must apply prompt and equitable grievance procedures to resolve complaints of sex discrimination generally, and to resolve formal complaints of sexual harassment. As explained below, we have revised § 106.8(c) to clarify that recipients must have "prompt and equitable" grievance procedures for complaints of sex discrimination, and must have in place a grievance process that complies with § 106.45 for formal complaints of sexual harassment.

The Department believes that the notice and publication requirements in § 106.8(b) and the adoption and publication of grievance procedures provisions in § 106.8(c) adequately ensure that the recipient disseminates information about its obligation not to discriminate under Title IX, and how to report and file complaints about sex discrimination, including sexual harassment. The Department notes that while the definition of "actual knowledge" in § 106.30 provides for a recipient to obtain actual knowledge of sexual harassment via third-party reporting, the definition of "formal complaint" in § 106.30 precludes a third party from filing a formal complaint, which is defined as a document that must be filed by a complainant or signed by the Title IX Coordinator. As discussed elsewhere in this preamble, the final regulations neither require nor

prohibit a recipient from disseminating information about bystander intervention designed to prevent sexual harassment. A primary focus of these final regulations is to govern a recipient's response to sexual harassment of which the recipient has become aware, and to provide accessible options for any person to report sexual harassment to trigger a recipient's response obligations. Similarly, nothing in the final regulations requires or prohibits a recipient from posting flyers on campus encouraging students and others to report sexual harassment; recipients should retain flexibility to communicate with their educational community regarding the importance of reporting sexual harassment. The Department believes that Title IX's non-discrimination mandate is best served by ensuring that a recipient's response obligations are triggered via notice of sexual harassment from any source, and that third-party reporting appropriately furthers the purposes of Title IX. We have revised § 106.8(a) to emphasize that "any person" may report sexual harassment (whether or not the person reporting is the person alleged to be the victim of sexual harassment) using the contact information listed for the Title IX Coordinator, and specifying that such a report may be made "at any time (including during non-business hours)" by using the telephone number or e-mail address, or by mail to the office address, listed for the Title IX Coordinator. We have also revised the § 106.30 definition of "actual knowledge" to emphasize that "notice" includes (but is not limited to) a report to the Title IX Coordinator as described in § 106.8(a). The Department disagrees that accessible reporting channels, and the right of *any* person to report sexual harassment, constitute a "totalitarian" system or otherwise has negative consequences. As demonstrated by the data discussed in the "General Support and Opposition" section of this preamble, sexual harassment is a prevalent problem affecting the educational access of students at all educational levels, and a recipient's knowledge of sexual harassment triggers the recipient's non-deliberately indifferent

response under these final regulations so that instances of sexual harassment are addressed in a manner that is not clearly unreasonable in light of the known circumstances.[1713]

Changes: We have revised § 106.8(a) to state that any person may report sex discrimination, including sexual harassment, whether or not the person reporting is the person alleged to be victimized by sex discrimination or sexual harassment, by using the contact information listed for the Title IX Coordinator, and stating that such a report may be made at any time (including during non-business hours) by using the telephone number or e-mail address, or by mail to the office address, listed for the Title IX Coordinator. We have also revised the § 106.30 definition of "actual knowledge" to specify that "notice" conveying actual knowledge on the recipient includes reporting sexual harassment to the recipient's Title IX Coordinator as described in § 106.8(a).

Comments: Some commenters expressed confusion as to whether the "grievance procedures" referenced in § 106.8(c) would apply to sexual harassment, sex discrimination generally, or both. Some commenters criticized the § 106.45 grievance process as "extreme" and argued that recipients should not have to use the same "weaponized" process to address non-sexual harassment sex discrimination. Other commenters asserted that the proposed rules created a dual system of grievance procedures: "prompt and equitable" grievance procedures applicable to sex discrimination generally, and to "informal complaints" of sexual harassment, and separate grievance procedures (described in § 106.45) for formal complaints of sexual harassment. Some commenters asserted that the phrasing in proposed § 106.8(c) was unnecessarily confusing

[1713] Section 106.44(a) (describing a recipient's general response obligations upon having actual knowledge of sexual harassment against a person in the United States in the recipient's education program or activity).

because "grievance procedures that provide for the prompt and equitable resolution of student and employee complaints . . . and of formal complaints" suggests that two separate processes are required; commenters recommended removing the phrase "student and employee complaints" to affirm that "prompt and equitable" grievance procedures are used only in response to "formal complaints." Some commenters wondered if a complaint about retaliation would be handled under the § 106.45 grievance process, or under the "prompt and equitable" grievance procedures referenced in § 106.8(c).

Some commenters argued that schools do not need more specific procedural rules than the directive in § 106.8(c) that grievance procedures must be "prompt and equitable" and that the "extreme" procedures in § 106.45 are not necessary. Other commenters argued that schools need more guidance as to how to handle non-sexual harassment sex discrimination complaints than the broad "prompt and equitable" requirement in § 106.8(c). Some commenters argued that while § 106.8(c) "claims" that procedures resolving formal complaints of sexual harassment must be "equitable," the provisions of § 106.45 are inequitable.

Some commenters asserted that recipients know they are supposed to "adopt and publish" grievance procedures yet, commenters claimed, most recipients still do not adopt and publish their grievance procedures or designate a Title IX Coordinator. Some commenters asserted that § 106.8(c) should only require recipients to "adopt and publish" grievance procedures that align with the recipient's State laws regarding imposition of discipline in response to sexual harassment or sex discrimination. At least one commenter argued that § 106.8(c) should expressly require that recipients must "adopt and publish" the recipient's entire grievance process "soup-to-nuts" so that parties to a sexual harassment complaint do not need to wait until the process has begun to be informed by the recipient of exactly what the grievance process

entails; the commenter gave an example of the commenter's university's written grievance procedures that informed students in writing, on the university's website, of several steps in the grievance process and then stated that "the remainder" of the recipients' procedures would "be explained to a respondent and complainant" as needed, which the commenter asserted is unfair.

One commenter urged the Department to modify § 106.8(c) to specifically require elementary and secondary schools to provide copies of the school's complaint form, because the commenter asserted that many schools use their own customized form yet fail to make the form available, so students and employees do not know how to actually file a complaint.

One commenter stated that because Title IX was written to prevent all discrimination, a recipient's policy should not distinguish among, and should address, all types of harassment with basic common sense rules such as: (1) every educational institution should have a harassment policy written by a representative group of educators and students or their parents and approved by the parent's association or student council; (2) every student and/or parent should receive and sign an acknowledgement of that policy; (3) every educational institution should be responsible for inappropriate behavior on any of its educational and recreational areas; (4) complaints may be filed by an alleged victim or their representative who can be a parent, educational, medical or law enforcement professional; (5) complaints must be acknowledged within a week and addressed by an independent board of individuals which should include parents, educational, medical or law enforcement professionals, and peers at the postsecondary level; (6) complaints should be forwarded to law enforcement when appropriate; (7) opportunity for redress should be allowed by a second independent board if the first verdict is unacceptable; and (8) a no bullying/no harassment curriculum should be mandatory for all students and all teaching professionals, and coaches should be required to attend training on this subject.

One commenter recommended that students and employees should be notified promptly when a policy or procedure is changed in order for the community to be made aware of any alterations to the policies and procedures to which they are held accountable and by which they are protected.

Discussion: In response to commenters' concerns that the wording in § 106.8(c) did not clearly convey that under the final regulations a recipient must adopt a grievance process that complies with § 106.45 for handling formal complaints of sexual harassment, the final regulations revise § 106.8(c) to specify that a recipient must not only adopt and publish grievance procedures "for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part" but also a "grievance process that complies with § 106.45 for formal complaints as defined in § 106.30." While a recipient is free to apply the § 106.45 grievance process to resolve complaints of non-sexual harassment sex discrimination, the final regulations only require a recipient to use the § 106.45 grievance process with respect to formal complaints of sexual harassment.[1714] These final regulations do not recognize a response specifically for an "informal complaint" of sexual harassment. These final regulations require a recipient to investigate and adjudicate using a grievance process that complies with § 106.45 in response to any formal complaint of sexual harassment,[1715] and preclude a recipient from imposing disciplinary sanctions on a respondent without first following a grievance process that

[1714] As discussed throughout this preamble, including in the "Role of Due Process in the Grievance Process" section of this preamble, the Department has selected the specific procedures prescribed in the § 106.45 grievance process for the purpose of addressing the unique challenges presented by sexual harassment allegations, and such challenges may or may not be present with respect to other forms of sex discrimination, many of which result from official school policy rather than from the independent choices of individual students, employees, or third parties.

[1715] Section 106.44(b)(1).

complies with § 106.45.[1716] Thus, if a recipient has actual knowledge of sexual harassment allegations (whether via a verbal or written report or other means of conveying notice to a Title IX Coordinator, official with authority to institute corrective measures, or any elementary or secondary school employee), but neither the complainant (i.e., the person alleged to be the victim) nor the Title IX Coordinator decides to file a formal complaint, the recipient must respond promptly in a non-deliberately indifferent manner, including by offering supportive measures to the complainant, but cannot impose disciplinary sanctions without following the § 106.45 grievance process. We have also clarified, in § 106.71(a), that complaints of retaliation for exercise of rights under Title IX must be handled by the recipient under the "prompt and equitable" grievance procedures referenced in § 106.8(c) for handling of complaints of non-sexual harassment sex discrimination.

We have also revised § 106.8(c) to expand the group of persons to whom notice of the "prompt and equitable grievance procedures" and "grievance process that complies with § 106.45" must be provided: rather than sending such notice only to students and employees, recipients now also must send that notice to "persons entitled to a notification under paragraph (a) of this section" (i.e., § 106.8(a)), which, as discussed above, includes students, employees, applicants for admission and employment, parents or legal guardians of elementary and secondary school students, and unions and similar professional organizations). Moreover, this provision is revised to clarify that the notice about the grievance procedures (which apply to sex discrimination) and grievance process (which applies specifically to sexual harassment) must include "how to report or file a complaint of sex discrimination, how to report or file a formal

[1716] Section 106.44(a).

complaint of sexual harassment, and how the recipient will respond." These changes to § 106.8(c) thus ensure that more people affected by a recipient's grievance procedures (for sex discrimination, and per § 106.71(a) of the final regulations, complaints of retaliation under Title IX) and grievance processes for Title IX sexual harassment, receive notice of those grievance procedures and grievance processes, including how to initiate those procedures and processes.

These revisions to § 106.8(c) emphasize that a result of the final regulations is creation of a prescribed grievance process for Title IX sexual harassment (which is triggered when a complainant files, or a Title IX Coordinator signs, a formal complaint), while the handling of non-sexual harassment sex discrimination complaints brought by students and employees (for instance, complaints of sex-based different treatment in athletics, or with respect to enrollment in an academic course) remains the same as under current regulations (i.e., recipients must have in place grievance procedures providing for prompt and equitable resolution of such complaints). Thus, § 106.8(c) better ensures that students, employees, parents of elementary and secondary school students, applicants for admission and employment, and unions, all are aware of a recipient's procedures and processes for intaking reports and complaints of all forms of sex discrimination including the particular reporting system, grievance process, and recipient responses required under these final regulations regarding sexual harassment. For reasons discussed throughout this preamble, including in the "General Support and Opposition for the Grievance Process in § 106.45" section of this preamble, the Department believes that the prescribed procedures that recipients must use in a Title IX sexual harassment grievance process are necessary to achieve the purposes of increasing the legitimacy and reliability of recipient determinations regarding responsibility for sexual harassment while decreasing the likelihood of sex-based bias influencing such determinations, and we clarify in revised § 106.8(c) that the §

106.45 grievance process is different from the directive that recipients' handling of complaints of other types of sex discrimination must be "prompt and equitable." We therefore decline to authorize recipients to substitute a State law grievance procedure for the § 106.45 grievance process. Because recipients must "adopt and publish" (and send notice to the group of people identified in § 106.8(a) of) a grievance process that complies with § 106.45, the Department believes that each recipient's educational community will be aware of the procedures involved in a recipient's grievance process without the unfairness of waiting until a person becomes a party to discover what the recipient's grievance process looks like. Non-sexual harassment sex discrimination often presents situations that differ from sexual harassment (for example, a complaint that school policy treats female applicants differently from male applicants, or that school practice is to devote more resources to male sports teams than to female sports teams), and the Department does not, in these final regulations, alter recipients' obligation to handle complaints of non-sexual harassment sex discrimination by applying grievance procedures that provide for the "prompt and equitable resolution" of such complaints.

The Department understands that despite 34 CFR 106.9 having required, for decades, recipients to adopt and publish prompt and equitable grievance procedures (and designate an employee to coordinate the recipient's efforts to comply with Title IX), some recipients have not "adopted and published" grievance procedures for handling sex discrimination complaints, and have not designated a Title IX Coordinator. The Department intends to enforce these final regulations vigorously for the benefit of all students and employees in recipients' education programs or activities, and any person may file a complaint with the Department alleging that a recipient is non-compliant with these final regulations. We have revised § 106.8(c) to more clearly require recipients to give notice to its educational community of how to report sex

discrimination or sexual harassment, how to file a complaint of sex discrimination or a "formal complaint of sexual harassment," and "how the recipient will respond."

We appreciate a commenter's concern that some recipients use a specific form for students and employees when filing a sex discrimination complaint. Under these final regulations at § 106.30, a "formal complaint" of sexual harassment is defined as a "document signed by a complainant" and a formal complaint may be filed by a complainant in person or by mail to the office address, or by e-mail, using the listed contact information for the Title IX Coordinator, or by any other method designated by the recipient. Thus, even if a recipient desires for complainants to only use a specific form for filing formal complaints, these final regulations permit a complainant to file a formal complaint by either using the recipient-provided form (or electronic submission system such as through an online portal provided for that purpose by the recipient), or by physically or digitally signing a document and filing it as authorized (i.e., in person, by mail, or by e-mail) under these final regulations.

These final regulations do not preclude a recipient from following the steps suggested by a commenter with respect to involving parent and student groups in the development of a recipient's anti-harassment policy, so long as the recipient adopts and publishes a grievance process for formal complaints of sexual harassment that complies with § 106.45, and so long as the recipient's reporting system for responding to sexual harassment complies with § 106.8, § 106.30, and § 106.44 in these final regulations.

Because recipients must "adopt and publish" the recipient's grievance procedures (for sex discrimination) and grievance process (for formal complaints of sexual harassment), the recipient's obligation is to "publish" (and send notice, as appropriate) when the recipient no

longer uses one grievance procedure or grievance process and instead uses a different procedure or process.

Changes: The final regulations revise § 106.8(c) by distinguishing between the "grievance procedures" for "prompt and equitable resolution" of complaints of non-sexual harassment sex discrimination, and the "grievance process that complies with § 106.45 for formal complaints" of sexual harassment; expands the list of people whom the recipient must notify of the foregoing procedures and processes (by referencing the revised list in § 106.8(a)); and adds clarifying language that the information provided must include how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond.

Section 106.8(d) Application Outside the United States

Comments: One commenter expressed general support for § 106.8(d). Some commenters argued that § 106.8(d) is inconsistent with the spirit of Title IX and the Clery Act. Commenters contended that, under the NPRM, no misconduct outside the United States would be covered, which frustrates the basic goal of Title IX to protect students when participating in educational programs or activities receiving Federal funds. Commenters also asserted that § 106.8(d) is inconsistent with the Clery Act because the Clery Act addresses conduct committed abroad on campuses of institutions of higher education. Commenters asserted that this inconsistency would impede the Title IX Coordinator's ability to implement consistent responses to sexual misconduct and identify patterns that could threaten individuals and communities. Commenters argued that this conflict also creates the need for separate processes to address the same misconduct, which undermines the Department's stated goal of streamlining processes to create more efficient systems.

Discussion: The Department appreciates the general support for this provision and appreciates commenters' concerns. Section 106.8(d) of the final regulations clarifies that the recipient's non-discrimination policy, grievance procedures that apply to sex discrimination, and grievance process that applies to sexual harassment, do not apply to persons outside the United States. Contrary to the claims made by some commenters that this provision conflicts with the spirit of Title IX, the Department believes that by its plain text the Title IX statute does not have extraterritorial application. Indeed, 20 U.S.C. 1681 indicates 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" (emphasis added). We believe a plain language interpretation of a statute is most consistent with fundamental rule of law principles, ensures predictability, and gives effect to the intent of Congress. Courts have recognized a canon of statutory construction that "Congress ordinarily intends its statutes to have domestic, not extraterritorial, application."[1717] This canon rests on presumptions that Congress is mainly concerned with domestic conditions and seeks to avoid unintended conflicts between our laws and the laws of other nations.[1718] If Congress intended Title IX to have extraterritorial application, then it could have made that intention explicit in the text when it was passed in 1972. The Supreme Court most recently acknowledged the presumption against extraterritoriality in *Morrison v. National Australian Bank*,[1719] and *Kiobel v. Royal Dutch Petroleum*.[1720] In *Morrison*, the Court reiterated the "longstanding

[1717] *Small v. United States*, 544 U.S. 385 (2005).
[1718] *See Smith v. United States*, 507 U.S. 197, 204 (1993).
[1719] 561 U.S. 247 (2010).
[1720] 569 U.S. 108 (2013).

principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."[1721] The Court concluded that "[w]hen a statute gives no clear indication of extraterritorial application, it has none."[1722] As discussed in the "Section 106.44(a) 'against a person in the U.S'" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this preamble, the Department believes that restricting Title IX coverage to persons in the United States applies the statute as passed by Congress. However, in response to commenters' assertions that § 106.8(d) was not faithful to the wording of the Title IX statute, the final regulations revise this provision's header to read "*Application outside the United States*" and simplify the provision's wording to more clearly accomplish the provision's goal by stating: "The requirements of paragraph (c) of this section apply only to sex discrimination occurring against a person in the United States."

With respect to the concerns raised by commenters that § 106.8(d) would conflict with the Clery Act, the Department acknowledges certain misconduct committed overseas is reportable under the Clery Act where, for example, the misconduct occurs in a foreign location that a U.S.-based institution owns and controls. However, the Clery Act and Title IX do not have precisely the same scope or purpose, and the text of the Title IX statute and controlling case law on the topic of extraterritoriality support the conclusion that Title IX does not apply to sex discrimination that occurs outside the United States. The Department does not believe the

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[1721] *Morrison v. Nat'l Australian Bank*, 561 U.S. 247, 255 (2010).
[1722] *Id.; Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108, 115 (2013) (citing *Morrison*, 561 U.S. at 255).

interpretation of Title IX as embodied in these final regulations prevents or complicates a postsecondary institution's compliance with reporting obligations under the Clery Act.[1723]

Changes: The final regulations revise § 106.8(d) so that its header reads "*Application outside the United States*" and simplify the wording to more clearly accomplish the provision's goal by stating that the requirements of paragraph (c) of this section apply only to sex discrimination occurring against a person in the United States.

Comments: A number of commenters raised the issue that § 106.8(d) may endanger students and faculty abroad. Commenters argued that sexual misconduct abroad, whether perpetrated by other students, faculty, graduate advisors, or other recipient employees, may significantly impact survivors' academic and career trajectories.[1724] Commenters argued that the effect of § 106.8(d) would be to force victims to drop out of their schools to avoid hostile environments created by misconduct committed abroad. Some commenters asserted that the U.S. generally has more robust disciplinary systems for addressing sexual misconduct than other countries. Commenters contended that for the Department to deny Title IX protections outside the United States would mean unfairly punishing students who simply were in the wrong place when they were assaulted. One commenter asserted that § 106.8(d) will also endanger recipient faculty and staff who are sexually assaulted while participating in conferences and other activities abroad. This commenter argued that Title IX should apply where both parties are affiliated with the recipient. A few commenters contended that the Department is ignoring the reality that study abroad programs

[1723] For further discussion on the intersection between these final regulations and the Clery Act, see the "Clery Act" subsection of the "Miscellaneous" section of this preamble.

[1724] Commenters cited: Robin G. Nelson *et al.*, *Signaling Safety: Characterizing Fieldwork Experiences and Their Implications for Career Trajectories*, 119 AM. ANTHROPOLOGIST 4 (2017).

and foreign educational activities are increasingly common. These commenters asserted that, beyond formal study abroad programs, many other undergraduate and graduate students are engaged in research, fieldwork, and data collection abroad, across a wide range of fields, and argued that the NPRM does not just impact study abroad programs, but also students temporarily visiting other countries for educational purposes.

Discussion: For the same reasons discussed under the "Section 106.44(a) 'against a person in the U.S'" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this preamble, the Department believes that restricting Title IX to persons in the United States applies the statute as passed by Congress, and notes that Congress remains free to modify Title IX to overcome the judicial presumption against extraterritorial application of Title IX. Under these final regulations recipients remain free to adopt robust anti-harassment and assault policies that apply to the recipient's programs or activities located abroad, to use recipients' disciplinary systems to address sexual misconduct committed outside the United States, and to protect their students from such harm by offering supportive measures to students impacted by misconduct committed abroad.

Changes: None.

Section 106.12 Educational Institutions Controlled by a Religious Organization

Comments: Some commenters expressed support for the changes to § 106.12(b), on the basis that the changes offered additional flexibility to religious educational institutions, and religious freedom is a vital constitutional guarantee. Commenters also elaborated on the benefits of religious freedom, suggesting that religion helps preserve civic virtues, and instills positive moral values for both individuals and communities. Some commenters noted that freedom of religion is specifically contemplated by the U.S. Constitution, in the First Amendment's Free Exercise

Clause. Drawing on this fact, commenters noted that the freedom of religion has been a touchstone of American government since the country was founded. Other commenters stated that proposed § 106.12(b) is consistent with the Religious Freedom Restoration Act, since it avoids placing an unnecessary burden on religious institutions. Some commenters noted that proposed § 106.12(b) has the ancillary benefit of avoiding confusion for schools, since many institutions may not obtain a religious exemption before having a complaint against them filed, but now they will know that there is no such duty. The corollary to this point, asserted commenters, is that opponents of a school's religious exemption may not incorrectly argue that a school has "waived" a right to invoke a religious exemption.

Discussion: The Department appreciates and agrees with the comments in support of § 106.12(b), which align with the Title IX statute, the First Amendment, and the Religious Freedom Restoration Act, 42 U.S.C. 2000bb-1. The final regulations bring § 106.12(b) further in line with the relevant statutory framework in this context, which states 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," as defined in 20 U.S.C. 1687, "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."

No part of the statute requires that recipients receive an assurance letter from OCR, and no part of the statute suggests that a recipient must be publicly on the record as a religious institution claiming a religious exemption before it may invoke a religious exemption in the context of Title IX. Nevertheless, the current regulations are not clear on whether recipients may

claim the exemption under § 106.12(a) only by affirmatively submitting a letter to the Assistant Secretary for Civil Rights.

However, longstanding OCR practice aligns with the statute, and the final regulations codify OCR's practice. To the extent that a recipient would like to request an assurance letter from OCR, the agency will continue to respond to such requests, as an option for recipients that are educational institutions controlled by a religious organization.

Changes: None.

Comments: Commenters noted that religious educational institutions themselves are vital for American society, noting that schools, among other religious institutions, have contributed to the alleviation of social ills through philanthropic and humanitarian projects. Religious educational institutions, suggested commenters, are necessary for religious freedom, and the proposed rules are consistent with the robust views of religious freedom that have been expressed by the U.S. Constitution, the U.S. Supreme Court, and Congress itself when it enacted Title IX. To that end, commenters noted that the Federal government ought to be making it easier for religious institutions to operate and thrive, not harder. Commenters noted that it would be a waste of a school's resources to apply for a religious exemption assurance letter, when no letter is in fact needed to invoke a religious exemption to Title IX. At least under the proposed rule, asserted the commenters, the Department's entanglement with a religious institution's tenets might be limited to those cases where a complaint is filed, or where the school affirmatively requests an exemption assurance letter.

Discussion: The Department appreciates the positive feedback on the proposed revisions in § 106.12(b) and believes that the Department's prior practice and the revisions to §106.12(b) in

these final regulations have the effect of promoting religious freedom. The final regulations codify longstanding OCR practices, and are consistent with the Title IX statute.

Changes: None.

Comments: Some commenters discussed current § 106.12, as well as the practice of OCR. Commenters stated that the status quo requires a religious institution to affirmatively request an exemption, and that imposing such a duty inappropriately places the burden on religious educational institutions. Instead, the commenters suggested, the burden would more appropriately be placed on the government, by having to disprove the application of a religious exemption. Indeed, commenters suggested that the status quo could occasionally be turned against religious educational institutions, by denying religious exemptions or forcing schools to wait an excessively long period of time before obtaining a letter of assurance from OCR.

Discussion: Contrary to commenters who suggested that the status quo requires schools to affirmatively request an assurance letter from OCR, OCR has previously interpreted the current regulation to mean that a school can invoke a religious exemption even after OCR has received a complaint regarding the educational institution. Additionally, the Department views both the status quo and the final regulations to require a recipient to invoke and establish its eligibility for an exemption, and does not view the final regulations as placing the burden on the Federal government to disprove any claim for religious exemption. However, it may be correct that many schools and individuals—such as these commenters themselves—have incorrectly read current § 106.12 to mean that a recipient must always seek or receive an assurance letter from OCR to assert the religious exemption before any complaint is filed against the school, if a religious exemption is to be invoked. These final regulations clarify that this is not the case.

Changes: None.

Comments: In the same vein, many commenters supported § 106.12(b) because the provision alleviated the need for schools to request an assurance letter in order to invoke a religious exemption. That purported need, the commenters asserted, was inconsistent with the authority granted by Congress to the Department of Education in Title IX itself. It was better, the commenters argued, to simply allow schools the option to obtain the assurance ahead of time, but not require it. Commenters suggested that forcing religious institutions to jump through hoops in order to invoke a religious exemption imperils schools' deeply held religious beliefs. At least one commenter stated that religious educational institutions have a natural tendency to reduce their interactions with government, and thus allowing schools to maintain a religious exemption to Title IX even absent an assurance letter was appropriate.

Discussion: The proposed revisions to § 106.12(b) codifies OCR's practice of permitting recipients to invoke a Title IX religious exemption without having obtained an assurance letter. However, the Department agrees with the concern that the current regulation is not as clear as it could be on this point, and that appears to have resulted in some confusion among recipients who were unaware of OCR's existing practice.

Changes: None.

Comments: Some commenters noted that § 106.12(b) will aid religious educational institutions, and assist with their legal compliance regimes under Title IX. For instance, one commenter asserted that a religious educational institution that had single-sex classes would understand that they do not have to comply with the single-sex provisions of the current Title IX regulations and instead would simply be able to maintain a religious exemption generally, if the classes were based on religious tenets or practices. In other cases, commenters stated, schools would be able to maintain more flexibility in their school policies, such as whether to allow students who were

assigned one sex at birth to use the intimate facilities assigned to another sex; whether to offer birth control as part of their health services; and how to structure dormitory and other housing policies.

Discussion: The Department appreciates the positive feedback on § 106.12(b) and agrees with commenters that stated that the final regulations will assist recipients with complying with Title IX. The final regulations codify longstanding OCR practices, and are consistent with the Title IX statute.

Changes: None.

Comments: Many commenters suggested that the proposed change in § 106.12(b) is a good way to prevent future administrations from maintaining a hostile posture toward religious educational institutions. These commenters suggested that the process of compelling a school to write a request letter to the Assistant Secretary for Civil Rights, and then waiting for OCR to respond, may raise fears that the Federal government is passing judgment on religious institutions, or that hostility toward certain categories of exemptions could trigger additional delays, or perhaps unduly close scrutiny of whether a religious educational institution really is eligible for such an exemption. Commenters also suggested that close scrutiny of religious exemption requests excessively entangles OCR with religious educational institutions.

Discussion: The Department is mindful of the concerns that educational institutions controlled by a religious organization sometimes express that OCR "entangles" itself with a recipient's religious practices by scrutinizing them too closely, or by delaying the issuance of an assurance letter (even when such delay is due to administrative backlogs and is not an intentional delay). The Department appreciates the positive feedback on § 106.12(b) and believes that the final regulations will help the Department and its OCR administer these final regulations consistent

with the U.S. Constitution by minimizing entanglement issues. The final regulations codify longstanding OCR practices, and are consistent with the Title IX statute.

Changes: None.

Comments: Some commenters sought to address concerns about religious exemptions generally, suggesting that religious institutions need to rely on Title IX less than other schools, since some acts – like sexual harassment or sexual assault – are generally considered abhorrent sins under most religious persuasions. Some comments mentioned Christianity, in particularly, as a religion that is committed to promoting the safest environment for students, free from discrimination and harassment. In that vein, commenters stated that Christian principles have caused Christian colleges to be exceptionally diligent in protecting students and employees from sexual harassment and sexual assault. Some commenters stated that it is inappropriate for a school to invoke a religious exemption in order to escape Title IX liability, since religious values disfavor discrimination, and discrimination is generally against a religious moral code. Commenters also stated that religious exemptions are contrary to the Bible, in that the Bible condemns sexual harassment and assault, and religious institutions should be leading the charge against such misconduct. One commenter stated that God made beings different from each other, and discrimination against students is contrary to God's creation.

Discussion: The Department appreciates the commenter's concerns and perspectives. The Department notes that the religious exemption applies only to the extent application of this part would not be consistent with the religious tenets of such organization. Through 20 U.S.C. 1682, Congress authorized the Department to effectuate the provisions of Title IX, which includes a religious exemption. The Department does not take a position on whether it is appropriate for a school to invoke such an exemption and is effectuating the provisions of Title IX, including the

religious exemption that Congress provided in 20 U.S.C. 1681(a)(3) through these final regulations, which are consistent with the First Amendment and the Religious Freedom Restoration Act.

Changes: None.

Comments: Several commenters noted that they supported § 106.12(b) because of its breadth, reading the provision to mean that any school, even with a minor religious affiliation, would be eligible for a religious exemption. The commenters asserted that this was the correct approach, and that the Department was wise to embrace such a broad religious exemption.

Discussion: Title IX and current § 106.12 provide that they do not apply to an "educational institution which is controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such organization." The Department does not consider the final regulations to be broader than the scope of the current regulations or the statute.

Changes: None.

Comments: One commenter argued that there is a potential internal contradiction between § 106.8 and proposed § 106.12. While a recipient may have a duty to issue a general notice of non-discrimination, the commenter argued that they might—at the same time—maintain a religious exemption that permitted such discrimination. The commenter argued that this would allow schools to mislead students by sending out a misleading non-discrimination notice. The commenter contended that this "bait and switch" would undermine OCR's credibility, and would mean that students at religious institutions will be deterred from filing complaints. To solve this problem, the commenter suggested schools claiming a religious exemption should have to include such a statement in the non-discrimination notice mandated by § 106.8.

Discussion: Recipients are permitted to distribute publications under § 106.8(b)(2)(ii) that clarify that the recipient may treat applicants, students, or employees differently on the basis of sex to the extent "such treatment is permitted by Title IX or this part." Nothing in the final regulations mandates that recipients deceive applicants, students, or employees regarding their non-discrimination practices, and recipients that assert a religious exemption are not required to misstate their actual policies when disseminating their Title IX policy under § 106.8. Indeed, if a recipient provided inaccurate or false information in any notification required under § 106.8, then the recipient would not be in compliance with § 106.8. We note that nothing in the final regulations supersedes any other contractual or other remedy that an applicant, student, or employee may have against a recipient based on an alleged misstatement or false statement. Students at schools that assert a religious exemption also may always file a complaint with OCR.

Changes: None.

Comments: Numerous commenters expressed opposition to religious exemptions as a general matter, suggesting that such exemptions are commonly used to discriminate against students or employees, cause harm to students and employees, and often are not adequately disclosed in a public and transparent way so as to give students and employees appropriate notice that they would not be protected by Title IX. These commenters argued that the interests underlying the protection of civil rights outweigh the need to protect a religious institution's discomfort regarding student behavior. Students at religious institutions, including LGBTQ students, asserted the commenters, deserve protection just as much as all other students. Commenters asserted that the Department owes a duty to students to protect their civil rights and argued that the proposed rules run contrary to that duty.

In the same vein regarding transparency, some commenters argued that permitting recipients to invoke religious exemptions without having to make a public statement will pit students against their own schools. The commenters say that since a school is designed to cultivate critical thinkers, depriving students of transparency runs counter to this interest. Additionally, commenters stated that students who seek abortions, hormone therapy, or access to intimate facilities that are sex-segregated, may feel like their own school does not protect them, and may feel betrayed by their own institution, leading to an environment of distrust on campus. Worse, the commenters say, some students could feel bullied, threatened, or harassed once students see that the school itself is openly discriminating against its students. Commenters noted that the same could be true for employees, and not just students.

Commenters argued that even if a school is entitled to assert a religious exemption, proposed § 106.12(b) goes too far because it seems to encourage schools to lie in wait before formally invoking the religious exemption. Commenters stated that religious educational institutions should have a legal obligation to give students notice prior to enrolling or working at a school maintaining a religious exemption. For that reason, commenters stated, § 106.12(b) is in tension with the OCR's usual assurance process for all recipients of Federal education funds, which requires a school to assure the Department that it will comply with non-discrimination laws as a condition of receiving Federal education dollars. Another commenter argued that for private religious elementary and secondary schools that educate students as part of their Free and Appropriate Public Education, it is highly troubling for parents not to know about Title IX exemptions prior to enrollment. One commenter alleged that allowing a recipient to invoke a religious exemption after a complaint has been filed with OCR is contrary to the due process principles that these final regulations are attempting to preserve and protect.

Discussion: In response to the comments about the propriety of having any religious exemption or the need to protect civil rights over religious freedom, the Department notes that Title IX itself guarantees the religious exemption and these final regulations do not change our long-standing practice of honoring and applying the religious exemption in the appropriate circumstances. As some commenters in support of § 106.12(b) noted, the proposed regulations do not prevent OCR from investigating a complaint simply because the complaint involves an educational institution controlled by a religious organization. The recipient must additionally invoke a religious exemption based on religious tenets. Moreover, this does not prevent OCR from investigating or making a finding against a recipient if its religious tenets do not address the conduct at issue. In those cases, OCR will proceed to investigate, and if necessary, make a finding on the merits.

The Department also appreciates the feedback on the potential policy implications of the proposed rule; however, the Department is limited by the Title IX statute,[1725] and cannot make changes to the final regulations that are inconsistent with the statute, regardless of the policy implications addressed by commenters. As mentioned, the final regulations codify longstanding OCR practices, and are consistent with the Title IX statute. The Department does not believe that its current practice or the final regulations violate the U.S. Constitution. The Department further asserts that § 106.12(b) in these final regulations is consistent with the First Amendment, including the Free Exercise Clause as well as the Establishment Clause, because the Department is not establishing a religion and is instead respecting a recipient's right to freely exercise its religion. Additionally, § 106.12(b) in these final regulations is consistent with the Religious

[1725] 20 U.S.C. 1681(a)(3) ("[T]his 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").

Freedom Restoration Act, 42 U.S.C. 2000bb *et seq.*, which applies to the Department, and requires the Department not to substantially burden a person's exercise of religion unless certain conditions are satisfied.[1726] As the Title IX statute does not require a recipient to request and receive permission from the Assistant Secretary to invoke the religious exemption, requiring a recipient to do so may constitute a substantial burden that is not in furtherance of a compelling government interest or the least restrictive means of furthering that compelling government interest under the Religious Freedom Restoration Act, 42 U.S.C. 2000bb-1. Such a requirement also is unnecessary in light of the other requirements in these final regulations that a recipient notify students, prospective students, and others about the recipient's non-discrimination statement as well as its grievance procedures and grievance process to address sex discrimination, including sexual harassment.

Section 106.8 requires all recipients to notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient of its non-discrimination on the basis of sex as well as its grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond. Additionally, § 106.8(b)(2)(ii) provides that 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 Title IX or these final regulations. Accordingly, students

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[1726] *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (holding "person" within meaning of the Religious Freedom Restoration Act's protection of a person's exercise of religion includes for-profit corporations).

and prospective students should receive adequate notice of the recipient's non-discrimination statement as well as its grievance procedures and grievance process regarding sex discrimination, including sexual harassment, and such notice is consistent with due process principles. Such transparency helps guard against any misunderstandings, irrespective of whether a school asserts a religious exemption.

The religious exemption in Title IX, 20 U.S.C. 1681(a)(3), applies to an educational institution which is controlled by a religious organization, and students and prospective students likely will know whether an educational institution is controlled by a religious organization so as not to be surprised by a recipient's assertion of such a religious exemption. Additionally, the Department also notes that under § 106.8(b)(1) any person can inquire about the application of Title IX to a particular recipient by inquiring with the recipient's Title IX Coordinator, the Assistant Secretary, or both.

OCR is unaware of a religious school claiming an exemption from Title IX's obligations to respond to sexual harassment on the basis that such a response conflicts with the religious tenets of an organization controlling the religious school. As the Department explains more thoroughly in the "Gender-based harassment" subsection of the "Sexual Harassment" subsection of the "Section 106.30 Definitions" section, these final regulations focus on prohibited conduct. The Department believes any person may experience sex discrimination, irrespective of the identity of the complainant or respondent.

Nothing in the final regulations mandates that recipients deceive applicants, students, or employees regarding their non-discrimination practices, a recipient remains free to describe its religious exemption on its website, and nothing in the final regulations supersedes any other

contractual or other remedy that an applicant, student, or employee may have against a recipient based an alleged misstatement or false statement.

Changes: None.

Comments: Some commenters ascribed particularly nefarious motives to recipients, arguing that schools often intentionally deceive applicants to the school in order to obtain application fees or tuition revenues. These commenters alleged that religious educational institutions deliberately hid their purported exemptions from Title IX and would then blindside students once they were already enrolled in school. One commenter suggested bigoted university officials would use religious exemptions as a fig leaf to impose personal beliefs, such as denying transgender students medical coverage for hormone therapy.

Discussion: Nothing in these final regulations mandates that recipients deceive applicants, students, or employees regarding their non-discrimination practices, and nothing in the final regulations supersedes any other contractual or other remedy that an applicant, student, or employee may have against a recipient based an alleged misstatement or false statement. On the contrary, as explained above, these final regulations including § 106.8, promote transparency by requiring a recipient to provide notice of its non-discrimination statement as well as its grievance procedures and grievance process to address sex discrimination, including sexual harassment. Additionally, § 106.8(b)(1) allows inquiries about the application of Title IX and this part to a recipient to be referred to the recipient's Title IX Coordinator, to the Assistant Secretary, or both.

The Department disagrees with the suggestion that religious exemptions are tools for bigotry or should not be provided due to such characterizations. The First Amendment to the Constitution protects religious exercise, and Congress placed a religious exemption in Title IX and numerous other statutes. The Department's experience is that exemptions for religious

liberty overwhelmingly serve to advance freedom and diversity in education, not bigotry. To the extent that an official of a recipient invokes a religious exemption "as a fig leaf" in order to impose only personal beliefs, that recipient would not qualify for a religious exemption because the religious exemption requires the application of Title IX and its regulations to be inconsistent with the religious tenets of a religious organization and not just inconsistent with personal beliefs.

Changes: None.

Comments: Some commenters ascribed nefarious motives to the Department. Commenters asserted that the people drafting the proposed rules would not be in favor of religious exemptions if their wives, mothers, or daughters were the victims of sexual assault. One stated that honoring women and girls' rights is what Jesus calls for and implied that the proposed regulations go against this principle. Some commenters objected that the inclusion of religious exemptions is clearly a political decision made by politicians in this administration who seek to avoid accountability for their own sexual misconduct. Other commenters stated that the drafters of the proposed rules do not have the interests of students at heart, and that the proposed rules are intentionally designed to institutionalize patriarchy and homophobia. Other commenters stated that the inclusion of the religious exemption provision was a political decision to curry favor with religious institutions and warned the Department not to divide people. Another commenter suggested that the provision was an effort by Secretary Betsy DeVos to establish a Christian fascist nation that favors a fundamentalist strain of Christianity.

Discussion: Although the Department appreciates the feedback on the proposed rule, it rejects the assumptions of these commenters. As stated above, the Department's goals for these final regulations are to establish a grievance process that is rooted in due process principles of notice

and opportunity to be heard and that ensures impartiality before unbiased officials. Specifically, these goals are to (i) improve perceptions that Title IX sexual harassment allegations are resolved fairly and reliably, (ii) avoid intentional or unintentional injection of sex-based biases and stereotypes into Title IX proceedings, and (iii) promote accurate, reliable outcomes, all of which effectuate the purpose of Title IX to provide individuals with effective protection from discriminatory practices, including remedies for sexual harassment victims. As stated above, § 106.12 reflects the statutory exemption for religious educational institutions granted by Congress, and the religious exemption applies only to the extent that the tenets of a religious organization controlling a religious educational institution conflict with the application of Title IX.

These final regulations apply to prohibit certain conduct and apply to anyone who has experienced such conduct, irrespective of a person's sexual identity or orientation. The Department believes that these final regulations provide the best protections for all persons, including women and people who identify as LGBTQ, in an education program or activity of a recipient of Federal financial assistance who experience sex discrimination, including sexual harassment.

Contrary to commenters' assertions, these final regulations do not establish a religion, and § 106.12(b) applies to all religions and not just Christianity.

The Department disagrees that these final regulations are patriarchal. These final regulations empower complainants with a choice to consider and accept supportive measures that a recipient must offer under § 106.44(a) and/or to file a formal complaint to initiate a grievance process under § 106.45.

The Department does not seek to curry favor with a particular population of recipients or individuals. The Department seeks to effectuate Title IX's non-discrimination mandate consistent with the U.S. Constitution, including the First Amendment, as well as other Federal laws such as the Religious Freedom Restoration Act.

Changes: None.

Comments: Some commenters suggested that religious educational institutions could manipulate the revisions to § 106.12(b) to their benefit. For instance, one commenter asserted that a school might wait to see how a Title IX investigation by OCR is going, and then if OCR is on the verge of issuing a finding in the case, the school might invoke a religious exemption at the last minute. Other commenters stated that a school might invoke a religious exemption as a way to retaliate against students, or would abuse the ability to invoke a religious exemption even when the school's tenets do not strictly contradict Title IX. One commenter asserted that recipients of all religious persuasions will suffer, when the public assumes that all religious schools discriminate against students.

Another commenter suggested that OCR ought to closely scrutinize claims of religious exemptions, and that schools should not receive any deference when invoking a religious exemption or arguing that their tenets conflict with Title IX. The commenter argued that this would be like letting a corporation verify or change its own tax status while being investigated by the Internal Revenue Service, e.g., moving to non-profit status in the middle of a tax fraud investigation.

Discussion: The Department appreciates the feedback on the potential policy implications of the proposed rules and believes that some of the commenters misunderstand § 106.12(b). Section 106.12(b) states: "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 an exemption from the Assistant Secretary." When the Department notifies a recipient that it is under investigation for noncompliance with this part or a particular section of this part, the recipient identifies the provisions of this part which conflict with a specific tent of the religious organization. Of course, a recipient must know what it is under investigation for, in order to assert an applicable exemption such as a religious exemption. Nonetheless, a recipient cannot invoke a religious exemption "at the last minute" because the recipient must be an educational institution which is controlled by a religious organization, and such control by a religious organization is not something that occurs "at the last minute." The educational institution must have been controlled by a religious organization when the alleged noncompliance occurred, and the educational institution is only exempt from Title IX and these final regulations to the extent that Title IX or these final regulations are not consistent with the religious tenets of such organization.

Additionally, retaliation is strictly prohibited under § 106.71, and a recipient cannot invoke a religious exemption to retaliate against a person. Similarly, a recipient may only assert an exemption to the extent that Title IX or these regulations are not consistent with the religious tenets of the religious organization that controls an educational institution.

The Department is not aware of any assumption that all educational institutions which are controlled by a religious organization engage in discriminatory practices, and the Department's

experience has not been that all educational institutions which are controlled by a religious organization engage in discriminatory practices.

Under long-standing OCR policy, OCR's practice is generally to avoid questioning the tenet that an educational institution controlled by a religious organization has invoked to cover the conduct at issue. OCR does not believe it is in a position, generally, to scrutinize or question a recipient's sincerely held religious beliefs, and the First Amendment likely prohibits questioning the reasonableness of a recipient's sincerely held religious beliefs. However, recipients are not entitled to any type of formal deference when invoking eligibility for a religious exemption, and recipients have the duty to establish their eligibility for an exemption, as well as the scope of any exemption. These final regulations, including § 106.12(b), make no changes to the conditions that must apply in order for a religious educational institution to qualify for the religious exemption.

Changes: None.

Comments: Some commenters stated that the Department failed to adequately provide a rationale for changing current 34 CFR 106.12(b) in the manner proposed in § 106.12(b), and argued that the Department failed to disclose the potential negative impacts of this change. The commenters suggested that the proposed rules ought to more carefully explain how compliance with Title IX is burdensome for religious institutions, given that the current procedures, according to commenters, are exceptionally generous to religious institutions. Additionally, these commenters stated that the Department should reassess the religious exemption to weigh more heavily a school's potential to be dishonest and to discriminate.

Commenters stated that they favored what they considered to be current OCR practice, under which, commenters asserted, most requests for exemptions came by letter before a

complaint was opened, and under which OCR posts a publicly-available list of all schools that had invoked an exemption. Commenters contended that the Obama-era approach was popular among students and faculty, and was fair to all parties. Commenters also suggested that a requirement to force religious institutions to submit assurance requests ahead of time saves agency resources for OCR, so the preamble's assertion that the prior practice is confusing and burdensome is an absurd thing to say. Commenters argued that proceeding with this rationale will mean violating the Administrative Procedure Act, because the current procedures are not confusing or burdensome, as set forth clearly in the current regulation. Commenters argued that the current procedures require religious institutions to establish which tenets of their religion are in conflict with Title IX, whereas the proposed regulations would not require schools to fully elaborate which of their tenets are contradicted by Title IX.

Discussion: The Department appreciates the feedback on the potential policy implications of the proposed rule. The Department acknowledges that its practices in the recent past regarding assertion of a religious exemption, including delays in responding to inquiries about the religious exemption and publicizing some requests for a religious exemption, may have caused educational institutions to become reluctant to exercise their rights under the Free Exercise Clause of the First Amendment, and the Department would like educational institutions to fully and freely enjoy rights guaranteed under the Free Exercise Clause of the U.S. Constitution without shame or ridicule. The Department may be liable for chilling a recipient's First Amendment rights and also is subject to the Religious Freedom Restoration Act. The Department properly engaged in this notice-and-comment rulemaking to clarify that the Department, consistent with 20 U.S.C. 1681, will not place any substantial burden on a recipient that wishes to assert the religious exemption under Title IX.

The Department is giving due weight to Congress' express religious exemption for recipients in Title IX, and Congress did not require a recipient to first seek assurance of such a religious exemption from the Department. The First Amendment and the Religious Freedom Restoration Act, which apply to the Department as a Federal agency, cause the Department to err on the side of caution in not hindering a recipient's ability to exercise its constitutional rights.

Based on at least some commenters asserting that recipients needed more clarity on the current regulations, the Department respectfully disagrees with commenters arguing that confusion and burdens have not resulted from the text of the current regulations. In any event, the final regulations codify longstanding OCR practices, and are consistent with the Title IX statute.

With respect to publishing a list of all recipients who have received assurances from OCR, OCR declines to set forth any formal policy in the final regulations. Such lists are necessarily incomplete, since they do not adequately describe the scope of every exemption, and because many recipients that are eligible for religious exemptions may nevertheless not seek assurance letters from OCR. However, nothing in the final regulations addresses publishing such a list, one way or another. In any event, correspondence between OCR and recipient institutions, including correspondence addressing religious exemptions, is subject to Freedom of Information Act requirements.

Changes: None.

Comments: Commenters argued that OCR's practice regarding religious exemptions has worked since 1975, and that the time period between 1975 and the present day spans numerous presidencies across both Democrat and Republican administrations. One commenter stated that

no religious exemption request has ever been denied, so addressing this topic in formal rulemaking is unnecessary.

Commenters contended that the change to the text of the religious exemption regulation is not responsive to any specific issue or wrong, and that the current regulation appropriately burdens the institution, as opposed to students.

Commenters also stated that the revisions to § 106.12(b) would largely remove the Department and OCR out of the religious exemption process, since students may not challenge a school's assertion of a religious exemption during the school's handling of a complaint. That would be problematic, asserted commenters, because students would be blindsided by assertions of exemptions that have not yet been evaluated or ruled on by the Department and OCR, so a student challenging an exemption, asserted commenters, would have their complaint ignored or stayed while they waited for OCR to rule on the validity of the exemption assertion.

Commenters suggested that placing the burden on a party not invoking the exemption is discordant with other areas of law, such as many States' requirement that parents submit a religious objection to immunizations in writing, or that an entity bear the burden of establishing its entitlement to tax-exempt status. Indeed, say the commenters, the Department administers the Clery Act, which is another statute that burdens schools by requiring them to collect and report information.

Discussion: The Department disagrees with commenters that assert § 106.12(b) should not be part of this notice-and-comment rulemaking. Some commenters have asserted that the current § 106.12(b) has caused confusion, and the Department wishes to clarify that neither Title IX nor these final regulations require a recipient to request an assurance of a religious exemption under 20 U.S.C. 1681(a)(3). Additionally, the Department wishes to avoid liability under the First

Amendment and the Religious Freedom Restoration Act, and to the extent that § 106.12(b) may be ambiguous or vague, the Department would like to take this opportunity to revise § 106.12(b) to be even more consistent with Title IX, the First Amendment, and the Religious Freedom Restoration Act.

Section 106.12(b) as proposed and as included in these final regulations does not burden students as the recipient must still invoke the exemption. Indeed, a recipient must still demonstrate that it is an educational institution which is controlled by a religious organization and that the application of Title IX or its implementing regulations would not be consistent with the religious tenets of such organization. The student does not bear the burden with respect to the religious exemption.

The Department also disagrees that a complaint is placed on hold while the Department considers a recipient's religious exemption. The Department processes complaints in the normal course of business and will consider any religious exemption in the normal course of an investigation just as it considers other exemptions under Title IX during an investigation. Accordingly, a student will not suffer from any delays in the Department's processing of a complaint as a result of the revisions to § 106.12(b).

There also should not be any delays with respect to the recipient's processing of a student's complaint such as a formal complaint under §§ 106.44 and 106.45. Section 106.44(a) requires a recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States to respond promptly in a manner that is not deliberately indifferent. Section 106.12(b) clarifies that a recipient does not need to submit a statement in writing to the Assistant Secretary to assert a religious exemption before asserting an exemption and, thus, there is no need for the Department to intervene or delay any

complaint of sex discrimination, including a formal complaint of sexual harassment, that the recipient is processing to determine whether the recipient qualifies for a religious exemption.

Students should not be blindsided and may always inquire about the application of Title IX and its implementing regulations to the recipient's Title IX Coordinator, to the Assistant Secretary, or both. Additionally, a recipient that is an educational institution must be controlled by a religious organization in order to assert an exemption under Title IX, 20 U.S.C. 1681(a)(3), and students likely will know whether the educational institution is controlled by a religious organization.

The Department reiterates that the burden remains on the recipient to establish and assert a religious exemption to Title IX, 20 U.S.C. 1681(a)(3). Congress expressly requires postsecondary institutions that receive Federal student financial aid through the programs authorized by Title IV of the Higher Education Act of 1965, as amended, to make certain reports, including reports to the Department. The Department's regulations, implementing the Clery Act, address the reporting requirements that Congress enacted. Congress, however, did not require educational institutions to report a religious exemption to the public or to the Department under Title IX, and the Department declines to impose any burden on the constitutional rights of recipients of Federal financial assistance that Congress did not impose. Additionally, as previously explained, the First Amendment and the Religious Freedom Restoration Act may prohibit any such additional burdens.

Changes: None.

Comments: One commenter objected to any form of assurance letter being sent by OCR, on the basis that such a process caused an undue entanglement with religion. The commenter suggested

that the statute simply apply on its own terms, without the need for OCR to closely scrutinize the tenets of a religious educational institution.

Discussion: The Department appreciates feedback on the proposed rule. The process of applying to OCR for an assurance letter is entirely optional, and nothing in the final regulations requires a school to obtain an assurance letter prior to invoking a religious exemption. The Department therefore sees no entanglement problem in allowing recipients to request an assurance letter, and generally avoids scrutinizing or questioning the theological tenets or sincerely held religious beliefs of a recipient that invokes the religious exemption in Title IX.[1727]

Changes: None.

Comments: Several commenters asserted that the final regulations ought to be changed such that recipients are not entitled to religious exemptions under Title IX. Some commenters stated that the topic of religious exemptions might not be a significant one, and that it was unclear how many recipients had truly avoided an investigation or finding under Title IX due to a religious exemption. The commenter suggested that instead of modifying the regulations, the better course would be to study the issue further and determine how many recipients had successfully invoked a religious exemption to avoid a Title IX compliance issue in the last three to five years.

Discussion: The Department appreciates the feedback on § 106.12(b) but does not believe it is necessary to examine OCR records to report on how many recipients have successfully invoked a religious exemption under Title IX. This is because the Title IX statute provides a religious exemption for recipients, and the Department cannot eliminate the religious exemption in the Title IX statute through its regulations. In any event, the final regulations codify longstanding

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[1727] 20 U.S.C. 1681(a)(3).

OCR practices, and both the final regulations and OCR practice are consistent with the Title IX statute.

Changes: None.

Comments: A commenter suggested that part of the process ought to be a publication of a book by OCR that contains the full list of recipients that have obtained an assurance letter. Some commenters suggested, apart from a book, that OCR ought to publish on its website a list of all recipients that have obtained a religious exemption assurance letter. Another commenter suggested that OCR at least require recipients to inform a student who has filed a complaint that the recipient has invoked a religious exemption, particularly if no assurance letter has been previously requested. These measures, asserted commenters, would increase transparency for students and employees who may attend or work for educational institutions that maintain exemptions from Title IX.

Discussion: The Department appreciates the feedback on the proposed rule. When OCR receives a complaint involving a recipient that invokes a religious exemption, OCR will proceed in accordance with OCR's Case Processing Manual, including with respect to notifying a complainant that the recipient has invoked a religious exemption. OCR's current practice does not require OCR to keep a complainant apprised of developments in an ongoing investigation of a recipient, and the Department has not proposed any procedural changes to the manner in which it processes complaints in this notice-and-comment rulemaking so as to give the public notice to comment on such a proposal. A complainant currently receives the opportunity to appeal the Department's determination with respect to a complaint or the dismissal of a complaint and may

raise any concerns about a recipient's religious exemption as well as other matters on appeal.[1728] The Department does not wish to treat a religious exemption, which Title IX provides and which the Department is required to honor under Title IX and in abiding by the First Amendment and the Religious Freedom Restoration Act, differently than any other exemption from Title IX that a recipient may invoke. Title IX provides exemptions other than a religious exemption in 20 U.S.C. 1681(a) (e.g., exemptions for membership policies of social fraternities or sororities, father-son or mother-daughter activities, scholarship awards in "beauty" pageants). The Department does not notify a complainant of a recipient's invocation of other exemptions provided in Title IX when the Department is processing a complaint and declines to do so for a religious exemption. Nothing in the final regulations prevents a recipient from informing the complainant of its invocation of a religious exemption. The Department notes that any person may direct an inquiry about the application of Title IX to a particular recipient to the recipient's Title IX Coordinator, the Assistant Secretary, or both, pursuant to § 106.8(b)(1).

On the subject of OCR publishing a book, list of names, or copies of the assurance letters that have been provided to recipients that address a recipient's eligibility for a religious exemption, the Department often posts such correspondence on the OCR website. Additionally, such documents are subject to Freedom of Information Act requests, and attendant rules regarding public disclosure of commonly-requested documents. The Department does not believe that publishing a book or a list of names of recipients that have asserted eligibility for a

[1728] U.S. Dep't. of Education, Office for Civil Rights, *Case Processing Manual* § 307 Appeals, https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf.

religious exemption is necessary, and the final regulations do not address that issue, one way or another.

Changes: None.

Comments: Some commenters stated that they would prefer the Department to at least encourage recipients to post information about Title IX religious exemptions on the recipient's website, so that people who are actively looking for that information can find it easily. Other commenters suggested that a recipient maintaining a religious exemption ought to be compelled to publish such information in their materials and policies, i.e., a student handbook, or a website.

Discussion: The Department generally does not include in its regulations specific types of advice or encouragement for recipients and believes that the Title IX statute and § 106.12 appropriately guide recipients as to the scope and application of the religious exemption under Title IX.

The Department does not require recipients to publish any exemptions from Title IX under 20 U.S.C. 1681(a)(3) that may apply to the recipient and does not wish to single out the religious exemption for special or different treatment. The Department believes that the requirements in these final regulations provide sufficient transparency. As previously stated, § 106.8 requires all recipients to notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient of its notice of non-discrimination on the basis of sex as well as its grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond. Additionally, § 106.8(b)(2)(ii) provides that 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 Title IX or these final regulations. Accordingly, students and prospective students should receive adequate notice of the recipient's non-discrimination statement as well as its grievance procedures and grievance process regarding sex discrimination, including sexual harassment, and such notice is consistent with due process principles. Such transparency helps guard against any misunderstandings, irrespective of whether a school asserts a religious exemption.

The religious exemption in Title IX, 20 U.S.C. 1681(a)(3), applies to an educational institution which is controlled by a religious organization, and students and prospective students likely will know whether an educational institution is controlled by a religious organization so as not to be surprised by a recipient's assertion of such a religious exemption. Additionally, the Department also notes that under § 106.8(b)(1) any person can inquire about the application of Title IX to a particular recipient by inquiring with the recipient's Title IX Coordinator, the Assistant Secretary, or both.

Changes: None.

Comments: Some commenters suggested that the religious exemptions language be altered, to carve out conduct that would be considered a crime. Other commenters suggested that the Department should clarify how a school that maintains a religious exemption ought to interact with a school that does not maintain a religious exemption, if an incident involves two students, one from each type of school. Specifically, a commenter asked whether a school with a religious exemption has a duty to cooperate with another school that was investigating a Title IX incident involving one of its students. Another commenter asked the Department to clarify whether a recipient that invoked a religious exemption still had the duty to provide the full extent of the grievance procedures in § 106.45.

Discussion: The Department appreciates these nuanced questions about how recipients can comply with the final regulations under specific fact patterns. Generally, religious exemptions cannot be invoked to avoid punishment for criminal activity, and absent a specific example, the Department believes asserting a religious exemption to avoid punishment for a crime is unrealistic under Title IX. In any event, the Department does not punish recipients for criminal activity. The Department enforces the non-discrimination mandate in Title IX, which prohibits discrimination on the basis of sex.

With respect to the other factual scenarios that commenters present, the Department and OCR are willing to provide technical assistance to recipients who seek answers to individual factual circumstances, or to stakeholders who may file complaints against recipients eligible for religious exemptions, but we do not believe it is appropriate to attempt to answer these questions at this stage and without the benefit of a complete set of facts.

As with any regulation under Title IX, including § 106.45, an educational institution that is controlled by a religious institution is exempt from Title IX or its implementing regulations only to the extent that Title IX or one of its implementing regulations would not be consistent with the religious tenets of such organization.

Changes: None.

Comments: One commenter suggested a minor revision to § 106.12(b) to make clear that any future claims of institutional religious exemption under the proposed regulations are not predetermined by the scope or nature of any prior claims submitted in writing to the Assistant Secretary: ". . . whether or not the institution had previously sought assurance of ~~the~~ *an* exemption from the Assistant Secretary *as to that provision or any other provision of this part.*"

Discussion: The Department agrees with the reasoning behind this change and changes "the" to "an" as the commenter suggested. The Department does not believe the commenter's other suggested phrase, "as to that provision or any other provision of this part" is necessary to adequately explain the scope and application of this provision.

Changes: The word "the" has been changed to "an" in the final sentence of § 106.12(b) of the final regulations.

Comments: One commenter suggested that the Department ought to go beyond the proposed rule, and promulgate a definition for what it means to be "controlled by a religious organization," so that recipients and the public would know which institutions are in fact eligible for religious exemptions, since there has been confusion previously. Additionally, the commenter asked that the definition take account of and be consistent with Supreme Court case law interpreting the Establishment Clause of the First Amendment.

Discussion: Although the Department appreciates this feedback, it declines to make any changes to these final regulations because the scope of proposed changes to § 106.12 was limited by the Department's proposal to change § 106.12(b) but not subsection (a). The Department decided to address what it means to be controlled by a religious organization for purposes of the religious exemption in Title IX through a subsequent notice of proposed rulemaking.[1729] The Department will continue to offer technical assistance regarding compliance with these final regulations.

Changes: None.

[1729] 85 FR 3190.

Directed Questions[1730]

Directed Question 1: Application to Elementary and Secondary Schools

Comments: Some commenters commended the proposed rules for including elementary and secondary schools, suggesting that their inclusion would have a positive impact on these schools for Title IX purposes. Another commenter asserted that elementary and secondary schools, too, have sexual harassment issues that they must confront; it is not only a problem in postsecondary institutions. One commenter asserted that it was good to have different Title IX approaches for elementary and secondary schools as opposed to postsecondary institutions, since some procedures are appropriate for postsecondary institutions, but may not work for elementary and secondary schools; the commenter pointed to live hearings for postsecondary institutions but no hearing requirement for elementary and secondary schools as a good example of recognizing the differences between elementary and secondary education (ESE) and postsecondary education (PSE) contexts. Another commenter argued that elementary and secondary schools need flexibility to address sexual harassment issues that arise involving younger students.

Discussion: The Department appreciates this feedback on the proposed rules. The Department agrees with commenters that some procedures are more appropriate for postsecondary institutions but not for other recipients, including elementary and secondary schools, and the final regulations reflect such differences. For example, § 106.30 defines "actual knowledge"

[1730] The Department addresses comments submitted in response to the NPRM's Directed Questions 3-4, and 6-9, throughout sections of this preamble to which such directed questions pertain. For example, Directed Question 3 inquired about applicability to the proposed rules to employees, and comments responsive to that directed question are addressed in the "Section 106.6(f) Title VII and Directed Question 3 (Application to Employees)" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble.

more broadly in elementary and secondary schools and § 106.45(b)(6)(ii) does not require live hearings or cross-examination procedures for recipients who are not postsecondary institutions.

Changes: We have revised § 106.30 defining "actual knowledge," to include notice to any elementary and secondary school employee; and we have clarified the language in § 106.45(b)(6)(ii) to more expressly state that unlike postsecondary institutions, elementary and secondary schools are not required to hold hearings as part of the grievance process.

Comments: Some commenters argued that the proposed rules ought to make additional distinctions between ESE students and PSE students. These distinctions, commenters asserted, should include removing the presumption of non-responsibility for students accused of sexual harassment in ESE contexts. Commenters argued that schools at the ESE level ought to be able to presume, in some cases, that a student is responsible for sexual harassment, or at least that no presumption ought to exist in any direction. Commenters argued that this was necessary because schools need to react to time-sensitive situations and exclude accused students or employees from the school atmosphere without having to go through the extensive grievance procedures contemplated by the proposed rule. Commenters also suggested that offering supportive measures was often time-sensitive, such that a full grievance process is not appropriate. Other commenters supported significantly abbreviating the grievance procedures, on the basis that a full process was unworkable at the ESE level. Some commenters expressed concern that younger students would be put at a higher risk for sexual violence, because they might not know the types of touching that are appropriate or inappropriate to come forward to the designated school employee on their own.

Discussion: The Department appreciates this feedback. The Department agrees that schools must have effective tools for responding to allegations of sexual harassment, and the final regulations

protect this interest. The final regulations are designed to promote predictability and a clear understanding of every recipient's legal obligations to respond to sexual harassment incidents, including promptly offering supportive measures to a complainant (i.e., a person alleged to be the victim of sexual harassment) whenever any ESE employee has notice of sexual harassment or allegations of sexual harassment. One of the ways in which these final regulations differentiate between ESE and PSE students is recognizing that ESE students cannot reasonably be expected to report sexual harassment only to certain school officials, or even teachers, and that ESE recipients and their employees stand in a special relationship regarding their students, captured by the legal doctrine that school districts act *in loco parentis* with respect to authority over, and responsibility for, their students. Thus, the final regulations (at § 106.30 defining "actual knowledge") trigger an ESE recipient's response obligations any time an ESE employee has notice of sexual harassment. These final regulations obligate all recipients to promptly reach out to each complainant (i.e., a person alleged to be the victim of conduct that could constitute sexual harassment, regardless of who actually witnessed or reported the sexual harassment) and offer supportive measures, under § 106.44(a). These final regulations (at § 106.6(g)) also expressly acknowledge the importance of respecting the legal rights of parents or guardians to act on behalf of students in a Title IX matter, including but not limited to the choice to file a formal complaint asking the school to investigate sexual harassment allegations. These final regulations define "supportive measures" in § 106.30 in a manner that gives ESE recipients wide discretion to quickly, effectively take steps to protect student safety, deter sexual harassment, and preserve a complainant's equal educational access. As discussed in the "Supportive Measures" subsection of the "Section 106.30 Definitions" section of this preamble, supportive measures cannot "unreasonably burden" the respondent but this does not mean that supportive measures

cannot place *any* burden on a respondent, so actions such as changing a respondent's class or activity schedule may fall under permissible supportive measures, and supportive measures must be offered without waiting to see if a grievance process is eventually initiated or not. Recipients also retain the authority to remove a respondent from education programs or activities on an emergency basis if the respondent presents an imminent threat to the physical health or safety of any individual, under § 106.44(c). We also reiterate that many actions commonly taken in the ESE context are not restricted under these final regulations; while a recipient may not punish or discipline a respondent without complying with the § 106.45 grievance process, actions such as holding an educational conversation with a respondent, explaining to the respondent in detail the recipient's anti-sexual harassment policy and code of conduct expectations, and similar actions are not restricted unless paired with actions that are punitive, disciplinary, or unreasonably burdensome to the respondent.

We disagree that a presumption of non-responsibility[1731] is less important for respondents in the ESE context than in the PSE context, because the presumption serves to reinforce that a recipient must not treat a respondent as responsible for Title IX sexual harassment unless such allegations have been proved or otherwise resolved under a process that complies with § 106.45, but as discussed above, this leaves wide flexibility for recipients to address the need for complainants' equal educational access, protect safety, and deter sexual harassment, while a grievance process is pending or without any grievance pending.

Changes: None.

[1731] For further discussion see the "Section 106.45(b)(1)(iv) Presumption of Non-Responsibility" subsection of the "General Requirements for § 106.45 Grievance Process" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble.

Comments: Many commenters argued that the grievance procedures in the NPRM generally do not work well for ESE recipients. Commenters argued that schools need to take swift action in the ESE setting, since young children are at particular risk of further harm. Commenters also argued that live hearings with cross-examination should not occur where young children are involved. The prospect of an employee or the employee's advisor cross-examining a student in cases where a school opted to allow live hearings troubled some commenters. Some stated that prior written notice should not be required at the ESE level for every investigative interview. Commenters stated that these were flaws in the proposed rules that stemmed from the Department not adequately considering how differences in structure and populations affect Title IX enforcement, as between ESE and PSE contexts.

Commenters contended that the extensive due process protections in the proposed rules would have the consequence of making school proceedings more intimidating for victims. They stated that setting up what amounts to an expressly adversarial process between students at ESEs is inappropriate. Some commenters argued that even referring to students as "complainants" and "respondents" had the unfortunate effect of creating litigation-like settings in ESE schools, and argued that the proposed rules would require significantly more process than what is required by the Supreme Court.[1732] Commenters also stated that students themselves will be confused by the proposed rules, and many will need to hire legal counsel in order to fully understand their rights. Commenters argued that sexual harassment incidents disproportionately affect Black students and transgender students, so the proposed rules would hurt them especially.

[1732] Commenters cited: *Goss v. Lopez*, 419 U.S. 565 (1975).

Some commenters argued that cases at the ESE level should never be subject to a clear and convincing evidence standard of evidence, yet the proposed rules would allow a recipient to choose that standard for resolving allegations of sexual harassment. Some stated that schools, especially underfunded schools, would not be able to afford many of the evidence-sharing provisions of the proposed rules, or the requirement that the investigator be a different person than the person who adjudicates a claim of sexual harassment. Commenters argued that many schools would be destroyed by having to comply with the proposed rules. Some commenters objected to the requirement that every determination regarding responsibility for sexual harassment needed to be accompanied by specific findings and a written report, arguing that such a burden was too onerous for ESE schools. Some contended that poorer schools needed to rely on the single investigator model – as opposed to separate individuals being the Title IX Coordinator, the investigator, and the decision-maker for discipline – and that the proposed rules are unworkable at the ESE level. Other commenters contended that having to explain why each question is or is not asked during a hearing, if it occurs, will be cumbersome and unnecessary.

Aside from the issue of financial burden, some commenters argued that the proposed rules were likely to cause confusion for school personnel, many of whom are not lawyers and who are not trained to administer or prepare for adversarial proceedings. The commenters argued that school officials will often make mistakes, and that confidence in the system will deteriorate to the point that students will opt not to report instances of sexual harassment. Commenters argued that the proposed rules insufficiently consider that schools know best how to handle their own students, and that imposing these burdens is not necessary to resolve claims of sexual harassment.

Some commenters argued that even if recipients were able to implement the new grievance procedures properly, there would still be negative consequences for students and schools. For instance, some commenters argued that the grievance procedures are subject to manipulation, especially when students with financial resources are able to take advantage of the procedures against other students who may lack similar resources. Other commenters suggested that frequent dissatisfaction with the processes or with outcomes would lead to litigation in court. These commenters also argued that full compliance with these final regulations at the ESE level will be expensive and would outweigh any savings.

Other commenters took issue with the informal resolution provisions of the proposed rules, stating that mediation is never appropriate at the ESE level, particularly if there are few requirements surrounding the content of the mediation or if the underlying allegation involves sexual assault. Commenters stated that since the informal resolution process can end the investigation into allegations of sexual harassment, it is problematic to rely on a student's willingness to object to informal resolution – and to insist on the formal grievance procedures – to adequately cause the school to respond to sexual harassment. Other commenters stated that forms of informal resolution like mediation are inherently traumatic for victims of sexual harassment, and some argued that mediation generally utilizes "rape myths" and "victim-blaming language" that ought to be avoided.

Many commenters wanted the Department to expand the scope of the individuals whose knowledge could give rise to a school's duty to respond to sexual harassment. Some commenters expressed concern that students do not know who might have authority to institute corrective measures and who does not, per the scope of the proposed rules. Some commenters suggested that at least mandatory reporters should be covered. Other commenters argued that regardless of

who receives information about sexual harassment, the appropriate response is a "trauma-informed" response, such that the person who alleges sexual harassment ought to be believed from the outset.

The net of all of these issues, argued commenters, was that educational environments and learning would suffer. Schools would have difficulty effectively responding to sexual harassment, and preventing future incidents, asserted commenters. Commenters contended that the proposed rules would discourage young vulnerable students from reporting instances of sexual harassment, out of fear that they might have to endure lengthy and onerous procedures while trying to still maintain their academic progress.

Discussion: The Department appreciates this feedback. The Department is promulgating consistent, predictable rules for recipients who must respond to allegations of sexual harassment, and has balanced the strong need to protect students from sexual harassment and the need to ensure that adequate processes are in place. The Department agrees with commenters who stated that the types of school personnel to whom notice should charge a recipient with "actual knowledge" in the ESE context should be expanded. As discussed in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section and the "Actual Knowledge" subsection of the "Section 106.30 Definitions" section of this preamble, we have revised the final regulations to provide that notice to any elementary or secondary school employee triggers the ESE recipient's response obligations.

Within the confines of these final regulations, recipients may adjust their procedures to minimize the amount of resources that must be spent with respect to each allegation of sexual harassment. The final regulations allow recipients the discretion to facilitate an informal

resolution process,[1733] and permit each recipient to conduct the grievance process under time frames the recipient has designated as reasonable for an ESE environment.[1734] For emergencies posing imminent risks to any individual's safety recipients may, consistent with the terms of the final regulations, invoke emergency removal procedures.[1735]

The Department disagrees that the final regulations are unworkable in the ESE environment, or that they will destroy recipients who must abide by them. Instead, the final regulations offer significant flexibility to recipients, while still maintaining the appropriate balance between a recipient's duty to respond to allegations of sexual harassment and its duty to ensure due process protections that benefit both complainants and respondents.[1736] Additionally, the Department expects that significant efficiencies will result, and the cost to implement required procedures will be reduced, as students, employees, and school personnel interact with consistent and predictable rules. To the extent that a recipient needs the advice of legal counsel to understand its duties, it will be easier for counsel to advise them on the requirements of concrete rules published in regulations than on Department guidance that does not represent legally binding obligations. What may be a cumbersome new procedure at first may soon become routine, and reduce confusion, as a recipient responds to all of its Title IX formal complaints with specific procedures. At the same time, many recommendations and best

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[1733] Section 106.45(b)(9) allows recipients to facilitate informal resolution of formal complaints, except as to allegations that an employee sexually harassed a student. We understand that some commenters, including some recipients, do not believe that informal resolution is appropriate at all in the ESE context, or is not appropriate for sexual assault allegations, and the final regulations allow each recipient to choose whether to offer any informal resolution processes at all.

[1734] Section 106.45(b)(1)(v).

[1735] Section 106.44(c).

[1736] For further discussion see the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section and "Role of Due Process in the Grievance Process" section of this preamble.

practices found in Department guidance remain viable policies and procedures for recipients while also complying with these final regulations, so the Department anticipates that not all recipients will find the need to change their current Title IX policies and procedures wholesale. For further discussion of the similarities and differences among these final regulations and Department guidance documents, see the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section and "Role of Due Process in the Grievance Process" section of this preamble.

As to live hearings with cross-examination, we have clarified the language in the final regulations to emphasize that ESE recipients are not required to use a hearing model to adjudicate formal complaints of sexual harassment under these final regulations. Moreover, if an ESE recipient chooses to use a hearing model, that recipient does not then need to comply with the provisions in § 106.45(b)(6)(i), which applies only to postsecondary institution recipients. For further discussion see the "Section 106.45(b)(6)(ii) Elementary and Secondary School May Require Hearing and Must Have Opportunity to Submit Written Questions" subsection of the "Hearings" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble. Nothing prevents schools from counseling students as to how the grievance procedures will work, or aiding and assisting the parties, on an equal basis, with additional supports as they go through the process. Additionally, many provisions of the final regulations require only that schools provide an equal opportunity to the parties, leave the recipient flexibility to the extent that a recipient would prefer to make the grievance process less formal or intimidating for students. We have also added § 106.6(g) in the final regulations, acknowledging the legal rights of parents or guardians to act on behalf of complainants,

respondents, or other individuals with respect to exercising rights under Title IX, including participation in a grievance process.

The Department disagrees that the final regulations will deter reporting, since having consistent, predictable rules for Title IX proceedings will likely make them less intimidating for ESE students and their parents, and students or employees may gain confidence in a process that expressly allows the complainant to choose whether reporting leads only to supportive measures or also leads to a grievance process.[1737] Indeed, the Department believes that having predictable rules will encourage reporting by students or their parents, and ensure that students and employees who allege sexual harassment will not have to wonder how they will be treated upon reporting. As described in the "Deliberate Indifference" subsection of the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, we have significantly revised § 106.8 and § 106.44(a) to emphasize that reporting sexual harassment is the right of any complainant (or third party, including a complainant's parent) and recipients must offer supportive measures to every complainant (i.e., person alleged to be the victim of sexual harassment), regardless of whether a grievance process is also initiated against a respondent.

The Department also disagrees that parties with significant financial resources will be able to manipulate the grievance process in an unjust manner any more than any other Title IX grievance procedures established in response to Department guidance, since the final regulations provide for meaningful participation of both parties at every stage in a grievance process. The grievance process is designed for students (including, as legally applicable, parents acting on

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[1737] Section 106.44(a); § 106.30 (defining "formal complaint").

behalf of their children)[1738] to navigate without legal representation, though every party has the right to an advisor of choice who may be, but need not be, an attorney.[1739] The Department believes that one way to mitigate the possibility of a party unfairly using financial resources is to grant both complainants and respondents strong procedural rights (including the right to assistance and advice from an advisor of the party's choosing) as they engage in the process.

The Department agrees that schools themselves know best how to engage with their students, and recipients are encouraged to use their discretion and expertise within the confines of the final regulations. This includes what training to give to ESE employees regarding reporting sexual harassment to the Title IX Coordinator (knowing that notice to any ESE employee triggers the recipient's response obligations under these final regulations), what training to give the Title IX Coordinator with respect to circumstances that might justify the Title IX Coordinator deciding to sign a formal complaint in situations where the complainant (and complainant's parent, as applicable) does not want the recipient to investigate allegations, which supportive measures may be appropriate in certain circumstances, what time frames to designate for completion of a grievance process, the use of age-appropriate explanatory language in the written notices that must be sent to parties under § 106.45, what standard of evidence to apply to resolving formal complaints, whether to use the Title IX Coordinator as the investigator or separate those roles, whether to use informal resolution, whether to offer grounds for appeal in addition to those required under § 106.45, the selection of remedies for a complainant where a respondent is found responsible for sexual harassment, and the choice of disciplinary sanctions

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[1738] Section 106.6(g).
[1739] Section 106.45(b)(5)(iv).

against a respondent who is found responsible. The foregoing illustrations of discretion that ESE recipients possess is in addition to the ability of ESE recipients to address conduct that does *not* meet the definition of sexual harassment as defined in § 106.30, as well as other types of student misconduct, outside the confines of these final regulations; these final regulations apply only when the conditions of § 106.44(a) are present (i.e., an ESE employee has notice of conduct that could constitute sexual harassment as defined in § 106.30, that occurred in the recipient's education program or activity, against a person in the United States). The § 106.45 grievance process is a required part of the recipient's response only when the recipient is in receipt of a formal complaint (as defined in § 106.30), which must either be filed by a complainant (i.e., the person alleged to be the victim of sexual harassment, or a parent or guardian legally entitled to act on that person's behalf) or signed by the Title IX Coordinator. In the absence of a formal complaint, the recipient's response must consist of offering supportive measures designed to preserve the complainant's equal access to education, as well as to protect the safety of all parties or deter sexual harassment. The Department does not believe that the final regulations present unduly burdensome, much less insurmountable, obstacles for ESE recipients to fulfill every recipient's obligation to supportively and fairly address sexual harassment in a recipient's education programs or activities.

The Department disagrees that informal resolution is never appropriate for ESE institutions, or that ESE recipients may never use it in the context of allegations of sexual assault. In these cases, the final regulations provide adequate limitations and protections for parties

regarding the use of informal resolutions, and we reiterate that the final regulations do not mandate that any recipient offer or facilitate information resolution processes.[1740]

For the reasons explained in the "Section 106.45(b)(7)(i) Standard of Evidence and Directed Question 6" subsection of the "Determinations Regarding Responsibility" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble, the Department disagrees that the clear and convincing evidence standard of evidence is never appropriate in the ESE setting, such that no ESE recipient should ever be able to adopt that standard to resolve formal complaints of sexual harassment.

Changes: None.

Comments: Commenters argued that students should not have to wait weeks, if not months, for adjudications of and responses to their allegations of sexual harassment. Lack of timely resolution would be made worse, some commenters argued, by the fact that the grievance process can be delayed for law enforcement investigations. Commenters argued that because nearly all sexual harassment allegations in the ESE context will require law enforcement intervention, the proposed rules would result in frequent, significantly delayed processes in the ESE context.

Discussion: The Department appreciates this feedback and discusses these concerns in the "Section 106.45(b)(1)(v) Reasonably Prompt Time Frames" subsection of the "General Requirements for § 106.45 Grievance Process" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble. We reiterate here that the final regulations do not require a recipient to delay a Title IX grievance process while a law

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[1740] Section 106.45(b)(9).

enforcement investigation is pending; rather, § 106.45(b)(1)(v), only permits a recipient to provide for short-term delays or extensions of the recipient's own designated, reasonably prompt time frame for conclusion of the grievance process, when such short-term delay or extension is based on "good cause," and that provision gives as an example of good cause, concurrent law enforcement activity. "Good cause" under these final regulations would not justify a long or indefinite delay or extension of time frames for concluding the Title IX grievance process, regardless of whether a law enforcement investigation is still pending.

Additionally, we reiterate that under § 106.44 a recipient's prompt response to every complainant (once a recipient is on notice that a complainant has been victimized by sexual harassment) is triggered with or without the filing of a formal complaint and without awaiting the conclusion of a grievance process if a formal complaint is filed. We therefore disagree that the § 106.45 grievance process poses a risk of undue delay for any complainant in the ESE context to expect and receive a prompt, supportive response from the ESE recipient designed to restore or preserve the complainant's equal educational access.

Changes: None.

Comments: Commenters argued that the proposed rules' definition of "sexual harassment" would be problematic for ESE populations. These commenters stated that young teens are particularly vulnerable to sexual harassment, but that the standard for determining whether a school has a duty to act – whether conduct was severe, pervasive, and objectively offensive – is too high a bar for ESE students. In this vein, commenters stated that ESE students will be traumatized from repeated incidents of sexual misconduct that do not rise to the level of the § 106.30 definition of sexual harassment. Other commenters noted that because this definition mirrors the standard for private rights of action in civil suits, the proposed rules would have the

consequence of leading more people to court. The commenters argued that if one of the goals of the proposed rules is to reduce the amount of litigation involving Title IX, they do the opposite.

Discussion: The Department appreciates this feedback, but for the reasons explained in the "Sexual Harassment" subsection of the "Section 106.30 Definitions" section of this preamble and in the "Definition of Sexual Harassment" subsection of the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, the Department believes that the § 106.30 definition of sexual harassment is appropriate for application in elementary and secondary schools. We reiterate that under these final regulations, recipients remain free to address misconduct that does not meet that definition under State laws or a recipient's own code of conduct, and as to such misconduct these final regulations (including the general response obligations in § 106.44 and the grievance process in § 106.45) do not apply. For reasons discussed throughout this preamble, including in the "Litigation Risk" subsection of the "Miscellaneous" section of this preamble, the Department believes that these final regulations may have the benefit of reducing litigation, because these final regulations adopt the Supreme Court's *Gebser/Davis* framework for addressing sexual harassment, yet adapt that framework in a manner that places on recipients specific legal obligations to support complainants that are not required in private Title IX lawsuits, and do so in a manner that we believe also ensures that the recipient's response meets constitutional requirements of due process of law and respect for First Amendment rights (which public schools owe to students and employees) and concepts of fundamental fairness that private schools owe to students and employees. Thus, we believe that implementing these final regulations may have the ancillary benefit of reducing litigation arising from school responses to Title IX sexual harassment.

Changes: None.

Comments: Commenters argued that schools will be confused when trying to balance certain Federal rights with other ones, in cases where there is tension. Commenters argued that the proposed rules did not adequately discuss what should happen when one of the students involved in allegation of sexual harassment is a student with a disability and has rights under the IDEA or Section 504. One commenter stated that under the IDEA, school districts serve students from the age of three to the age of 21, so providing for one-size-fits-all policies, even just for students with a disability, might not be developmentally appropriate. Other commenters argued that the proposed rules may be in tension with rape shield laws, or that, at least, school personnel will have difficulty navigating the issues if there is ambiguity.

Discussion: The final regulations do not supersede the IDEA, Section 504, or the ADA. The final regulations provide significant flexibility for recipients, and recipients may utilize this flexibility in challenging cases, including where a recipient must comply with both these final regulations, and applicable disability laws. Additionally, the final regulations provide complainants with rape shield protections, and deem questions and evidence regarding a complainant's prior sexual behavior irrelevant (unless such questions or evidence are offered to prove that someone other than the respondent committed the alleged conduct, or if it concerns specific incidents of sexual behavior with the respondent and is offered to prove consent). These concerns are further addressed in the "Section 106.45(b)(6)(ii) Elementary and Secondary School Recipients May Require Hearing and Must Have Opportunity to Submit Written Questions" subsection of the "Hearings" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble.

Changes: None.

Comments: Some commenters stated that they were concerned about the proposed rules creating a two-tiered system of complaints, which would be particularly challenging at the ESE level. The commenters argued that some allegations would rise to the level of sexual harassment contemplated by the proposed rules and would therefore trigger a school's duty to respond and go through the grievance procedures. Other conduct, stated commenters, might be sexual in nature, and even severe or pervasive or objectively offensive – but not all three – and thus not trigger a duty to respond, and not trigger any need to go through the grievance procedures. But this conduct might still be prohibited by a school's code of conduct, noted commenters, and a school could still discipline students for code of conduct violations. Commenters thought this would pose an awkward, confusing process for both students who allege unwelcome conduct occurred, and for students who were accused of unwelcome conduct.

Discussion: As discussed above and throughout this preamble, these final regulations define sexual harassment that triggers a recipient's response obligations to mean any of three types of misconduct (i.e., *quid pro quo* harassment by an employee, severe and pervasive and objectively offensive unwelcome conduct that denies a person equal educational access, or any of the four Clery Act/VAWA sex offenses – sexual assault, dating violence, domestic violence, or stalking). The Department believes that drawing a distinction between actionable sexual harassment under Title IX, and other misconduct that may be unwelcome but does not interfere with a person's equal educational access (such as offensive speech protected by principles of free speech and academic freedom), helps a recipient reach the difficult balance between upholding the non-discrimination mandate of Title IX while comporting with constitutional rights and principles of

fundamental fairness.[1741] As explained in the "Sexual Harassment" subsection of the "Section 106.30 Definitions" section of this preamble, Federal non-discrimination laws such as Title IX (as interpreted under Department guidance) and Title VII (under which a standard of "severe or pervasive" sexual harassment applies) have long utilized *some* threshold measure of when misconduct rises to the level of being actionable under the Federal non-discrimination law (e.g., when a school must respond under Title IX, or an employer must respond under Title VII). The Department's use in these final regulations of the Supreme Court's *Davis* formulation of actionable sexual harassment as *one of three* categories of misconduct defined as actionable sexual harassment leaves recipients discretion to address other misconduct as the recipient deems appropriate (or as required under State laws), while focusing Title IX enforcement on responding to conduct that jeopardizes a person's equal educational access. That response must support a complainant while being fair to both parties, including by offering supporting measures to a complainant and refraining from punishing a respondent without following a fair grievance process. The Department views this flexibility as a strength of these final regulations, rather than to the detriment of recipients or their students and employees. While this may create two different sets of procedures for recipients, this is a natural consequence of having to comply with a Federal non-discrimination laws such as Title IX, which focuses on denial of equal educational access and does not cover all types of student misconduct, and appropriate enforcement of which may require processes that are above and beyond processes a school uses to address other types of student misconduct.

Changes: None.

[1741] *See* the "Role of Due Process in the Grievance Process" section of this preamble.

Comments: Commenters suggested that if anything, ESE schools should provide more due process for respondents than PSE institutions, and not less, because students must generally attend ESE schools as a matter of compulsory State laws regarding education, whereas there is no compulsory education at the postsecondary level; commenters shared personal stories of themselves (or family members) being accused of sexual harassment as high school students and urged the Department to provide high school students with strong due process protections. One commenter alleged that ESE institutions are dominated by teachers' unions on the left side of the political spectrum, and are therefore trained to believe all accusers, such that accused students cannot expect to get fair treatment unless it is mandated by Federal law. One other commenter argued that whatever the proposed rules provide, they should offer additional protections to parties who are students, as opposed to employees, given that there is no right or obligation related to having a job, but there are compulsory attendance rules for schools.

One other commenter stated that the proposed rules do not account for schools that want to eschew the adversarial process in most cases and focus instead on practices generally referred to as "restorative justice." These practices, asserted commenters, reduce implicit bias and protect school climate better than pure disciplinary models.

Discussion: The Department believes that the final regulations protect due process for students and employees at both the ESE and PSE levels.[1742] The final regulations effectively require that schools provide adequate due process protections to all students, irrespective of whether school personnel themselves are ideologically supportive of such rights, and at the same time require schools to respond supportively to protect complainants' equal educational access. Additionally,

[1742] *See* the "Role of Due Process in the Grievance Process" section of this preamble.

the final regulations establish sufficient rights for ESE students to adequately defend themselves from accusations of sexual harassment, for example through the right to inspect and review all evidence directly related to the allegations including exculpatory evidence, whether obtained by a party or other source, the right to review the investigative report containing the recipient's summary of relevant evidence, the right to an advisor of choice, and the right to pose written questions and follow-up questions to the other party and witnesses prior to a determination regarding responsibility being reached. At the same time, the foregoing procedural rights are granted equally to complainants, resulting in a truth-seeking grievance process that provides due process protections for all parties.

Nothing in the final regulations prevents recipients from facilitating informal resolution processes, including what commenters referred to as restorative justice processes, within the confines of § 106.45(b)(9).

Changes: None.

Comments: Many commenters argued that the Department's Directed Question 1 was itself flawed, because it asked whether different rules ought to apply to different institutions that are ESE or PSE institutions, while many ESE students interact with PSE institutions in a variety of ways. Commenters noted that some PSE institutions run daycares, elementary and secondary school sporting enrichment programs, host high-school students for events, and even enroll high-school students in dual-enrollment courses at the PSE level. Several community colleges commented to say that they had numerous ESE students enrolled in their courses, and that many of these students came onto their campuses physically during the day. The schools argued that it would be confusing to use certain procedures designated only for the PSE recipients when minors – and perhaps even young children who were simply enrolled in daycare at the institution

– were involved in an allegation of sexual harassment. Some commenters noted that it was theoretically possible to have two minors who attend high school but who are dual-enrolled in college courses as parties to an investigation. In that case, asserted commenters, a school would have to use its own institution's grievance procedures, despite the students being minors, which commenters argued cannot be what the proposed rules intended.

Discussion: The Department agrees with commenters who suggested that no system will perfectly distinguish individuals who ought to be subject to more sophisticated procedures in every instance of alleged sexual harassment, but that distinguishing between ESE and PSE recipients is valuable as a proxy. These final regulations require a recipient to respond to sexual harassment whenever the recipient has notice of sexual harassment that occurred in the recipient's own education program or activity, regardless of whether the complainant or respondent is an enrolled student or an employee of the recipient.[1743] The manner in which a recipient must, or may, respond to the sexual harassment incident may differ based on whether the complainant or respondent are students, or employees, of the recipient. For example, if a complainant is not an enrolled student but attends a sports camp at the institution, the type of supportive measures reasonably available to help that complainant may differ from supportive measures that would assist an enrolled student. As another example, if the respondent is not enrolled or employed by the institution but commits sexual harassment in the recipient's education program or activity, the recipient may in its discretion (via the Title IX Coordinator

[1743] Section 106.44(a) (general response obligations of a recipient); § 106.30 (defining "complainant" to mean "an individual" without restricting the definition to a student or employee); § 106.30 (defining "respondent" to mean "an individual" without restricting the definition to a student or employee); § 106.30 (defining "formal complaint" and stating that a formal complaint may be filed by a complainant who is participating, or attempting to participate, in the recipient's education program or activity at the time of filing the formal complaint).

signing a formal complaint) initiate a grievance process against that respondent,[1744] yet must still offer supportive measures to the complainant. Conversely, if the respondent is not enrolled or employed by the institution, the recipient may, in its discretion, dismiss a formal complaint filed by the complainant against that respondent,[1745] and again, must still offer supportive measures to the complainant. While the Department understands that many students are dual-enrolled, and that some students in ESE are over the age of majority and some students in PSE are minors, we believe that these final regulations appropriately set forth legal obligations for all recipients to respond supportively to complainants and fairly to both complainants and respondents, and that the concept of an ESE recipient, or a PSE recipient, needing to take into account the ages of its students is neither unfamiliar nor infeasible for ESE and PSE recipients.

With respect to concerns that complainants who are minors may suffer sexual harassment in a PSE institution's education program or activity and thus the PSE institution would be applying grievance procedures to a formal complaint filed by that complainant, including procedures that are more difficult for minors to navigate in and participate in (for example, appearing at a live hearing and being subjected to cross-examination), these final regulations contain protections that mitigate the potential for re-traumatization of all complainants at a live hearing. For instance, § 106.45(b)(6)(i) states that, at the request of either party, the recipient must provide for the live hearing (including cross-examination) to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see

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[1744] Section 106.30 (defining "formal complaint" as a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent); § 106.44(b)(1) (requiring a recipient to follow the § 106.45 grievance process in response to any formal complaint and to meet all § 106.44(a) obligations which include offering the complainant supportive measures).

[1745] Section 106.45(b)(3)(ii) (permitting discretionary dismissal of a formal complaint in specified instances, including where the respondent is no longer enrolled or employed by the recipient).

and hear the party or the witness answering questions; forbids parties from personally questioning each other; and expressly states that before any party must answer a cross-examination question the decision-maker must first determine whether the question is relevant. Moreover, a complainant need not be subjected to cross-examination at a PSE institution's live hearing, so long as the decision-maker does not rely on any statement of that complainant in reaching a determination regarding responsibility.[1746] Nothing in these final regulations precludes a recipient from training its investigators or decision-makers in best practices for interviewing and questioning minors, so long as such training also meets the requirements for training of Title IX personnel set forth in § 106.45(b)(1)(iii). These provisions help ensure that cross-examination (which may seem daunting especially for a minor) is conducted in a reasonable, respectful, truth-seeking manner. These final regulations provide additional protections that are especially helpful for a minor student navigating a grievance process, whether conducted by an ESE institution or a PSE institution; for example, § 106.45(b)(5)(iv) allows each party to select an advisor of choice who may be, but need not be, an attorney, while § 106.6(g) recognizes the legal right of a parent to act on a complainant's behalf throughout the grievance process.

Changes: None.

Comments: Some commenters argued that the proposed rules ought to be changed to contemplate different categories of ESE students, and therefore distinguish between allegations of sexual harassment that occur at elementary schools, middle schools, and high schools.

[1746] Section 106.45(b)(6)(i).

Discussion: As discussed in the "Role of Due Process in the Grievance Process" section of this preamble, consistency and predictability are important goals of these final regulations, balanced with the recognition that the type of due process owed may be different in particular situations, which the Department has concluded include the difference between the ESE and PSE context.[1747] However, different processes for preschool, elementary school, middle school, and high school would significantly reduce the end goal of providing recipients, students, and employees with a consistent, predictable framework for recipient responses to Title IX sexual harassment. Within the framework of the final regulations, recipients retain significant discretion to employ age-appropriate rules and approaches (so long as such discretionary rules apply equally to complainants and respondents).[1748]

Changes: None.

Comments: Commenters asserted that the proposed rules ought to be modified to state expressly that students can always rely on their parents or guardians for assistance as they proceed through the Title IX process at their school.

Discussion: Nothing in the final regulations prevents students from relying on their parents or guardians for assistance or selecting a parent or guardian as an advisor of choice during a grievance process. Indeed, where parents or guardians have a legal right to act on behalf of a student, including during a grievance process, the final regulations expressly respect such right, and where a parent has the legal right to act on their child's behalf, the parent may accompany

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[1747] For example, the final regulations require postsecondary institutions to use a live hearing model for Title IX sexual harassment adjudications, while ESE recipients need not use any kind of hearing. § 106.45(b)(6)(i)-(ii).
[1748] The introductory sentence of revised § 106.45(b) states that any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in § 106.30, must apply equally to both parties.

their child throughout the grievance process in addition to an advisor of the party's choice.[1749] The Department expects that for many students, the participation of a parent or guardian in the grievance process will be a function of their underlying legal rights as parents or guardians, and the final regulations respect, and do not alter, those parental or guardianship rights.

Changes: None.

Comments: One commenter suggested that in the ESE setting, schools should have the duty only to investigate and draft a report and recommendation, but then provide the report and recommendation to an outside neutral party. That way, asserted the commenter, school personnel would not have to adjudicate the final result and potential disciplinary consequences of the Title IX process.

Discussion: The final regulations are designed for school officials to perform the functions of investigators and decision-makers without the need to hire outside contractors. The final regulations do not preclude a recipient from outsourcing its investigative and adjudicative responsibilities under these final regulations, but the Department declines to require recipients to do so, and the recipient remains responsible for compliance with these final regulations whether a recipient meets its obligations by using its own personnel or by hiring outside contractors.

Changes: None.

Comments: Commenters suggested that the final regulations should include robust training requirements for school personnel, especially with respect to the differences between ESE and PSE institutions. Other commenters suggested that school personnel undergo trauma-informed training, such that they would better be able to observe symptoms of sexual harassment.

[1749] Section 106.6(g); § 106.45(b)(5)(iv).

Discussion: Recipients must, under § 106.45(b)(1)(iii), ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process receive certain training, including on the definition of sexual harassment, the scope of the recipient's education program or activity, how to conduct an investigation and grievance process, including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias, and (as to investigators and decision-makers) how to determine issues of relevance. While these training materials must not rely on sex stereotypes and must promote impartial investigations and adjudications of sexual harassment, recipients may use their discretion to adopt additional components to training, including materials describing the impact of trauma.

Changes: None.

Comments: Commenters stated that the proposed rules would likely be in tension with numerous State laws that codify certain procedures before students can be disciplined, particularly if the discipline is suspension or expulsion. Commenters asserted this would have unpredictable consequences, such as schools perhaps having to conduct two separate investigatory or grievance procedures, in order to comply with both the proposed rules and State law. Commenters asserted that having to conduct two separate processes would be awkward, confusing, and potentially in conflict with one another. Some suggested as a solution adding a waiver requirement, so that the Secretary could permit schools to opt out of certain grievance procedures. Other commenters suggested a safe harbor provision, such that a school in compliance with State law need not separately comply with the proposed rules.

Discussion: The Department appreciates this feedback but declines to make any changes to the final regulations in response to these comments. Recipients ought, to the maximum extent

possible, seek to comply with all State and local laws, consistent with the final regulations. To the extent that a conflict cannot be resolved, the final regulations control. For further discussion of conflict with State laws, see the discussion in the "Section 106.6(h) Preemptive Effect" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble. For reasons explained in the "Role of Due Process in the Grievance Process" section of this preamble, the Department has determined that the provisions in § 106.45 constitute the important procedures needed to ensure that investigations and adjudications of Title IX sexual harassment allegations are fair, reliable, and viewed as legitimate, to effectuate the non-discrimination mandate of Title IX – an important Federal civil rights law. As to student or employee misconduct that does not constitute Title IX sexual harassment, these final regulations do not prescribe what kind of disciplinary procedures a recipient must or may use. The Department does not view this potential for "two separate processes" as a negative consequence of these final regulations; rather, these final regulations appropriately confine their application only to sex discrimination in the form of sexual harassment, and leave other misconduct under the purview of States and local schools.

Changes: None.

Comments: Some commenters asked whether the grievance procedures varied based on who the complainant was, who the respondent was, or which institution was conducting the process. These commenters also asked what should occur if there are multi-party allegations, and the school must interact with individuals of different grade levels. One commenter described a hypothetical situation of a professor in a PSE setting who teaches ESE students, perhaps as part of a dual-enrollment program. In the hypothetical, one of the ESE students accuses the professor of sexual harassment, but refuses to participate in cross-examination at a live hearing, since the

proposed rules contemplate that procedure only for PSE institutions. The commenter asked if the school must discount the allegation, find the professor non-responsible for the accusation, and simply drop the issue, ignoring the possibility that the professor may then sexually harass other students.

Discussion: The obligations of a recipient are tied to whether it is an ESE or a PSE institution, not to the individual parties involved in a specific allegation of sexual harassment. Whether sexual harassment involves two individuals or more is not relevant to the question of which procedures apply; however, in response to commenters who wondered how multi-party situations could be addressed, the final regulations add § 106.45(b)(4) giving recipients discretion to consolidate formal complaints where allegations arise from the same facts and circumstances, so that a single grievance process might involve multiple complainant and/or multiple respondents. Where sexual harassment is alleged in the education program or activity of a PSE institution, § 106.45(b)(6)(i) requires the recipient to adjudicate the allegations by holding a live hearing, with cross-examination conducted by party advisors (including a recipient-provided advisor if a party appears at the live hearing without an advisor of choice). That provision instructs the decision-maker not to rely on statements of a party who chooses not to appear or be cross-examined at the live hearing; however, the revised provision also directs the decision-maker not to draw any inference about the determination regarding responsibility based on the refusal of a party to appear or be cross-examined. Thus, a recipient is not required to "drop the issue" or required to reach a non-responsibility finding whenever a complainant refuses to appear or be cross-examined; rather, the decision-maker may proceed to objectively evaluate the evidence that remains (excluding the non-appearing party's statements) and reach a determination regarding

responsibility.[1750] Further, a recipient must offer supportive measures to a complainant regardless of whether the complainant signs a formal complaint initiating a grievance process or refuses to participate in a grievance process, and nothing in the final regulations precludes a recipient from providing supportive measures designed to deter sexual harassment regardless of the outcome of a grievance process. Under § 106.44(d), a recipient may place a non-student employee-respondent on administrative leave during pendency of a grievance process, ensuring that regardless of the outcome of the grievance process the recipient may separate an employee from contact with students, in the recipient's discretion.

Changes: None.

Comments: Some commenters asked for more guidance about how ESE students should pose questions to each other during the grievance process, and how ESE students should be expected to respond, and whether a parent or advisor could help them craft responses. One commenter suggested that the proposed rules ought to expressly provide that a school should take account of the English proficiency of the parties involved in a sexual harassment complaint. Another commenter suggested that the final regulations should address instances where a young student alleges sexual harassment, but their parent is unsupportive or uninvolved in the student's life and thus does not adequately help the student through the process.

One commenter suggested that all cases of sexual harassment involving an ESE institution ought to begin with informal resolution processes to avoid the allegedly lengthy and

[1750] For further discussion of the consequences of a party or witness refusing or failing to appear at a live hearing or refusing to submit to cross-examination, see the "Hearings" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble.

onerous grievance processes. Another commenter suggested that a school ought to have a duty to appoint an advocate or trauma-informed counselor for every student alleging sexual harassment.

Other commenters suggested that some provisions be clarified. For instance, commenters suggested that it be unambiguously expressed that live hearings are not required at the ESE level. Commenters also suggested an unambiguous provision about emergency removal being acceptable where a school determines that an imminent threat to health or safety exists in an ESE school. Another commenter suggested that parental rights should be more clearly spelled out than in the proposed regulations. One commenter suggested that OCR issue sub-regulatory guidance to aid ESE institutions in understanding the final regulations.

Discussion: As discussed in the "Section 106.45(b)(6)(ii) Elementary and Secondary School Recipients May Require Hearing and Must Have Opportunity to Submit Written Questions" subsection of the "Hearings" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble, we have revised § 106.45(b)(6)(ii) in line with commenters' request to more clearly state that an elementary and secondary school recipient is not required to hold hearings to adjudicate formal complaints, and the aforementioned preamble discussion explains that if an ESE recipient does choose to hold a hearing (live or otherwise), these final regulations do not prescribe the procedures that must occur at such a hearing held by an ESE recipient (e.g., cross-examination need not be provided), and that preamble discussion also addresses commenters' concerns and questions about what the written submission of questions process must, and may, consist of under § 106.45(b)(6)(ii).

As noted previously, we have added § 106.6(g) to expressly acknowledge the legal rights of parents or guardians to act on behalf of parties during a Title IX grievance process. Where a young student's parent is unsupportive or unable to assist the student, the student is still entitled

to an advisor of choice (under § 106.45(b)(5)(iv)) and nothing in the final regulations precludes a recipient from adopting a policy of offering to provide an advisor to students, as long as such a policy makes a recipient-offered advisor equally available (on the same terms) to complainants and respondents, per the revised introductory sentence of § 106.45(b). As noted previously, nothing in the final regulations precludes a recipient from training its Title IX personnel in trauma-informed approaches as long as such training also complies with the requirements in § 106.45(b)(1)(iii).

The final regulations expressly acknowledge that recipients may need to adjust a grievance process to provide language assistance for parties; see § 106.45(b)(1)(v).

For reasons discussed in the "Informal Resolution" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble, we decline to require parties to attempt informal resolution prior to commencing the grievance process; we believe that the parties should only engage in informal resolution when that choice is the result of each party's voluntary, informed, written consent.[1751] We reiterate that a parent or guardian's legal right to act on behalf of a complainant or respondent extends to every aspect of a grievance process, which would include deciding whether to voluntarily consent to participate in informal resolution.

The Department believes that § 106.44(c) authorizing emergency removals of respondents who pose an imminent threat to the physical health or safety of one or more individuals appropriately addresses the need for ESE recipients to respond quickly and

[1751] We have revised § 106.45(b)(9) regarding informal resolutions to preclude a recipient from offering or facilitating informal resolution to resolve allegations that an employee sexually harassed a student.

effectively to emergency risks that arise out of sexual harassment allegations. That provision applies equally to all recipients, including ESE recipients.

The Department will offer technical assistance to recipients, including ESE recipients, regarding implementation of these final regulations. However, for reasons described in the "Notice and Comment Rulemaking Rather than Guidance" section of this preamble, the Department believes that legally binding regulations will be more effective than Department guidance with respect to enforcing recipients' Title IX obligations.

Changes: None.

Comments: One commenter stated that the proposed rules create a separate process for one type of discrimination but do not impose the same requirements for other types of discrimination, and elementary and secondary school districts already have age appropriate procedures in place to respond to claims of all types of discrimination.

One commenter asserted that postsecondary institutions have significantly more resources than elementary and secondary schools and argued that the proposed rules should be tested at the postsecondary level prior to implementation in elementary and secondary schools.

One commenter asserted that the proposed rules are problematic in the elementary and secondary school context because many of the school districts in the commenter's State are small, with one administrator acting as Title IX Coordinator, who is typically the school district superintendent. The commenter stated that decisions regarding responsibility for behavioral violations and disciplinary actions, however, are typically left to school principals who are directly accountable for students. The same commenter asserted that implementing the proposed rules will be costly for small school districts, which will need to train additional staff and contract with third-party investigators.

Discussion: These final regulations specifically address sexual harassment as a form of sex discrimination and are based on the premise that sexual harassment must be addressed through a specific grievance process, whether or not that process is also applied with respect to other types of discrimination. The "prompt and equitable" grievance procedures described in § 106.8 must be used to resolve complaints of sex discrimination, while the grievance process in § 106.45 must be used to resolve allegations of sexual harassment in formal complaints. The Department's regulations under Title VI describe the process for addressing discrimination based on race, color, and national origin. Different types of discrimination may require a different process, and a recipient is not required to address discrimination on the basis of race (for instance, under Title VI) in the same manner as sexual harassment under these final regulations implementing Title IX.[1752]

The Department disagrees that all elementary and secondary school districts have age-appropriate procedures to respond to allegations of sexual harassment as well as all other types of discrimination. Numerous commenters described experiences with ESE recipients who have not responded supportively and/or fairly to sexual harassment allegations, and the Department seeks to hold ESE recipients accountable for meeting legally binding response obligations under these final regulations.

We disagree that all postsecondary institutions have more resources than elementary and secondary schools. The Department notes that these final regulations apply to smaller and larger postsecondary institutions. The Department disagrees that these final regulations should be tested

[1752] For further discussion see the "Different Standards for Other Harassment" subsection of the "Miscellaneous" section of this preamble.

in postsecondary institutions before being applicable to elementary and secondary schools because the final regulations have different requirements for postsecondary institutions than for elementary and secondary schools where appropriate, and require all recipients to respond supportively and fairly to sexual harassment in recipients' education programs or activities. Testing these final regulations at postsecondary institutions will not necessarily result in a better outcome for elementary and secondary schools. There also should be some uniformity or similarity among recipients, whether elementary and secondary schools or postsecondary institutions, in addressing the same type of sex discrimination in the form of sexual harassment. The Department disagrees that these final regulations are unduly burdensome for smaller elementary and secondary schools. The Department does not require any recipient to use third-party investigators or otherwise to hire contractors to perform a recipient's investigation and adjudication responsibilities under these final regulations. Any recipient, irrespective of size, may use existing employees to fulfill the role of Title IX Coordinator, investigator, and decision-maker, as long as these employees do not have a conflict of interest or bias and receive the requisite training under § 106.45(b)(1)(iii). These final regulations provide essential safeguards for complainants and respondents, and these safeguards should not be sacrificed due to concerns of administrative burden or financial cost. We note throughout this preamble areas in which the Department has revised these final regulations to relieve administrative burdens where doing so preserves the intention of important provisions of the grievance process (for example, § 106.45(b)(5)(vi) removes the requirement that evidence subject to the parties' inspection and review be electronically sent to parties using a file sharing platform that restricts downloading and copying, and now permits the evidence to be sent either in electronic format or hard copy).

The Department is not aware of any State or local laws that directly conflict with these final regulations and discusses preemption and conflicts with State laws in greater detail in the "Section 106.6(h) Preemptive Effective" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble.

Changes: None.

Directed Question 2: Application Based on Type of Recipient or Age of Parties

Comments: Numerous commenters stated that the proposed rules appropriately distinguished between ESE and PSE institutions, as opposed to distinguishing between students based on age. Some commenters noted that it would be difficult for schools to apply different procedures to different students, and it would be especially confusing when the students were different ages, such as 17 and 18. Commenters asserted that for multi-party allegations where both minors and adults are involved as both complainants or respondents, it would be hard for schools to know which policies to apply.

Many commenters stated that once a student attends a PSE institution, the student should be treated as an adult for the purpose of the proposed rules. Some commenters cited FERPA in support of this proposition, contending that FERPA recognizes instances where "a student has reached 18 years of age or is attending an institution of postsecondary education." Other commenters suggested that no system was perfect, but that using the institution that the student attends or employee works at is at least a rough proxy for which procedures should apply. One commenter asserted that since the real risk posed by the distinction between procedural regimes is having young children subject to procedures that are most effective for more sophisticated parties, the safer approach is to distinguish by institution, not age, since very few young children will be in a college setting. One commenter cited the varying school climates between ESE and

PSE institutions as another reason that the distinction worked as a rough proxy for sophisticated parties. One commenter stated that it would do little good for the final regulations to distinguish parties by age, since the commenter argued that even two people who are over 18 can be in vastly different positional relationships to one another, in terms of power, authority, or mental development.

Discussion: We appreciate the feedback offered by commenters, and the Department agrees that given the options, it is preferable to distinguish between the types of institution that are involved in a sexual harassment allegation rather than try to distinguish based on the ages of the parties involved. While no dividing line will ever be perfect, we expect that the line that the Department has chosen will minimize the situations where young students are subject to procedures conducted by a PSE institution, and we reiterate that even the most rigorous procedures required in PSE institutions (i.e., live hearings with cross-examination) may be applied in a manner that seeks to avoid retraumatizing any complainant, including a complainant who is underage.[1753]

Changes: None.

Comments: Some commenters responded to the NPRM's Directed Question 2 by disagreeing with the approach taken in the proposed rules, stating that it would be preferable to distinguish students and applicable grievance procedures by age, rather than the institution with jurisdiction over the incident. These commenters suggested that age, combined with maturity level, is the best way to determine whether a student ought to be subject to more sophisticated grievance procedures. Some commenters asserted that students who are under age 18 might be more likely

[1753] For further discussion see the "Hearings" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble.

to rely on their parents or guardians, who may be able to assist them with the process, whereas students over age 18 may not have the same ability.

Other commenters defended the use of age as a dividing line, stating that some very young students go to college if they advance swiftly through elementary and secondary school. Commenters also stated that students who are over age 18 have vastly different mental maturity and developmental abilities than those under age 18, although commenters did say that some individuals with neuro-developmental disabilities who are over age 18 should not be subject to cross-examination.

Other commenters asserted that it would be strange to have teachers and other employees at ESE institutions receive fewer due process rights than PSE employees, given that these individuals may need access to the same grievance procedures to ensure a fair hearing. For instance, the commenter suggested that it was anomalous to offer a professor the right to have their advisor cross-examine a complainant who was 17 years old, but enrolled in college, whereas a teacher accused by an 18 year old senior in an ESE setting would have no such right. Indeed, where two employees at an ESE institution are involved, commenters asserted, it is not clear why the parties are not entitled to the full breadth of the grievance procedures, since both are presumably sophisticated parties.

Discussion: The Department appreciates this feedback and acknowledges that any dividing line may lead to anomalous results in some cases. We believe, however, that the final regulations can best ameliorate those situations by structuring the distinction in certain procedural requirements as between ESE and PSE institutions, rather than by the ages of involved parties. Nothing in the final regulations, however, prevents schools from, for example, holding live hearings at the ESE level when both parties are employees or over age 18. We agree with commenters who stated

that requiring an institution to vary its procedures based on the ages of the parties would likely lead to undue confusion, particularly where the parties are of different ages, or where multi-party allegations occur. We note that § 106.6(g), acknowledging the legal rights of parents and guardians to act on behalf of parties in a Title IX grievance process, does not differentiate between when a parent or guardian's rights apply to an ESE student versus a PSE student, except to recognize that application of parental rights must also be consistent with FERPA.

Changes: None.

Comments: Commenters stated that informal resolution is not appropriate at the ESE level, especially in cases involving a teacher who is accused of sexual harassment. Since adults sometimes groom their victims for sexual abuse, commenters argued that it would be inappropriate and harmful to permit a teacher to escape the grievance process by going through mediation or another informal resolution process when the "choice" to participate in informal resolution may not be truly voluntary on the part of the young victim.

Discussion: The Department is persuaded by commenters' concerns that grooming behaviors make ESE students susceptible to being pressured or coerced into informal resolution processes, and we have revised § 106.45(b)(9) to preclude all recipients from offering or facilitating informal resolution processes to resolve allegations that an employee sexually harassed a student.

Changes: As discussed elsewhere in this preamble, we have revised § 106.45(b)(9)(iii) to prohibit ESE recipients (or any other recipients) from providing an informal resolution process to resolve allegations that an employee sexually harassed a student.

Comments: Some commenters stated that the proposed rules should be revised to more consciously address students who are dual-enrolled in high school and college. Commenters asserted, for instance, that the PSE procedures (i.e., live hearings with cross-examination) should

not apply to students who are minors, even if they are dual-enrolled in postsecondary institutions. Other commenters argued that the final regulations should be changed to focus more on age distinctions, but only for specific processes, such as cross-examination, which some commenters asserted would be fine for students over age 18. Some commenters suggested that a PSE institution ought to at least have the flexibility to apply the ESE grievance procedures for instances where all of the parties were dual-enrolled, or where all of the parties were minors. Some commenters responded to the directed question by suggesting even further breakdowns of students; for example, that the full grievance procedures should only apply to students who are adults and who are in a PSE setting; another set of procedures should apply to students in grades four through 12; and another set of procedures should apply to students in grades three and below.

Other commenters responded to the directed question by proposing other modifications to the proposed rules. One commenter suggested that PSE schools be able to adopt separate policies for individuals who are in their education program or activity, but who are not students or employees. These might include, according to the commenter, students who are merely enrolled at the PSE institution for athletic camp, 4-H programs, daycare students, or other individuals who are not taking normal college courses at the PSE institution. The commenter suggested that this was particularly appropriate where State law might already address these situations, such as when a daycare is operated on a PSE campus.

Discussion: The Department appreciates this feedback but declines to make any changes to the final regulations based on these comments. In these final regulations, we seek to balance competing interests to adequately make Title IX processes consistent, predictable, and understandable for all parties, at all types of educational institutions, as well as in the context of

recipients who operate education programs or activities but are not educational institutions (for example, some museums and libraries are recipients of Federal financial assistance covered under Title IX). The commenters' suggestions would involve making further distinctions between students, than the differences acknowledged in the final regulations between ESE and PSE recipients. The more exceptions that are made to what is largely a uniform rule, the less likely it is that students and employees will know what to expect with respect to reporting sexual harassment and their school's response to such a report, including what a grievance process will look like if a formal complaint is filed, and it could become more difficult for recipients to apply these final regulations in a consistent, transparent manner. The distinctions the final regulations do make between elementary and secondary schools, and postsecondary institutions, are those distinctions that the Department believes result in a consistent, transparent set of rules appropriately modified to take into account the generally younger ages of students in elementary and secondary schools.[1754]

Changes: None.

Directed Question 5: Individuals with Disabilities

Comments: While some commenters stated that the proposed rules adequately accounted for issues related to the needs of students and employees with disabilities, many commenters raised concerns and objections based on obstacles students with disabilities currently face in the context of Title IX proceedings, and expressed general opposition on the ground that the proposed rules

[1754] For example, see the discussion in the "Hearings" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble regarding use of a live hearing model for adjudications in postsecondary institutions but not mandating hearings (live hearings or otherwise) for elementary and secondary schools or other recipients that are not postsecondary institutions.

fail to take into account the different needs, experiences, and challenges of students with disabilities. A few commenters suggested that the Department seek the counsel of, and defer to, organizations and professionals well-versed in issues faced by individuals with disabilities, so that the needs of individuals with disabilities are accommodated in all phases of a Title IX process.

Several commenters stated that students with invisible disabilities such as ADHD (attention-deficit/hyperactivity disorder), autism, and anxiety disorder, do not currently receive the resources and supports specific to their unique needs during Title IX proceedings. Some commenters presented personal stories of how their disabilities, or those of their children or students they know, were not accommodated during Title IX investigations and hearings. Some commenters were concerned about a recipient's apparent discretion to provide appropriate reasonable accommodations individuals with disabilities during the investigation and adjudication process. Some commenters stated that their disability, or the disability of their child, would make the grievance process too difficult to undergo, and would result in fewer people with disabilities being able to report, which may even lead to more suicides.

Some commenters believed the proposed rules failed to consider the need for accommodations for respondents with disabilities, particularly those on the autism spectrum, and that it is important that communications with those students are made in a manner that is clearly understandable to those students. Commenters asserted that many respondents with disabilities are not informed or aware that their rights under disability law also are available to them in a Title IX disciplinary proceeding. One commenter suggested, for example, that all Title IX-related communications, such as e-mails, should have a bold print statement of protection for students with disabilities. Commenters noted that effective communication is essential to protect

the rights of respondents who have disabilities, particularly communication disorders such as autism, nonverbal learning disorders, and expressive and receptive language disorders. Commenters stated that such students often lack appropriate social skills, do not understand nonliteral language, desperately want to "fit in," are terrified of persons with authority, are quick to apologize for fear of "getting in trouble" and generally can be very manipulated as they are very misunderstood, and that these factors may lead to unfairly holding such students responsible for sexual harassment when a student may not actually be responsible.

Several commenters stated that there is inadequate coordination between Title IX offices and disability services offices when a student with an invisible disability becomes involved in a Title IX proceeding, as either a complainant or a respondent. Often, commenters stated, students are unaware of either the necessity of receiving accommodations from disability services or of the necessity of waiving their privacy rights to allow the two offices to communicate. Some commenters stated that institutions of higher education should coordinate with their offices of disability services to identify students with disabilities who are involved in Title IX proceedings (while respecting student privacy rights), and should disseminate Title IX information in ways that are accessible to all students (including ensuring that websites are accessible and that information is provided in plain language for students with intellectual disabilities). Commenters asserted that failure of a student to access disability services can result in the complainant or respondent being placed at a distinct disadvantage during the Title IX proceedings. Some commenters suggested that one way to connect the university's disability services with the Title IX office might be to have students who may need accommodations provide advance permission for a disability office to consult with a disciplinary office (including a Title IX office) should the

student be subjected to a disciplinary proceeding, thereby alerting the Title IX office to the student's disability and ensuring the student's disability rights are protected.

Discussion: The Department appreciates that some commenters believed that the proposed rules adequately accounted for issues faced by students and employees with disabilities, and understands the concerns from other commenters that the final regulations should more fully and expressly account for the needs, experiences, and challenges of students with disabilities. The Department appreciates that many stakeholders representing the interests of individuals with disabilities participated in the public comment process, and appreciates the opportunity here to emphasize the importance of recipients complying with all applicable disability laws when meeting obligations under these final regulations.

The Department understands that a grievance process may be difficult to undergo for many students, regardless of disability status, and that such a process may be more challenging to navigate for individuals with disabilities. In response to commenters' concerns, we have revised § 106.44(a) to require recipients to offer supportive measures as part of a prompt, non-deliberately indifferent response any time a recipient has notice of sexual harassment or allegations of sexual harassment against a person in the United States, in the recipient's education program or activity. This prompt response must include the Title IX Coordinator promptly contacting the complainant (i.e., the person alleged to be the victim of conduct that could constitute sexual harassment, regardless of who reported the sexual harassment to the recipient) to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. The process for offering supportive

measures after considering the complainant's wishes is an interactive process that is not unlike the interactive process that the ADA requires. By ensuring that each complainant is offered supportive measures regardless of whether the reported incident results in a grievance process, more complainants, including individuals with disabilities, can feel safe reporting without fearing that a report automatically leads to participation in a grievance process.[1755]

The Department appreciates the descriptions from commenters of the importance of clear communication with students with disabilities, particularly those on the autism spectrum, and the importance that students understand that their rights under disability laws apply during a Title IX proceeding. The Department appreciates the opportunity to emphasize here that recipients must meet obligations under these final regulations while also meeting all obligations under applicable disability laws including the IDEA, Section 504, and the ADA. With respect to the intersection between these Title IX final regulations, and disability laws under which the Department has enforcement authority, the Department will continue to offer technical assistance to recipients.

The Department acknowledges commenters' concerns noting that a student with a disability may need to interact with separate offices within a recipient's organizational structure (e.g., a disability services office, and a Title IX office). The Department emphasizes that recipients must comply with obligations under disability laws with respect to students, employees, or participants in a Title IX reporting or grievance process situation, regardless of the recipient's internal organizational structure. These final regulations, which concern sexual harassment, do not address a recipient's obligations under the ADA and do not preclude

[1755] Supportive measures are also available for respondents. *See* § 106.30 (defining "supportive measures" to include services provided to respondents); § 106.45(b)(1)(ix) (ensuring that parties are informed of the type of supportive measures available to complainants and respondents).

recipients from notifying students involved in a Title IX grievance process that the students may have rights to disability accommodations.

To the extent that disability accommodations may overlap with supportive measures or remedies required under Title IX, the Department notes that if an accommodation involves a Title IX supportive measure or remedy, the final regulations specify that the Title IX Coordinator is responsible for the effective implementation of such supportive measures (§ 106.30 defining "supportive measures") and remedies (§ 106.45(b)(7)(iv) as added in the final regulations). These requirements are intended, in part, to ease the burden on a student in need of the supportive measure or remedy to receive the needed service especially when doing so involves coordination of multiple offices within the recipient's organizational structure (for example, when a supportive measure involves changing a dorm room assignment and doing so through the housing office, and a student with a disability needs to ensure a housing unit modified to accommodate a disability, or when a remedy involves re-taking an exam and doing so through an academic affairs office).

Changes: We have revised § 106.44(a) to require recipients to offer supportive measures as part of a prompt, non-deliberately indifferent response to sexual harassment, and to require the recipient's Title IX Coordinator to promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. Section 106.45(b)(7)(iv) now provides that Title IX Coordinators are responsible for the effective implementation of remedies.

Comments: Some commenters expressed concern that the proposed rules would harm students with disabilities and make them more invisible and vulnerable to sexual abuse because they might not know the types of touching that are appropriate or inappropriate to come forward to the designated school employee on their own.

Several commenters stated that students with disabilities that limit their ability to communicate may find it even more difficult to discuss incidents of a sexual nature. People with significant intellectual disabilities may not understand what is happening or have a way to communicate the sexual assault to a trusted person. Some commenters expressed concern that the proposed rules would isolate students with disabilities because a recipient's disability office may no longer be required to report a sexual assault.

Some commenters stated that the proposed rules discriminate against survivors with developmental disabilities, who are more vulnerable to sexual abuse and that such a disability might prevent such individuals from being able to communicate with school officials and provide evidence for their case. For example, commenters suggested, a student with a disability may only be comfortable communicating sensitive issues to their own teacher(s), and in some cases may only be able to communicate with appropriately trained special education staff. Other students, commenters asserted, with less significant disabilities, may realize they are being assaulted, but do not know they have a right to say no. In addition, they are rarely educated about sexuality issues (including consent) or provided assertiveness training. Even when a report is attempted, such students face barriers when making statements to police because they may not be viewed as credible due to having a disability. Some people with intellectual disabilities also have trouble speaking or describing things in detail, or in proper time sequence. Other commenters stated that people with disabilities may also face challenges in accessing services to make a

report in the first place; for example, someone who is deaf or deaf-blind may face challenges accessing communication tools, like a phone, to report the crime or get help.

Discussion: The Department appreciates commenters' concerns that students with disabilities may have challenges comprehending the types of touching that are inappropriate or understanding they have a right to say "no," identifying when they have been sexually harassed, or communicating about an incident, and concerns that some students with disabilities are more vulnerable to sexual abuse than peers without the same disabilities. While the Department does not control school curricula and does not require recipients to provide instruction regarding sexuality or consent, nothing in these final regulations impedes a recipient's discretion to provide educational information to students. Although the Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault, a recipient's definition of consent should not violate any disability laws, and the Department will continue to enforce the disability laws that it is authorized to enforce. The Department also wishes to emphasize that a recipient's obligation to respond to sexual harassment incidents does not depend on the reporting complainant using specific or particular language to describe an experience that may constitute Title IX sexual harassment. The Supreme Court has noted that whether conduct rises to the level of actionable harassment depends on a "constellation of surrounding circumstances, expectations, and relationships" including but not limited to "the ages of the harasser and the victim . . . ."[1756] Similarly, recognizing whether a student has disclosed a Title IX sexual harassment incident includes taking into account any disability the reporting student may have that may affect how that student describes or communicates about the incident.

[1756] *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999) (internal citations omitted).

In response to commenters concerned that younger students, whether because of age, development, or disability, reasonably cannot be expected to report to a school's Title IX Coordinator, the final regulations expand the definition of a recipient's actual knowledge to include notice to any elementary or secondary school employee. Thus, in an elementary or secondary school context, the school's response obligations are triggered when, for instance, an employee in the school's disability office, or the teaching aide of a student with disabilities, has notice of a Title IX sexual harassment incident. These final regulations therefore expand the pool of school employees to whom any complainant, including a student with a disability, may disclose sexual harassment and expect the school to respond as required under Title IX, whether the student reports to a particular employee due to feeling more comfortable or due to only being able to communicate with special education staff.

With respect to commenters' concerns that individuals with certain disabilities may face challenges accessing communication tools, such as a phone or website, when trying to report a Title IX sexual harassment incident, the Department reiterates that recipients must meet obligations under these final regulations while also meeting all obligations under applicable disability laws including the IDEA, Section 504, and ADA, including with respect to accessibility of websites and services. With respect to the intersection between the Title IX final regulations and disability laws under which the Department has enforcement authority, the Department will continue to offer technical assistance to recipients.

Changes: We have revised § 106.30 to expand the definition of "actual knowledge" to include notice to any employee of an elementary or secondary school.

Comments: Commenters stated that the proposed rules seemed concerned with the rights and needs of respondents with disabilities (for instance, by expressly referencing the IDEA and ADA

in the emergency removal provision in § 106.44(c) that applies to removing a respondent), but not with the rights and needs of students with disabilities who are sexually harassed, and commenters stated that these students face unique challenges that would be intensified if the proposed rules were implemented.

Commenters asserted that some disabilities may put people at higher risk to be victims of crimes like sexual assault or abuse, for example because someone who needs regular assistance may rely on a person who is abusing them for care, and may be more likely to suffer physical and mental illnesses because of violence. Other commenters noted that students with disabilities already face unfair challenges such as removal from classes because of disproportionate discipline.

Commenters also stated that people hold negative stereotypes about students with disabilities (such as being child-like for life, or sexually deviant) that make Title IX proceedings more difficult. Commenters stated that students with disabilities are less likely to be believed when they report and often have greater difficulty describing the harassment they experience, and that students with disabilities who also identify as members of other historically marginalized and underrepresented groups, such as LGBTQ individuals or persons of color, are more likely to be ignored, blamed, and punished when they report sexual harassment due to harmful stereotypes that label them as "promiscuous."

Discussion: To the extent that some commenters misconstrue the final regulations to consider only the rights and needs of students with disabilities who are accused of sexual harassment and not the unique challenges facing students with disabilities who are sexually harassed, the Department appreciates the opportunity to clarify that recipients must comply with all disability laws protecting the rights and accommodating the needs of students (and employees) with

disabilities regardless of whether such students (and employees) are complainants or respondents in a Title IX sexual harassment situation. The Department also notes that § 106.44(a) has been revised to require recipients to provide supportive measures as part of its prompt and non-deliberately indifferent response to sexual harassment, and the Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. All complainants, including complainants with disabilities, will receive the benefit of supportive measures under § 106.44(a).

The Department acknowledges that some disabilities may put people at greater risk of being sexually assaulted or abused and that individuals with disabilities may be more likely to suffer physical or mental illness due to violence. The final regulations prescribe a consistent framework for a recipient's response to Title IX sexual harassment for the benefit of every complainant, including individuals with disabilities and other demographic populations who may be at higher risk of sexual assault than the general population.

To the extent that commenters accurately describe negative stereotypes applied against students with disabilities, and particularly against students with disabilities who are also students of color or LGBTQ students, the final regulations expressly require recipients to interact with every complainant and every respondent impartially and without bias. A recipient that ignores, blames, or punishes a student due to stereotypes about the student violates the final regulations. We have revised § 106.45(b)(1)(iii) prohibiting Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolutions, from having conflicts of interest or bias

against complainants or respondents generally, or against an individual complainant or respondent, by requiring training that also includes "how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias." No complainant reporting Title IX sexual harassment should be ignored or met with judgment or disbelief, and the final regulations obligate recipients to meet response obligations impartially and free from bias. The Department will vigorously enforce the final regulations in a manner that holds recipients responsible for acting impartially without bias, including bias based on an individual's disability status.

In further response to commenters' concerns that harmful stereotypes may also lead a recipient to unfairly punish students with disabilities reporting sexual harassment allegations, the Department has added § 106.71(a) to expressly prohibit retaliation and specifically stating that charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX or its implementing regulations, constitutes retaliation. This section is intended to draw recipients' attention to the fact that punishing a complainant with non-sexual harassment conduct code violations (e.g., "consensual" sexual activity when the complainant has reported the activity to be nonconsensual, or underage drinking, or fighting back against physical aggression) is retaliation when done for the purpose of deterring the complainant from pursuing rights under Title IX. The Department notes that this provision applies to respondents as well.

Changes: We have revised § 106.45(b)(1)(iii) to include in the required training how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and

bias. Additionally, we have added § 106.71(a), prohibiting retaliation and stating that charging an individual with a code of conduct violation that does not involve sexual harassment but arise out of the same facts or circumstances as sexual harassment allegations, for the purpose of interfering with rights under Title IX, constitutes retaliation.

Comments: Some commenters asserted that even in the higher education context cross-examination would inhibit individuals with disabilities from receiving equal access to the process. These commenters asserted that the proposed rules made no exception for individuals with disabilities who would require a reasonable modification of the live cross-examination requirement in order to testify in the proceeding, so the required live cross-examination would place undue burden on individuals with various types of disabilities or force recipients to violate Section 504 or the ADA. For example, individuals with psychiatric disabilities such as post-traumatic stress disorder, social anxiety disorder, or generalized anxiety disorder are at particular risk of having their symptoms exacerbated by such a live cross-examination process, potentially causing serious harm to their wellbeing and their ability to function in interpersonal and academic environments.

Additionally, commenters stated, individuals with various other disabilities, especially those who utilize various verbal and nonverbal communication methods and/or who have disabilities impacting their receptive or expressive language, may also feel undue pressure of needing to present details as evidence in such a time-constrained environment.

Discussion: The Department reiterates that recipients must meet obligations under these final regulations while also meeting all obligations under applicable disability laws including the IDEA, Section 504, and ADA. It is unnecessary to specify as an "exception" to the live hearing requirements in § 106.45(b)(6)(i) that recipients must also comply with disability laws. The

Department notes that § 106.45(b)(1)(v) expressly contemplates that good cause for temporary delays or limited extensions of time frames relating to a grievance process may include "the need for language assistance or accommodation of disabilities." With respect to the intersection between the Title IX final regulations and disability laws under which the Department has enforcement authority, the Department will continue to offer technical assistance to recipients.

Changes: None.

Comments: Some commenters argued that the proposed rules fail to recognize the difference between the procedural requirements elementary and secondary school students have under the IDEA and how Title IX, the ADA, and Section 504 each distinctively require equal educational opportunity for all students with disabilities at all levels (elementary, secondary, and postsecondary institutions that receive Federal funds). Some commenters asserted that many students will be denied access to free appropriate public education (FAPE) under the IDEA if bullying is carved out of the definition of sexual harassment, and that school districts should have the flexibility to investigate allegations of sexual harassment and impose disciplinary consequences in accordance with school district policies, as well as to determine what additional supports and services may be necessary to ensure a safe and welcoming environment for all students. Other commenters stated that an incident under Title IX may also trigger a need for an individualized education plan (IEP) team to meet to discuss behavior modifications.

Some commenters requested that the final regulations clarify that segregation of elementary and secondary school students with disabilities from classroom settings should be rare and only allowed when in compliance with IDEA; that recipients must be made aware that a student with a disability does not have to be eligible for FAPE in order to be protected under the disability laws; and that, although IDEA may have additional requirements to provide FAPE,

recipients must not be misled into thinking there are different standards for elementary and secondary school and postsecondary education environments when it comes to equal access to educational opportunities.

Discussion: The Department reiterates that recipients, including elementary and secondary schools and postsecondary institutions, must meet obligations under the final regulations while also meeting all obligations under applicable disability laws including the IDEA, Section 504, and ADA. With respect to the intersection between these Title IX final regulations, and disability laws under which the Department has enforcement authority, the Department will continue to offer technical assistance to recipients. Recipients' obligation to comply both with these final regulations and with disability laws applies to all aspects of responding to a Title IX sexual harassment incident including investigation, discipline, and segregating elementary and secondary school students with disabilities from classroom settings. Nothing in these final regulations precludes or impedes a recipient from determining what services may be necessary to ensure a safe, welcoming environment for all students.

The Department does not fully understand the commenter's concern that bullying will be "carved out" of the definition of Title IX sexual harassment. Section 106.30 defining sexual harassment for Title IX purposes does not reference bullying or carve it out. To the extent that conduct understood as "bullying" is also conduct on the basis of sex that meets the definition in § 106.30, such conduct is also Title IX sexual harassment. Additionally, these final regulations expressly prohibit retaliation in § 106.71, and to the extent that "bullying" constitutes retaliation as defined in § 106.71(a), such conduct is strictly prohibited.

Changes: None.

Comments: Some commenters asserted that students with disabilities are improperly accused and mistreated in Title IX hearings in the elementary and secondary school and college settings, where their due process rights are often ignored, and they are not treated equitably. One commenter expressed concern that the grievance procedures outlined in the proposed rules rely heavily on a written communication modality, which may mean that individuals with communication disorders and disabilities, may not have access to the complaint process and suggested that the proposed rules should be revised to include other modalities, such as oral, manual, augmentative and alternative communication (AAC) techniques, and assistive technologies, that allow individuals with disabilities and individuals who rely on AAC technology to use unaided systems such as gestures, facial expressions, or sign language, or they may use basic aided systems including picture boards or high-tech aided systems such as speech-generating devices. Several commenters expressed concern that § 106.45(b)(7) (prescribing what a written determination regarding responsibility must include) does not adequately protect students with disabilities.

Some commenters stated that institutions of higher education should coordinate with their offices of disability services to identify students with disabilities who are involved in Title IX proceedings (while respecting student privacy rights), and disseminate Title IX information in ways that are accessible to all students (including website accessibility, and provided in plain language for students with intellectual disabilities). Commenters stated that electronic file sharing may create barriers for students with disabilities to review the materials confidentially, and that the proposed rules require documents in writing and other processes that are not accessible to many students with disabilities.

Commenters stated that the final regulations should require recipients to be on notice that they must consider the unique needs of students with disabilities throughout the entire Title IX process, not just during an emergency removal determination (referring to § 106.44(c)). Some commenters specifically requested that recipients be instructed to provide training to any officials involved in Title IX proceedings (including any faculty or staff with reporting obligations under Title IX, and, per some commenters, campus police officers and per other commenters, all elementary and secondary school employees) that explicitly includes information about how to meet the needs of students with disabilities, the various ways in which students with invisible disabilities may behave as a complainant or respondent in a Title IX proceeding, and the intersection of Title IX, the ADA, and the IDEA. Similarly, commenters requested that the final regulations require schools to ensure that pre-existing resource guides for students involved in Title IX proceedings also include specialized resources for students with invisible disabilities.

Other commenters stated that institutions for higher education are not providing their faculty and staff with the necessary training for them to identify and accommodate the unique needs of students with invisible disabilities if one of these students were to become involved in a Title IX proceeding, as either a complainant or respondent. These commenters argued that as to prevention, due process, and supportive measures, there are numerous advantages in recognizing and addressing the intersection between students with disabilities and sexual harassment, both for alleged perpetrators and alleged victims.

Commenters asserted that failure of a student to access disability services can result in the complainant or respondent being placed at a distinct disadvantage during the Title IX proceedings. Commenters suggested that one way to connect the university's disability services

with the Title IX office might be to have students who may need accommodations to provide advance permission for a disciplinary office to consult with the disability office, should the student be subjected to a disciplinary proceeding, thereby alerting the Title IX office of the student's disability and ensuring the student's disability rights are protected. Other commenters suggested that the Title IX office should provide all students with a notification form at the beginning of the process informing the student that if the student has a documented disability, the student may have the right to accommodations during the Title IX process, for example by modifying a university's enrollment intake form to include the option: "If you are ever a party in any disciplinary proceeding on campus, do you give permission for the discipline officers to be given information about your disability and for the disability office to be notified?" Related to that waiver, some commenters requested that the Department instruct each school to properly inform students of their right to inform their parents about their involvement in a Title IX proceeding, and any additional ramifications that may arise from their decision to waive their confidentiality rights so as to ensure that any students exercise of such a waiver is done in an informed manner.

Commenters also stated that the Department should expand the proposed rules to provide explicit support for complainants and respondents with disabilities, for example by allowing the presence of a "support person" separate and apart from the student's Title IX advisor. Some commenters requested that the final regulations specify that recipients have an affirmative duty to communicate the nature of the allegation and inquire whether a person needs an accommodation in a way that people with an intellectual disability can understand and respond, and that campus police enforcing Title IX must be trained on how to interact with students with disabilities in ways that are not harmful to the learning environment.

Some commenters stated that at small institutions of higher education there is a conflict of interest if the Title IX investigator is also the ADA compliance officer, which diminishes the protection of students with disabilities.

Some commenters stated that many colleges' and universities' Title IX offices do not have accessible facilities for students.

Some commenters requested the Department consider how allowing parties to review even evidence the investigator deems irrelevant (§ 106.45(b)(5)(vi)) could result in disclosure of private disability-related information.

Some commenters requested that other specific disability accommodations be described in the final regulations including:

- accessible formatting of all written and recorded based documentation based upon the person's individually specific needs;
- adding language about accessible formatting of materials distributed by the recipient regarding Title IX information and relevant local resources;
- the live hearing portion of this document should account for individuals with disabilities by guaranteeing accessible technology when separate room and same room hearings are conducted;
- requiring recipients to offer reasonable accommodations to complainants who are unable to submit a written complaint due to, for example, a physical disability;
- acknowledging that disability-related accommodations may be necessary for any part of the proceeding that requires use of technology (such as the evidence review (§ 106.45(b)(5)(vi)) and testimony provided via video (§ 106.45(b)(6)(i)).

Discussion: To the extent that commenters asserted that students with disabilities are improperly accused of Title IX violations due to the accused person having a disability, the Department notes that the definition of Title IX sexual harassment includes an element that the allegations constitute conduct that is "objectively offensive," and that the Supreme Court has stated that application of the "severe, pervasive, and objectively offensive" portion of the definition "depends on a constellation of surrounding circumstances, expectations, and relationships . . . including, but not limited to, the ages of the harasser and the victim . . . ."[1757] The Department believes that any disability of the person accused (or of the person making the allegation) is also part of the "surrounding circumstances" to be taken into consideration when evaluating whether conduct meets the definition of sexual harassment. Even when conduct committed by a respondent with a disability constitutes sexual harassment (e.g., because the conduct constitutes sexual assault, or because the conduct is severe, pervasive, and objectively offensive), the Department does not second guess whether the recipient imposes a disciplinary sanction on a respondent who is found responsible for sexual harassment, and thus recipients have flexibility to carefully consider the kind of consequences that the recipient believes should follow in a situation where a respondent with a disability unintentionally committed conduct that constituted sexual harassment, perhaps not realizing the effect of the conduct on the victim. For example, the recipient could determine that counseling or behavioral intervention is more appropriate than disciplinary sanctions for a particular respondent. (We note that in such a circumstance, the complainant is still entitled to remedies designed to restore or preserve the complainant's equal educational access.)

[1757] *Davis*, 526 U.S. at 651 (internal quotation marks and citations omitted).

To the extent that commenters have observed, or believe, that students with disabilities accused of sexual harassment often have their due process rights ignored, the final regulations do not permit disciplinary sanctions against any respondent for Title IX sexual harassment without the recipient first following the § 106.45 grievance process, which incorporates fundamental principles of due process.

In response to the commenter's concern that the grievance process relies heavily on a written communication modality, the Department reiterates that recipients must meet obligations under these final regulations while also meeting all obligations under applicable disability laws including the IDEA, Section 504, and ADA. Recipients' obligations to comply both with these final regulations and with disability laws applies to all aspects of responding to a Title IX sexual harassment incident including throughout the § 106.45 grievance process.

The Department is unsure what commenters mean by asserting that § 106.45(b)(7)(ii) (prescribing what a written determination regarding responsibility must include) does not adequately protect students with disabilities; this provision, along with § 106.45 in its entirety, applies equally to any party in a grievance process including individuals with disabilities, and recipients are required to comply with § 106.45(b)(7)(ii) and to comply with applicable disability laws, including with respect to accessibility of written materials. Similarly, recipients must comply with § 106.45(b)(5)(vi) requiring recipients to send evidence to the parties while also complying with legal obligations under disability laws. The Department revised § 106.45(b)(5)(vi) to specifically provide that the recipient may provide the party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy format, and recipients should provide such evidence in a format that complies with any applicable disability laws.

The Department appreciates commenters urging the Department to put recipients on notice that recipients must comply with applicable disability laws in all aspects of a Title IX response including throughout the grievance process, and not only with respect to removals under § 106.44(c), and the Department takes this opportunity to emphasize to recipients that such compliance is required.

The Department declines to impose new requirements through these final regulations that recipients train employees on how to meet the needs of students with disabilities or training on recognizing the way students with invisible disabilities may behave as a complainant or respondent in a Title IX proceeding, or on the intersection of Title IX, the ADA, and the IDEA, or to provide resource guides that include specialized resources for students with invisible disabilities. Nothing in these final regulations precludes a recipient from providing employee training with respect to students with disabilities. In response to commenter's concerns about bias against various groups (including bias stemming from negative stereotypes), we have revised § 106.45(b)(1)(iii) to require Title IX Coordinators, investigators, decision-makers, and persons who facilitate an informal resolution process to be trained on how to serve impartially and avoid conflicts of interest and bias; such impartiality and avoidance of bias protect all parties including individuals with disabilities. As to questions regarding the intersection of Title IX, the ADA, and IDEA, the Department will continue to offer technical assistance to recipients who must comply with multiple laws under which the Department has enforcement authority.

The Department acknowledges commenters' concerns noting that a student with a disability may need to interact with separate offices within a recipient's organizational structure (e.g., a disability services office, and a Title IX office). The Department emphasizes that recipients must comply with obligations under disability laws with respect to students,

employees, or participants in a Title IX reporting or grievance process situation, regardless of the recipient's internal organizational structure. These final regulations, which concern sexual harassment, do not address a recipient's obligations under the ADA and do not preclude recipients from notifying students involved in a Title IX grievance process or at the beginning of any Title IX process that the students may have rights to disability accommodations.

With respect to allowing a "support person" to accompany a person with a disability during a grievance process, apart from an advisor of choice under § 106.45(b)(5)(iv), recipients must comply with any disability laws that require such an accommodation, and § 106.71(a), which requires recipient to keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as permitted by FERPA, required by law, or as necessary to conduct the grievance process. Thus, a recipient may be required under disability laws to permit a person with a disability to be accompanied throughout a grievance process by a support person, in addition to the party's advisor of choice. Similarly, nothing in these final regulations precludes a recipient from affirmatively inquiring of each party whether any disability accommodation is needed, and recipients must comply with applicable legal obligations under disability laws including Child Find mandates under the IDEA.

The Department notes that § 106.45(b)(1)(iii) prohibits conflicts of interest on the part of Title IX Coordinators, investigators, decision-makers, or persons who facilitate informal resolution processes; however, the Department declines to prematurely judge whether or not a Title IX Coordinator also serving as a school's ADA compliance officer presents a prohibited

conflict of interest because such a determination is fact-specific. The Department will offer technical assistance to recipients regarding compliance with the final regulations.

The Department reiterates that recipients must comply with applicable disability laws in all aspects of a Title IX response including with respect to intake of reports and formal complaints, written communications with complainants and respondents, review of evidence under § 106.45(b)(5)(vi), and holding a live hearing with parties in separate rooms or holding live hearings virtually using technology in postsecondary institutions under § 106.45(b)(6)(i). With respect to the intersection between these Title IX final regulations, and disability laws under which the Department has enforcement authority, the Department will continue to offer technical assistance to recipients.

Changes: The Department has revised § 106.45(b)(1)(iii) to include in the required training how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. The Department revised § 106.45(b)(5)(vi) to provide that recipients must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and we have removed the reference to a file sharing platform.

Comments: Some commenters stated that recipients should be expected to carefully analyze their data on complainants and respondents with disabilities, and consider that information with respect to disproportionate outcomes and discipline for students by disability, race, sexual identity, sexual orientation, age, and other important demographics.

Discussion: The Department does not disagree that analyzing data about a recipient's Title IX grievance processes could provide the recipient with useful information that could help the recipient self-evaluate the fairness and effectiveness of its processes as well as the impact on various demographics of the recipient's educational community. The Department, however,

declines to burden recipients with the obligation to collect and analyze such data in these final regulations, the scope of which was defined by the Department's proposals in the NPRM. These final regulations do not prohibit a recipient from engaging in such self-study or collecting data that will be useful for an assessment. The Department believes that these final regulations provide robust protections for complainants and respondents and that by complying with these final regulations, recipients will not discriminate on the basis of sex and will provide equal access to its education program or activities such that any self-assessment is not required in order to appropriately enforce Title IX, though self-assessment may be a valuable tool for recipients to undertake in the recipient's discretion.

Changes: None.

Miscellaneous

Executive Orders and Other Requirements

Comments: Some commenters expressed concerns about the process for commenting electronically, both in terms of how the Department processed comments it received electronically and the functionality of the electronic system for submitting public comments, regulations.gov. With respect to how the Department processed comments, some commenters contended that the Department, in the NPRM, committed to posting, before the comment period ended, all of the public comments it received. One of these commenters referred to Administrative Conference of the United States (ACUS) recommendation 2018-6 (see 84 FR 2139) that encouraged agencies to allow access to comments already received to help inform others who are developing comments on the same proposed rule. With respect to the electronic commenting process, at least one commenter stated that the technical problems that regulations.gov experienced during the comment period prevented them from accessing the

proposed rules as a reference for informing their public comment and that, consequently, there was a question as to the fairness of the commenting process.

Some commenters expressed concern that the manner in which people must submit their comments is discriminatory, for example by race, class, educational status, ability status, and more. Commenters argued that the process for submitting public comments assumes that people write in English-Standardized English, leaving no room for dialects and vernaculars like African American Vernacular English, much less non-English languages, and assumes that people have a detailed understanding of the law and can comprehend the inaccessible way in which the proposed regulations were written.

Discussion: The Department did not commit to electronically posting all of the comments it received *before the comment period closed*, and there is no legal requirement to do so. The language the commenter referred to is language we use in all of our NPRMs designed to inform interested parties that we provide avenues for review of all public comments, but that language did not specify that all comments received (and not yet posted) would be available to review on regulations.gov before the comment period closed. The ACUS recommendation the commenter cited explicitly qualifies that an agency should post comments during the comment period "to the extent this is possible." Reviewing and processing comments before they are posted takes time and resources, and the Department did so as expeditiously as possible.

Regarding the concern that the NPRM was not available on regulations.gov on February 13-14 because of a server failure, the NPRM was available on regulations.gov from November 29, 2018, through February 12, 2019, and on February 15, the day when the comment period reopened. The Department originally provided a 60-day comment period for its proposed regulations that began on November 29, 2018, and the Department extended the comment period

for two days until January 30, 2019,[1758] and also reopened the comment period for one day on February 15, 2019.[1759] We note that the outage the commenter referred to did not last for the entirety of February 13 and 14 and that www.regulations.gov was available for significant parts of both days. Additionally, the NPRM was available on other websites for viewing to help inform the development of comments, such as www.federalregister.gov and the Department's website, on February 13-14, 2019. The comment period for the proposed rules spanned a total of 63 days, which is longer than the 60-day comment period referenced in section 6(a) of Executive Order 12866.

The Department followed applicable legal requirements for the manner in which public comments were submitted. The Department reviewed and considered comments submitted by any person regardless of race, class, educational status, ability status, or any other characteristic. The Department reviewed and considered comments regardless of whether a comment utilized language reflecting various dialects or vernaculars and regardless of whether a comment evidenced a detailed understanding of the law.

Changes: None.

Comments: At least one commenter stated that the Department failed to consult with the Department of Justice, the Small Business Administration (SBA), small entities, Native American tribes, and State and local officials pursuant to various laws and policies. Specifically, the commenter stated that Executive Order 12250 required the Department to obtain approval from the Attorney General before we published the NPRM. The commenter also stated that the

[1758] 84 FR 409.
[1759] 84 FR 4018.

Department did not transmit a copy of the NPRM to the SBA's Office of Advocacy ("SBA Advocacy") which is required under § 603(a) of the Regulatory Flexibility Act. The commenter also claimed that the Department did not use of any of the reasonable techniques required under 5 U.S.C. 609(a) to assure that small entities have been given an opportunity to participate in the rulemaking. Similarly, the commenter stated that the Department did not consult with tribal officials under § 5(a) of Executive Order 13175, which the commenter believed was required because the NPRM proposed to regulate when and how tribally-operated schools will investigate and adjudicate complaints of sexual harassment. Lastly, the commenter stated that the Department did not consult with State and local officials as required under executive order. This commenter referenced a process that the Department allegedly used in 2000 to provide interested State and local elected officials opportunities for consultation through a biweekly electronic newsletter and to provide the National School Boards Association and others with opportunities for consultation through a listserv notification. The commenter stated that there was no language in the NPRM suggesting the Department complied with its internal process. In addition, the commenter stated that Executive Order 13132 requires the Department to consult with elected State and local officials "early in the process of developing the proposed regulation" under § 6(c)(1), and to publish a federalism summary impact statement under § 6(c)(2).

Discussion: The Assistant Attorney General for Civil Rights reviewed the proposed rules and approved the NPRM to be published in the *Federal Register* in accordance with Executive Order 12250. Additionally, SBA Advocacy had the opportunity to review the NPRM and submitted a public comment, which we have addressed in this preamble, specifically in the "Regulatory Flexibility Act" subsection of the "Regulatory Impact Analysis" section of this document. Furthermore, 5 U.S.C. 609(a) applies only if a rule has a significant economic impact on a

substantial number of small entities, and we have certified that this rule does not have such an impact. Even if § 609(a) applied, that section provides that one of the five techniques available to provide small entities the opportunity to participate in the rulemaking is to publish the proposed rules in publications likely to be obtained by small entities. We published the NPRM in the *Federal Register* and specifically provided small entities the opportunity to comment on the proposed regulations. With regard to Native American tribal consultation, we note that the comment we received was not from a Native American tribe or from a representative of a Native American tribe. Nevertheless, section IV of the Department's Consultation and Coordination with American Indian and Alaska Native Tribal Governments policy,[1760] provides that the Department will conduct tribal consultation regarding actions that have a substantial and direct effect on tribes. The policy lists specific programs that serve Native American students or that have a specific impact on tribes and provides that for those programs, regulatory changes or other policy initiatives will often affect tribes, but for other programs that affect students as a whole, but are not focused solely on Native American students, the Department will include Native American tribes in the outreach normally conducted with other stakeholders who are affected by the action. Here, the action affects all students and entities in the U.S. equally and is not specifically impacting only tribes. Thus, Native American tribes had the same opportunity to comment on the proposed rules as other stakeholders.

As previously noted in the "General Support and Opposition for the Grievance Process in § 106.45" section and the "Section 106.44(c) Emergency Removal" subsection of the

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[1760] U.S. Dep't. of Education, Consultation and Coordination with American Indian and Alaska Native Tribal Governments Policy ("Tribal Governments Policy") 2, https://www2.ed.gov/about/offices/list/oese/oie/tribalpolicyfinal.pdf.

"Additional Rules Governing Recipients' Responses to Sexual Harassment" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this preamble, at least one commenter stated that schools receiving funds from the Bureau of Indian Affairs are required to provide greater due process protections for students pursuant to Part 42 of Title 25 of the Code of Federal Regulations than what these final regulations require. Part 42 of Title 25 "govern[s] student rights and due process procedures in disciplinary proceedings in all Bureau-funded schools" and sets forth specific due process procedures and protections for all disciplinary proceedings in these schools.[1761] The Department applauds the Bureau of Indian Affairs for requiring robust due process protections in disciplinary proceedings for students in Bureau-funded schools. To the extent that the regulations governing Bureau-funded schools may include due process protections that exceed what these final regulations require, such additional due process protections do not contradict these final regulations. There is no direct conflict between what these final regulations require and what the regulations governing Bureau-funded schools require, and nothing prevents a Bureau-funded school from complying with both these final regulations and the regulations in Part 42 of Title 25. Accordingly, these final regulations "would [not] have a substantial direct effect on Indian educational opportunities" such as to necessitate consultation with tribes under section IV of the Department's Consultation and Coordination with American Indian and Alaska Native Tribal Governments policy.[1762]

The same commenter who supported the Department's proposal for increased due process protection asserted that all students, and not just Native American students, should

[1761] 25 CFR 42.1.
[1762] Tribal Governments Policy at 2.

receive the due process protections required for Bureau-funded schools and suggested that not providing more robust due process protections may violate Title VI. The Department appreciates the commenter's concern but notes that Title IX does not apply only to students in schools, whether elementary and secondary schools or postsecondary institutions. Not all recipients of Federal financial assistance are schools; recipients covered under Title IX include, for instance, museums and libraries that operate education programs or activities. Additionally, these final regulations specifically address sexual harassment and do not affect all student disciplinary proceedings. Title IX applies to all education programs or activities that receive Federal financial assistance,[1763] and impacts students, employees, and third parties. These final regulations provide the most appropriate due process protections for a wide variety of recipients and individuals whom Title IX affects. The Department is not discriminating based on race, color, or national origin in promulgating these final regulations, but is requiring due process protections that will affect students, employees, and third parties in an education program or activity of recipients that may, for example, include schools, libraries, museums, and academic medical centers, among other types of recipients.

Some commenters' suggestion that Executive Order 13132, 64 FR 43255 (Aug. 10, 1999), requires the Department to have consulted with State and local officials before issuing the NPRM is inaccurate. That Order's goal was "to guarantee the Constitution's division of governmental responsibilities between the Federal government and the states" and to "further the policies of the Unfunded Mandates Reform Act."[1764] The purpose of the Unfunded Mandates

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[1763] 20 U.S.C. 1681(a).
[1764] 2 U.S.C. 1501 *et seq*.

Reform Act is, in its own words, "to end the imposition, in the absence of full consideration by Congress, of Federal mandates on State, local, and tribal governments without adequate Federal funding, in a manner that may displace other essential State, local, and tribal governmental priorities."[1765] In other words, when the Federal government imposed an *unfunded* mandate on the States (including local governments) and tribal governments carrying federalism implications and had effects on State and local laws, this Order required the Federal government to consult with State and local authorities. However, these final regulations are entirely premised as a condition of receiving Federal funds, and the recipient has the right to forgo such funds if the recipient does not wish to comply with these final regulations. Additionally, this Order states: "*To the extent practicable* and permitted by law, no agency shall promulgate any regulation that has federalism implications, that imposes substantial direct compliance costs on State and local governments, *and* that is not required by statute" unless the agency takes a few steps.[1766] The use of "and" as well as "to the extent practicable" indicate that each of these requirements must be met before the agency is compelled to take those additional steps. These final regulations do not *compel* a recipient to accept Federal financial assistance. Moreover, these final regulations are consistent with Title IX and other Federal statutory provisions. Thus, Executive Order 13132 may not apply to these final regulations. But even if it were applicable here, the Department has complied with it by carefully considering and addressing comments from State and local officials and issuing, through this preamble, a federalism summary impact statement.

[1765] 2 U.S.C. 1501(2).
[1766] Executive Order 13132, § 6(b) (emphasis added).

Finally, Executive Order 13132 does not provide a specific method to consult with State and local officials, and the Department is not required to use a bi-weekly electronic newsletter or listserv to provide opportunities for consultation with State and local officials or any other entity. Instead, the Department has carefully considered and addressed comments from State and local officials in promulgating these final regulations.

Changes: None.

Comments: Some commenters stated that the Department's NPRM did not disclose enough of its scientific and technical findings and studies it relied on, which prevented the public from having the opportunity to assess the accuracy of the Department's methodology and conclusions. These commenters asserted that, in this respect, the Department violated the Administrative Procedure Act ("APA"), 5 U.S.C. 701 *et seq.*, and Executive Order 13563. Specifically, these commenters stated that the NPRM's Regulatory Impact Analysis (RIA) mentioned that the Department examined public Title IX reports and investigations at 55 IHEs nationwide and drew some conclusions from this analysis but the Department did not specify which 55 IHEs were the subject of this review or make the reports publicly available. These commenters had a similar objection to the reference in the NPRM's RIA to a sample of public Title IX documents reviewed by the Department because the Department did not make those documents available for review by the public during the comment period. According to these commenters, the failure to specify this information made it impossible for members of the public to determine whether any of the information was erroneous or whether the conclusions the Department drew from this review may be improper. These commenters had similar objections to the NPRM's RIA discussion of different simulations of its model, including various footnotes within the RIA without making any of those models or the underlying data used to develop those models

publicly available. These commenters believed that the NPRM's Initial Regulatory Flexibility Analysis (IFRA) similarly failed to disclose information it referred to in two places: (1) the Department's prior analyses that showed that enrollment and revenue are correlated for proprietary institutions; and (2) the Department's analysis of a number of data elements available in the Integrated Postsecondary Education Data System (IPEDS). Additionally, these commenters stated that the NPRM's RIA and IRFA did not ascertain or account for the potential inaccuracy of some data the Department relied on, namely, the Civil Rights Data Collection (CRDC) and Clery Act data, which the commenters stated have accuracy deficiencies. According to the commenters, the Department's reliance on this data without acknowledgement of the shortcomings for this purpose conflicts with the Department's responsibilities under its Information Quality Act (IQA) Guidelines.

Discussion: With respect to the analysis of the Title IX reports from 55 IHEs, the reports we reviewed are publicly available from IHEs' websites and were not determinative of any assumptions or methodologies used within the NPRM's RIA. As clearly discussed in the NPRM, the Department was concerned that the data available from the U.S. Senate Subcommittee on Financial and Contracting Oversight report may have only captured a subset of incidents that would otherwise be captured in the definition of "sexual assault" in the proposed rule. Our review of these reports confirmed that IHEs appeared to be including a much wider range of offenses in their Title IX enforcement than simply those that might be reasonably categorized as "sexual violence" by the subcommittee report. Members of the public did not need to review these specific reports to assess the veracity or reasonableness of that analysis. Indeed, a review of any Title IX report could have provided insight into whether it was likely that "sexual misconduct" and "sexual violence" were interchangeable terms and whether the former term

subsumed activities not captured under the latter. In addition, our review informed our assumption that incidents of sexual misconduct only represented half of all current Title IX investigations. Again, members of the public did not need access to the specific reports we reviewed to ascertain the quality of this assumption. A review of any Title IX reports or their own experiences in enforcing Title IX would have provided insight into whether this assumption was reasonable. As discussed in the NPRM, the Department reasonably concluded that the term "sexual violence" used in the Subcommittee report was likely a subset of all incidents of "sexual misconduct" and that incidents of "sexual misconduct" were a subset of all incidents investigated under Title IX. The documents reviewed served only to independently validate those logical conclusions.[1767] In light of the public availability of the data, any interested party had the opportunity to assess the logic presented in the NPRM for the decisions regarding how to code the data. Further, if the general public disagreed with our decision regarding how to code the data, the analysis provided alternative impact analyses that would have resulted from a different set of decisions regarding how to code those data in Table 1 from our Sensitivity Analysis in the NPRM. Finally, we note that the Title IX "reports" referenced in the NPRM's RIA at 83 FR 61485 and the Title IX "documents" referenced at 83 FR 61487 are the same documents.

With respect to the models and underlying data that we used in the NPRM's RIA, we referenced the underlying data, such as the U.S. Senate Subcommittee on Financial and Contracting Oversight report. The footnotes in this discussion of the NPRM's RIA explained the formulas and methods we used to make our calculations. We did not employ any calculations

[1767] 83 FR 61485.

that we did not explain in the text of the document. We believe that the NPRM's RIA included the specificity necessary to allow others to reproduce our analysis and test our conclusions.

With respect to the NPRM's IRFA and our reference to our prior analyses, we explained later in that section that our prior analyses were based on our review of revenue and enrollment figures (including Carnegie Size Definitions, IPEDS institutional size categories, and total FTE) from IPEDS data. Revenue and enrollment data are publicly available through IPEDS, so any interested party was capable of analyzing this data and offering evidence to challenge our conclusion that enrollment and revenue are correlated for proprietary institutions. The NPRM's IRFA also referred to a prior rulemaking docket ED-2017-OPE-0076i, as a resource for the public to find more information on the Department's previous research on proprietary institutions.

With respect to our use of CRDC and Clery Act data, we used the most appropriate data to which we have access. In addition, we specifically invited public comment on other data sources that would help inform our rulemaking. Specifically, we compared the Clery Act data to the U.S. Senate Subcommittee on Financial and Contracting Oversight report to try to understand how the number of investigations is correlated with the various types of IHEs. As described in the NPRM, this analysis informed our estimates that the proposed regulations would decrease the number of investigations conducted per year. Ultimately, the Clery Act data, data from the Subcommittee report, and our logic and assumptions were made public for review. The public had ample opportunity to challenge those assumptions and provide alternative analyses. The CRDC data served the same purpose but as a tool for estimating the number of investigations within LEAs. We are not aware of data that is more reliable than the CRDC and Clery Act data

that we could have used to inform our analysis, and no commenters provided us with an alternative high-quality comprehensive data source.[1768]

Changes: None.

Comments: One commenter stated that this rulemaking should not be exempt from Executive Order 13771 because the cost savings are inaccurate and exaggerated.

Discussion: As a result of the revisions to the proposed regulations, we agree that Executive Order 13771 applies to these final regulations and provide our revised economic analysis in support of this conclusion in the "Regulatory Impact Analysis" section of this preamble.

Changes: The Department provides a revised economic analysis in the "Regulatory Impact Analysis" section of this preamble, which includes the application of Executive Order 13771 to these final regulations.

Comments: One commenter asserted that the law requires the Department to analyze the distributional effects of the proposed rules and that the Department did not provide this analysis. This commenter believed that if the Department analyzed distributional effects, it would have found that the proposed rules would widen existing inequities for groups that already face considerable challenges, namely young people, women, pregnant or parenting students, undocumented students, students of color, individuals with disabilities, and LGBTQ students.

Discussion: We note that the commenter cited, as support for its comment, a congressional bill from 2012 that has not been passed into law. Nevertheless, the NPRM's RIA analyzed how the

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[1768] Although the Department may designate certain classes of scientific, financial, and statistical information as influential under its Guidelines, the Department does not designate the information in the Regulatory Impact Analysis in these final regulations or in its NPRM as influential and provides this information to comply with Executive Orders 12866 and 13563. U.S. Dep't. of Education, Information Quality Guidelines (Oct. 17, 2005), https://www2.ed.gov/policy/gen/guid/iq/iqg html.

proposed rules would impact different types of institutions. We provided significant detail on the different impacts the proposed rules would have on two-year institutions as compared to four-year institutions and large institutions as compared to small institutions. We appreciate the concern about distributional effects among the different types of students, but it is unclear how these final regulations would have a differential impact on the types of students the commenter mentioned, for the purposes of our cost-benefit analysis. We note that the proposed rules, and these final regulations, treat all students equally with respect to age, sex, pregnancy or parenting status, citizenship or legal residency status, race and ethnicity, disability status, sexual orientation, and gender identity. The Department explained that the NPRM's RIA was not attempting to quantify the economic effects of sexual harassment or sexual assault because the NPRM's RIA analysis was limited to the economic effects of the proposed regulations.[1769]

Changes: None.

Comments: At least one commenter argued that the NPRM is unlawful because 20 U.S.C. 1098a (§ 492 of the Higher Education Act of 1965, as amended ("HEA")) requires the Department to engage in negotiated rulemaking for the proposed regulations, which it did not do. In that section, Congress used the phrase "pertaining to this subchapter" when describing regulations for which negotiated rulemaking was required. Because the proposed regulations would affect all institutions that receive funds under Title IV of the HEA, commenters argued they are regulations "pertaining to" Title IV, for which negotiated rulemaking is required. One commenter proposed that the Department undergo a negotiated rulemaking, simplify the NPRM,

[1769] 83 FR 61462, 61485.

and appoint a committee of practitioners (excluding lawyers and special interest groups) to discuss best practices and make recommendations.

Commenters also argued that the HEA's master calendar requirement (20 U.S.C. 1089(c)(1)) should apply to these regulations, meaning that regulations that have not been published by November 1 prior to the start of the award year will not become effective until the beginning of the second award year after such November 1 date, July 1. One commenter also stated that they had submitted a Freedom of Information Act (FOIA) request with respect to the Department's interpretations of this and the negotiated rulemaking requirement and asserted that the Department did not respond in a satisfactory manner. This commenter contended that this unsatisfactory response prejudiced the commenter's ability to make arguments on these points, and that the comment period should be reopened after the Department fully responds.

Discussion: The negotiated rulemaking requirement in section 492 of the HEA applies only to regulations that implement the provisions of Title IV of the HEA, all of which relate to student financial aid programs or specific grants designed to prepare individuals for postsecondary education programs. Specifically, Title IV contains seven parts: (1) Part A – Grants to Students at Attendance at Institutions of Higher Education; (2) Part B – Federal Family Education Loan Program; (3) Part C – Federal Work-Study Programs; (4) Part D – William D. Ford Federal Direct Student Loan Program; (5) Part E – Federal Perkins Loans; (6) Part F – Need Analysis; and (7) Part G – General Provisions Relating to Student Financial Assistance Programs.

The requirements of section 492 do not apply to every Department regulation that impacts institutions of higher education; instead, they apply exclusively to regulations that implement Title IV of the HEA, in other words, that "pertain to" Title IV of the HEA. They do not apply to programs authorized by other titles of the HEA, such as the discretionary grant

programs in Title VI, or the institutional aid programs in Titles III and V, all of which impact many institutions that also participate in the Title IV student aid programs. Title IX is not part of the HEA, rather it is part of the Education Amendments of 1972, and provides, 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.[1770] Further, we believe the notice and comment rulemaking process for these final regulations was appropriate and adequate and that public comment provided the Department with the recommendations of practitioners and experts, and decline to undertake the negotiated rulemaking process suggested by one commenter.

Similarly, the Title IV master calendar requirements do not apply to the Title IX regulations. The HEA provides that "any regulatory changes initiated by the Secretary affecting the programs under [Title IV] that have not been published in final form by November 1 prior to the start of the award year shall not become effective until the beginning of the second award year after such November 1 date."[1771] While the Department has acknowledged that these Title IX regulations would impact institutions that participate in the Title IV student assistance programs, among others, that impact does not trigger the master calendar requirement. The requirement applies exclusively to regulations that affect Title IV programs. Title IX is not a "program under title IV."

Finally, we note that the sufficiency of the Department's response to any individual FOIA request is beyond the scope of this rulemaking, and decline to comment on the content of such a

[1770] 20 U.S.C. 1681(a).
[1771] 20 U.S.C. 1089(c)(1).

request or its relationship to these final regulations. Since, as explained above, the HEA's negotiated rulemaking and master calendar requirements are inapplicable to these regulations, it was unnecessary to discuss them in the NPRM in order to ensure the public's meaningful ability to comment.

Changes: None.

Comments: Commenters argued that the proposed regulations would create inconsistencies between the Department's approach to Title IX and that of the over 20 other agencies that enforce Title IX. They stated that more than 20 of those other agencies adopted their identical final Title IX regulations in 2000 based on a common NPRM. Because the Department's new NPRM would depart from the common rule and other agencies may choose to maintain their existing regulations, commenters asserted that institutions could be subjected to conflicting obligations, and the Department itself could face difficulties in handling complaints. The commenters noted that the Regulatory Flexibility Act, Executive Order 12866, and Executive Order 13563 all require coordination between agencies and work to reduce inconsistencies. Further, one commenter cited examples of why it is not sufficient to predict or expect that other agencies will amend their Title IX regulations to comport with the Department's revisions. For instance, they pointed to the Department's single-sex Title IX regulations, which were adopted in 2006 but with which other agencies have yet to come into conformance.

Discussion: The Department understands the importance of cross-agency coordination, and the effect such coordination can have on stakeholders. While the Department cannot control what actions other agencies take to ensure this coordination with respect to their regulations, we have taken the necessary steps to effectuate such coordination for these final regulations. The specifics

of other rulemaking proceedings, while perhaps instructive, do not have direct bearing on this rulemaking proceeding.

As commenters acknowledged, the Department included in the NPRM an initial regulatory flexibility analysis (IRFA). As discussed above, consistent with the requirements of Executive orders 12866 and 13563, the Department coordinated with other agencies by sharing the proposed regulations with the Office of Management and Budget (OMB) prior to publication of the NPRM. Through the interagency review process, OMB provided other Federal agencies, including SBA Advocacy and agencies that also administratively enforce Title IX, an opportunity to review and comment on the proposed regulations before they were published. This process is designed to avoid regulations that are inconsistent, incompatible, or duplicative with those of other agencies, and to promote coordination among agencies. Additionally, as noted above, the Assistant Attorney General for Civil Rights reviewed the proposed regulations and approved them to be published in the *Federal Register* in accordance with Executive Order 12250.

Changes: None.

Comments: Some commenters asserted that the proposed regulations will not withstand judicial scrutiny because they were developed under a pretextual rationale and are thus arbitrary and capricious. These commenters refer to public statements made by several Administration officials that they say demonstrate that those officials harbor sexist and discriminatory beliefs which motivated the content of the proposed regulations. The commenters say that this, together with the lack of data and lack of reasoned explanation for departure from past practice, makes it apparent that the proposed regulations are a pretext for implementing discriminatory policy. For instance, one commenter stated the Department had not produced any evidence to support its

belief that these measures are needed to address sex-based discrimination, or even any evidence that sex-based discrimination exists against respondents in Title IX proceedings.

Discussion: In order to permit meaningful review of an agency decision, an agency must disclose the basis of its action.[1772] The Department is doing so through the rulemaking process for this agency action. Neither the Department, nor the Administration, nor its officials, have acted in bad faith or exhibited improper behavior with respect to these Title IX regulations.

Instead, the Department has been clear about our reasons for the changes we proposed in the NPRM, and revisions made in these final regulations, to Title IX implementing regulations. As explained more thoroughly in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section, we seek to better align Title IX implementing regulations with the text and purpose of Title IX and Supreme court precedent and other case law, which 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 recipients, 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. Recognizing that every situation is unique, we wish to ensure that schools provide complainants with clear options and honor the wishes of the complainant (i.e., the person alleged to be the victim) about how a recipient should respond to the situation. Where a complainant elects to file a formal complaint alleging sexual harassment, we intend for the final regulations to ensure that a recipient's investigation be fair and impartial, applying strong procedural protections for both parties, which will produce more reliable factual outcomes,

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[1772] *See Dep't. of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019).

furthering Title IX's non-discrimination mandate consistent with constitutional protections and fundamental fairness.

The Department believes that it has provided all the data required to be included in the NPRM.[1773] We received over 124,000 public comments on the proposed regulations. We have reviewed and considered those comments and have made changes to the proposed regulations, reflected in these final regulations and discussed throughout this preamble, in response to many of those comments.

The Department collected extensive anecdotal evidence through this notice-and-comment rulemaking that demonstrates the provisions in these final regulations are appropriate to address sex discrimination in the form of sexual harassment. Personal stories from both complainants and respondents are anecdotal evidence that the Department received through public comment. Complainants generally would like recipients to provide supportive measures, at a minimum, and to allow complainants to retain some control over the response to any report of sexual harassment. Some complainants are also concerned that biased school-level Title IX proceedings have deprived complainants of due process protections. Similarly, many respondents specifically requested a grievance process with robust due process protections prior to the imposition of disciplinary sanctions.

Changes: None.

Comments: Some commenters asserted that various provisions of the NPRM violate the Administrative Procedure Act ("APA"), 5 U.S.C. 701 *et seq.*, because they reflect a departure from past Department regulations, guidance, policies or practices, without adequate reasons,

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[1773] 83 FR 61464.

explanations, or examination of relevant data. Commenters cited various legal authorities to substantiate an agency's responsibility to explain the basis for its decision making, particularly when changing position on a given issue. They asserted that the NPRM is arbitrary and capricious and will not receive *Chevron* deference. One commenter stated that the Department failed to explain which stakeholders were consulted on particular issues, and why their views on any change were persuasive.

Commenters stated that the NPRM offered only conclusory statements for its dramatic changes in the Department's longstanding interpretation of Title IX as expressed in Department guidance documents. Commenters argued that the Department failed to provide "adequate reasons" or "examine relevant data" to support its proposed regulations. Commenters argued that this also was illustrated by the data relied on in the NPRM's RIA; commenters asserted that the Department predicated its cost calculations on limited data sets – like the CRDC and the Clery Act data sets – that have significant quality issues, explicitly acknowledged data constraints in developing its cost baseline, and provided an incomplete and unconvincing outline of the costs and benefits resulting from the implementation of the proposed regulations. According to the commenters, these facts indicate that the Department failed to provide the necessary "rational connection" between the underlying facts and its decision to engage in its proposed rulemaking.

Commenters also contended that the Department failed to consider reliance interests. Commenters stated that students and educational institutions have relied on the previous standards, expressed in Department guidance, to vindicate their statutory rights and to set their disciplinary procedures, respectively.

Discussion: We agree with commenters that an agency must give adequate reasons for its decisions, and that when an agency changes its position, it must display awareness that it is

changing position and show that there are good reasons for the new policy. In explaining its changed position, an agency must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account. In such cases it is not that further justification is demanded by the mere fact of policy change, but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.[1774] On the other hand, the agency need not demonstrate that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better.[1775]

Throughout the NPRM and this document, we provide such reasons, discussion, and justification for our changes, both from the status quo and from the NPRM. These reasons, discussions, and justifications address, as appropriate, data cited by commenters. In the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, we discuss in particular our reasoning for adopting – but adapting for administrative enforcement – the Supreme Court's three-part framework describing the conditions that trigger a recipient's obligation to respond to sexual harassment, including the definition of actionable sexual harassment, the actual knowledge requirement, and the deliberate indifference standard. We discuss rationale for, and changes to, the § 106.45 grievance process in the "Role of Due Process in the Grievance Process" section of this preamble. We understand that recipients have relied on our prior guidance and discuss these and other changes from the

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[1774] *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009)).

[1775] *Fox*, 556 U.S. at 515. An agency's interpretation must also comport with procedural and substantive requirements in order to receive *Chevron* deference. *See United States v. Mead Corp.*, 533 U.S. 218, 227 (2001); *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984).

Department's past guidance in the foregoing and other applicable sections throughout this preamble.

With respect to the comments about the Clery Act and CRDC data, as discussed in more detail above, we used the most appropriate data to which we had access. The costs and benefits of these final regulations, and our detailed analysis in determining them, are discussed in the "Regulatory Impact Analysis" section of this preamble.

The NPRM discussed the various stakeholders the Department heard from in developing the proposed regulations (83 FR 61463-61464), and in developing these final regulations and revising the NPRM the Department considered the input of the over 124,000 comments we received on the NPRM. All of these stakeholders' and commenters' views were considered in development of the NPRM and these final regulations, and their input was taken into account with respect to each issue addressed in these final regulations.

Changes: None.

Length of Public Comment Period/Requests for Extension

Comments: Several commenters requested for the NPRM comment period to be extended, stating that commenters needed additional time to make their views known. Some commenters asked that the Department also publicize the extension of the comment period. One commenter stated that the law requires a minimum 60-day public comment period but did not specify which law imposed that requirement. Another commenter stated that the public comment period coincided with many colleges' winter breaks. In addition to asking for an extension of the comment period, one commenter asked that the Department schedule public hearings at schools and colleges campuses throughout the country to encourage additional input from students, teachers, administrators, and advocates. One commenter argued that the Department

inappropriately limited public commentary on the proposed regulations and failed to extend the comment period, making the proposal arbitrary and capricious under the Administrative Procedure Act ("APA"), 5 U.S.C. 701 *et seq*. One commenter thanked the Department for allowing a lengthy comment period on this significant NPRM.

Discussion: The Department published the NPRM in the *Federal Register* on November 29, 2018 (83 FR 61462), for a 60-day comment period, with a deadline of January 28, 2019. Following technical issues with the Federal eRulemaking portal, the Department extended the public comment period for an additional two days, through January 30, 2019, to ensure that the public had at least 60 days in total to submit comments on the Department's NPRM using that portal (84 FR 409). In an abundance of caution, to the extent that some users may have experienced technical issues preventing the submission of comments using the Federal eRulemaking Portal, the Department again reopened the comment period for one day, on February 15, 2019 (84 FR 4018). The Department also publicized each of the two extensions on its website, prior to their publication in the *Federal Register*.

The APA does not mandate a specific length for an NPRM comment period, but states that agencies must "give interested persons an opportunity to participate" in the proceeding.[1776] This provision has generally been interpreted as requiring a "meaningful opportunity to comment."[1777] Executive Order 12866 states that a meaningful opportunity to comment on any proposed regulation, in most cases, should include a comment period of not less than 60 days.[1778]

[1776] 5 U.S.C. 553(c).
[1777] *E.g.*, *Asiana Airlines v. F.A.A.*, 134 F.3d 393, 396 (D.C. Cir. 1998) (internal citations omitted).
[1778] Exec. Order No. 12866, Section 6(a); *see also* Exec. Order 13563, Section 2(b).

Case law interpreting the APA generally stipulates that comment periods should not be less than 30 days to provide adequate opportunity to comment.[1779]

In this case, commenters had 60 days, with extensions of time to account for the potential effects of technical issues, to submit their comments. The Department received over 124,000 public comments, many of which addressed the substance of the proposed regulations in great detail, indicating that the public in fact had ample opportunity to participate in the proceeding. Although some of the 60-day period overlapped in part with many colleges' winter breaks, students were able to submit comments regardless of whether school was in session. The Department believes it provided sufficient, meaningful opportunity for the public to comment on the proposed regulations, and that the public in fact did meaningfully participate in this rulemaking.

Changes: None.

Conflicts with First Amendment, Constitutional Confirmation, International Law

Comments: First, a group of commenters argued that the NPRM is unlawful because it violates the First Amendment rights of institutions. Traditionally, these commenters contended, academic institutions have retained the freedom to determine for themselves "'on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'"[1780] As a result, the commenters argued, the NPRM infringes upon the First Amendment rights of institutions of higher education to determine their Title IX policies and procedures with

[1779] *See, e.g.*, *Nat'l Retired Teachers Ass'n v. U.S. Postal Serv.*, 430 F. Supp. 141, 147 (D.D.C. 1977).
[1780] Commenters cited: *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (quoting The Open Universities in South Africa 10-12).

sufficient latitude and autonomy because the proposed rules lack a compelling governmental interest and/or are not sufficiently narrowly tailored.

Second, some commenters suggested that Secretary Elisabeth DeVos lacks the authority to issue the NPRM and to promulgate the final regulations because Vice President Michael Pence cast the deciding vote to confirm the Secretary after the Senators were equally divided on her confirmation;[1781] they contended that the Vice President is not constitutionally authorized to break a tie for a cabinet member's confirmation, thereby rendering Secretary DeVos' Senate confirmation itself invalid and rendering her actions legally unauthorized.

Third, some commenters contended that the NPRM violates the United States' international law obligations, including the International Covenant on Civil and Political Rights ("ICCPR"), which prohibits discrimination on the basis of sex, and its commitments under the 2030 Agenda for Sustainable Development ("Sustainable Development Goals" or "Goals").

Discussion: First, we appreciate some commenters' concerns that the NPRM transgresses upon recipients' First Amendment rights and share commenters' commitment to the importance of interpreting Title IX in a manner that respects constitutional rights, including the rights of recipients under the First Amendment. However, we disagree that the NPRM, or the final regulations, impermissibly infringe on recipients' First Amendment rights. These final regulations do not address what a recipient may teach or how the recipient should teach. These final regulations also do not dictate who may be admitted to study or who may be permitted by a recipient to teach. When a recipient follows a grievance process that complies with § 106.45 and

[1781] Commenters cited: U.S. Senate, Vote: On the Nomination (Confirmation Elisabeth Prince DeVos, of Michigan, to be Secretary of Education), Feb. 7, 2017.

finds a respondent responsible for sexual harassment, these final regulations do not second guess whether or how the recipient imposes disciplinary sanctions on the respondent. Indeed, these final regulations expressly provide in § 106.44(b)(2) that the Assistant Secretary will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient, or otherwise evidence of discrimination under Title IX by the recipient, solely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence. Accordingly, recipients retain discretion as to determinations of responsibility for sexual harassment, and the Department expressly defers to a recipient's judgment with respect to disciplinary action against a respondent whom the recipient has determined to be responsible for sexual harassment. These final regulations do not impact a recipient's decisions about who to admit to study, who to hire to teach, or what curricula a recipient uses for instructional materials. Even with respect to disciplinary action, these final regulations only apply to how a recipient responds to alleged sexual harassment as defined in § 106.30, and not to how a recipient might respond (including with disciplinary action) to alleged misconduct that does not constitute sex discrimination in the form of sexual harassment under Title IX. Recipients also may determine who may be admitted to study and teach at their schools and who may remain to study and teach at their schools through disciplinary sanctions, with respect to both sexual harassment and non-sexual harassment misconduct. We have revised § 106.45(b)(3)(i) to clarify that any dismissal of a formal complaint of sexual harassment or any allegations therein does not preclude action under another provision of the recipient's code of conduct. Thus, recipients remain free to address conduct that is not covered under Title IX and these final regulations. These final regulations also clearly provide in § 106.6(d)(1) that nothing in Part 106 of Title 34 of the Code of Federal Regulations requires a recipient to restrict rights

that would otherwise be protected from government action by the First Amendment of the U.S. Constitution, and recipients are not required to infringe upon the First Amendment rights of students and employees.

As an initial matter, commenters did not (and could not) claim an absolute First Amendment right of an academic institution to conduct its Title IX proceedings however it wishes. Title IX proceedings have long been part of the largely-undisputed regulatory framework.[1782] As a result, this NPRM has not suddenly crossed a line making suspect its First Amendment validity. These final regulations are the product of compliance with rulemaking under the Administrative Procedure Act ("APA"), 5 U.S.C. 701 *et seq.*, including robust public comment. Furthermore, neither Title IX nor the final regulations governs the recipients' *speech* but only their *conduct* in exchange for their accepting Federal financial assistance. But even if commenters were to argue that the NPRM infringes on recipients' freedom of *association*, that argument would fail because compelling governmental interests and narrowly tailored means to achieve those interests may qualify that right. Similarly, the recipient's freedom to define and engage with its campus with respect to sexual harassment and assault is also subject to qualification. It is not an absolute right, and these final regulations, furthering the purposes underlying Title IX, appropriately qualify it.

[1782] 34 CFR 106.8(b) has for decades required recipients to "adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints" of sex discrimination under Title IX. Department guidance has, since 1997, considered sexual harassment a form of sex discrimination under Title IX to which those prompt and equitable grievance procedures must apply, and has since 2001 interpreted the "prompt and equitable grievance procedures" in regulation to mean investigations of sexual harassment allegations that provide for "Adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence." 2001 Guidance at 20.

Controlling precedents demonstrate the foregoing. The Supreme Court has never held that the right to punish or exclude non-member students and employees by potentially harming their future careers and reputations is an unfettered right of speech or association. In *Roberts v. United States Jaycees*,[1783] the Supreme Court held that the freedom of association could be limited "by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." Likewise, in *Boys Scouts of America v. Dale*, the Supreme Court permitted the Boy Scouts to exclude LGBTQ *members* as an exercise of the Scouts' freedom of speech but only if their exclusion was largely necessary for the group to advocate a particular viewpoint: "[t]he freedom of expressive association . . . could be overridden by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[1784] In the Title IX context, though, students and employees are not "members" in the conventional sense and their inclusion does not therefore infringe on an institution's freedom of speech or of association.[1785] The NPRM, furthermore, has justified a compelling governmental interest in providing respondents accused of serious misconduct with a fair, truth-seeking grievance process, which is a pillar of the American legal tradition, and the final regulations further that interest in a manner that equally elevates the compelling governmental interest in ensuring that recipients provide remedies to victims of sexual harassment, ensures that complainants also benefit from the strong procedural protections set forth in the § 106.45 grievance process, and requires recipients to offer

[1783] 468 U.S. 609, 623 (1984).
[1784] 530 U.S. 640, 647-48 (2000).
[1785] *Id*.

supportive measures to complainants with or without the filing of a formal complaint that initiates a grievance process. These interests are intertwined, since due process protections benefit both parties by permitting the parties to meaningfully participate in the grievance process and increase the accuracy of outcomes, thereby ensuring that complainants victimized by sexual harassment receive remedies designed to restore or preserve equal access to education while also ensuring that respondents are not treated as perpetrators of sexual harassment deserving of separation from educational opportunities unless that conclusion is the result of a fair, truth-seeking process. Yet another reason the right to exclude is not as strong here as it was deemed to be in *Dale* is that if a group excludes a member because of the member's status, the member is not ruined for life and no one will hold that against the excluded party. But if an inferior – typically, a student or employee – ends up being excluded because of an opprobrious moral failing like a sexual harassment violation, their prospects are ruined for a long time, perhaps for life. Similarly, if a recipient wrongfully determines that a complainant was not victimized by sexual harassment and on that basis does not provide remedies, the victim may suffer loss of educational opportunities that may derail the victim's education and future for a long time, perhaps for life. This, too, affirms the final regulations' compelling interest in protecting the integrity of a Title IX grievance process against a First Amendment challenge.

The language the commenters cite from Justice Frankfurter's concurrence in *Sweezy* – some institutional latitude to determine "on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study" – that only Justice Harlan joined and that did not command controlling effect, is also inapposite on its own terms.[1786] Those

[1786] *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (Frankfurter, J., concurring).

were not Justice Frankfurter's words or even words he was quoting as having authoritative force. He was merely quoting in passing an excerpt from *Open Universities in South Africa 10-12, A statement of a conference of senior scholars from the University of Cape Town and the University of the Witwatersrand, including A. v. d. S. Centlivres and Richard Feetham, as Chancellors of the respective universities*.[1787] For First Amendment purposes, Justice Frankfurter specifically refused to equate a State legislative inquiry into the contents of the appellant's lecture and into his knowledge of the Progressive Party and its members, with the Open Universities excerpt.[1788] Further, Justice Frankfurter pointed out that *certain specific kinds of* "inroads on legitimacy must be resisted at their incipiency."[1789] This was non-binding *dictum* in the concurrence and has no bearing on the final regulations at hand.[1790]

In *Keyishian v. Board of Regents of the University of the State of New York*,[1791] the Supreme Court stated: "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." The final regulations intentionally protect academic freedom by carefully adopting and adapting the *Davis* standard in the second prong of conduct defined as sexual harassment in § 106.30, as explained in the "Sexual Harassment" subsection of the "Section 106.30 Definitions" section of this preamble.

[1787] *See id.*
[1788] *See id.*
[1789] *Id*.
[1790] *See*, *e.g.*, *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006) ("[W]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.").
[1791] 385 U.S. 589, 603 (1967).

The most analogous case here is *Rumsfeld v. Forum for Academic and Institutional Rights, Inc*.[1792] *Rumsfeld* suggests that the final regulations are consistent with the First Amendment. There, the Supreme Court upheld the Federal Solomon Amendment, which had conditioned law schools' receipt of Federal financial assistance on their giving equal access to military recruiters on par with all other recruiters when institutions instead wished to send a message of disapproval of military policies on social issues. In fact, the "message" inherent in the law schools' refusal to let the military recruiters in was stronger in many respects than any "message" that a recipient can assert here. Nonetheless, the *Rumsfeld* Court determined that "the compelled speech [t]here [wa]s plainly incidental to the . . . [Solomon] Amendment's regulation of conduct."[1793] So it is here; Congress has determined through passage of Title IX that recipients of Federal financial assistance must not permit sex discrimination to deprive any person of educational opportunities; with respect to sexual harassment as a form of sex discrimination, the Supreme Court has interpreted Title IX to require recipients to respond to sexual harassment that occurs between its students, and employees, under certain conditions, and the Department has determined that appropriate adoption, with adaptations, of the Supreme Court's framework effectuates Title IX's non-discrimination mandate consistent with constitutional rights (including free speech, academic freedom, and due process of law) and consistent with fundamental fairness. Furthermore, like the conduct at issue in *Rumsfeld*, the conduct here is not so "inherently expressive" that it deserves First Amendment protection.[1794] There is nothing particularly expressive about a recipient's desire to deny parties to a Title IX proceeding

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[1792] 547 U.S. 47 (2006).
[1793] *Id.* at 62.
[1794] *Id*. at 64-66.

sufficient due process protections before reaching determinations regarding responsibility. In the same way that the law schools' First Amendment freedom of expressive association was not violated in *Rumsfeld*, here too recipients' freedom to expressively associate with students and employees is not violated. It is true that under *Rumsfeld*, the freedom of expressive association protects against laws that make "group membership less attractive" because such laws adversely "affect[] the group's ability to express its message."[1795] But that is not the case here because the final regulations strive to ensure that a fair process will make the institution more attractive, or at least not *less* attractive, because the institution will be responsible for clearly, transparently, and fairly responding to sexual harassment allegations (including by always offering supportive measures to a complainant regardless of whether sexual harassment allegations are ever investigated or proved through a grievance process). Accordingly, the Department disagrees with commenters' argument that the final regulations infringe on the First Amendment rights of recipients, including academic freedom.

Second, we disagree with commenters' concerns that Secretary DeVos might not be constitutionally empowered to issue the NPRM or the final regulations because the Vice President lacked the constitutional prerogative to cast the tie-breaking vote to confirm the Secretary. Because the Vice President *is* constitutionally empowered to cast the tie-breaking vote in executive nominations, President Donald J. Trump's nomination of Secretary DeVos properly was confirmed by the United States Senate; and Secretary DeVos therefore may function as the Secretary of Education. Article I, Section 3, cl. 4 of the Constitution did confer on the Vice President the power to break ties when the Senators' votes "be equally divided." Secretary

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[1795] *Id*. at 69.

DeVos' service as the United States Secretary of Education has therefore been lawful; no pall of constitutional doubt on account of her confirmation is cast on Secretary DeVos' service.

A commenter largely relies on one piece of scholarship to advance this claim.[1796] But that source principally concerns the Vice President's power to break Senate ties on *judicial* nominations, not Executive ones. Morse does not develop robustly an argument about the latter. Moreover, Morse acknowledges there is nothing "conclusive" about Executive nominations, and argues only that Vice Presidents are without constitutional authority to break ties in judicial nominations.[1797] Morse cites three examples from 1806 (Vice President George Clinton voted to confirm John Armstrong as the Minister to Spain), 1832 (Vice President Calhoun cast a tie-breaking vote that defeated the nomination of Martin Van Buren as Minister to Great Britain), and 1925 (Vice President Charles G. Dawes almost cast the tie-breaking vote to confirm President Calvin Coolidge's nominee for attorney general), respectively.[1798] But even the evidence in this source points to the fact that the Vice President was always considered to hold the tie-breaking vote for Executive nominations (indeed for all Senate votes). Particularly the nineteenth century examples do seem to show that historically Vice Presidents have enjoyed this widely-acknowledged power.[1799] Due to this time period's chronological proximity to the Constitution's ratifying generation, this is strong evidence that the original public meaning of the Constitution, left undisputed by intervening centuries of practice, confers the power of breaking Senate ties in executive nominations on Vice Presidents.

[1796] *See* Samuel Morse, *The Constitutional Argument Against the Vice President Casting Tie-Breaking Votes in the Senate*, 2018 CARDOZO L. REV. *DE NOVO* 142 (2018) (herein, "Morse," "the source" or "the article").
[1797] *See d.* at 151.
[1798] *See id.* at 150-51.
[1799] *See id*. at 143-44 fn.4.

As for the argument that the placement of this power in Article I, which generally deals with Congress, meant the power was limited to the legislative votes, this misconceives the context in which the provision exists: that section concerns length of Senate tenure, the roles of congressional personnel, and the Senate's powers, including that of trying impeachments.[1800] It is not limited to what the Senate can accomplish but rather encompasses matters about *who* in the Senate gets to do what, concerning all Senate business. In this section of Article I, the Vice President, *as President of the Senate*, accordingly is given the power to break ties. This was the most logical section in which to put this prerogative of the Vice President. And given how the power to cast tie-breaking votes is left open-ended, the most natural inference is that it applies to *all* Senate votes in *all* Senate business. Consequently, this evidence refutes the commenter's claim about Secretary DeVos' confirmation because: (1) this section in Article I simply concerned the functions and prerogatives of the Senate and its various officers, including the Vice President's general tie-breaking authority; and (2) that the Senate's power to try impeachments is included in the same section means that this section is just as applicable to Executive nominations as to anything else (that neither the commenter nor the article is challenging).[1801] This analysis shows that Morse's argument, and transitively that of the commenter, is flawed.

Furthermore, one commenter's reference to Senator King's statement in 1850 as supporting a view that could lead anyone in the present day to conclude Secretary DeVos's Senate confirmation is invalid is unhelpful because the overwhelming weight of text and history

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[1800] *See generally* U.S. CONST. art. I, § 3.
[1801] *But see* Morse 144, 146.

is against the merits of this pronouncement. Even at that time, King appears to have been one of a handful of people, if that, to express this view. It was not a widely accepted view, before or after.

Finally, a commenter's citation to John Langford's *Did the Framers Intend the Vice President to Have a Say in Judicial Appointments? Perhaps Not*[1802] and the reference to the Federalist Papers also misconceive the constitutional text, design, and history. To be sure, Alexander Hamilton in *The Federalist No. 69* does contrast the New York council at the time,[1803] with the Senate of the national government the Framers were devising ("[i]n the national government, if the Senate should be divided, no appointment could be made").[1804] The commenter's overall point is unpersuasive. As an initial matter, the Federalist Papers were persuasion pieces to convince the People (as sometimes addressed to "The People of New York," etc.) to accept the Constitution. Therefore, while the Papers supply a framework and understanding closely linked to the Constitution's text by some of the authors of that text, it does not supplant the original public meaning of that text itself. Moreover, all *The Federalist No. 69* refers to is that the President *himself* may not cast the tie-breaking vote in the Senate. The *Vice* President, however, may do so, for he is *not* the Executive.

For much of our Nation's history, including when the Equally Divided Clause was written as part of the original Constitution, the President and the Vice President could be from different parties and fail to get along. This Clause gave the Vice President some power and

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[1802] John Langford, *Did the Framers Intend the Vice President to Have a Say in Judicial Appointments? Perhaps Not*, BALKANIZATION (Oct. 5, 2018).
[1803] *See* "The Federalist No. 69," at 389 (Alexander Hamilton) (Clinton Rossiter ed., Mentor 1999) (1961) ("[I]f the [New York] council be divided, the governor can turn the scale, and confirm his own nomination.").
[1804] *Id.*

authority independent of the President. There is an important context behind this. Prior to the Twelfth Amendment's adoption, the Vice Presidency was awarded to the presidential candidate who won the second most number of votes, regardless of which political party he represented.[1805] In the 1796 election, for instance, voters chose the Federalist John Adams to be President.[1806] But they chose Thomas Jefferson, a Democratic-Republican, as the election's runner-up, so Jefferson became Adams' Vice President.[1807] Under the Twelfth Amendment, however, usually Presidents and Vice Presidents are elected on the same ticket. But this does not change the Equally Divided Clause, preserving the Vice President's authority to break Senate ties for executive and other nominations. As a result, any argument to the contrary necessarily ignores the constitutional text, design, and history.

Langford and the commenter at issue also misunderstand what Hamilton actually said in *The Federalist No. 76*, which was: "A man disposed to view human nature as it is . . . will see sufficient ground of confidence in the probity of the Senate, to rest satisfied, not only that it will be impracticable to the Executive to corrupt or seduce a majority of its members, but that the necessity of its co-operation, in the business of appointments, will be a considerable and salutary restraint upon the conduct of that magistrate."[1808] Langford reads this to mean that Alexander Hamilton was saying the Executive needs a majority of the voting Senators present to confirm nominations.

[1805] *See* U.S. CONST. amend. XII.
[1806] *See* Jerry H. Goldfeder, *Election Law and the Presidency*, 85 FORDHAM L. REV. 965, 974-75 (2016).
[1807] *See id.*
[1808] "The Federalist No. 76," at 395 (Alexander Hamilton) (Clinton Rossiter ed., Mentor 2003).

Langford's interpretation wrongly conflates the necessary with the sufficient, for Hamilton was saying only that it will *suffice* for a President to get a nominee confirmed with a majority of the Senate, not that he *needs* a Senate majority to get his nominee confirmed. This is all the more so because Senators may *abstain* from voting, so not every Senator will necessarily be voting. Doubtless Hamilton knew this because the Constitution gives the Senate the power to decide its own rules, including quorum, *see* U.S. CONST. art. I, § 5, cl. 1, 2, and therefore, a President need not even "corrupt or seduce" a majority of the *full* Senate, *The Federalist No. 76*; all he needs is a majority of the *voting* Senators. Thus, Hamilton's phrasing indicates not precision but a common parlance. It is, accordingly, too slender a reed (outside the constitutional text, at that) for Langford to base much of his thesis on, providing no support for the commenter's argument.

Langford is also incorrect in saying that "the Framers situated the Senate's 'advice and consent' powers in Article II, not Article I," where the Equally Divided Clause is located, means that the Vice President's tie-breaking power does not apply to nominations. This argument fails because, as noted earlier, it made more sense for the original Constitution's drafters and the ratifying generation to name the Vice President's tie-breaking power right in the same section of Article I when they were spelling out that he would be the President of the Senate. It is a limitation on his role as President of the Senate as well as his prerogative. Article II, by contrast, says what the President can do; and as already noted, when the original Constitution was ratified, the President and the Vice President were two different and often conflicting entities. Langford assumes the modern view that President and Vice President work hand in hand; that was not the original Constitution's presupposition, explaining why Langford's argument (and the commenter's) is flawed.

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Langford is also wrong to suggest that because "the Framers explicitly guarded against a closely divided Senate by requiring a two-thirds majority of Senators present to concur in order to consent to a particular treaty," this might show that: "Perhaps the Framers assumed the default rule [of the Vice President's tie-breaking power] would apply whereby a tie goes to the Vice President; perhaps, instead, the Framers meant to provide for the possibility of a divided Senate, in which case the nomination would fail." However, the real reason for these placements is simple and has been alluded to earlier: the Treaty Clause belongs in Article II because the President is the first mover on treaties; the Senate's role is reactive. Also, the Vice President is a different actor from the President under the Constitution. This placement, therefore, has nothing to do with the Vice President's tie-breaking power, which remains universally applicable across Senate floor votes. And even Langford is inconclusive about the reason for this placement and structure of keeping the Treaty Clause separate from the Equally Divided Clause.

Therefore, the Constitution permits the Vice President to cast the tie-breaking vote for executive nominations. Vice President Pence constitutionally cast the tie-breaking vote to confirm President Trump's nomination of Secretary DeVos. The Secretary is a constitutionally appointed officer functioning in her present capacity and suffers from no want of authority to issue the NPRM or to promulgate the final regulations on this or any other matter pertaining to the Department of Education.

Third, we appreciate some commenters' concerns that the NPRM and the final regulations run afoul of the United States' international law obligations, including the ICCPR and the Sustainable Development Goals, but we disagree with those contentions.

With respect to the ICCPR, both the text of Title IX and the goals and procedures the final regulations operationalize are similar to the ICCPR. As background, the ICCPR is a

covenant professing to adhere to the principle that the "inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."[1809] Monitored by the United Nations Human Rights Committee, the ICCPR is a multilateral treaty the United Nations General Assembly adopted in 1966, though it did not come into force until 1976. It is true that Article 2 of the ICCPR prohibits sex discrimination, but so does Title IX. To the extent there is any difference between what is expected under the ICCPR and what is expected under Title IX with respect to prohibiting sex discrimination, the Secretary must follow Title IX because when the United States Senate ratified the ICCPR, one of its formal reservations was that Article 2 "of the Covenant [is] not self-executing."[1810]

This is in keeping with controlling Supreme Court precedent because while a treaty (such as the ICCPR) "may constitute an international commitment, it is not binding domestic law unless Congress has enacted statutes implementing it or the treaty itself conveys an intention that it be 'self-executing' and is ratified on that basis."[1811] Under *Foster* and *Medellín*, a treaty is "equivalent to an act of the legislature," and therefore self-executing, when it "operates of itself without the aid of any legislative provision."[1812] Even if such intention were manifest in the ICCPR's text, the Senate's reservation would make short work of it. It follows that Article 2, which is the Covenant's principal relevant provision, is not binding on the United States. By contrast, the Department is directed and authorized by Congress to effectuate Title IX's non-discrimination mandate, pursuant to 20 U.S.C. 1682.

[1809] Preamble, ICCPR.
[1810] *See* Principle III(1), U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992).
[1811] *See Medellín v. Texas*, 552 U.S. 491 (2008) (citing *Foster v. Neilson*, 2 Pet. 253, 314 (1829), overruled on other grounds, *United States v. Percheman*, 7 Pet. 51 (1833)).
[1812] *Foster,* 2 Pet. at 314.

On the merits, too, the commenter's argument is unavailing. The ICCPR's Article 2 states:

> 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
> 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
> 3. Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Neither the commenter nor the ICCPR's text nor still the commenter's recent submission to the United Nations Human Rights Committee ("UNHRC")[1813] explains how Title IX or the NPRM deviate from the ICCPR commitment into which the United States, along with its reservations, has entered. This submission contends that the NPRM and the likely final regulations "weaken[] protections for students who have experienced sexual harassment and assault in numerous ways, including by raising the standard of evidence required to 'clear and convincing,' narrowing the definition of sexual harassment, and by requiring schools to begin the investigation procedure with the presumption that the alleged perpetrator is innocent."[1814] The commenter's submission continues: "The adoption of these guidelines will result in more limited protections for adolescent girls, who are already disproportionately likely to experience sexual violence."[1815]

Endeavoring to justify those arguments, the commenter further states: "The adoption of these regulations will also limit the United States' ability to reach Sustainable Development Goals targets 5.2 (eliminate all forms of violence against all women and girls in the public and private spheres, including trafficking and sexual and other types of exploitation) and 16.2 (end abuse, exploitation, trafficking and all forms of violence against and torture of children)."[1816] But this contention is unavailing because the record cultivated by the NPRM and these final

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[1813] *See* Letter from Yasmeen Hassan, Global Exec. Director, Equality Now, Dr. Ghada Khan, Network Coordinator, U.S. End FGM/C Network, & Jessica Neuwirth Co-President, ERA Coalition to Gabriella Habtrom, Human Rights Committee Secretariat, Office of the United Nations High Commissioner for Human Rights (Jan. 14, 2019).
[1814] *Id.*
[1815] *Id.*
[1816] *Id.*

regulations already explains why the goal or the effect of the final regulations is not to remove women's protections and expose them to violence or to do anything short of ending "abuse, exploitation, trafficking and all forms of violence against and torture of children."[1817] There is no evidence that the final regulations permit or facilitate any of these abhorrent forms of misconduct.

There is prominent international human rights case law from various tribunals demonstrating that children's physical integrity and lives deserve protection; this precept occupies a role of *opinio juris* (opinion of law by prominent scholars and jurists) in international law.[1818] When a government fails to investigate such abuses, such failure may give rise to violations of the child's and family's rights.[1819] But it does not trump the text of the salient instrument, and combined with the fact that the United States reserved certain objections, those *other* international law sources do not dictate what the United States must do. The final regulations will protect complainants by requiring recipients to offer supportive measures designed to restore or preserve the complainant's equal educational access irrespective of whether the recipient also investigates the complainant's sexual harassment allegations, and regardless of whether the respondent accused of sexually harassing the complainant is ever proved responsible or disciplined. When a recipient does investigate sexual harassment allegations in a Title IX grievance process, the final regulations ensure that both complainants and respondents receive strong, clear procedural rights in a fair, truth-seeking grievance process,

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[1817] *Id.*
[1818] *See Mapiripán Massacre v. Colombia,* Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 134 (15 Sept. 2005); *Okkalı v. Turkey*, No. 52067/99, Eur. Ct. H.R. (2006); *Stoica v. Romania*, no. 42722/02, Eur. Ct. H.R. (2008).
[1819] *See Leydi Dayan Sánchez v. Colombia*, Report, Inter-Am. Ct. H.R. No. 43/08 (23 July 2008); *Case of the "Street Children" (Villagran-Morales et al.) v. Guatemala,* Judgment, Inter-Am. Ct. H.R. (May 26, 2001).

and if the respondent is found responsible the recipient must effectively implement remedies for the complainant. Nothing in the United States' international obligations prevents the achievement of these objectives set forth under the final regulations.

As a result, the commenter's suggestions for the UNHRC Secretariat to ask the United States regarding the ICCPR, are unnecessary because the final regulations will optimize "protections for students who have experienced sexual violence" and the final regulations remains "in line with international human rights standards."[1820] Furthermore, "students in secondary schools," under the final regulations, will continue to be "offered a safe educational environment in which schools are held accountable for failure to respond to incidents of sexual harassment and violence."[1821]

As for the Sustainable Development Goals, the United States is not legally obligated to abide by them because the United States never has assented to them – consent is the essential predicate for most international law norms to be binding on a sovereign nation – and they do not occupy the status of customary international law.[1822] Customary international law "may originate 'in custom or comity, courtesy or concession,'" and "[being] 'part of our law, . . . must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as

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[1820] Letter from Yasmeen Hassan, Global Exec. Director, Equality Now, Dr. Ghada Khan, Network Coordinator, U.S. End FGM/C Network, & Jessica Neuwirth Co-President, ERA Coalition to Gabriella Habtrom, Human Rights Committee Secretariat, Office of the United Nations High Commissioner for Human Rights 7 (Jan. 14, 2019).
[1821] *Id*.
[1822] *See generally Oliva v. U.S. Dep't. of Justice*, 433 F.3d 229, 233-34 (2d Cir. 2005); *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 939 (D.C. Cir. 1988); *see also* Andrew Guzman, *The Consent Problem in International Law* 5 (Berkeley Program in Law and Economics Working Paper, 2011); Anthony Aust, *Handbook of International Law* 4 (2005) ("[International law] is based on the consent (express or implied) of states."); Laurence R. Helfer, *Nonconsensual International Lawmaking*, 2008 UNIV. OF ILL. L. REV. 71, 72 (2008) ("For centuries, the international legal system has been premised on the bedrock understanding that states must consent to the creation of international law."); United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development* (2015).

questions of right depending upon it are duly presented for their determination.'"[1823] Drafted in September 2015, the Goals cannot be customary international law because they have not, "over the long passage of years grow[n] 'by the general assent of civilized nations, into a settled rule of international law.'"[1824]

Even on the merits, though, the Goals are consistent with the final regulations. The Goals pledge that, by 2030, "[a]ll forms of discrimination and violence against women and girls will be eliminated, including through the engagement of men and boys."[1825] Nothing in the final regulations promotes, perpetuates, or tolerates any "form[] of discrimination and violence against women and girls," and indeed strives to "eliminate[]" "[a]ll forms of [sex] discrimination."[1826] That is the objective of Title IX and the final regulations. These final regulations do not violate any of the United States' international law obligations or, for that matter, norms or principles.

Consequently, the final regulations are consistent with the United States' international law obligations.

Clery Act

Background

The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act ("Clery Act"), 20 U.S.C. 1092(f), applies only to institutions of higher education that receive Federal student financial aid through the programs authorized by Title IV of the Higher Education Act of 1965, as amended ("HEA"). The Clery Act uses the term "victim."[1827]

[1823] *Oliva v. U.S. Dep't. of Justice*, 433 F.3d 229, 233 (2d Cir. 2005) (quoting *The Paquete Habana*, 175 U.S. 677, 694, 700 (1900)).
[1824] *Id.* (quoting *The Paquete Habana*, 175 U.S. at 694).
[1825] United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development* (2015).
[1826] *Id*.
[1827] 20 U.S.C. 1092(f).

Accordingly, this section of the preamble in which the Department responds to comments about the intersection of these final regulations with the Clery Act, uses the term "victim" in discussing the Clery Act and its implementing regulations. The Clery Act requires institutions of higher education to disclose campus crime statistics and security information about certain criminal offenses, including sexual assault, that occur in a particular geographic area, including the public property immediately adjacent to a facility that is owned or operated by the institution for educational purposes.[1828] VAWA[1829] amended the Clery Act to require institutions of higher education to report information about additional criminal offenses, including domestic violence, dating violence, and stalking.[1830]

VAWA included several amendments to the Clery Act that may be relevant to some parties implicated in a report of sexual harassment or a grievance process to resolve allegations of sexual harassment under Title IX and these final regulations. For example, the Clery Act, as amended by VAWA, requires that students and employees receive written notification of available victim services including counseling, advocacy, and legal assistance, as well as options for modifying a victim's academic, living, transportation, or work arrangements.[1831] The Clery Act also requires institutions of higher education to notify victims of their rights, including their right to report or not report a crime of sexual violence to law enforcement and campus authorities.[1832]

[1828] 20 U.S.C. 1092(f)(1)(F); 20 U.S.C. 1092(f)(6)(A)(iv).
[1829] PL 113-4.
[1830] 20 U.S.C. 1092(f)(6)(A)(i); 20 U.S.C. 1092(f)(7).
[1831] 20 U.S.C. 1092(f)(8)(B)(vii).
[1832] 20 U.S.C. 1092(f)(8)(C).

The Department promulgates these final regulations under Title IX and not under the Clery Act. These final regulations apply to all recipients of Federal financial assistance, and these recipients include many parties that are not institutions of higher education, receiving Federal student financial aid under Title IV of the HEA. For example, these final regulations apply to elementary and secondary schools, which are not subject to the Clery Act. These final regulations do not change, affect, or alter any rights, obligations, or responsibilities under the Clery Act. These final regulations only concern a recipient's rights, obligations, and responsibilities under Title IX. Accordingly, the Department will not respond to any comments that solely concern compliance with the Clery Act and its implementing regulations because such comments go beyond the scope of the NPRM to promulgate regulations under Title IX.[1833]

Comments, Discussion, and Changes

Comments: One commenter expressed concern that § 106.45(b)(1)(vi) (Describe Range of Sanctions) conflicts with the Clery Act, which requires institutions to include a complete list of sanctions that may be imposed following an institutional disciplinary proceeding to support transparency in adjudications, and suggested that recipients should be required to provide a complete list of sanctions, not a range. Without such transparency, the commenter argued, there could be inconsistency in sanctioning, a distrust of the process, as well as confusion among recipients regarding the requirements under the Clery Act and the Department's Title IX regulations.

Discussion: If the Clery Act applies to an institution, the institution must, under 34 CFR §668.46(k)(1)(iii), provide a list of sanctions that the institution may impose following an

[1833] 83 FR 61462.

institutional disciplinary proceeding based on an allegation of dating violence, domestic violence, sexual assault, or stalking. Such a list also satisfies the requirement in § 106.45(b)(1)(vi) to describe the range of sanctions that a recipient may impose on a respondent, and the Department has revised § 106.45(b)(1)(vi) to state that a recipient must describe the range of sanctions or provide a list of sanctions. Through this revision, the Department clarifies that a list of sanctions or a description of the range of sanctions satisfies § 106.45(b)(1)(vi). These final regulations apply to elementary and secondary schools in addition to postsecondary institutions. The Department believes it is appropriate for elementary and secondary schools and other recipients to retain discretion in imposing sanctions in cases involving sexual harassment, and requiring a recipient to describe the range of sanctions will help ensure that the parties know the sanctions that are appropriate in different circumstances, which could arise from a finding of responsibility. The requirements of the Clery Act were designed to fit the population, environment, and traditional processes used by institutions of higher education. The other recipients of Federal funds subject to the Title IX requirements have different populations, environments, and processes. The Department does not believe it is appropriate to prohibit recipients from crafting unique sanctions designed to specifically address the circumstances of a particular formal complaint as long as recipients stay within the range of sanctions described in their policies. Accordingly, the Department will continue to allow recipients to describe the range of possible sanctions and acknowledges that listing all possible sanctions is also permissible.

The Department further notes that the Clery Act regulations in § 668.46(k)(1)(iv) require an institution to describe "the range of protective measures that the institution may offer to the victim following an allegation of dating violence, domestic violence, sexual assault, or stalking."

Unlike the regulations implementing the Clery Act, these final regulations require that a recipient describe only the range of remedies that the recipient may implement following any determination of responsibility. The term "remedies" in these final regulations refers to measures that a recipient provides a complainant after a determination of responsibility for sexual harassment has been made against the respondent, as described in § 106.45(b)(1)(i). Section 106.45(b)(1)(i) provides that "remedies may include the same individualized services described in § 106.30 'supportive measures'; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent." To better align the requirement to describe the range of remedies with the revisions with respect to sanctions in § 106.45(b)(1)(vi), the Department revised § 106.45(b)(1)(vi) to provide that a recipient may either describe the range of possible remedies or list the possible remedies.

The Department does not believe it serves the purposes of title IX to limit the type of "supportive measures," as defined in § 106.30, that a recipient may provide and, thus, a recipient may describe the range of supportive measures, or list the possible supportive measures. A recipient retains discretion to tailor supportive measures to a party's unique circumstances and may not foresee or anticipate all possible supportive measures.

Changes: The Department revised § 106.45(b)(1)(vi) to state that a recipient may describe the range of possible sanctions and remedies or list the possible sanctions and remedies that the recipient may implement following any determination of responsibility.

Comments: Some commenters expressed general concern with the proposed rules and asserted that they were inconsistent with the Clery Act without providing additional details. Some commenters noted that while the Department acknowledged that Title IX and the Clery Act's jurisdictional schemes may overlap in certain situations, the Department failed to explain how

institutions of higher education should resolve the conflicts between the two sets of rules when addressing sexual harassment and claimed that these different sets of rules would likely create widespread confusion for schools.

Some commenters expressed concern that the proposed rules conflict with congressional intent regarding the appropriate level of due process and fairness, which the commenters contended was set forth by Congress in the Clery Act. One commenter asserted that Congress specifically defined what due process rights it demands for campus adjudications of sexual assault in the Clery Act and nowhere did Congress manifest an intent that the Department should consider the elevated due process protections for respondents outlined in the proposed rule.

Another commenter stated that the Department enacted the Clery Act regulations following a negotiated rulemaking process designed to implement Congress's intent. The commenter argued that in its Clery Act regulations the Department did not interpret the phrase "prompt, fair, and impartial investigation and resolution" in the Clery Act to require any of the elevated due process protections for respondents contained in the proposed Title IX rules and further noted that the Department disagreed with comments on the proposed Clery Act regulations arguing that the regulations eliminated essential due process protections. The commenter asserted that in response to such comments, the Department stated that the Clery Act statute and regulations require that the proceedings be fair, prompt, and impartial to both parties and be conducted by officials who receive relevant training and noted that in such cases, institutions are not making determinations of criminal responsibility, but are determining whether the institution's own rules have been violated. The commenter argued that the Department's interpretation of Title IX in the proposed rules is incompatible with its Clery Act regulations and the relevant Clery Act rulemaking process, which demonstrates that the

Department's Title IX rulemaking is arbitrary and capricious and an attempt by the Department to circumvent its own regulations and the clear intent of Congress with respect to procedural due process in campus sexual assault proceedings.

Discussion: Although the commenters allude to conflicts between the regulations implementing the Clery Act, and these final regulations implementing Title IX, they did not identify a true specific conflict. The Department acknowledges that its Clery Act regulations overlap with these final regulations and impose different requirements in some circumstances. It has always been true that some recipients that are subject to both the Clery Act regulations and the Title IX regulations must comply with both sets of regulations. The Department has long interpreted Title IX to apply to incidents of sexual harassment and, through guidance, has provided its views of how Title IX applies to prohibit sexual harassment. Even before the proposed regulations, institutions of higher education raised concerns that the Department has not been clear about how requirements under Title IX interact with requirements under the Clery Act. The Department has consistently stated that institutions of higher educations must comply with both Title IX and the Clery Act and provided guidance in the past. These final regulations more formally and clearly address the obligations of a recipient under Title IX than the Department's past guidance.

Contrary to creating confusion, the Department is addressing the intersection of the Clery Act and Title IX through these final regulations. Sexual harassment for purposes of Title IX means conduct on the basis of sex that meets the definition of sexual assault, dating violence, domestic violence, and stalking in the Clery Act. By aligning the definition of sexual harassment in § 106.30 with the Clery Act, the Department is attempting to resolve confusion or perceived conflicts about a recipient's obligations under Title IX and how these obligations may overlap with some of the conduct that the Clery Act requires.

The Department disagrees that these final regulations conflict with the level of due process and fairness, which the commenters contended was set forth by Congress in the Clery Act. Congress stated in 20 U.S.C. 1092(f)(8)(B)(iv)(I)(aa) that an institution's proceedings must provide a "prompt, fair, and impartial investigation and resolution." The Department's regulations implementing the Clery Act adhered to the plain meaning of the statute and establish requirements sufficient for purposes of the Clery Act. Congress, however, did not set forth any parameters for the due process that the Department should require under Title IX to prohibit sex discrimination in a recipient's education program or activity. The due process protections that the Department requires in these final regulations are designed to address sex discrimination, specifically sexual harassment, in a recipient's education program or activity for both parties, and not just the respondent. A complainant who chooses to file a formal complaint will benefit from a transparent grievance process under § 106.45 that provides both an investigation and a hearing.

The Clery Act is part of Title IV of the HEA, which requires the Department to use negotiated rulemaking procedures in most cases. Congress does not require negotiated rulemaking to promulgate regulations implementing Title IX. The Department used notice-and-comment rulemaking to promulgate these final regulations in accordance with the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, and that process was not arbitrary and capricious. The fact that there are differences between these final regulations and the regulations implementing the Clery Act do not render these final regulations arbitrary and capricious.

The purpose of Title IX, which is to prohibit sex discrimination in a recipient's education program or activity, is different than the purpose of the Clery Act, which is to require disclosure of certain campus security policies and campus crime statistics. Additionally, Title IX is a

condition of receipt of Federal financial assistance, whereas the Clery Act is a condition of receipt of Federal student financial aid for students at institutions of higher education. The Department may legally impose different conditions as requirements for different types of funding.

Changes: None.

Comments: Some commenters asserted that the proposed rules conflict with the Clery Act's requirements regarding geographic jurisdiction and coverage of conduct that occurs off-campus, online, and outside of the United States. One commenter found the Department's failure to follow the Clery Act rules regarding geographic jurisdiction especially problematic in light of the fact that the proposed Title IX rules repeatedly cite and rely on the Clery Act regulations and argued that the Department cannot pick and choose which parts of the Clery Act are applicable to Title IX.

One commenter asserted that pursuant to the Clery Act, complainants alleging incidents of sexual assault, dating violence, domestic violence, and stalking, regardless of location, must be given information about off-campus resources as well and questioned why complainants are treated differently under the proposed Title IX rules. Some commenters argued that the response requirements in the Clery Act are not limited to Clery geography. These commenters noted that the Clery Act regulations require institutions to have a policy statement explaining the process and procedure for disclosures of sexual assault (and three other crimes) and asserted that the statement would apply whether the offense occurred on or off campus. The Clery Act final regulations further require institutions to follow the procedures described in their statement regardless of where the conduct occurred. In contrast, the commenters argued, the proposed Title IX rules requiring recipients to adopt policy and grievance procedures apply only to exclusion

from participation, denial of benefits, or discrimination on the basis of sex occurring against a person in the United States.

The commenters argued that the geographic limitations in the proposed Title IX rules conflict with the Department's traditional interpretation, which required institutions to respond to harassment or violence that could limit participation in educational programs or activities wherever they occurred in the world, if the covered institution is in the United States. According to these commenters, the geographic limitations in the proposed Title IX rules are inconsistent with the way the Department has interpreted geographic jurisdiction under the Clery Act, and the proposed geographic limitation will have a significant impact on the access of some students to their education and lead to confusion among institutions.

Discussion: These final regulations do not conflict with the Department's regulations concerning Clery geography. Although these final regulations may apply to some incidents of sexual harassment that occur on areas included in an institution's Clery geography, these final regulations are promulgated under Title IX, which prohibits discrimination on the basis of sex in a recipient's education program or activity against a person in the United States. These final regulations are consistent with the statutory limitations that Congress applied to Title IX, 20 U.S.C. 1681. The Department is not "picking and choosing" which obligations from the Clery Act to incorporate in these Title IX final regulations. The Department is acknowledging that some conduct covered under Title IX also is covered under the Clery Act.

These regulations apply more broadly than the Clery Act insofar as these regulations apply to recipients of Federal financial assistance that are not institutions of higher education whose students receive Federal student financial aid. The Department does not believe it is appropriate to impose on all recipients of Federal financial assistance the same obligations that

recipients of Federal student financial aid have. Many recipients of Federal financial assistance such as elementary and secondary schools have never been subject to the requirements of the Clery Act and its geography and forcing them to comply with such requirements as a condition of Federal financial assistance is inappropriate for various reasons. For example, elementary and secondary schools generally are more limited in the geographic scope of their educational activities. The requirement to report crimes described in the Clery Act that occur on Clery geography is not as helpful in the elementary and secondary school context as it is in the postsecondary institution context. Many students attend public elementary and secondary schools that they are assigned to attend and do not have a choice as to which school to attend. Students at postsecondary institutions usually have more options as to which college or university to attend and learning about Clery/VAWA crimes that occur on Clery geography or the nearby geographic area of the institution may help them choose which institution is best for them and help raise awareness of the types and frequency of crimes at or near a particular institution.

The Department does not agree that the Clery Act requires the "disclosure" of sexual assault. The Department acknowledges that the Clery Act and its implementing regulations require a postsecondary institution receiving Federal student financial aid, to report the number of incidents of sexual assault, dating violence, domestic violence, and stalking, among other crimes, that occur on Clery geography. The Department also acknowledges the Clery Act may require a postsecondary institution to issue a timely warning in certain circumstances.

The Department acknowledges that some of the requirements in the Clery Act are not limited to crimes that occur on Clery geography. However, the Clery Act does not provide that an institution's obligations regarding an incident that occurred on campus are necessarily the same as its obligations to an incident that occurred off campus. The Department's Clery Act

regulations provide in § 668.46(b)(11)(vii) that the institution will have "[a] statement that, when a student or employee reports to the institution that the student or employee has been a victim of dating violence, domestic violence, sexual assault, or stalking, whether the offense occurred on or off campus, the institution will provide the student or employee a written explanation of the student's or employee's rights and options, as described in paragraphs (b)(11)(ii) through (vi) of this section." This regulation does not state that the institution must provide students or employees with the exact same rights and options, irrespective of where the offense occurred.

The Department appreciates the commenter who noted the differences between the Clery Act and Title IX and agrees that each statute has a different purpose. For the reasons explained more thoroughly in the "Adoption and Adaptation of the Supreme Court's Framework to Address Sexual Harassment" section, the Department is adopting and adapting the rubric in the Supreme Court's decisions in *Gebser* and *Davis*. The Department is faithfully administering the requirements in Title IX that "[n]o 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."[1834] The Department explains its interpretations of "no person in the United States," "education program or activity," and other elements of Title IX in the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this preamble. The only specific geographic limitation that these final regulations respect is a limitation that Congress imposed in Title IX by requiring the sex discrimination to be against a person in the United States. No other specific, geographic limitations exist in Title IX, and a recipient with actual knowledge of sexual harassment in its

[1834] 20 U.S.C. 1681(a).

education program or activity against a person in the United States must respond promptly and in a manner that is not deliberately indifferent.[1835]

The Department disagrees with the commenters' claim that these final regulations will lead to confusion. Imposing all the requirements in the Department's regulations under the Clery Act on recipients of Federal financial assistance would result in greater confusion, especially for recipients who have never had to comply with the Department's regulations implementing the Clery Act.

Changes: None.

Comments: Some commenters expressed general concerns with the lack of coverage for off-campus sexual harassment noting that especially at the higher education level, many students live away from home and are likely to explore high-risk situations away from campus. These commenters argued that the proposed changes ignore the reality of the degree to which off-campus sexual harassment impacts a student who is forced to see their harasser on campus daily. These commenters asserted that schools should be required to provide services to students who are assaulted off-campus when the violence interferes with their education and schools should be required to discipline perpetrators who assault students off-campus, especially when the perpetrator is a student of the institution and recommended that the Department refer to the Clery Act rules on geographic jurisdiction.

Some commenters expressed concern that the Clery Act requires institutions of higher education to report certain incidents of dating violence, domestic violence, stalking, and sexual assault that occur in certain off-campus locations and notify all students who report such

[1835] Section 106.44(a).

incidents of their rights regardless of whether the offense occurred on or off-campus, but the proposed Title IX rules limit the ability of institutions of higher education to take action to address such incidents. Commenters concluded that § 106.45(b)(3) undermines the Clery Act's mandate and creates a perverse system in which institutions would have to report incidents of sexual assault that occur off-campus in order to comply with the Clery Act, but would be required by the Department under Title IX to dismiss these complaints instead of investigating them. One commenter asserted that this would allow perpetrators to engage in sexual misconduct with impunity and prevent institutions from taking action to address incidents of sexual misconduct that impact survivors' access to education. Another commenter asserted that since institutions of higher education are required to report incidents of sexual assault, dating violence, domestic violence, and stalking that occur in noncampus buildings and locations under the Clery Act, these institutions have acquired actual knowledge of such incidents, which, the commenter argued, cannot be ignored.

The commenter argued that this conflict between the Clery Act and the proposed Title IX rules would allow schools to ignore off-campus sexual harassment even while reporting and having actual knowledge of these incidents which would likely lead to lawsuits over the inaction of the institutions.

Discussion: These final regulations require a recipient to respond to sexual harassment that occurs in its education program or activity, irrespective of whether the sexual harassment occurs on or off campus. For the reasons set forth earlier, it is imprudent to impose all requirements in the regulations implementing the Clery Act including requirements regarding Clery geography on recipients who are not subject to the Clery Act.

The Clery Act requirements that institutions include certain off-campus incidents in crime statistics and provide certain information and opportunities to victims of incidents of dating violence, domestic violence, stalking, and sexual assault that occur in certain off-campus locations do not contradict these final regulations. As previously noted, the Clery Act regulations do not state that the institution must provide students or employees with the exact same rights and options, irrespective of where the offense occurred. The mandatory dismissal in § 106.45(b)(3)(i) also does not conflict with the Department's regulations implementing the Clery Act. In these final regulations the Department is clarifying that a recipient must dismiss an allegation of sexual harassment in a formal complaint in certain circumstances and that such a dismissal under these final regulations does not preclude action under another provision of the recipient's code of conduct. If recipients would like to address conduct that these final regulations do not address, recipients may do so.

The Department agrees that if a recipient has actual knowledge of sexual harassment, the recipient must respond promptly in a manner that is not deliberately indifferent if the sexual harassment occurred in a recipient's education program or activity against a person in the United States. The Department notes that under these final regulations, a recipient may be required to respond to incidents that occur off campus. Whether sexual harassment occurs in an education program or activity requires a different analysis than whether sexual assault, domestic violence, dating violence, or stalking occur on campus or off campus. Section 106.44(a) provides that for the purposes of §§ 106.30, 106.44, and 106.45, education program or activity includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which sexual harassment includes, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary

institution. As discussed in the "Litigation Risk" subsection of the "Miscellaneous" section of this preamble, the Department believes that these final regulations may have the effect of decreasing litigation arising out of a recipient's responses to sexual harassment.

Changes: None.

Comments: Some commenters raised general concerns that excluding study abroad programs does not reflect the current reality where many institutions across the United States have campuses and educational programs across the world and whose study abroad programs are offering an important component of the educational programs available to students. These commenters stated that schools should be required to provide services to students who are assaulted in a study abroad program when the violence interferes with their education and schools should be required to discipline perpetrators who assault students off-campus, especially when they are a student of the institution and recommended that the Department refer to the Clery Act rules on geographic jurisdiction for study abroad programs. One commenter argued that by not covering study abroad programs under Title IX the Department was creating a scenario in which a U.S. institution is required to have institutional policies to address incidents of sexual assault in a campus residence hall at an abroad location of the institution under the Clery Act, but such policies would need to be independent of the Title IX process even though it would address the same conduct. The commenter argued that this undermines the ability of the Title IX Coordinator to implement a consistent response to sex discrimination and identify patterns that could put individuals and the community at risk and creates a need for separate processes to address the same behavior, in direct opposition to the stated goal of the proposed Title IX rules to streamline processes and create more efficient systems.

Discussion: The Department appreciates the commenter's concerns about study abroad programs. As explained elsewhere in this preamble, the Department interprets Title IX as prohibiting discrimination on the basis of sex against persons in the United States. The Department notes that recipients of Federal financial assistance may respond to reports of sexual harassment that occur abroad, including in study abroad programs. The Department, however, cannot require a recipient to do so under Title IX. The Department also is not requiring recipients to adopt different processes to address conduct that these regulations do not address. In the interest of efficiency, a recipient may use, but is not required to use, the processes and procedures in these final regulations to address conduct that these final regulations do not address.

Changes: None.

Comments: One commenter who represents a system of postsecondary institutions raised specific concerns regarding the conflict in geographic jurisdiction between the Clery Act and the proposed Title IX rules related to Greek letter organizations at such institutions. The commenter explained that under prior OCR interpretations, institutions would be required to take action if the incidents disclosed at Greek letter housing could limit access to education, regardless of the level of oversight of the group. Under the Clery Act, analogous sexual assault crimes might be reported if they occurred at Greek letter housing, but only if the house was owned or controlled by a student organization that is officially recognized and the deed or lease would have to be held by the organization, as private homes and businesses are not included. The commenter argued that the Clery Act definition is inconsistent with the proposed Title IX rules and expressed concern that this conflict will create confusion among institutions. The commenter expressed additional concerns that some institutions may be incentivized to no longer recognize

Greek letter associations or reduce their recognition so that they would not be considered a program or activity based on the tests drawn from cases included in the proposed Title IX rules. The commenter argued that recognizing such associations can come with requirements such as mandatory insurance, risk management standards, and training requirements, which can reduce incidents of sexual harassment and assault so there are reasons for the Department to incentivize such recognition.

Discussion: The Department agrees that with respect to Greek letter organizations, recipients of Federal financial assistance may have different obligations under these final regulations, implementing Title IX, than under the regulations implementing the Clery Act. These obligations, however, do not present a conflict, and the commenter does not identify any specific conflict with respect to Greek letter organizations.

The Department recognizes that each recipient may have a different arrangement with Greek letter associations active at its institution and that the application of these final regulations will differ based upon the relationship between the recipient and the Greek letter association. Whether the Greek letter association is an education program or activity of the recipient will depend on the relationship between the recipient and the Greek letter association. These final regulations provide clarity and not confusion as to what an education program or activity includes, as § 106.44(a) states that for purposes of §§ 106.30, 106.44, and 106.45, an education program or activity includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. The Department acknowledges that many but not all Greek letter associations are student organizations that own or control a building. As

more fully explained in the "Section 106.44(a) 'education program or activity'" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this preamble, recipients may dictate the terms under which they recognize student organizations that own or control buildings, and the reference in § 106.44(a) to "buildings owned or controlled by a student organization that is officially recognized by a postsecondary institution" as part of a recipient's "education program or activity" for purposes of responding to sexual harassment under these final regulations, includes buildings that are on campus and off campus. By contrast, the Clery Act's definition of noncampus property excludes from Clery geography "a fraternity or sorority house that is located within the confines of the campus on land owned by the institution."[1836] The Department does not intend to encourage or discourage recipients from recognizing Greek letter associations, and each recipient must determine what its relationship should be with Greek letter associations. However, where a postsecondary institution does choose to officially recognize a Greek letter association, buildings owned or controlled by that fraternity or sorority are part of the postsecondary institution's education program or activity under these final regulations.

Changes: None.

Comments: One commenter claimed that while the Department indicated that the proposed language regarding emergency removals in § 106.44(c) tracks the Clery Act regulation at 34 CFR 668.46(g), in fact the corresponding Clery Act provision says nothing about the process owed to respondents subject to an interim suspension, and courts have held that due process

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[1836] 34 CFR 668.46 (definition of noncampus building or property); U.S. Dep't. of Education, Office of Postsecondary Education, *The Handbook for Campus Safety and Security Reporting*, 2-18 to 2-19 (2016), https://www2.ed.gov/admins/lead/safety/handbook.pdf.

required under an interim suspension is less elaborate than during a full hearing. One commenter stated that the Clery Act does not prescribe what analytical procedures should be used to determine if an emergency exists, it asks institutions to determine that process for their institution and then disclose that process in institutional policy and in their annual security reports. When such an emergency is confirmed, the Clery Act requires the institution to inform the campus community of the nature of the emergency and what actions they should take to protect themselves. The commenter argued that applying this construct to Title IX makes it seem as though the Department is asking the institution to apply the Clery Act standards to a Title IX process without considering or providing guidance on the implications of such changes to Clery-required emergency notification policies or practices.

Some commenters requested clarification regarding how institutions should utilize the referenced Clery standard, "immediate threat to the health or safety of students and employees occurring on the campus" to determine whether a student should be removed from campus. One commenter expressed concern that without additional guidance or directives, this requirement makes it unclear how/to whom/when such circumstances would apply and how and by whom these requirements should be carried out so as to complement, as opposed to interfere with, an institution's established emergency notification policy and procedures under the Clery Act. The commenter stated that the proposed Title IX rules require that an individual be given an opportunity to challenge the institution's emergency removal immediately following their removal. The commenter asserted that a successful appeal of an emergency removal would require the institution to determine that its own process for assessing an immediate threat to the health or safety of the campus community was flawed, which would influence Clery Act enforcement as well. The commenter expressed concern that without more clarity and

consultation with the Department's Clery Act Compliance Division, separate parties on campus could be making separate analyses on the presence or absence of an immediate threat to the health or safety of the campus community – one in relation to an emergency removal and the other in relation to the institution's obligations to determine whether a threat exists and its impact on the broader community – resulting in potential conflicts across departments and creating significant challenges for the Department in assessing an institution's compliance with Title IX and the Clery Act.

One commenter appreciated the ability for schools to remove a respondent that may be a threat to the complainant or the broader campus community, but believed additional clarification was needed as to what elements need to be included in the assessment. The commenter asked for more specific information including whether there are specific assessment tools that are recommended, what does assessment look like, who conducts this assessment, what conduct or behavior would constitute a broader threat, whether it is a standard threat assessment, what constitutes the process for a "challenge," and who hears that challenge. For example, the commenter inquired whether the person who hears the challenge must be someone separate from the Title IX Coordinator, investigator, decision maker, or appeals person, whether "removal" includes removal from all "programs/activities," such as extra-curricular activities like athletics; and if so, whether such a removal impacts who conducts the assessment, and to whom a "challenge" should be made. The commenter also noted that the Clery Act requires institutions to alert their campus communities to certain crimes in a manner that is timely and will aid in the prevention of similar crimes. Warnings are issued regarding criminal incidents to enable people to protect themselves. Warnings are issued after an assessment is conducted to determine if the crime that has occurred represents a serious or continuing threat to the campus community. The

commenter asked whether it is the Department's intention to require institutions to conduct a similar assessment before initiating the emergency removal of a respondent.

Discussion: The Department noted in the NPRM that the language about an immediate threat to the health or safety of students appears in § 668.46(g) but did not intend to imply that the proposed regulations would have any effect on § 668.46(g) or its application. The Department acknowledges that the emergency removal provision in § 106.44(c) of these final regulations is different than the emergency notification provision in § 668.46(g) of the Clery Act regulations. The Department clarifies here that an institution that is subject to the Clery Act does not need to send an emergency notification each time an institution removes a respondent under § 106.44(c). Whether an institution needs to issue a timely warning is governed under the regulations implementing the Clery Act, and these final regulations do not address the conditions (i.e., Clery crime, Clery geography) that may require a recipient to issue a timely warning. The Department also notes that similar language about health or safety emergencies appears in §§ 99.31(a)(10) and 99.36 of the regulations implementing FERPA, and the Department revised the emergency removal provision in § 106.44(c) to better align with the health and safety emergency exception in the FERPA regulations, §§ 99.31(a)(10) and 99.36. Even though the Department uses similar language in the regulations implementing the Clery Act and FERPA, the Department is not requiring recipients to use the same analysis in Clery or in FERPA to determine whether an emergency removal may be appropriate under § 106.44(c). The Department defers to a recipient to conduct an individualized safety and risk analysis to determine whether an immediate threat to the physical health or safety of any student or other individual exists under § 106.44(c). The emergency removal process under § 106.44(c) is a separate process than the process that an institution uses to determine whether there is a threat that requires a timely warning or an

emergency notification under the Clery Act, and a recipient may determine that there is a sufficient threat to justify an emergency removal under the Title IX regulations but not to require a timely warning or an emergency notification under the Clery Act regulations. Similarly, a recipient may determine that the circumstances justify issuing a timely warning or emergency notification but not an emergency removal. Section 106.44(c) leaves recipients with flexibility to decide who conducts the individualized safety and risk analysis, and who hears any post-removal challenge. Requiring a post-removal challenge opportunity under § 106.44(c) does not create a conflict with a recipient's obligation under the Clery Act. Neither a recipient's decision to invoke emergency removal under § 106.44(c), nor the outcome of a respondent's post-removal challenge, alters a recipient's obligations under the Clery Act regulations.

The recipient has discretion as to whether to remove the respondent from all of its education programs or activities or only some education programs and activities, and as long as a recipient is not deliberately indifferent with respect to whether an emergency removal is an appropriate response to sexual harassment under § 106.44(a), the Department will not second guess the recipient's decision. The Department also defers to a recipient as to who hears a respondent's challenge to a decision to remove the respondent. A Title IX Coordinator, investigator, or decision-maker may have a role in the emergency removal process as long as such a role does not result in a conflict of interest with respect to the grievance process as prohibited in § 106.45(b)(1)(iii). The Department does not require that a recipient use the grievance process in § 106.45 to address an emergency removal and will defer to a recipient's process as long as the recipient provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. For further discussion of the emergency removal provision, see the "Section 106.44(c) Emergency Removal" subsection of

the "Additional Rules Governing Recipients' Responses to Sexual Harassment" section of this preamble.

Changes: None.

Comments: Some commenters raised concerns about conflicts between language in the proposed Title IX rules related to advisors of choice and cross-examination and the Clery Act. One commenter argued that the Clery Act reflects congressional intent regarding providing advisors and cross-examination in campus conduct processes and the proposed Title IX rules conflict with that intent. The commenter stated that congressional intent was clear from the language in the Clery Act, and the Department reasonably interpreted "advisor of their choice" to mean that an institution could not ban a participating student from choosing an attorney. The commenter stated, however, that the Department itself indicated that it did not believe that the statutory language in the Clery Act permitted it to require institutions to provide legal representation to a party in a situation in which one party has legal representation and the other party does not and in the Clery Act final regulations the Department stated that it would not impose such a burden on institutions absent clear and unambiguous statutory authority. The commenter asserted that the commenter could find no statutory authority in Title IX for the Department to require advisors of choice to be provided to students at no cost. The commenter argued that if the Department could find no such authority in the Clery Act, which mentions advisors of choice, there can similarly be no such authority in Title IX, which does not reference advisors or attorneys, and which has not previously been interpreted by the Department to require institutions to provide such representation. Thus, the commenter claimed, because there is no authority or evidence that providing or not providing advisors has a disparate impact based on gender, such a requirement is therefore arbitrary and capricious under the law. The commenter similarly claimed that there is

no statutory authority under Title IX to support a requirement that institutions allow advisors to participate in investigations and adjudications under Title IX and the Department could have, and did not, at least make an argument that the Clery Act required advisors to be permitted to participate in such proceedings.

Discussion: Contrary to the commenter's assertions, these final regulations do not require a recipient to provide legal representation for the parties. The Department is clarifying in §§ 106.45(b)(2)(i)(B), 106.45(b)(5)(iv) and 106.45(b)(6)(i) that an advisor may be, but is not required to be, an attorney. The Department's position that an advisor does not need to be an attorney is consistent with the regulations implementing the Clery Act. In the preamble to the final regulations published October 20, 2014, implementing changes to the Clery Act, the Department stated: "We do not believe that [the Clery Act] permits us to require institutions to provide legal representation in any meeting or disciplinary proceeding in which the accused or the accuser has legal representation but the other party does not. Absent clear and unambiguous statutory authority, we would not impose such a burden on institutions."[1837] The Department's position has not changed with respect to the Clery Act, and these final regulations do not require institutions to provide legal representation to either the complainant or the respondent.

As previously stated, the Clery Act has a different purpose than Title IX, and the Clery Act applies to recipients of Federal student financial aid and not recipients of Federal financial assistance. Although the Clery Act does not require that an advisor be permitted to conduct cross-examination of witnesses testifying at a proceeding, the Department believes that for postsecondary institutions, cross-examination by a party's advisor is the best approach to

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[1837] 79 FR 62774.

assessing allegations of sexual harassment when a formal complaint is filed under these final regulations. The "Section 106.45(b)(6)(i) Postsecondary Institution Recipients Must Provide Live Hearing with Cross-Examination" subsection of the "Hearings" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section in this preamble fully explains the Department's position regarding the requirement that an advisor be permitted to conduct cross-examination on behalf of a party during a hearing at a postsecondary institution. Under these final regulations, a postsecondary institution is not required to provide an advisor to a party for any purpose other than for cross-examination during the live hearing. Providing an advisor to a party who does not have an advisor for the purpose of cross-examination during a hearing prevents parties from directly cross-examining each other.

Changes: The Department has revised §§ 106.45(b)(2)(i)(B), 106.45(b)(5)(iv) and 106.45(b)(6)(i) to specify that the advisor may be, but is not required to be, an attorney.

Comments: Some commenters expressed concern that the requirement that institutions allow for cross-examination by an advisor of choice in sexual harassment cases under Title IX that are also within the Clery Act's definition of sexual assault conflicts with the Clery Act regulations. The commenters noted that the Clery Act regulations explicitly allow institutions to establish restrictions regarding the extent to which the advisor of choice may participate in the proceedings, as long as the restriction applies to both parties, including prohibiting them from conducting or participating in direct cross-examination. At least one commenter stated that in the preamble to the Clery Act final regulations, the Department responded to concerns that advisors of choice may interfere with the process and make the investigation and adjudication of cases more legalistic and take it further away from the educational model. According to this commenter, the Department made several clear statements that institutions may restrict an

advisor's role, such as by prohibiting the advisor from speaking during the proceeding, addressing the disciplinary tribunal, or questioning witnesses. This commenter contended that the Department's regulations, implementing VAWA, clearly allow colleges and universities to prohibit advisors, including attorneys, from participating in any way, including prohibiting them from conducting or participating in direct or cross-examination. One commenter asserted that the establishment of advisors of choice in the Clery Act was designed to ensure that both parties receive individualized support throughout the process and asserted that this individual is designed to play a supportive role to the complainant or respondent. The commenter stated it was unclear why the Department chose to incorporate this Clery Act requirement into the proposed Title IX rules, particularly if such an advisor would then be expected to conduct a cross-examination. The commenter argued that incorporating this Clery Act requirement into the proposed Title IX rules and requiring that person to conduct cross-examination could lead to people who are untrained, or at best, with limited training offered to them by the institution performing a role they were never intended to perform under the existing Clery Act regulations and creates a destructive process for all parties involved.

Discussion: There is no conflict between the regulations implementing the Clery Act and these final regulations implementing Title IX with respect to an advisor conducting cross-examination on behalf of a party. The regulations implementing the Clery Act in § 668.46(k)(2)(iii)-(iv) are similar to these final regulations and require that an institution provide an 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 and requires that an institution not limit the choice of advisor or presence for either the accuser or the accused. Under § 668.46(k)(2)(iv), an institution may

establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as these restrictions apply equally to both parties. Section 106.45(b)(5)(iv) contains almost the same language as § 668.46(k)(2)(iii)-(iv) with minor revisions to clarify that the advisor may be, but is not required to be, an attorney. Unlike the regulations implementing the Clery Act, these final regulations require that postsecondary institutions provide an advisor to the parties for the purpose of conducting cross-examination at the hearing. This requirement does not conflict with the Clery Act regulations, as this requirement applies to both parties. As previously noted, the Department may impose different requirements on recipients of Federal financial assistance with respect to Title IX, which prohibits sex discrimination, than on recipients of Federal financial student aid with respect to the Clery Act. The Department's rationale for requiring that postsecondary institutions provide an advisor to the parties for the purpose of cross-examination at the live hearing or allow a party to have an advisor who conducts cross-examination at the live hearing is more fully explained in the "Section 106.45(b)(6)(i) Postsecondary Institution Recipients Must Provide Live Hearing with Cross-Examination" subsection of the "Hearings" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble.

Nothing in these final regulations precludes a recipient from preventing an advisor from being disruptive, and a recipient may implement rules about appropriate conduct at an interview, meeting, hearing, etc., to require all participants to behave in an orderly manner. Advisors may continue to provide support to the parties, and an advisor's role is not limited to an adversarial role. Institutions also are welcome to provide training to advisors on cross-examination. The Department fully acknowledges that the role of advisors under these final regulations, implementing Title IX, differs in some respects from the rules relating to advisors under the

Department's Clery Act regulations. However, the rules regarding advisors under both sets of regulations are consistent with each other and do not preclude a recipient from complying with both. The Department does not believe that any such differences, including the requirement to perform cross-examination, will lead to a destructive process and believes that this requirement will lead to a fair, impartial process that will help assess allegations of sexual harassment, as defined in § 106.30.

Changes: None.

Comments: One commenter asserted that the requirements in the proposed Title IX rules related to the standard of evidence are inconsistent with the language in the Clery Act final regulations. The commenter stated that in the Clery Act final regulations, the Department allowed institutions to select between the preponderance of the evidence standard and the clear and convincing evidence standard without an emphasis on one standard over the other or challenges to implementing the chosen standard. The commenter further stated that in response to comments on the proposed Clery Act rules that the Department should require the clear and convincing evidence standard because this standard better safeguards due process, the Department stated that an institution can comply with both Title IX and the Clery Act by using a preponderance standard. The commenter expressed concern that the Department's proposed Title IX rules put significant bounds on when the preponderance of the evidence standard can be used versus the clear and convincing evidence standard with a clear intent to push recipients to use the clear and convincing evidence standard, which they argue is a reversal of previous Department policy without any explanation other than that campus conduct processes are not the same as civil litigation. The commenter further argued that the Department has not previously contended that the campus conduct process must hold the same level of process as a lawsuit in Federal court,

and it is clear this was never Congress's intent based on the language in the Clery Act final regulations.

Discussion: Under these final regulations, the Department will allow recipients to adopt either a preponderance of the evidence standard or a clear and convincing evidence standard. The Department does not emphasize one standard over another and is not moving forward with its proposal to require that a recipient adopt the same standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction. The only requirement in § 106.45(b)(7) is that recipients use the same standard of evidence for complaints against students as it does for complaints against employees, including faculty. As explained in more detail elsewhere in this preamble and in the "Section 106.45(b)(1)(vii) Describe Standard of Evidence and Directed Question 6" subsection of the "General Requirements for § 106.45 Grievance Process" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble, requiring a higher standard of evidence for a student's formal complaint against an employee than a student's formal complaint against another student is unfair, especially in light of the power deferential between a student and an employee such as a faculty member.

The Department disagrees that it is imposing the same level of process that a Federal district court requires. For example, these final regulations do not contain a comprehensive set of rules of evidence. Neither party may issue a subpoena to gather information from each other or the recipient for purposes of the grievance process under § 106.45. Congress's intent in enacting the Clery Act is not particularly relevant in determining what Title IX requires to prohibit discrimination on the basis of sex in a recipient's education program or activity against a person in the U.S.

Changes: None.

Comments: One commenter expressed support for § 106.45(b)(7) (Determinations Regarding Responsibility) because the requirement to share information about sanctions imposed on the respondent is consistent with both FERPA and the requirements under the Clery Act, for crimes of violence and nonforcible sex offenses.

Some commenters expressed general concerns with some requirements in the proposed Title IX rules on the grounds that they violate complainants' rights to privacy and disagreed with the Department's assertion that these requirements track language in the Clery Act. Some of these commenters noted that the Clery Act requires an institution to maintain as confidential any accommodations and protective measures provided to the victim.

One commenter expressed concern that § 106.45(b)(7) conflicts with § 668.46(k)(2)(v), implementing the Clery Act. The Clery Act regulations clarify that the disclosure of the "result" to the victim must include information on any sanctions imposed and the rationale for the results and sanction. Several commenters suggested that § 106.45(b)(7) should be modified to mirror the Clery Act. One commenter requested to know what the purpose of generally tracking the Clery Act language is in sections such as Section 106.45(b)(7).

Several commenters argued that Section 106.45(b)(7) should align completely with the Clery Act, including requiring that an institution maintain as confidential any accommodations or protective measures provided to the victim.

One commenter noted the differences between what the Clery Act requires to be included in a written determination regarding responsibility and what the proposed Title IX rules require and expressed concern that the proposed Title IX rules exceed what is required by the Clery Act. The commenter asserted that the additional content that must be included in the written

determination regarding responsibility under Title IX are burdensome, repetitive, and unnecessary, particularly given the requirements that the parties have already been provided the investigative report.

Some commenters expressed specific concerns with § 106.45(b)(7) which requires recipients to create and make available to the complainant information that includes the determination regarding responsibility, disciplinary sanctions imposed on the respondent, and remedies provided to the complainant and aspects of § 106.45(b)(7) which requires that the recipient's written determination, which is provided to both parties, include, among other things, any remedies provided by the recipient to the complainant designed to restore or preserve equal access to the recipient's education program or activity. The commenters asserted that it is a violation of the complainant's privacy to include information about remedies and supportive measures and, as such, that information should not be included in the recipient's report nor disclosed to the respondent and that disclosure of such information about supportive measures and remedies provided to the complainant violated, among other things, the Clery Act. The commenters stated that compliance with Title IX's mandate to prohibit discrimination based on sex is not served in any fashion by informing a respondent of the remedies and supportive measures that a complainant received and disclosing such information is also unconnected to the Department's stated purpose of assuring compliance with proper procedure. The commenters argued that the Department's assertion in the preamble that the language in the proposed regulations that the written determination include information on any remedy given to the complainant and be provided to both parties generally tracks the language of the Clery Act regulations is inaccurate because the Clery Act does not permit the disclosure of confidential student information. The commenters noted that while the Clery Act requires that the

complainant and respondent receive notification of the result of the disciplinary proceeding, defined as "any initial, interim and final decision by any official or entity authorized to resolve disciplinary matters within the institution," there is no provision in the Clery Act for providing information about supportive measures or remedies provided to the complainant. Moreover, the commenters argued that in the preamble to the Clery Act final regulations the Department stated that while institutions may need to disclose some information about a victim to a third party to provide necessary accommodations, institutions may disclose only information that is necessary to provide the accommodations or protective measures and should carefully consider who may have access to this information to minimize the risk to a victim's confidentiality. To alleviate these concerns, the commenters recommended that the Department remove any requirement to include information regarding remedies and supportive measures accessed by the complainant from the requirements related to documentation of the recipient's response to a Title IX complaint and instead follow FERPA and the Clery Act for the confidentiality of such information.

Discussion: The Department appreciates the comments in support of these final regulations. Some commenters mistakenly thought that the proposed regulations require a recipient to share the supportive measures that a complainant receives with the respondent. Neither the proposed regulations nor these final regulations require a recipient to share with the complainant or respondent any supportive measures that either party receives. The definition of supportive measures in § 106.30 clearly states: "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 recipient to provide the supportive measures." Accordingly, a recipient is required to maintain confidentiality with respect to supportive

measures as long as such confidentiality does not impair the ability of the recipient to provide the supportive measures. Similarly, a recipient is required to maintain records of supportive measures under § 106.45(b)(10)(C)(ii), and these records, unlike training materials as specified in § 106.45(b)(10), are not publicly available. The Department, thus, maintains the confidentiality of the parties with respect to supportive measures.

There also is no conflict between § 668.46(k)(2)(v), implementing the Clery Act, and § 106.45(b)(7) regarding a written determination regarding responsibility. There are many similarities between these two provisions. For example, under both the Clery Act and these final regulations, both parties receive written notification of the results of the hearing simultaneously.

These final regulations in § 106.45(b)(7) have been revised to clarify that for purposes of Title IX, the result includes the sanctions for the respondent and whether remedies will be provided by the recipient to the complainant. The Department agrees with commenters who noted that a respondent does not need to know the specific remedies that a complainant receives to restore or preserve equal access to the recipient's education program or activity. For example, if the recipient changed a complainant's housing arrangements as part of the remedy, there is no reason for the respondent to know about this change. Both parties, however, will know whether the recipient will provide remedies to the complainant but not what these exact remedies are. The Department states in § 106.45(b)(7)(ii)(E) that the parties must be informed in writing of "the result as to each allegation, including a determination regarding responsibility, any sanctions the recipient imposes on the respondent, and whether remedies will be provided by the recipient to the complainant designed to restore or preserve access to the recipient's education program or activity." These final regulations do not differ from the Clery Act regulations in requiring that both parties be notified of the result of any disciplinary proceeding.

The Department acknowledges that these final regulations implementing Title IX, may require information in the written determination that the Clery Act regulations do not require, such as the findings of fact supporting the determination under § 106.45(b)(7)(ii)(C). (The Clery Act regulations in §§ 668.46(k)(2)(v)(A) and 668.46(k)(3)(iv) require that both parties receive written notification of the results of the hearing simultaneously and specify that the results of the hearing include any initial, interim, or final decision as well as the rationale for the result and the sanctions.) Parties should know the findings of fact that support a determination regarding sexual harassment. As explained in more detail in the section "Determinations Regarding Responsibility" of this preamble, the Department believes § 106.45(b)(7) serves the important function of ensuring that both parties know the factual basis for the outcome of the grievance process. Requiring decision-makers to provide findings of fact helps verify whether the decision-maker is exercising independent judgment and making an evaluation free from bias. As previously explained, the Department may deviate from the Clery Act regulations, which apply to recipients of Federal student financial aid, in these Title IX final regulations, which apply to recipients of Federal financial assistance. The Department explains its rationale for adopting these requirements for a written determination pursuant to Title IX in the "Determinations Regarding Responsibility" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble.

The Department has revised the proposed regulations to include a provision regarding retaliation in § 106.71(a) that requires a recipient to keep the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness,

except as may be permitted by the FERPA statute or regulations or as required by law or to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder. This provision helps ensure confidentiality and addresses some of the commenter's concerns.

These final regulations are consistent with FERPA, and FERPA applies fully to Title IX proceedings under these final regulations. The commenter does not explain how these final regulations deviate from FERPA, and the Department interprets its regulations under FERPA to be fully consistent with these final regulations. The Department notes that its revision to require the written determination to state whether a complainant will receive remedies and not what remedies the complainant receives aligns with FERPA. As explained in greater detail in the section on FERPA, the specific remedies that a complainant receives are part of the complainant's education records and need not be disclosed to the respondent. The final regulations revise § 106.45(b)(7)(iv) to state that the Title IX Coordinator is responsible for effective implementation of remedies, thereby indicating that where a written determination states that the recipient will provide remedies to a complainant, the complainant can then communicate separately with the Title IX Coordinator to discuss the nature of such remedies.

Changes: The Department revised the proposed regulations to include a provision regarding retaliation in § 106.71(a) that requires a recipient to keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute or regulations or as required by law or to the extent necessary to carry out the purposes of 34 CFR part 106, including the

conduct of any investigation, hearing, or judicial proceeding arising thereunder. The Department also revised § 106.45(b)(7)(ii)(E) to state that the parties must be informed in writing of the result as to each allegation, including any sanctions the recipient imposes on the respondent and whether remedies will be provided by the recipient to the complainant. The Department further revised § 106.45(b)(7)(iv) to provide that the Title IX Coordinator is responsible for the effective implementation of remedies.

Comments: One commenter expressed concern with the proposed rules defining sexual assault as defined by the Clery Act. The commenter asserted that the Clery Act defines sexual assault as carnal knowledge of another person and does not define consent, which the commenter argued is a necessary component of sexual activity. The commenter further stated that failing to include affirmative consent buys into rape myths including that silence is consent.

Some commenters expressed concerns regarding the requirement in the proposed Title IX rules that supportive measures be non-punitive, non-disciplinary, and pose no unreasonable burden on the other party noting that there is no similar requirement in the Clery Act. The commenters specifically mentioned changes to the respondent's class or residence following the filing of a formal complaint or a mutual restriction on contact between the parties as examples of accommodations that are fairly routine, but which may be prohibited under the proposed Title IX rules. The commenters asserted because there are no such restrictions on accommodations for survivors in the Clery Act, there should be no such restrictions on supportive measures under Title IX. One commenter also noted that the Clery Act does not limit accommodations to only those that are reasonably available and designed to preserve or restore access to the school's program. A commenter also expressed concern that the requirement that the supportive services be provided somehow in relation to a complaint conflicts with the Clery Act requirements that

victims not be required to file any kind of report to be entitled to interim protective measures and accommodations.

One commenter asserted that the Clery Act even more directly requires that recipients minimize the burden on complainants rather than worrying about the burden on respondents and noted that the definition of supportive measures in the proposed Title IX rules is particularly problematic because the proposed Title IX rules also require that respondents be presumed not responsible. Some commenters expressed specific concerns that requiring respondents be presumed not responsible conflicts with the fair and impartial investigation required by the Clery Act, which requires that an institution make no predetermination in favor of either the complainant or respondent. These commenters asserted that this requirement in the proposed Title IX rules explicitly requires that recipients presume complainants are lying, thereby denying sexual misconduct victims the equitable, impartial treatment throughout grievance procedures to which they are entitled under Title IX and the Clery Act and would erode any confidence in the processes and institutions.

Discussion: The Department appreciates the commenter's concern about the definition of consent with respect to sexual assault and intentionally does not require recipients to adopt a particular definition of consent. The Department added language in § 106.30 to clarify that the Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault. Accordingly, recipients may adopt their own definition of consent. The Department is not buying into any "rape myths" by not endorsing a particular definition of consent and is giving recipients the discretion to adopt a definition that it deems appropriate. Allowing a recipient to adopt its own definition of consent also helps avoid any conflict with State or local laws that may require a recipient to adopt a particular definition of consent.

The Department acknowledges that there are differences between the Clery Act regulations, and these final regulations implementing Title IX. Contrary to the commenter's assertions, the Department does not require a complainant to file a formal complaint before considering whether to provide supportive measures. The Department clarifies in § 106.44(a) that a recipient must offer supportive measures to a complainant irrespective of whether the complainant files a formal complaint. The Clery Act regulations are silent in this regard and do not require such consideration unless the complainant requests accommodations. The Clery Act regulations at § 668.46(b)(11)(v) provide that the institution must have "[a] statement that the institution will provide written notification to victims about options for, available assistance in, and how to request changes to academic, living, transportation, and working situations or protective measures [and that t]he institution must make such accommodations or provide such protective measures if the victim requests them and if they are reasonably available, regardless of whether the victim chooses to report the crime to campus police or local law enforcement." The Department notes that this Clery Act regulation does not require any recipient to impose any accommodations that are disciplinary and punitive. The commenter is also mistaken that the Title IX regulations prohibit a recipient from providing a no-contact order. Both the proposed Title IX regulations[1838] and these final regulations allow for mutual restrictions on contact between the parties as stated in § 106.30, and § 106.30 does not expressly prohibit other types of no-contact orders such as a one-way no-contact order. Any supportive measures, however, must be non-disciplinary, non-punitive, and must not unreasonably burden the other party, under § 106.30.

[1838] 83 FR 61496.

Additionally, a sanction for a respondent may consist of or include a one-way no-contact order that only prohibits the respondent from contacting the complainant.

The Department does not agree with the commenter's belief that the definition of supportive measures in these final regulations is particularly problematic in light of the presumption of non-responsibility for the respondent prescribed in § 106.45(b)(1)(iv). The definition of supportive measures in § 106.30 requires any supportive measures to be non-punitive and non-disciplinary because the respondent should receive due process through a grievance procedure under § 106.45 before the imposition of any sanctions or discipline, as stated in § 106.44(a). The presumption of non-responsibility does not provide any advantage to the respondent over the complainant and certainly does not require a recipient to believe that a complainant is lying. This presumption only helps ensure that a respondent is not treated as responsible prior to being proved responsible (subject to exceptions stated under these final regulations, such as § 106.44(c) emergency removal or § 106.44(d) administrative leave applied to a non-student employee-respondent). As discussed in the "Section 106.45(b)(1)(iv) Presumption of Non-Responsibility" subsection of the "General Requirements for § 106.45 Grievance Process" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble, the presumption does not allow, much less require, a recipient to presume that a respondent is truthful or credible. Notwithstanding the presumption of non-responsibility, credibility determinations cannot be based on a party's status as a complainant or respondent, and recipients must reach determinations without prejudging the facts at issue and by objectively evaluating all relevant evidence.[1839] Changes: The Department

[1839] Section 106.45(b)(1)(ii).

clarifies in § 106.44(a) that a recipient must offer supportive measures to a complainant irrespective of whether the complainant files a formal complaint.

Comments: Some commenters expressed general concern that the proposed Title IX rules would tilt investigation procedures in favor of the respondent and have unclear time frames for investigations and thus conflict with the Clery Act requirement that investigations be "prompt, fair, and impartial."

Discussion: These final regulations do not tilt the investigation procedures in favor of the respondent and certainly do not allow a recipient to delay an investigation. The Department notes that the Clery Act and its implementing regulations do not include a specific time frame for an investigation. The Department has revised § 106.44(a) to clarify that when a recipient has actual knowledge of sexual harassment in its education program or activity against a person in the U.S., the recipient must respond "promptly." These final regulations also provide in § 106.45(b)(1)(v) that a recipient must designate reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution process(es) if the recipient offers informal resolution process(es). Accordingly, these final regulations are consistent with the requirement in the Clery Act and its implementing regulations that investigations must be prompt, fair, and impartial.

Changes: The Department has revised § 106.44(a) to clarify that when a recipient has actual knowledge of sexual harassment in its education program or activity against a person in the U.S., the recipient must respond "promptly."

Comments: One commenter expressed concern that the definition of actual knowledge in the proposed Title IX rules, which limits the categories of employees to whom notice constitutes actual knowledge on the part of the institution, conflicts with the sections of the Clery Act that

overlap in this area. The commenter asserted that this is especially cause for concern because the proposed Title IX rules adopt the Clery Act definition of sexual assault. The commenter argued that establishing requirements for an institution to respond to allegations of sexual harassment merely so they are not found deliberately indifferent does not exonerate institutions from complying with the Clery Act's requirement to respond to reports of sexual assault. As a result, institutions would be compelled to develop parallel processes for reporting, investigating, adjudicating, and providing supportive measures for some cases, which does not align with the Department's stated goal of wanting to streamline Title IX to make the existing response efforts more effective and less burdensome.

Some commenters asserted that adopting "actual knowledge" will enable institutions to combine the mandatory reporter lists from Title IX and the Clery Act and will eliminate confusion over who is a mandatory reporter for what conduct. Another commenter stated that under the Clery Act, Campus Security Authorities (CSAs) are defined by the Department as the very wide-ranging group of individuals whose campus role gives them "significant responsibility for student and campus activities" and thus the responsibility to report crimes reported to them. The commenter stated that there is not a perfect overlap between CSAs and responsible employees under existing Title IX guidance, and there is sexual harassment which is actionable under Title IX but which does not rise to the level of a Clery-reportable crime, but the commenter argued that it is incoherent to say that if an individual has such significant responsibility for student and campus activities that they put the institution on notice of Clery-reportable crimes, that they do not also put the institution on notice of Title IX-actionable harassment, especially when the same behavior spans both categories. The commenter argued that one of the reasons that the Department has taken this approach in the Clery context is that

CSAs under the Clery Act are regularly and highly trained in the intricacies of their reporting responsibilities and determining precisely the elements of incident and geography that compose a Clery-reportable incident and event in the Daily Crime Log. It is not left to untrained and undertrained individuals to make these determinations, whereas removing the responsible employee designation for Title IX does precisely that. One commenter asserted that the proposed rules regarding employees obligated to report directly conflicts with the Clery Act without providing additional reasons regarding the commenter's reasons for believing such a conflict exists. The commenter expressed concern that many students do not feel safe reporting incidents to university administrators and would feel safer disclosing information to a resident advisor or trusted faculty member and having responsible employees on college campuses ensures that students are at least contacted by the Title IX office to ensure they know there are supportive resources available to them.

Discussion: The Department disagrees that "actual knowledge" as defined in § 106.30 and referenced in § 106.44(a) conflicts with the Clery Act and its implementing regulations. The Department defines "actual knowledge" in § 106.30 as notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator, to any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school.[1840] The Department disagrees that this definition limits the categories of employees to whom notice charges an elementary and secondary school recipient

[1840] For discussion of the actual knowledge definition and requirement, see the "Actual Knowledge" subsection of the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section, the "Actual Knowledge" subsection of the "Section 106.30 Definitions" section, and the "Section 106.44(a) 'actual knowledge'" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this preamble.

with actual knowledge, because under revised § 106.30 defining "actual knowledge," notice to *any* employee of such a recipient riggers the recipient's response obligations. The Department does not believe the § 106.30 definition of "actual knowledge" is limiting as to postsecondary institutions. The reference in § 106.30 to an "official of the recipient who has authority to institute corrective measures on behalf of the recipient" does not limit the categories of postsecondary employees to whom notice might trigger the postsecondary institution's response obligation, because the institution may in its discretion designate and grant authority to specific categories of employees to institute corrective measures on its behalf, thereby assuring that such employees' knowledge of sexual harassment or alleged sexual harassment conveys actual knowledge to the recipient. The final regulations allow each recipient to make such determinations taking into account the recipient's unique educational environment, including which employees the recipient's students may expect to be required to report disclosures of sexual harassment to the Title IX Coordinator, versus any of the recipient's employees in whom students at postsecondary institutions may benefit from confiding sexual harassment experiences without triggering a mandatory report to the Title IX Coordinator.

The Department acknowledges that there are different requirements in the Clery Act and its implementing regulations. The obligations that recipients have under these final regulations and under the regulations implementing the Clery Act differ in some respects, but there is no inherent conflict between the two statutory schemes or their respective implementing regulations. The Department agrees with a commenter that compliance with these final regulations does not necessarily equate with compliance with the Clery Act regulations. The Department disagrees, however, that institutions would need a different grievance process than the process in § 106.45 to respond to allegations of sexual assault, domestic violence, dating violence, or stalking under

these regulations implementing Title IX and under the Clery Act regulations because § 106.30 expands the definition of sexual harassment to include dating violence, domestic violence, and stalking under the Clery Act. Additionally, these final regulations clarify in § 106.45(b)(3) that dismissal of a formal complaint because the conduct does not fall under Title IX jurisdictional requirements does not preclude a recipient from addressing the conduct through the recipient's own code of conduct. Nothing in the final regulations prevents a recipient from using the same grievance process required under § 106.45, to address other misconduct.

The Department also disagrees that there is any conflict between these final regulations and the definition of campus security authorities (CSAs) under the Clery Act regulations. If a campus security authority is an official of the recipient who has authority to institute corrective measures on behalf of the recipient with respect to sexual harassment or allegations of sexual harassment, then notice of sexual harassment or allegations of sexual harassment to that official constitutes actual knowledge. If a campus security authority, however, does not have authority to institute corrective measures on behalf of the recipient with respect to sexual harassment or allegations of sexual harassment, then notice of sexual harassment or allegations of sexual harassment to that official would not constitute actual knowledge to the recipient. The Department's 2001 Guidance referred to "responsible employees" in the Title IX context, but the Department no longer adheres to the rubric of "responsible employees" adopted in the 2001 Guidance. Instead, the Department is adopting a definition of actual knowledge in § 106.30 and a deliberate indifference standard in § 106.44(a). The Department notes that there have always been differences with respect to who may constitute a responsible employee under the Department's Title IX guidance, including the 2001 Guidance, and who constitutes a CSA under

the Department's Clery Act regulations. Postsecondary institutions have long experience working with these requirements and are familiar with these differences.

Under these final regulations, postsecondary institutions have more discretion (than under Department guidance) to determine which employees, other than the Title IX Coordinator, have authority to institute corrective measures on behalf of the recipient, and that is independent of whether such employees are CSAs under the Clery Act. Institutions may determine that all of their CSAs are officials who have the authority to institute corrective measures on behalf of the recipient with respect to sexual harassment or allegations of sexual harassment. It is very likely that at least some of an institution's CSAs have authority to institute corrective measures on behalf of the recipient for purposes of the conduct defined as "sexual harassment" under § 106.30. For example, if a resident advisor has authority to institute corrective measures with respect to sexual harassment or allegations of sexual harassment on behalf of the recipient, then notice to that resident advisor conveys actual knowledge to the recipient under these final regulations, which is a separate inquiry from whether that resident advisor is a CSA under the Clery Act regulations. A CSA has crime reporting obligations under the Clery Act. If a CSA is also an official with authority to institute corrective measures as to sexual harassment, then under these final regulations, notice of sexual harassment to that CSA requires the institution's prompt response, whether or not the sexual harassment disclosed to that CSA constitutes a Clery Act crime that must be reported for Clery Act purposes. If a CSA is not an official with authority to institute corrective measures as to sexual harassment, then these final regulations allow the postsecondary institution to choose whether that CSA must report sexual harassment to the Title IX Coordinator or may remain a confidential resource for the postsecondary institution recipient's students (and employees) instead of being required to report the sexual harassment to

the Title IX Coordinator. Even if the institution designates certain CSAs as confidential resources for Title IX purposes, CSAs may still be required to report sexual harassment (when the conduct also consists of a Clery crime) for Clery Act purposes, which does not require the CSA to divulge the student's name or identity.

The "mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient" under § 106.30 of these final regulations. Nothing in these final regulations precludes a recipient from giving more employees or officials the requisite authority to institute corrective measures with respect to sexual harassment or allegations of sexual harassment. Similarly, nothing in these final regulations precludes a recipient from training more employees or officials about how to report sexual harassment.

Changes: None.

Comments: While supportive of the Department's views on the importance of allowing parties to access evidence, one commenter was concerned that the way in which the access is provided is limited. The commenter stated that this provision is problematic because on many occasions one party has unrestricted access to some or all of the evidence while the other does not. The commenter asserted that only allowing one party access to versions of the records that would, for example, allow them to search materials would create a significant procedural disadvantage and violate the Clery Act, and would be inconsistent with the proposed Title IX rule requirement that the parties have equal access to the records.

One commenter asserted that the Clery Act permits an institution to withhold irrelevant or prejudicial evidence from both parties, with the understanding that such evidence will not be

brought into the investigation/decision-making process, while the proposed Title IX rules at 106.45(b)(5)(vi) require that all evidence be disclosed, regardless of whether the investigator or decision-maker intends to rely on the information. The commenter argued that not only does the proposed Title IX language conflict with the Clery Act, it also has the potential for harmful information to be presented to both parties, regardless of relevancy. For example, commenters asserted, past victimization and mental health records of both involved parties may be brought into investigations and the decision-making process and be the subject of review and scrutiny by the opposing party, causing irreparable harm. Additionally, commenters argued, with students knowing that all evidence gathered will be brought into an investigation, it will significantly impair the university's ability to gather relevant information and cause students to not want to file a complaint or participate in the formal process.

Commenters also discussed other potential conflicts with the Clery Act. One commenter asserted that the definition of complainant, which states that a complainant is the direct victim of the sexual misconduct reported, prevents third-parties from intervening and conflicts with the Clery Act's requirement that institutions of higher education respond properly to all reports of sexual violence and thwarts efforts to get students to intervene when they know their friends are experiencing sexual harassment but are too afraid to come forward.

One commenter expressed concern that 106.45(b)(2) in the proposed Title IX rules does not mention that complainants are entitled to protection from retaliation regardless of whether their complaints are successful, as long as they acted in good faith and noted that the Clery Act requires institutions' sexual misconduct policies to include prohibition of retaliation.

One commenter expressed concern that the proposed definition of sexual harassment, that is unwelcome conduct "on the basis of sex" conflicts with the definitions of sexual harassment in

the Clery Act which defines sexual harassment to include conduct based on gender or perceived gender.

One commenter stated that under the Clery Act, mediation would be considered a proceeding; therefore, all Clery Act requirements related to disciplinary procedures would still apply regardless of whether such proceedings are considered informal under Title IX.

Discussion: The commenter mistakenly asserts that parties would not have equal access to the records under the proposed or final Title IX regulations. Like the proposed regulations,[1841] these final regulations specifically provide in § 106.45(b)(5)(vi) that the recipient must 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 and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to the conclusion of an investigation. Additionally, 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, and the parties must have at least ten days to submit a written response, which the investigator will consider prior to completion of the investigative report. Accordingly, the parties will have equal access to evidence under these final regulations.

The Department disagrees that the Clery Act regulations require an institution to exclude irrelevant or prejudicial evidence. Pursuant to § 668.46(k)(3)(i)(B)(3), an institution must "provide[] timely and equal access to the accuser, the accused, and appropriate officials to any

[1841] 83 FR 61498.

information that will be used during informal and formal disciplinary meetings and hearings." There is no conflict between this provision and the provision in § 106.45(b)(5)(vi), requiring that a recipient 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. A party's mental health records or other sensitive information is not always directly related to the allegations raised in a formal complaint. Additionally, these final regulations do not require a party to submit mental health records or other treatment records as part of the grievance process under § 106.45. If a party chooses to submit such sensitive records and they are directly related to the allegations raised in a formal complaint, the party will have notice that the other party will have the opportunity to review and inspect such records. This requirement should not chill reporting and is essential to a fair, impartial hearing in which both parties have access to the evidence that may be used to prove or disprove the allegations raised in a formal complaint.

Nothing in these final regulations prevents a bystander or someone who witnesses sexual harassment from reporting such sexual harassment to the Title IX Coordinator or other official who has authority to institute corrective measures on behalf of the recipient. When a person makes a report of sexual harassment to such an official, the recipient has actual knowledge. Pursuant to § 106.44(a), if a recipient has actual knowledge of sexual harassment in its education program or activity against a person in the United States, the recipient must respond promptly in a manner that is not deliberately indifferent. Accordingly, these final regulations do not preclude a recipient from responding to a report of sexual harassment simply because someone other than the person who experienced the sexual harassment reports it to the Title IX Coordinator or another official.

The Department appreciates the comment about retaliation and agrees that these final regulations should address retaliation. Accordingly, the Department has included a retaliation provision in these final regulations. The retaliation provision in these final regulations, § 106.71 states in relevant part: "No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the individual has made a report or complaint, testified, assisted, participated, or refused to participate in any manner in an investigation, proceeding, or hearing under this part." This retaliation provision protects all persons who may be involved in a report, investigation, proceeding, or hearing under these final regulations.

Contrary to the commenter's assertions, the Clery Act regulations do not define sexual harassment. The Clery Act regulations provide definitions of sexual assault, dating violence, domestic violence, and stalking, and none of these definitions refer to gender identity. These final regulations refer to sex because Title IX, 20 U.S.C. 1681, expressly prohibits discrimination "on the basis of sex."

The Department is not implementing the Clery Act or revising the Clery Act regulations in these final regulations. The Department's Office of Postsecondary Education may provide technical assistance as to whether mediation may be a disciplinary proceeding that requires procedures under § 668.46(k) of the Clery Act regulations. With respect to these final regulations, the Department notes that most mediations do not require a standard of evidence or an investigation, and under these final regulations, both parties must provide voluntary, written consent to an informal resolution process under § 106.45(b)(9)(ii).

Changes: None.

Comments: A number of commenters requested modifications to the proposed rules. Several commenters referenced the requirement in 106.45(b)(7)(i)-(ii) of the proposed Title IX rules requiring that 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 commenters suggested that instead of the proposed three-year period of retention, the Department instead require that such records be maintained for a period of seven years which is the period of retention required under the Clery Act.

One commenter expressed opposition to the notion that the Title IX Coordinator is the only person that can receive information sufficient to put an institution of higher education on notice. The commenter was concerned that limiting notice to the Title IX Coordinator removes the responsibility to train employees and otherwise implement compliant policies and creates an environment easily manipulated so that the institution would never have notice sufficient to create liability. To address these concerns, the commenter recommended that the Department coordinate reporting and knowledge requirements under Title IX with the Clery Act with the caveat that individuals who are "victim advocates" should be excluded from reporting. The commenter argued that aligning the list of individuals for reporting and notice under Title IX and the Clery Act would align two Federal laws and also clarify for students who has a duty to report knowledge of sexual harassment and simplify for institutions of higher education who among their faculty and staff have a duty to report what. This commenter recommended that persons classified under the proposed Clery/Title IX aligned reporting list be responsible for following campus protocols, informing students of who is qualified to receive a formal complaint, and

notifying campus officials of becoming aware of the harassment without instigating a formal complaint.

One commenter asserted a general conflict with the Clery Act mandates for CSAs and the proposed rules, stating that it is reasonable to assume that if a student went to a school official and disclosed having experienced sexual violence they would be provided with resources, since it is a school's duty to keep students safe on campus. To address this concern, the commenter recommended that the Title IX regulation be consistent with the Clery Act and require schools to publicize what individuals are classified as mandated reporters on a campus and any information that is shared to a mandated reporter (or CSA) should result in supportive measures being offered to the person who makes a report.

Discussion: The Department agrees with commenters who recommended a seven-year record retention period to align with the Clery Act regulations. Accordingly, the Department has revised § 106.45(b)(10) to require a seven-year retention period. Although the record retention period under these final regulations does not have to be the same as the record retention period under the regulations implementing the Clery Act, the Department believes it would be helpful to provide consistency and simplicity in this regard.

Contrary to the commenter's assertions, these final regulations do not require an individual to report sexual harassment only to the Title IX Coordinator. Any official who has authority to take corrective action on behalf of a recipient has actual knowledge, and a recipient with actual knowledge of sexual harassment in its education program or activity against a person in the U.S. must respond promptly and in a manner that is not deliberately indifferent under § 106.44(a).

The Department appreciates the comments about campus security authorities and does not assume that every campus security authority has authority to institute corrective measures on behalf of a recipient with respect to sexual harassment or allegations of sexual harassment. If a recipient chooses to designate that all campus security authorities have such authority, then a recipient may do so. The Clery Act requirement to have campus security authorities, however, does not apply in the elementary and secondary school context and adopting that terminology in these title IX rules will cause confusion for recipients that are not postsecondary institutions that receive Federal student financial aid. Additionally, the obligations under the Clery Act and its regulations are different than Title IX and its regulations, and creating a "Clery/Title IX aligned reporting list" requires that the same people be responsible for two different sets of regulatory requirements and obligations, which may be confusing. For example, the Clery Act and its regulations apply to some conduct such as burglary and arson that is not considered sexual harassment under the Title IX final regulations, and similarly, Title IX and its regulations may apply to some conduct that is not a Clery crime. Having a Title IX Coordinator who is specially trained to handle allegations of sexual harassment pursuant to § 106.45(b)(1)(iii) is important. A Title IX Coordinator performs unique functions that a Clery Act Coordinator and other persons who are responsible for compliance with the Clery Act do not perform, and anyone may report sexual harassment to the Title IX Coordinator.

Although the Department does not require recipients to provide supportive measures in response to any report made to a campus security authority or a mandated reporter at a postsecondary institution, the Department has revised these final regulations to require a recipient to offer supportive measures in response to a report of sexual harassment, if the recipient has actual knowledge of sexual harassment in an education program or activity of the

recipient against a person in the U.S. pursuant to § 106.44(a). As previously explained, a recipient may choose to give all of its campus security authorities authority to institute corrective measures on behalf of the recipient with respect to sexual harassment or allegations of sexual harassment. With respect to the elementary and secondary context, notice to any employee of the elementary and secondary school conveys actual knowledge to the recipient under § 106.30.

Changes: The Department has revised § 106.45(b)(10) to require a seven-year record retention period. The Department also revised these final regulations to require a recipient to offer supportive measures to a complainant, if the recipient has actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the U.S. pursuant to § 106.44(a).

Comments: One commenter expressed concern that actual knowledge as defined under the proposed Title IX rules is too narrow and would provide an incentive for institutions to discourage employees, whom students may reasonably believe have the authority to take corrective action, from communicating reports of sexual harassment or assault to the Title IX Coordinator. The commenter asserted that the individuals to whom notice would constitute actual knowledge under the proposed Title IX rules is inconsistent with the Clery Act. For example, the commenter argued, a student could report a rape to an athletic coach who is a CSA under the Clery Act and the institution would then be required to include the reported crime in its crime statistics, and may even issue a timely warning to the campus community under the Clery Act, but then deny actual knowledge of the rape for Title IX purposes if the student does not then duplicate their initial report to the Title IX Coordinator. To address these concerns, the commenter recommended that the Department expand the definition of actual knowledge to

include anyone who otherwise has the duty to report crimes to the institution for State and/or Federal law purposes.

Discussion: The Department defines "actual knowledge" in § 106.30 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 any employee of an elementary and secondary school. In elementary and secondary schools, if any employee of an elementary and secondary school has notice of sexual harassment or allegations of sexual harassment as described in the definition of "actual knowledge" in § 106.30, such notice conveys actual knowledge to a recipient and requires a recipient to respond to any alleged sexual harassment in a recipient's education program or activity against a person in the U.S. Accordingly, if an athletic coach is an employee of an elementary and secondary school, then that coach would have actual knowledge if the coach has notice of sexual harassment or allegations of sexual harassment as defined in § 106.30.

With respect to postsecondary institutions, the Department does not assume that all campus security authorities (CSAs) have the authority to institute corrective measures on behalf of a recipient with respect to sexual harassment or allegations of sexual harassment, and as discussed previously, these final regulations give postsecondary institutions discretion to decide to authorize certain employees in a manner that makes those employees "officials with authority" as described in § 106.30, and to decide that other employees should remain confidential resources to whom a student at a postsecondary institution might disclose sexual harassment without automatically triggering a report by the employee to the Title IX Coordinator. With respect to the commenter's hypothetical about a timely warning, a recipient that issues a timely warning also creates actual knowledge of sexual harassment because the timely warning would

go to the entire campus community, including to officials who have the authority to institute corrective measures on behalf of the recipient. A recipient with actual knowledge of sexual harassment in its education program or activity against a person in the U.S. must respond promptly and in a manner that is not deliberately indifferent under § 106.44(a).

Changes: None.

Comments: Another commenter agreed that the Title IX Coordinator, investigator, or decision-maker should be fair and impartial, but was concerned that the language in § 106.45(b)(1)(iii) is confusing and does not provide administrators or students with a clear, defined, understandable standard. The commenter also stated that although the Department indicated that the proposed rules are based on the Clery Act, the language in the Clery Act is limited to addressing a conflict of interest or bias for or against the accuser or accused while the proposed Title IX rule seeks to address conflict of interest or bias generally, as well as on an individual basis. To address this concern, the commenter recommended that the standard be revised to more clearly define the standard expected, e.g., require that any individual designated by a recipient as a Title IX Coordinator, investigator, or decision-maker not have a personal bias or prejudice for or against complainants or respondents generally, and not have an interest, relationship, or other consideration that may compromise, or have the appearance of compromising, the Title IX Coordinator's, investigator's, or decision-maker's judgement with respect to any individual complaint or respondent.

One commenter expressed several concerns and requested clarification regarding conflicts of interest and bias. The commenter stated that § 106.45(b)(1)(iii) is similar, although somewhat broader, than the Department's Clery Act regulations by requiring that proceedings be "[c]onducted by officials who do not have a conflict of interest for or against either party." The

commenter expressed concern that without a clear definition of "conflict of interest" or "bias" and in light of other confusing and conflicting aspects of the proposed rules, institutions will have difficulty implementing this requirement. The commenter also noted that to overcome the presumption that campus decision-makers are free of bias in Title IX litigation, courts require proof that a campus official had an actual bias against the party because of that party's sex, and the discriminatory actions flowed from that actual sex-based bias. The commenter expressed concern that absent additional clarification, the proposed rules suggest a reversal of the judicial presumption that campus decision-makers are free of bias. The commenter also asserted that the proposed rules would open the door to numerous claims that undermine the honesty in campus proceedings. The commenter stated that litigants in Title IX cases commonly argue that campus disciplinary officials were biased or conflicted because of their research agenda or pro-victim advocacy, but that the Department indicated in the Clery Act final regulations that a party could not support a claim of bias under § 668.46(k)(3)(i) based on an allegation that "ideologically inspired people dominate the pool of available participants" in a sexual misconduct proceeding, which is similar to holdings from Federal courts. The commenter was concerned that the proposed rules offer no clarity as to whether the Department would accept such claims, which the commenter described as frivolous. The commenter further stated that the proposed rules do not clearly indicate whether the Department will consider an official's holding of two or more roles in the conduct process to be *per se* proof of bias or conflict of interest. The commenter stated that small community colleges, in particular, have limited staff resources to investigate and adjudicate campus sexual misconduct and stated that if the Department intends to prohibit any overlap in responsibilities among the Title IX Coordinator, investigator, or decision-maker, it must make that intention clear. The commenter expressed concern that such a rule would

provide due process protections exceeding those required by Federal and State courts and will strain already limited resources. Finally, the commenter expressed concern that the lack of clarity in the proposed rules regarding bias and conflicts of interest could impede efforts to bring trauma-informed practice to campus disciplinary proceedings. The commenter stated that the Clery Act regulations require annual training for officials, and several States mandate trauma-informed training for campus officials who respond to sexual assault. The commenter further noted that although courts generally reject arguments that trauma-informed practice constitutes a form of sex discrimination in favor of reporting individuals, the lack of clarity in the proposed rules could lead to further litigation in the future.

Discussion: The Department appreciates the commenter's concerns and acknowledges that § 668.46(k)(3)(i)(C) of the Clery Act regulations requires a prompt, fair, and impartial proceeding that is "[c]onducted by officials who do not have a conflict of interest or bias for or against the accuser or the accused." These final regulations in § 106.45(b)(1)(iii) require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. The Department is not including the Clery Act language in these regulations. The Department believes that if a Title IX Coordinator, investigator, decision-maker, or person who facilities an informal resolution process has a conflict of interest or bias for or against complainants or respondents generally, then that conflict or bias will affect the grievance process under § 106.45. Although the requirement regarding conflict of interest and bias may go beyond what some courts require, the Department is committed to providing a fair, impartial process to address sexual harassment under Title IX. Eliminating conflicts of interest and bias from the

grievance process under § 106.45 is important to help insure a fair, impartial process. The Department further notes that in the preamble to the final regulations, implementing the changes to the Clery Act, made by VAWA, the Department responded to commenters who asked whether § 668.46(k)(3)(i)(C) may address "situations in which inappropriately partial or ideologically inspired people dominate the pool of available participants in a proceeding."[1842] The Department responded that "without more facts we cannot declare here that such scenarios present a conflict of interest, but if they did, § 668.46(k)(3)(i)(C) would prohibit this practice."[1843] In these final regulations implementing Title IX, the Department more clearly states that a conflict of interest or bias may be for or against complainants or respondents generally or an individual complainant or respondent for purposes of Title IX.

The Department further notes that the Clery Act regulations do not further elaborate on what may constitute a conflict of interest or bias and further declines to do so in these final Title IX regulations. Recipients of Federal student financial aid have been able to determine what constitutes a conflict of interest or bias without definitions in the regulations implementing the Clery Act. Recipients of Federal financial assistance also enjoy some discretion to determine what may constitute a specific conflict of interest or bias with respect to the unique factual circumstances in a report of sexual harassment.

The Department appreciates the commenter's concerns about whether an official may serve in dual roles, and these final regulations specify when serving in dual roles is prohibited. For example, the decision-maker who makes a written determination regarding responsibility

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[1842] U.S. Dep't. of Education, Office of Postsecondary Education, Final Regulations Implementing Changes to the Clery Act Made by VAWA, 79 FR 62752, 62775 (Oct. 20, 2014).
[1843] *Id*.

cannot be the same person as the Title IX Coordinator or the investigator under § 106.45(b)(7). The Department clarifies in these final regulations that the decision-maker for an appeal cannot be the Title IX Coordinator or any investigator or decision-maker that reached the determination regarding responsibility pursuant to § 106.45(b)(8)(iii).

Recipients have discretion to train Title IX personnel in trauma-informed approaches or practices, so long as all requirements of these final regulations are met. A trauma-informed approach or training on trauma-informed practices may be appropriate[1844] as long as such an approach or training is consistent with § 106.45(b)(1)(iii), which requires recipients to train Title IX personnel (i.e., Title IX Coordinators, investigators, decision-makers, persons who facilitate informal resolutions) to serve impartially, without prejudging the facts at issue, using materials free from reliance on sex stereotypes, and requires Title IX personnel to avoid conflicts of interest and bias for or against complainants or respondents generally or an individual complainant or respondent.

Changes: None.

Comments: One commenter requested clarification regarding what is included in supportive measures under Title IX, especially given potential conflicts with the Clery Act. The commenter questioned whether supportive measures under Title IX would be defined to include victim advocacy, housing assistance, academic support, disability service, health and mental health service, legal assistance as they have in the past and requested clarification regarding whether

[1844] *E.g.*, Jeffrey J. Nolan, *Fair, Equitable Trauma-Informed Investigation Training* (Holland & Knight updated July 19, 2019) (white paper summarizing trauma-informed approaches to sexual misconduct investigations, identifying scientific and media support and opposition to such approaches, and cautioning institutions to apply trauma-informed approaches carefully to ensure impartial investigations).

anti-retaliation measures are available. The commenter also noted that under the Clery Act, institutions must provide victims with written notification of their option to request changes in their academic, living, transportation, and working situations, and they must provide any accommodations or protective measures that are reasonably available once the student has requested them, regardless of whether the student has requested or received help from others or whether the student provides detailed information about the crime and questioned how this would be resolved in light of potential conflicts with the proposed Title IX rules and the limitations on the types of supportive measures institutions may provide under Title IX (e.g., non-punitive, non-disciplinary, not unreasonably burdensome to other party).

One commenter stated that § 106.30 defines complainant as "an individual who has reported being the victim of conduct that could constitute harassment, or on whose behalf the Title IX Coordinator has filed a formal complaint, " while the Clery Act uses the word "victim" throughout. The commenter requested clarification regarding the difference in language.

Discussion: The Department appreciates the commenter's concerns regarding supportive measures and disagrees that these final regulations conflict with the Clery Act regulations with respect to supportive measures. The Department notes in its definition of supportive measures in § 106.30 that 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 absences, increased security and monitoring of certain areas of the campus, and other similar measures." Supportive measures must be non-disciplinary and non-punitive individualized services under § 106.30. The Clery Act regulations do not require supportive measures to be disciplinary or punitive. Additionally, the Department revised these final regulations to require a

recipient to offer supportive measures to a complainant in response to a report of sexual harassment in the recipient's education program or activity against a person in the United States under § 106.44(a). A recipient's Title IX Coordinator also must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. These revisions clarify a recipient's obligation with respect to supportive measures.

With respect to the concern about retaliation, the Department added a provision in § 106.71 to prohibit retaliation, and this provision is explained in more detail in the section on "Retaliation" subsection of the "Miscellaneous" section in this preamble.

The Department acknowledges that both the Clery Act and its implementing regulations include the term "victim," while these final regulations include and define the term "complainant." The Department again notes that the purpose of the Clery Act differs from the purpose of Title IX. The Clery Act generally concerns the disclosure of campus security policy and campus crime statistics, and the term "victim" is appropriate in the context of crime or criminal activity. Title IX concerns discrimination on the basis of sex, and these final regulations specifically address sex discrimination in the form of sexual harassment.

The Department defines a complainant as "an individual who is alleged to be the victim of conduct that could constitute sexual harassment" under § 106.30 and uses the word "victim" in that context. Under these final regulations, a recipient has an obligation to respond to a report of sexual harassment that occurs in its education program or activity against a person in the United States, irrespective of whether the complainant chooses to file a formal complaint.

Defining a complainant as a person who has been alleged to be the victim of conduct that could constitute sexual harassment aligns better with a recipient's obligations to respond to such a report under Title IX. Accordingly, the term "complainant" is more appropriate for the structure and purpose of these final regulations to address sexual harassment under Title IX. The Department explains its decision to remove the phrase "or on whose behalf the Title IX Coordinator has filed a formal complaint" from the definition of complainant in § 106.30 as explained in the "Complainant" subsection of the "Section 106.30 Definitions" section of this preamble.

Changes: The Department has included a provision in § 106.71 to prohibit retaliation for the purpose of interfering with any right or privilege secured by Title IX or these final regulations or because the individual has made a report or complaint, testified, assisted, participated, or refused to participate in any manner in an investigation, proceeding, or hearing under these final regulations. The Department also has revised these regulations to require a recipient to offer supportive measures to a complainant in response to a report of sexual harassment in the recipient's education program or activity against a person in the United States under § 106.44(a), irrespective of whether a complainant files a formal complaint. Pursuant to § 106.44(a), a recipient's Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.

Different Standards for Other Harassment

Comments: Some commenters argued that the NPRM is arbitrary and capricious under § 706 of the Administrative Procedure Act[1845] ("APA") because it singles out sexual harassment for special rules, including procedural rules, while other forms of harassment such as racial discrimination under Title VI and disability discrimination under Section 504, are treated differently. The commenters contended that the fact that the Department does not require elaborate grievance procedures under Title VI or Section 504 undercuts any rationale the Department has for proposing the § 106.45 grievance process under Title IX.

Discussion: The Department disagrees that the NPRM or these final regulations are arbitrary and capricious under the APA due to the differences in the way the final regulations address sex discrimination under Title IX and the Department's regulations addressing concerning racial and disability discrimination, respectively, under other statutes.

The APA does not require the Department to devise identical or even similar rules to eliminate discrimination on the bases of sex, race or disability (or of any other kind), and commenters do not identify any legal obligation of that nature. The APA states, in relevant part, that "[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." 5 U.S.C. 706(2)(A). This test inquires whether the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made," and "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of

[1845] *See* 5 U.S.C. 701 *et seq*.

judgment."[1846] Furthermore, agency "action" is statutorily defined as "the whole or a part of *an* agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."[1847] The statutory text's placement of the modifier "an" indicates the APA is concerned with evaluating distinct final agency actions in their *individual* capacity rather than the collective whole of an agency's actions. Moreover, no textual or structural indicator, nor legislative history,[1848] contradicts this inference. Therefore, § 706(2)(A), incorporating § 551(13), is geared toward *individual* agency actions, not the whole corpus of *all or all possibly similar* agency actions.

This means that § 706(2)(A) does not require one agency action under one statute to be consistent with another agency action under a different statute. That makes sense because a contrary interpretation of § 706(2)(A) would require consistency between (and among) even *inter*-agency regulations; and potentially would render one agency's regulations arbitrary and capricious simply because they differ from *another* agency's regulations. That might happen in the guise of arguing that no matter what, the Federal government is the regulatory promulgator. But this is not what the APA effectuates, as "Congress . . . does not, one might say, hide elephants in mouseholes."[1849] If Congress were to take this dramatic step of opening up agency

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[1846] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) (internal quotations marks and citations omitted).
[1847] 5 U.S.C. 551(13) (emphasis added to show singularity of final agency action).
[1848] *See Lawson v. FMR LLC*, 571 U.S. 429, 459-60 (2014) (Scalia, J., concurring in principal part and concurring in judgment) ("Reliance on legislative history rests upon several frail premises. First, and most important: That the statute means what Congress intended. It does not. . . . Second: That there was a congressional 'intent' apart from that reflected in the enacted text. . . . Third: That the views expressed in a committee report or a floor statement represent those of all the Members of that House [or of the President]."); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56-58 (2012) ("[T]he [statute's] purpose must be derived from the text, not from extrinsic sources such as legislative history or an assumption about the legal drafter's desires.") .
[1849] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

regulations for any kind of comparative review by the courts, its "textual commitment [would have] be[en] a clear one."[1850]

While the APA has at times been interpreted to render agency regulations, notably interpretive rules, arbitrary and capricious, and thus *ultra vires*, because they conflict with the regulation promulgated by the same agency that the new rule was *interpreting*, as *Gonzales v. Oregon*[1851] typifies, that principle does not apply to inter- or even intra-agency regulations deriving their delegations from *different* statutes. In addition to this major difference with *Gonzales*, this NPRM – unlike the interpretive rule struck down in *Gonzales* – "would [not] substantially disrupt the [Title VI and Section 504] regime[s]." *Id*. at 254. The NPRM and the final regulations will have no impact whatsoever on the Title VI and Section 504 regimes, much less undermine those regimes. Consequently, while an agency regulation might be arbitrary or capricious in and of itself, it ordinarily cannot be so just because it differs somewhat from another regulation of the same agency stemming from different statutory provisions. Moreover, while agency authority is not unlimited, an agency's discretion in this regard is expansive, for the arbitrary and capricious standard is a high bar that mere disagreement with the agency's action will not satisfy.[1852]

All this is true for practical reasons too, because a contrary principle would wreak havoc on agency behavior regulating discrimination (and much else) in at least three fundamental respects. It would deny agencies latitude to *gradually* promulgate regulations governing different

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[1850] *Id.*
[1851] 546 U.S. 243, 255-58 (2006).
[1852] *See Assoc. of Data Processing Serv. Orgs., Inc. v. Bd. of Govs. of the Fed. Res. Sys*., 745 F.2d 677, 684 (D.C. Cir. 1984).

subject matters under different statutes. Moreover, it would raise gratuitous questions about whether to "equalize up" or "equalize down" the regulations across wide swaths of statutory regimes. And it would fail to account for the reasonable premise that the Federal government and its agencies are entitled to move cautiously, when they elect to do so at all, because of potentially significant differences between how different statutes address different subject matters and the impact that too expeditious a shift might have on the field.

Illustratively, here the three different statutes noted by commenters address sex, racial, and disability discrimination, and these three subject matters raise complex questions of evidentiary standards, definitions, grievance procedures, remedies, and more. Treating them as interchangeable would, among other things, strip the Federal government of a studious, careful approach to studying the impact of one set of regulations attending one subject matter before transposing them to *other* regulations concerning a *different* subject matter. Such an extreme and gratuitous step ought not to be taken lightly nor foisted on an agency.

The statutory texts attending Title VI, Title IX, and Section 504 give no indication that regulations arising from any of them must, or even may, serve as APA comparators for either or both of the others. Because that comparison would be an extraordinary act of intervention in the process of agency rulemaking, presumably Congress would have spoken clearly and unambiguously to that effect, for it does not hide momentous, law-altering "elephants" in statutory "mouseholes," and certainly not tacitly or silently.[1853] Congress, though, has done no such thing in this instance. Instead, Congress included specific statutory exemptions to Title IX that do not exist in Title VI or Section 504. For example, Congress included specific statutory

[1853] *Whitman*, 531 U.S. at 468.

exemptions to Title IX such as an exemption for educational institutions training individuals for military services or the merchant marine,[1854] for father-son or mother-daughter activities at an educational institution,[1855] and for pageants in which participation is limited to individuals of one sex only.[1856] Such exemptions indicate congressional recognition that prohibition of sex discrimination under Title IX is not necessarily identical to prohibition of discrimination based on race, or disability, under other non-discrimination statutes. As a further, similar example, Department regulations implementing Title IX have, since 1975, required recipients each to designate one or more employees to coordinate the recipient's efforts to comply with Title IX;[1857] no corresponding regulatory requirement exists in the Department's Title VI regulations, yet the fact that the Department's Title IX implementing regulations differ in such a manner from the Department's Title VI regulations has not rendered the Title IX regulations invalid under the APA or on any other basis.

Structural safeguards already in place ensure there is some consistency across various agency regulations stemming from different statutory regimes. The Department and other agencies submit their regulations to the inter-agency review process facilitated by the Office of Management and Budget (OMB) under Executive Order 12866 so that other agencies are consulted and can provide their input.

Consequently, the differences in the way the final regulations address sexual harassment as a form of sex discrimination under Title IX and the Department's regulations concerning

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[1854] 20 U.S.C. 1681(a)(4).
[1855] 20 U.S.C. 1681(a)(8).
[1856] 20 U.S.C. 1681(a)(9).
[1857] *See* 34 CFR 106.8(a); these final regulations at § 106.8(a) retain, clarify, and strengthen the requirement that each recipient designate at least one Title IX Coordinator.

racial and disability discrimination, respectively, under other statutes do not suggest that the NPRM or these final regulations exceeds the Department's authority under, or otherwise violates, the APA.

Changes: None.

Spending Clause

Comments: Some commenters argued that the Legislative Vesting Clause in Article I of the Constitution – "All legislative Powers herein granted shall be vested in a Congress of the United States," U.S. CONST. art. I, § 1, cl. 1 – requires that Congress may not delegate to the Department (indeed, to any agency) the power to implement regulations pertaining to specific subject matters. Commenters also argued that Congress has made no delegation to the Department that would allow the Department to promulgate regulations concerning sexual harassment and assault on campuses, because Title IX pertains to discrimination, not to harassment.

Second, some commenters argued that the NPRM exceeds the Federal government's constitutional authority under the Spending Clause, *see* U.S. CONST. art. I, § 8, cl. 1, because the mandatory procedures set out in the NPRM may constitute unconstitutional conditions. For example, at least one commenter asserted that the Department should not mandate specific grievance procedures because what process is due in each particular case may differ depending on the circumstances. These commenters contended that the NPRM improperly alters the essence of the bargain struck between the government and funding recipients long after the terms were finalized and the NPRM cannot form part of a true mutual agreement. These commenters also asserted that the proposed rules are not a true agreement between the parties whom the terms of the proposed rules purport to bind – including every student in a federally funded institution – because students have no say in this agreement.

One commenter argued that the Department cannot erode the First Amendment rights of academic institutions to determine who may be admitted to study and who may be permitted to continue to study through a fair process to determine responsibility and to sanction in a way that both educates the student as to the consequences of their actions and deters further similar deleterious activity. This commenter contended that the First Amendment or other constitutional rights of recipients do not automatically yield just because the action by the Federal government is declared to be taken under the Spending Clause.

Discussion: While we appreciate commenters' concerns, we disagree that the Department lacks the delegated authority to promulgate the final regulations. Certainly, commenters are correct that Article I of the U.S. Constitution provides, in the Legislative Vesting Clause, that "[a]ll legislative Powers *herein granted* shall be vested in a Congress of the United States."[1858] Article I then proceeds to enumerate Congress's authority on a power-by-power basis.[1859] It also means the only source of elasticity for congressional power is the Necessary and Proper Clause, authorizing Congress to "make all Laws which shall be necessary and proper for carrying into Execution the [enumerated] Powers."[1860]

This is why the early Supreme Court explained that Congress may not transfer to another branch "powers which are strictly and exclusively legislative."[1861] But, as the Supreme Court later recognized, the Constitution affords "Congress the necessary resources of flexibility and practicality [that enable it] to perform its function[s]."[1862] Congress, for instance, is permitted to

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[1858] U.S. CONST. art. I, § 1, cl. 1 (emphasis added).
[1859] *See generally* U.S. CONST. art. I.
[1860] U.S. CONST. art. I, § 8, cl. 18.
[1861] *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43.
[1862] *Yakus v. United States*, 321 U.S. 414, 425 (1944) (internal quotation marks omitted).

"obtain[] the assistance of its coordinate Branches," including by authorizing executive agencies implement the statutes passed by Congress, through agency regulations.[1863] With respect to "our increasingly complex society, replete with ever changing and more technical problems," the Supreme Court has reasoned that "Congress simply cannot do its job absent an ability to delegate power under broad general directives."[1864] As a consequence, the Supreme Court has held that a statutory delegation will be upheld under the Legislative Vesting Clause so long as Congress "lay[s] down by legislative act an *intelligible principle* to which the person or body authorized to [exercise the delegated authority] is directed to conform."[1865] This "intelligible principle" doctrine, which represents a delicate constitutional balance between no congressional delegation whatsoever and delegation with complete abandon, is the backbone of much of the Federal administrative state today.[1866] Congress does, of course, set forth various statutory restrictions on how and under which circumstances the agencies may operationalize congressional will through an agency's implementing regulations.[1867] But the precedent is clear that Congress constitutionally may delegate to the Department the power to implement regulations pertaining to specific subject matters. Congress has done so with respect to Title IX, in 20 U.S.C. 1682.

Agencies, such as the Department, are creatures of congressional will; an agency's powers to act must emanate from Federal law.[1868] Congress, in enacting Title IX, *has* conferred that power on the Department. The appropriate place to start is the statutory text, for "[u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary

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[1863] *Mistretta v. United States*, 488 U.S. 361, 372 (1989).
[1864] *Id.*
[1865] *Id*. (internal quotation marks and citation omitted; emphasis added).
[1866] *Mistretta*, 488 U.S. at 372.
[1867] *See*, *e.g*., Administrative Procedure Act, 5 U.S.C. 701 *et seq*.
[1868] *See Stark v. Wickard*, 321 U.S. 288, 309 (1944).

meaning."[1869] As has been noted, Title IX's text, 20 U.S.C. 1681(a) (emphasis added), states: "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[.]"

The Department's authority to regulate sexual harassment in a recipient's education program or activity as a form of sex discrimination pursuant to Title IX, is clear. The Supreme Court has noted that "[t]he *express* statutory means of enforc[ing] [Title IX] is administrative," as "[t]h[at] statute directs Federal agencies that distribute education funding to establish requirements to effectuate the non-discrimination mandate, and permits the agencies to enforce those requirements through 'any . . . means authorized by law,' including ultimately the termination of Federal funding."[1870] The Supreme Court has held that sexual harassment is a form of sex discrimination under Title IX.[1871] The Department's prerogative of implementing Title IX with respect to recipient responses to sexual harassment as a form of sex discrimination is authorized by statute, approved of by the Supreme Court, and warrants deference.

As to the assertion that the Department's authority to regulate under Title IX does not extend to ensuring that a Title IX grievance process contains procedural rights and protections for complainants and respondents, we explain throughout this preamble and especially in the "Role of Due Process in the Grievance Process" section that the Department interprets and enforces Title IX (and indeed, any law under the Department's regulatory purview) consistent

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[1869] *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006) (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)).
[1870] *Gebser v. Lago Vista Ind. Sch. Dist*., 524 U.S. 274, 280-81 (1998) (quoting 20 U.S.C. 1682) (emphasis added).
[1871] *See id.* at 283 (affirming "the general proposition that sexual harassment can constitute discrimination on the basis of sex under Title IX").

with the U.S. Constitution, including constitutional rights to due process of law. The Department has the authority to address through regulation the manner in which recipients respond to sexual harassment to further Title IX's non-discrimination mandate consistent with constitutional due process, has done so in these final regulations, and these final regulations are thus consistent with the separation of powers doctrine.

The Department also disagrees that the proposed regulations, or final regulations, exceed the Federal government's constitutional authority under the Spending Clause. To be sure, legislation enacted under Congress's Spending Clause power is "much in the nature of a contract: in return for Federal funds, the States agree to comply with federally imposed conditions."[1872] As a result, courts when construing such statutes "insis[t] that Congress speak with a clear voice," for – as is true for contracts generally – here too "[t]here can . . . be no knowing acceptance [of the terms of *this* statutory contract] if a State is unaware of the conditions [the statute imposes] or is unable to ascertain what is expected of it."[1873] But the Supreme Court held that recipients may be liable for monetary damages in Title IX lawsuits under a judicially implied private right of action, because while Title IX is in the nature of a contract, under Congress's Spending Clause authority, recipients have been on notice since enactment of Title IX that the statute means that no recipient may engage in intentional discrimination on the basis of sex – and knowing about and ignoring sexual harassment in the

[1872] *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).
[1873] *Id*. (emphasis added).

recipient's education program or activity constitutes the recipient committing intentional sex discrimination.[1874]

Undoubtedly, "Congress may use its spending power to create incentives for States to act in accordance with Federal policies."[1875] That said, "when 'pressure turns into compulsion,'" such as undue influence, coercion or duress—"the legislation runs contrary to our system of federalism."[1876] Federal statutes enacted under the Spending Clause "do not pose this danger when a State [or a private entity] has a *legitimate choice* whether to accept the Federal conditions in exchange for Federal funds."[1877] When determining whether a Spending Clause program constitutes "economic dragooning" (impermissible),[1878] or "'relatively mild encouragement'" (permissible),[1879] the Supreme Court asks whether the recipient is left with a "real option" to refuse the Federal offer.[1880] If, for instance, State recipients have established an elaborate, decades-long setup to administer Medicaid funding, a Federal directive threatening all of it if some new terms were not complied with would exceed Congress's Spending Clause authority.[1881] But if a State will lose five percent of Federal highway funds if the State does not raise the minimum drinking age, that is within Congress's spending power.[1882] As a general rule of thumb, Federal policy enacted through the Spending Clause as a backdoor when Congress's other enumerated powers do not so permit is disfavored. Other restrictions on the Federal

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[1874] *See Franklin v. Gwinnett Co. Pub. Sch.*, 503 U.S. 60, 74-75 (1992); *see also* the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble.
[1875] *Nat'l Fed'n of Ind. Bus. v. Sebelius*, 567 U.S. 519, 577-78 (2012).
[1876] *Id*. (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).
[1877] *Id.* at 579 (emphasis added).
[1878] *Id*. at 582.
[1879] *Id*. at 580-81 (quoting *South Dakota v. Dole*, 483 U.S. 203, 211 (1987)).
[1880] *Sebelius*, 567 U.S. at 582.
[1881] *See id.* at 575-85.
[1882] *See Dole*, 483 U.S. at 211-12.

government's Spending Clause authority are that it must be in pursuit of "the general welfare;" be stated unambiguously; that conditions on Federal grants must be related "to the Federal interest in particular national projects or programs;" and that it not violate any other constitutional provision.[1883]

The final regulations are consistent with all the limitations on the Spending Clause authority of the Federal government. Indeed, this entire notice-and-comment rulemaking process provides the notice the Spending Clause, as construed in *Pennhurst*, requires.[1884] To start, the final regulations do not change the fundamental aspects of the bargain struck between the government and funding recipients because these final regulations advance rather than curtail the core purposes of Title IX, and they represent a true mutual agreement under which recipients understand that the government requires operation of education programs or activities free from sex discrimination. This agreement has, for decades, been clearly understood to include a recipient's obligation to adopt and publish grievance procedures for the prompt and equitable resolution of student and employee complaints of sex discrimination.[1885] The background principles of Title IX and the APA, including the Department's authority to regulate as it has in this area, have been known to every recipient since passage of Title IX. Additionally, to this point, the final regulations are not a coercive "gun to the head" of the recipients or the States because recipients are perfectly free to refuse Title IX-centric Federal financial assistance;[1886] the recipients or States have not been operating under a promise or expectation of such funds being

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[1883] *Id.* at 207-08 (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion)).
[1884] *See Pennhurst*, 451 U.S. at 17.
[1885] 34 CFR 106.8(b) originally promulgated by HEW (the Department's predecessor) in 1975, and the similar requirement modified in the final regulations at § 106.8(c).
[1886] *Sebelius*, 567 U.S. at 581.

given in perpetuity; and there is no hint of compulsion on the recipients or States. Moreover, there is no suggestion the Department lacks the power to promulgate the final regulations through the Commerce Clause or Section 5 of the Fourteenth Amendment, so there is no possibility of the Spending Clause being used as a back door to achieve a Federal mandate on unwilling actors. Additionally, these final regulations undoubtedly advance the general welfare, are stated unambiguously and clearly, apply to the national concern of fairness to those affected by allegations of sexual harassment and assault in schools, colleges, and universities, and do not violate – indeed they further – other constitutional provisions such as equal protection of the laws, due process of law, and the First Amendment.

The Department acknowledges that different procedural due process protections may be required in different situations. As more fully explained in the "Role of Due Process in the Grievance Process" section, the Department does not mandate the same grievance process for elementary and secondary schools as for postsecondary institutions because the Department recognizes that due process is a "flexible" concept dictated by the demands of a "particular situation,"[1887] and that addressing sexual harassment as a form of sex discrimination in elementary and secondary schools may present different demands than addressing sexual harassment as a form of sex discrimination in postsecondary institutions. The grievance process provided in these final regulations is adapted for a particular situation, namely to address sexual harassment as a form of sex discrimination.

The Department acknowledges that these final regulations essentially constitute the terms of a contract between the Department and the recipient of Federal financial assistance. The

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[1887] *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (internal citations omitted).

Department does not enter into a contract or agreement with every student in a school that receives Federal financial assistance. Such an argument is absurd because such an argument would render the student and not the school responsible for fulfilling the non-discrimination mandate in Title IX. The Department disagrees though that students have "no say" in this agreement because any student may submit a comment during the public comment period for the Department to consider. Accordingly, every student had the opportunity to essentially be a part of the negotiation, and commenters who identified as students submitted comments.

The Department also is not encroaching upon the First Amendment rights of recipients as more fully explained in the "Conflicts with First Amendment, Constitutional Confirmation, International Law" subsection of the "Miscellaneous" section of this preamble. Recipients remain free to determine who may be admitted to study and who may be permitted to continue to study at elementary and secondary schools or at postsecondary institutions. The Department has repeatedly stated through its NPRM and in this preamble that it will not second guess the disciplinary decisions made by school administrators.[1888] One of the reasons that the Department chooses to adopt and adapt the deliberate indifference standard from *Davis* is the Supreme Court developed this standard to interpret Title IX in a manner that leaves room for flexibility in the schools' disciplinary decisions and does not place courts in the position of second-guessing school administrators' disciplinary decisions.[1889] The grievance process in § 106.45 does not demand a particular outcome and is simply a process designed to assess allegations of sexual harassment as a form of sex discrimination. A recipient still has significant discretion within the

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[1888] 83 FR 61466.
[1889] *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 648 (1999).

grievance process in § 106.45. For example, as previously noted in this preamble, a recipient may adopt reasonable rules of decorum or order to govern live hearings under this paragraph, provided that such rules apply equally to all participants and are consistent with this section. Additionally, these final regulations expressly state in § 106.6(d)(1) that nothing in Title IX implementing regulations requires a recipient to restrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution.

For all these reasons, the NPRM and these final regulations are within the Federal government's Spending Clause authority.

Changes: None.

Litigation Risk

Comments: At least one commenter stated that there is a nationwide trend of increased filings of sexual harassment and assault claims, and argued that therefore, it is reasonable to anticipate that because the Department has narrowed its jurisdiction under Title IX, 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.[1890] Several commenters asserted that the proposed rules will expose recipients to a greater risk of litigation from both complainants seeking redress for sex discrimination and respondents seeking to overturn a recipient's finding of responsibility.

[1890] *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); U.S. Equal Employment Opportunity Commission, *EEOC Releases Preliminary FY 2018 Sexual Harassment Data* (Oct. 4, 2018) (stating "charges filed with the EEOC alleging sexual harassment increased by more than 12 percent from fiscal year 2017").

Discussion: These final regulations do not address or alter any party's right to sue a recipient under various causes of action that may arise from a recipient's response to alleged sexual harassment. The Department, however, disagrees that as a result of these final regulations, there will be an increase in Title IX complaints in civil and criminal courts and in costly lawsuits alleging non-Title IX causes of action and believes that these regulations may result in decreased litigation. These final regulations align Title IX administrative enforcement more closely with the rubric that the Supreme Court adopted in Title IX cases[1891] while mandating that recipients support alleged victims of sexual harassment in ways that go beyond what the Supreme Court's private lawsuit framework requires, while prescribing a standardized grievance process consistent with due process of law and fundamental fairness. These final regulations therefore provide greater clarity to a recipient of its obligations under Title IX and may decrease litigation based on claims that the recipient responded inadequately to protect an alleged victim, or denied a respondent due process of law or fundamental fairness in investigations or adjudications of sexual harassment allegations. For example, a recipient that complies with § 106.44(a) and § 106.44(b)(1), which includes but goes beyond the Supreme Court's deliberate indifference liability standard, will promptly offer a complainant supportive measures when the recipient has actual knowledge of sexual harassment in its education program or activity against a person in the United States – whether or not the recipient also investigates and adjudicates the complainant's allegations of sexual harassment. More specifically, under § 106.44(a), the Title IX Coordinator must promptly contact the complainant (i.e., the person alleged to have been

[1891] For further discussion see the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble.

victimized by sexual harassment) to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. If such a recipient was then sued by the complainant for providing a deliberately indifferent response, the recipient would at least be able to argue that it did not respond in a manner clearly unreasonable in light of the known circumstances because the recipient considered a complainant's wishes with respect to supportive measures, offered supportive measures, and informed a complainant of the process for filing a formal complaint (and, under § 106.44(b)(1), the recipient would be obligated to investigate allegations in a formal complaint if the complainant exercised the option of filing a formal complaint). Similarly, a recipient that follows a the grievance process that complies with § 106.45 will provide robust due process protections to both the complainant and respondent that satisfy constitutional guarantees and, thus, may defend against allegations that it deprived a the respondent (or the complainant) of due process of law. The Department therefore believes that these final regulations may have the effect of decreasing litigation arising from how recipients respond to sexual harassment.

Changes: None.

Comments: One commenter stated that the Department did not evaluate the impact of the proposed regulations on recipients' legal budgets. One commenter stated that, in a United Educators (UE) study of 305 reports of sexual assault from 104 colleges and universities between 2011 and 2013, more than one in four reports resulted in legal action, costing schools about $200,000 per claim, with 84 percent of costs resulting from claims brought by survivors and other harassment victims and that another UE study of reports of sexual assault during 2011-

2015 found that schools lost about $350,000 per claim, with some losses exceeding $1 million and one reaching $2 million.

One commenter asserted that if students experiencing sexual harassment are no longer able to seek relief through their school or through OCR's complaint resolution system, more lawsuits will be filed, and not just under Title IX. Another commenter argued that any savings schools made because of the Department's rule changes will be eclipsed by the funds institutions will expend to defend the same accusations of Title IX violations in Federal and State courts. If the Department's Title IX regulations align with the standards used by Federal courts for money judgments in private lawsuits under Title IX, the commenter argued that there would no longer be any advantage for complainants to seek agency-level redress from OCR over the court system, especially since under the proposed rules complainants would not be able to obtain money damages from a recipient as a remedy ordered by OCR for a recipient's violation of Title IX regulations. The commenter cited a United Educators study in which the insurance company analyzed 1,000 claims in cases of Title IX litigation and found that, in just 100 of those cases, judgments and attorney's fees cost $21.8 million. United Educators reported that the cost on average is $350,000 per case. The commenter argued that, using those numbers, a mere 1,050 additional cases would completely wipe out any savings from even the highest savings number estimated by the NPRM's Regulatory Impact Analysis (RIA). The commenter argued that considering the detailed requirements and the gray areas of the proposed rules, 1,050 additional cases filed over the course of the same ten-year period referenced in the NPRM's RIA should be considered a low estimate. One commenter asserted that the proposed rules would also expose schools to significant potential Title VII liability due to the conflicts between Title VII and the

proposed rules' requirements, and possible liability under contradictory State, local, or tribal laws.

Discussion: The Department's RIA in the NPRM and its Regulatory Impact Analysis (RIA) in these final regulations address the costs of attorneys for recipients.[1892] The Department notes that each recipient may choose to use attorneys to advise a recipient on compliance with these final regulations but is not required to do so. As discussed previously, the Department believes that litigation may decrease as a result of these final regulations. As discussed previously, these final regulations impose on recipients more obligations to support complainants, and protect due process rights of all parties, than what the Supreme Court has required in private actions under Title IX; thus, we disagree that complainants (or respondents) will find "no advantage" or no difference in seeking redress of a recipient's alleged Title IX under the Department's administrative enforcement standards, versus under the Supreme Court's framework for judicial enforcement. For reasons discussed in the "Section 106.3(a) Remedial Action" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble, we have revised the proposed rules' revision to existing 34 CFR 106.3(a) such that under the final regulations, § 106.3(a) removes the NPRM's reference to monetary damages as a potential remedy that the Department may seek when administratively enforcing Title IX and its implementing regulations.

The Department disagrees that these final regulations conflict with any obligations that a recipient may have under Title VII, as explained in greater detail in the "Section 106.6(f) Title VII and Directed Question 3 (Application to Employees)" subsection of the "Clarifying

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[1892] *See, e.g.*, 83 FR 61494.

Amendments to Existing Regulations" section of this preamble. Similarly, the Department is not aware of any State, local, or tribal laws or rules that directly conflict with these final regulations. The Department addresses any such possible conflicts in more detail in the "Section 106.6(h) Preemptive Effect" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble.

Changes: We have revised § 106.3(a) to remove reference to damages as a possible remedy ordered by the Assistant Secretary when investigating a recipient for violations of Title IX or its implementing regulations, referring instead to the Department's authority to enforce Title IX pursuant to 20 U.S.C. 1682.

Comments: One commenter applauded the proposed rules as being long overdue but asserted that smaller schools will "suffer inordinately" under the proposed rules because the burden and costs of compliance would be more deeply felt by small schools, and small schools would serve as focal points for legal challenges to the implementation of these Title IX regulations.

Discussion: The Department disagrees that smaller schools will "suffer inordinately" in complying with these final regulations, and the RIA in this document expressly addresses the effect of the final regulations on small entities. As explained in the "Regulatory Flexibility Act" subsection of the "Regulatory Impact Analysis" section of this preamble, we do not believe that these final regulations would place a substantial burden on small entities, including small elementary and secondary schools and small postsecondary institutions. Moreover, as discussed in the "Role of Due Process in the Grievance Process" section of this preamble, we do not believe that students (including complainants, and respondents) should receive fewer protections aimed at furthering Title IX's non-discrimination mandate consistent with constitutional due process or fundamental fairness, depending on the size of their school. While the RIA estimates

the cost burden of these final regulations, these final regulations are motivated by fulfilling the important mandate of Title IX to prohibit sex discrimination, including in the form of sexual harassment, consistent with the U.S. Constitution and fundamental fairness, and we believe that the benefits of these final regulations outweigh the compliance costs likely to result.

Changes: None.

Effective Date

Comments: A number of commenters stated that the NPRM needed an effective date to allow recipients to implement policy changes, training, procedures, etc. to come into compliance with the provisions in the final regulations. A few commenters asked that the final regulations not take effect in the middle of a school year. A few commenters requested a 90-day implementation window and requested that the Department issue the final regulations in the month of May so that the requested 90-day implementation window takes place over the summer, when recipients have more time and ability to address and implement the changes constructively; some of these commenters asserted that requiring changes to be made in the middle of a school year will raise problems with applying two different sets of rules to sexual misconduct incidents occurring in the same school year based on an arbitrary cut-off date. Some commenters expressed concern that the proposed regulations indicated no provision for a time period allowing for transition from previously established procedures to the new procedures required. A few commenters asserted the Department should set an effective date at least eight months after publication of the final regulations because that time frame would align with the Higher Education Act's master calendar. A few commenters argued that the changes necessary under the final regulations justify an effective date no earlier than three years after the date of publication of the final regulations; other commenters asserted that small institutions in particular will require an extended period of

time to come into compliance. At least one commenter suggested a two-phase effective date – one effective date as to the topics covered in § 106.44(a)-(b), and a second (later) effective date for the other provisions of the final regulations including § 106.45, on the basis that changing grievance procedures is more complicated and will take more time for the Department to adequately explain to recipients. Another commenter, a State coordinating body for higher education, requested that the Department consider State and institutional budget cycles, especially in light of possible tuition and fee increases needed to help cover costs of implementing the proposed regulations. The commenter recommended that the final regulations allow for an implementation period of no less than 18 months, which would allow institutions time to accommodate budget cycles and to request additional resources for the subsequent fiscal year. Another commenter requested that the Department allow at least 12 months for full implementation of new Title IX rules and regulations. One commenter requested that the Department not adopt an early effective date because that would be inconsistent with the Department's recent approach to regulations that require less significant program changes; the commenter noted that the Department allowed schools until July 2019 to comply with the 2014 Gainful Employment regulation and the 2016 Borrower Defense regulation, and the commenter asked that the Department adopt a similar compliance period for the Title IX regulation.

Some commenters requested that the Department clarify the standing of the 2001 Guidance once the final regulations become effective, and at least one commenter stated that the proposed regulations could be improved by clearly rescinding all the Department's prior guidance documents regarding the subject of sexual harassment. Another commenter stated that the proposed regulations will have the unintended impact of altering the 2001 Guidance policies and practices that districts have implemented for nearly two decades. One commenter

specifically asked the Department to clarify whether the final regulations will rescind and replace the 2001 Guidance, which addresses retaliation, and noted that confusion about the status of the 2001 Guidance limits the public's ability to effectively comment on the NPRM because it prevents an understanding of the full extent of the changes to the administrative scheme.

Discussion: Under the Administrative Procedure Act ("APA"), 5 U.S.C. 701 *et seq.*, the effective date for the final regulations cannot be fewer than 30 days after the final regulations are published in the *Federal Register* unless special circumstances justify a statutorily-specified exception for an effective date earlier than 30 days from such publication. The Department has determined that no statutory exception justifies an effective date earlier than 30 days from publication of these final regulations. The Department has carefully considered commenters' concerns, including the concern to have sufficient time to prepare for compliance with these final regulations and the request to have these final regulations become effective during the summer when many recipients of Federal financial assistance that are schools are out of session.

In the ordinary course, the Department believes that 60 days would be sufficient for recipients to come into compliance with these final regulations. However, after the public comment period on the NPRM ended, and before publication in the *Federal Register* of these final regulations, on March 13, 2020, the President of the United States declared that a national emergency concerning the novel coronavirus disease (COVID-19) outbreak began on March 1, 2020, as stated in "Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak," Proclamation 9994 of March 13, 2020, *Federal Register* Vol. 85, No. 53 at 15337-38. The Department appreciates that exigent circumstances exist as a result of the COVID-19 national emergency, and that these exigent circumstances require great attention and care on the part of States, local governments, and recipients of Federal financial assistance. The

Department recognizes the practical necessity of allowing recipients of Federal financial assistance time to plan for implementing these final regulations, including to the extent necessary, time to amend their policies and procedures in order to comply.

In response to commenters' concerns about an effective date, and in consideration of the COVID-19 national emergency, the Department has determined that the final regulations are effective August 14, 2020. Recipients will thus have substantially more than the minimal 30 days to prepare for compliance with these final regulations. The Department recognizes that the length and scope of the current national emergency relating to COVID-19 is somewhat uncertain. But based on the information currently available to it, the Department believes that the effective date of August 14, 2020, adequately accommodates the needs of recipients, while fulfilling the Department's obligations to enforce Title IX's non-discrimination mandate in the important context of sexual harassment.

The Department appreciates the suggestions from commenters as to an appropriate length of time after publication of final regulations for the final regulations to become effective. As discussed in the "Executive Orders and Other Requirements" subsection of the "Miscellaneous" section of this preamble, these final regulations are not promulgated under the Higher Education Act and are not subject to the Master Calendar under that Act. The Department declines to align the effective date for the final regulations with the July 1 effective date of regulations under the Higher Education Act, including gainful employment and borrower defense to repayment regulations to which a commenter refers, because these final regulations concern improvement of civil rights protections for students and employees in the education programs and activities of all recipients of Federal financial assistance, not only those institutions to which the Higher Education Act applies. The Department notes that regardless of when the final regulations

become effective, some Title IX sexual harassment reports occurring within the same education program or activity within the same school year may be handled under the current Title IX regulations while others will be addressed under the requirements of the final regulations; this is not arbitrary, and occurs any time regulatory requirements are amended prospectively. The Department also declines other suggestions from commenters, including the creation of two separate effective dates for different provisions of the final regulations, because such an approach would create confusion rather than clarity. Additionally, some provisions in § 106.44 reference and incorporate requirements in § 106.45, and, thus, making § 106.44 effective before § 106.45 is not feasible. The Department cannot accommodate every recipient's budget cycle as each State may have a different fiscal year and budget cycle. The effective date of August 14, 2020 coincides with many schools' "summer break," so that recipients may finalize Title IX policies and procedures to comply with these final regulations during a time when many schools are "out of session" and will afford substantially greater opportunity to come into compliance than the statutory minimum, which is appropriate given the current challenges posed by the COVID-19 national emergency.

The Department notes that recipients have been on notice for more than two years that a regulation of this nature has been forthcoming from the Department, and recipients will have substantially more than the minimal 30 days to come into compliance with these final regulations, which become effective on August 14, 2020.[1893] During this transition period

[1893] U.S. Dep't. of Education, Office for Civil Rights, *Dear Colleague Letter* (Sept. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf (withdrawing the Department's 2011 Dear Colleague Letter and 2014 Q&A) ("The Department intends to implement such a policy [addressing campus sexual misconduct under Title IX] through a rulemaking process that responds to public comment.").

between publication of these final regulations in the *Federal Register*, and the effective date of August 14, 2020, the Department will provide technical assistance to recipients to assist with questions about compliance. The Department also will continue to provide technical assistance after these regulations become effective, including during the investigation of a complaint, a compliance review, or a directed investigation by OCR, if the recipient requests technical assistance.

On September 22, 2017, the Department expressly stated that its 2017 Q&A along with the 2001 Guidance "provide information about how OCR will assess a school's compliance with Title IX."[1894] The Department thus gave the public notice of how OCR will assess a school's compliance with Title IX until these final regulations become effective. The Department's NPRM also provided the public with notice of how the proposed regulations differ from the 2001 Guidance, and the Department explains departures taken in the final regulations from the 2017 Q&A, the 2001 Guidance, and also withdrawn guidance documents such as the 2011 Dear Colleague Letter, throughout this preamble.[1895] To the extent that these final regulations differ from any of the Department's guidance documents (whether such documents remain in effect or are withdrawn), these final regulations, when they become effective, and not the Department's guidance documents, are controlling.

Changes: The effective date of these final regulations is August 14, 2020.

[1894] 2017 Q&A at 1.

[1895] *E.g.*, the "Differences Between Standards in Department Guidance and These Final Regulations" subsection of the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section, and the "Similarities and Differences Between the § 106.45 Grievance Process and Department Guidance" subsection of the "Role of Due Process in the Grievance Process" section, of this preamble.

Retaliation

Section 106.71 Retaliation Prohibited

Comments: A few commenters commended the Department's proposed regulations as a reasonable means of reducing sex discrimination and explicitly guarding against unlawful retaliation; at least one commenter stated that the proposed rules' prohibitions against bias would make it difficult for recipients to engage in unlawful retaliation. In contrast, several commenters opposed the proposed regulations for not adequately addressing victims' fears of not being believed and for failing to protect complainants from retaliation for reporting. Commenters stated that under the proposed rules, schools might not do enough to prevent an assailant from retaliating against a survivor. Other commenters stated that many survivors who do not report cite fear of retaliation as one of the main reasons. Many commenters generally called for greater protections for victims to ensure that their alleged assailants cannot control victims with fear, intimidation, or embarrassment. Two commenters suggested that the proposed regulations do not go far enough in incentivizing schools to prohibit retaliation against students who report, noting that schools could and should do more to address toxic cultures or systemic problems among the student body. Several commenters included personal stories alleging they were retaliated against for reporting sexual harassment. Other commenters stated that, despite support for the proposed rules, following the Supreme Court's decisions in *Gebser* and *Davis* is inadequate because those decisions do not address retaliation and, as such, the Department should draw a clear delineation between retaliation claims and sexual harassment claims. This commenter asserted that the *Gebser*/*Davis* requirement that schools must be on notice of sexual harassment before they can be held accountable does not apply to retaliation and urged the Department not to accidentally risk imposing an actual notice requirement in the context of retaliation.

Several commenters suggested that the Department add a general prohibition of retaliation. Some commenters noted that retaliation is a serious concern for complainants when weighing whether to report and in deciding whether to participate in an investigation. Specifically, one commenter suggested that the final regulations adopt the language prohibiting retaliation from the withdrawn 2011 Dear Colleague Letter. A few commenters urged the Department to refer to its past guidance documents, which the commenters contended addressed retaliation more aptly than the current proposed rule. Many commenters noted that failing to include a clear prohibition on retaliation could chill reporting in the first place. One commenter requested that the final regulations contain an explicit provision protecting undocumented students from retaliatory immigration action similar to the provision in the withdrawn 2014 Q&A.

Several other commenters requested that if the final regulations are to include a provision regarding retaliation, then it should explicitly not protect those who make false allegations from any adverse consequences that result. One commenter, who has worked with survivors, sought clarification on whether schools will need to include language regarding false statements in their procedures and how false accusations should be determined. Some commenters cautioned that broad retaliation prohibitions can threaten free speech, and particularly the ability of the falsely accused to defend themselves. As such, commenters contended, any prohibition should include language clarifying that denying allegations does not constitute a violation of Title IX.

Several commenters sought clarity on how institutions were expected to handle retaliation claims under the proposed regulations. One commenter stated that if a student makes a formal complaint of sexual harassment, the proceedings would have to comply with § 106.45, but if the student alleged that they were retaliated against for filing the formal complaint, that

allegation of retaliation would then be handled through the Title IX grievance process under § 106.8. Another commenter inquired as to whether the grievance procedures that apply to alleged sex discrimination under § 106.8 would also apply where a complainant alleges retaliation for submitting a formal complaint of sexual harassment.

Discussion: The Department appreciates the commenters' concerns and suggestions regarding retaliation. Retaliation against a person for exercising any right or privilege secured by Title IX or its implementing regulations is never acceptable, and the Supreme Court has held that retaliation for complaining about sex discrimination is, itself, intentional sex discrimination prohibited by Title IX.[1896] The Department agrees with commenters that absent a clear prohibition of retaliation, reporting may be chilled. In response to these comments, the Department is adding § 106.71 to expressly prohibit retaliation. This retaliation provision contains language similar to the retaliation provision in § 100.7(e), implementing Title VI.

Under the retaliation provision in § 106.71(a) in these final regulations, no recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or its implementing regulations, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under Title IX and its implementing regulations. Complaints alleging retaliation may be filed according to the "prompt and equitable" grievance procedures for sex discrimination required to

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[1896] *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 183 (2005) (holding that "retaliation against individuals because they complain of sex discrimination is 'intentional conduct that violates the clear terms of the statute,' *Davis,* 526 U.S., at 642, 119 S. Ct. 1661, and that Title IX itself therefore supplied sufficient notice" that retaliation is itself sex discrimination prohibited by Title IX).

be adopted under § 106.8(c). If the person who is engaging in the retaliatory acts is a student or a third party and is not an employee of the recipient, a recipient may take measures such as pursuing discipline against a student who engaged in retaliation or issuing a no-trespass order against a third party to address such retaliation. This retaliation provision is purposefully broad in scope and may apply to any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, any witness, or any other individuals who participate (or refuse to participate) in any manner in an investigation, proceeding, or hearing under Part 106 of Title 34 of the Code of Federal Regulations. Accordingly, threatening to take retaliatory immigration action for the purpose of interfering with any right or privileged secured by Title IX or its implementing regulations may constitute retaliation, and additional language in the actual text of the final regulations to express this point is unnecessary. The Department acknowledges that persons other than complainants, such as witnesses may face retaliation, and seeks to prohibit retaliation in any form and against any person who participates (or refuses to participate) in a report or proceeding under Title IX and these final regulations.

The Department will hold a recipient responsible for responding to allegations of retaliation under § 106.71. The recipient's ability to respond to retaliation will depend, in part, on the relationship between the recipient and the individual who commits the retaliation. For example, if a respondent's friend who is not a recipient's student or employee and is not otherwise affiliated with the recipient threatens a complainant, then the recipient should still respond to such a complaint of retaliation to the best of its ability. Even though the recipient may not require the person accused of retaliation to participate in a recipient's equitable grievance

procedures under § 106.8(c), the recipient should process the complaint alleging retaliation in accordance with its equitable grievance procedures and may decide to take appropriate measures, such as issuing a no-trespass order.

The Department recognizes that retaliation may occur by punishing a person under a different code of conduct that does not involve sexual harassment but arises out of the same facts or circumstances as the report or formal complaint of sexual harassment. The Department also acknowledges that several commenters directed the Department to media articles documenting alleged incidents of such punishment against students reporting unwanted sexual conduct.[1897] Commenters cited research on sexual assault in the military, which found that fear of disciplinary action for collateral misconduct was a significant impediment to encouraging victims to come forward, and that some perpetrators explicitly told victims not to report or they would get the victim in trouble for collateral offenses, such as underage drinking.[1898] In order to address this particular form of retaliation, § 106.71(a) prohibits charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX or its implementing regulations. For example, if a recipient punishes a complainant or respondent for underage drinking, arising out of the same facts or circumstances as the report or formal complaint of sexual harassment, then such punishment constitutes

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[1897] *E.g.*, Tyler Kingkade, *When Colleges Threaten To Punish Students Who Report Sexual Violence*, THE HUFFINGTON POST (Sept. 9, 2015).
[1898] Commenters cited: Human Rights Watch, *Embattled: Retaliation Against Sexual Assault Survivors in the US Military* (2015).

retaliation if the punishment is for the purpose of interfering with any right or privilege secured by Title IX or its implementing regulations. If a recipient always takes a zero tolerance approach to underage drinking in its code of conduct and always imposes the same punishment for underage drinking, irrespective of the circumstances, then imposing such a punishment would not be "for the purpose of interfering with any right or privilege secured by" Title IX or these final regulations and thus would not constitute retaliation under these final regulations. The Department is aware that some recipients have adopted "amnesty" policies designed to encourage students to report sexual harassment; under typical amnesty policies, students who report sexual misconduct (whether as a victim or witness) will not face school disciplinary charges for school code of conduct violations relating to the sexual misconduct incident (e.g., underage drinking at the party where the sexual harassment occurred). Nothing in the final regulations precludes a recipient from adopting such amnesty policies. Section 106.71 does not create amnesty, but does prohibit charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, including any sanctions that arise from such charges, when such charges or resulting sanctions arise out of the same facts or circumstances as a report or complaint of sex discrimination, or report or formal complaint of sexual harassment, and when such charges or resulting sanctions are imposed "for the purpose" of interfering with the exercise of any person's rights under Title IX or these final regulations.

Additionally, § 106.71(a) requires that recipients keep the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witnesses confidential except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or its

implementing regulations, 34 CFR part 99, or as required by law, or to the extent necessary to carry out the purposes of the regulations implementing Title IX, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder. The Department realizes that unnecessarily exposing the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, may lead to retaliation against them and would like to prevent such retaliation.

The Department appreciates the commenter's concerns that the Department may "accidentally" impose the notice or actual knowledge requirement for sexual harassment adapted from the *Gebser/Davis* framework to a claim of retaliation. The Department acknowledges that the actual knowledge requirement in these regulations applies to sexual harassment and does not apply to a claim of retaliation; the Supreme Court has not applied an actual knowledge requirement to a claim of retaliation. No requirement of actual knowledge appears in § 106.71(a). These final regulations in § 106.44(a) clearly require a recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States to respond promptly in a manner that is not deliberately indifferent.

We agree with commenters who noted that a recipient may respond to an allegation of retaliation according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c). The retaliation provision in § 106.71(a) clarifies that a retaliation complaint may be filed with the recipient for handling under the "prompt and equitable" grievance procedures for resolving complaints of sex discrimination that a recipient is required to adopt and publish under § 106.8(c).

We appreciate concerns of commenters who feared that speech protected under the First Amendment may be affected, if a recipient applies an anti-retaliation provision in an erroneous manner. To address this concern, the Department added a provision in § 106.71(b)(1) to clarify that the Department may not require a recipient to restrict rights protected under the First Amendment to prohibit retaliation. The Department recognizes that the First Amendment does not restrict the activities of private elementary and secondary schools or private postsecondary institutions. The Department, however, is subject to the First Amendment and may not administer these regulations in a manner that violates or causes a recipient to violate the First Amendment. Accordingly, § 106.71(b)(1) states that the "exercise of rights protected under the First Amendment does not constitute retaliation," as defined in these final regulations.

The Department also understands the concerns of commenters that lying should not be protected and that any retaliation provision should explicitly exclude from protection those who make false allegations or false statements during a grievance process. Accordingly, § 106.71(b)(2) provides that charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under the regulations implementing Title IX does not constitute retaliation. Section 106.71(b)(2) also provides, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith. These provisions in § 106.71(b) make it clear that exercising rights under the First Amendment of the U.S. Constitution or charging an individual with a code of conduct violation for making a materially false statement in bad faith does not constitute retaliation. This regulatory provision is intended to permit (but not require) recipients to encourage truthfulness throughout the grievance process by reserving the right to charge and discipline a party for false statements made in bad faith,

while cautioning recipients not to draw conclusions that any party made false statements in bad faith solely based on the outcome of the proceeding. The final regulations, in § 106.45(b)(2)(B), continue to require that written notice of the allegations of a formal complaint 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. The Department believes it is 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, to emphasize the recipient's commitment to the truth-seeking nature of the grievance process, to incentivize honest, candid participation in it, and to caution both parties about possible consequences of lack of candor. Thus, under the final regulations, recipients retain flexibility and discretion to decide how a recipient wishes to handle situations involving false statements by parties, so long as the recipient's approach does not constitute retaliation prohibited under § 106.71.

The Department acknowledges that some commenters expressed a desire for the Department to return to recommendations regarding retaliation in its past guidance documents. We believe that the retaliation provision in these final regulations provides clearer, more robust protections than the recommendations in any of the Department's past guidance documents. For example, the 2001 Guidance stated that Title IX prohibits retaliation and that schools should prevent any retaliation against the complainant but did not define what constitutes retaliation, expressly address retaliation against other parties or witnesses, or address how recipients should respond to retaliation.[1899] The 2001 Guidance stated that "because retaliation is prohibited by

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[1899] 2001 Guidance at 17, 20.

Title IX, schools may want to include a provision in their procedures prohibiting retaliation against any individual who files a complaint or participates in a harassment inquiry."[1900] These final regulations specifically define retaliation, expressly state that the recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witnesses unless certain exceptions apply, specify that complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c), and expressly address retaliation in specific circumstances, including in circumstances in which speech and expression under the First Amendment are at issue. Similarly, the retaliation provision in these final regulations is more precise than the guidance provided on retaliation in the withdrawn 2014 Q&A which did not address retaliation in the form of a recipient imposing charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, including sexual harassment, did not address First Amendment issues, and did not address materially false statements made in bad faith during the course of a grievance proceeding.[1901] The 2014 Q&A prohibited retaliation but in a vague manner; although the 2014 Q&A provided that complainants, respondents, and others may report retaliation to the recipient, it did not specifically provide that complainants, respondents, and others may file a complaint alleging

[1900] *Id.*
[1901] 2014 Q&A at 42-43 (discussing retaliation).

retaliation under a recipient's grievance procedures for sex discrimination.[1902] The retaliation provision in these final regulations also is responsive to comments received about retaliation in this rulemaking. Aside from the 2001 Guidance, the Department's other guidance documents on this subject did not have the benefit of public comment. The Department's final regulations, unlike the Department's guidance documents, have the force and effect of law.[1903] The Department also notes that it expressly withdrew the 2011 Dear Colleague Letter and 2014 Q&A in a letter dated September 22, 2017, and no longer relies on these guidance documents.[1904] Accordingly, we are not adopting any of our prior policies on retaliation in these final regulations, but address retaliation in a comprehensive, clear manner through these final regulations.

Changes: The Department added § 106.71 to clarify that retaliation is prohibited. The Department will not tolerate any recipient or other person intimidating, threatening, coercing, or discriminating against any individual for the purpose of interfering with any right or privilege secured by Title IX or its implementing regulations, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under regulations implementing Title IX. Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or report or formal

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[1902] *Id*.
[1903] *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 97 (2015).
[1904] U.S. Dep't. of Education, Office for Civil Rights, *Dear Colleague Letter* (Sept. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf.

complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX or its implementing regulations, constitutes retaliation. The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute or regulations, 20 U.S.C. 1232g and 34 CFR part 99, as required by law, or to the extent necessary to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder. Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c). The exercise of rights under the First Amendment does not constitute retaliation. Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under the regulations implementing Title IX does not constitute retaliation; however, a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

Severability

Comments: None.

Discussion: We believe that each of the regulations discussed in this preamble would serve one or more important, related, but distinct purposes. Each provision provides a distinct value to the Department, recipients, elementary and secondary schools, institutions of higher education, students, employees, the public, taxpayers, the Federal government, and other recipients of Federal financial assistance separate from, and in addition to, the value provided by the other

provisions. To best serve these purposes, we include provisions in the final regulations to make clear that these final regulations are designed to operate independently of each other and to convey the Department's intent that the potential invalidity of one provision should not affect the remainder of the provisions.

Changes: The Department adds severability clauses at the end of each subpart of Part 106, Title 34 of the Code of Federal Regulations in §§ 106.9, 106.18, 106.24, 106.46, 106.62, and 106.72.

Regulatory Impact Analysis (RIA)

The Department received numerous comments on our estimates of the relative costs and benefits of the proposed rule. In response to those comments, the Department has reviewed our assumptions and estimates. Among other changes, we have added a new category of recipients, updated our assumptions regarding the number of investigations occurring annually, increased time burdens for certain activities, added new cost categories, and made other changes as a result of the revisions to the proposed regulations. As a result of these changes, the Department estimates these final regulations will result in net costs. We discuss specific comments and our responses below.

Costs of Sexual Harassment and Assault

Comments: One commenter asserted that, in addition to the significant, individual adverse effects to persons who experience sexual harassment, recipients stand to undergo increased absenteeism by students, student turnover, and conflict among students, as well as decreased productivity and performance, participation in school activities, and loss of respect for and trust in the institution. These effects, the commenter argued, also include damage to the institution's reputation. The same commenter added that the physical and mental health impacts of allowing sexual harassment to flourish, and failing to respond appropriately to sexual harassment, also

come at a high cost to recipients, for example, in the form of a free appropriate public education (FAPE) and disability services requirements. One commenter cited the statistic that about 34.1 percent of students who have experienced sexual assault drop out of college, which is higher than the overall dropout rate for college students. Additionally, about 40 percent or more of survivors experience post-traumatic stress disorder (PTSD), depression, and chronic pain following assaults, making them less likely to attend classes or participate in school programs. The commenter argued that, when students do not complete college, the tax dollars that help fund grants and subsidies are not being used efficiently. The commenter also predicted that schools with lower completion rates would have difficulty recruiting new students and retaining grants that fund their programs.

Another commenter expressed concerns that the proposed rules seek to decrease the number of Title IX investigations at each school, which would send a signal to students that neither their school nor the Department will address claims of sexual harassment. Based on this, the commenter predicted that schools would likely see a significant decrease in both application and enrollment rates if they are required to adopt the proposed rules.

Discussion: The commenters assume a causal relationship (without providing rigorous evidence) between the final regulations and a number of negative outcomes that does not necessarily exist or will ever materialize.

The Department does not include the costs associated with underlying incidents of sexual harassment and assault as (1) we have no evidence to support the claim that the final regulations would have an effect on the underlying number of incidents of sexual harassment and assault, (2) we have no evidence that these final regulations would exacerbate the negative effects of sexual harassment and assault, and (3) the provision of supportive measures as defined in the final

regulations may actually reduce some of the negative effects of sexual harassment and assault cited by commenters.

The Department does not have evidence to support the claim that the final regulations will have an effect on the underlying number of incidents of sexual harassment. The Department conducted an analysis on Clery Act data reported before and after the issuance of the 2011 Dear Colleague Letter to assess whether the 2011 Dear Colleague Letter had an effect on the underlying rate of sexual harassment, as well as to identify any corollaries that could inform our assumption regarding the final regulations. The analysis is included below. Acknowledging data quality limitations, the Department cannot conclude that the 2011 Dear Colleague Letter had an effect on the underlying rate of sexual harassment. The analysis is based on the best information available to the Department, but data quality limitations prevent a more rigorous analysis of the effects of the 2011 Dear Colleague Letter. Thus, there is insufficient evidence to determine conclusively whether the final regulations will have an effect on the underlying rate of sexual harassment.

We interpret the comment regarding FAPE to refer to eligibility for special education and related services under the IDEA and Section 504. We have no reason to believe that a recipient's compliance with these final regulations would alter a local educational agency's child find responsibilities or a child with a disability's right to a free appropriate public education (FAPE) under the IDEA or Section 504.

In the analysis, below, of the 2011 Dear Colleague Letter and data received pursuant to the Clery Act and its implementing regulations, we find no evidence or support that the final regulations will affect the underlying incidents of sexual harassment. We do not find evidence to reject the hypothesis that the 2011 Dear Colleague Letter had no effect on the underlying number

of incidents of sexual harassment and assault. Neither public comment nor internal deliberation yield sufficient evidence that the final regulations will affect the underlying incidents of sexual harassment. The bottom line is that the best available data (analysis of effects of the 2011 Dear Colleague Letter) is insufficient to yield any evidence or support that the final regulations will affect the underlying incidents of sexual harassment. We believe the analysis and its limitations support the claim that the Department has no rigorous evidence that the final regulations will have an effect on the underlying incidences of sexual harassment.

2011 Dear Colleague Letter Analysis – Data Sources

As noted in the NPRM and elsewhere in this notice, there is a general lack of high quality, comprehensive data on Title IX enforcement and incidents of sexual harassment and assault. The Department annually publishes data it receives under the Clery Act online.[1905] We compiled data from 2007 through 2013 on Forcible Sex Offenses.[1906] This period provides five years of data prior to release of the guidance and two years after release. After 2013, reporting categories changed, limiting a longer-term analysis. Specifically, beginning in 2014, institutions reported data on VAWA crimes rather than the previous categories of forcible sex offenses and non-forcible sex offenses. It is not clear how institutions viewed the relationship between the new and old categories and, absent further study, we do not think it prudent to assume that entities treated them interchangeably.

In using these data, we had to assume that Clery Act reports are uniformly correlated with the underlying rate of sexual harassment and assault. That is, we do not assume that Clery Act

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[1905] U.S. Dep't. of Education, *Download Data*, "Campus Safety and Security," https://ope.ed.gov/campussafety/.
[1906] Note: The number of Non-Forcible forcible Sex Offenses was too low and variable to allow reliable modeling.

data is totally comprehensive and captures all incidents of sexual harassment and assault, but we assumed it is correlated, meaning that the number of Clery Act reports increase and decrease in conjunction with increases and decreases in the underlying number of incidents of sexual harassment and assault. We note this is a major assumption and limitation of our analysis. Based on that assumption, if the 2011 Dear Colleague Letter affected the underlying rate of sexual harassment and assaults, we would anticipate a change in the number of Clery Act reports.

We believe the Clery Act data would generate poor estimates of the effect of the 2011 Dear Colleague Letter in the following circumstances:

1. The number of forcible sex offenses reported under the Clery Act are not uniformly correlated across years with the underlying number of incidents of sexual harassment and assault;
2. The 2011 Dear Colleague Letter changed the reporting behavior of victims of sexual harassment and assault;
3. The 2011 Dear Colleague Letter changed the reporting behavior of institutions under the Clery Act.

It is important to note that each of the above circumstances would not necessarily result in an inability to identify an effect of the 2011 Dear Colleague Letter. An inability to detect any effect in these circumstances (particularly 2 and 3) would actually require that the particular effects accrued in such a way that they were somehow otherwise offset in the underlying data (e.g., after the 2011 Dear Colleague Letter, victims were more likely to report incidents that occurred, but there was an overall decrease in the total number of incidents, resulting in no net change in the number of offenses reported).

2011 Dear Colleague Letter Analysis – Data Analysis[1907]

As an initial analysis, we examined the average number of reports per year during the pre-guidance and post-guidance periods. Across all locations, there were more reports in the post-guidance period as described in Table II below. While this analysis establishes that there were more reports in the post-2011 period, we cannot reject the null hypothesis that these differences were due to random variation.

In order to more fully examine the relationship between the 2011 Dear Colleague Letter and the number of Clery Act reports, we first analyzed aggregate data using the following regression:

(1) $FSO_t = \beta_0 + \beta_1 POST_t + \beta_2 t + \beta_3 t^2 + \beta_4 ENROLL_t + \varepsilon_t$

In the above equation, FSO_t represents the number of forcible sex offenses reported under the Clery Act in a given year t, $POST_t$ is a dummy variable for the post-2011 period, t is a variable for the untransformed year (e.g., 2012), $ENROLL_t$ is the total enrollment in a given year, and ε_t is an error term.

We allow for a quadratic relationship for t because the relationship between the year and the number of offenses reported is non-linear, as demonstrated in Figure I. A linear specification for the relationship between t and FSO_t would therefore fail to accurately reflect the relationship between the variables and inappropriately assign that variation to another variable, most likely $POST_t$. In geographies with no time-series effects, we would anticipate both t and t^2 to be non-significant. If the relationship is linear, we would expect only t^2 to be non-significant. We discuss the limitations of allowing for a quadratic relationship in the concluding section below.

[1907] Data was available and analyzed both in aggregate and at the individual campus level.

The equation was applied across each geography. Results are presented in Table III. While $POST_t$ is significant in the initial estimation for on-campus and noncampus geographies, it is no longer significant once covariates are added. Once we control for the baseline trend (i.e., pre-existing variation over time) and enrollment, $POST_t$ is not significant in any panel. As demonstrated in Panels C and D of Table III, we cannot establish any trend over time for either public property or total offenses. For on-campus and noncampus offenses, we can establish a trend over time, but it is not attributable to $POST_t$. As such, we cannot reject the null hypothesis using the aggregate data.

We note that the data used in this initial analysis are highly aggregated and Title IX enforcement occurs at the institution level. The Department annually collects data under the Clery Act at the individual campus level. Again, we used data on forcible sex offenses (as with the aggregate data) for the reasons outlined above. However, we also used data on the total number of robberies that were reported for each year. These data were used as a control for general trends in criminality on campus, particularly those that would be unlikely to be affected by a change in Title IX enforcement. Specifically, we want to ensure that any estimated change in the number of incidents of forcible sex offenses are not related to an overall change in the level of crime occurring on campus.

We compiled data for 7,938 campuses from 2007 through 2013 and merged those data with data from the Integrated Postsecondary Education Data System (IPEDS), including institutional control (i.e., public, private non-profit, private for-profit), level (i.e., less-than-two-year, two-year, four-year), and enrollment. Factors such as institutional control and level of institution are potentially relevant to any campus-level effects because those factors are highly correlated with other factors that are likely to affect the number of incidents and potential effects

of any change in Title IX enforcement. For example, students at four-year institutions are much more likely than those at two-year or less-than-two-year institutions to live on campus and conduct a greater proportion of their daily activities in an environment that could be construed as part of the institution's education program or activity. Further, compliance activities between public and private institutions may look different given the degree of oversight from State or local governments. Summary data of the total number of on-campus forcible sex offenses reported under the Clery Act from 2007 through 2013 are presented in Table IV below.

As with the aggregate data, we identify a clear non-linear relationship between the year and the number of forcible sex offenses reported under the Clery Act. See Figure II below.

Using this information, we then estimated the following equation:

(2) $$FSO_{ict} = \beta_0 + \beta_1 POST_t + \beta_2 t + \beta_3 t^2 + \beta_4 X_{ic} + \beta_5 ROB_{ct} + \beta_6 ENROLL_{it} + \varepsilon_{ict}$$

In Equation 2, FSO_{ict} represents the number of incidents of forcible sex offenses reported under the Clery Act on campus *c* of institution *i* in year *t*; $POST_t$ is a dummy variable for observations in the post-2011 period; *t* and t^2 allow for a quadratic relationship between the year and FSO_{ict}; X_{ic} is a vector of institutional characteristics including institutional control and level; ROB_{ct} represents the number of robberies reported under the Clery Act on campus *c* in year *t*; $ENROLL_{it}$ represents the number of students enrolled in institution *i* in year *t*; and ε_{ict} is an error term.

Estimates for Equation 2 are presented in Table V below. Columns 1 and 2 show a statistically significant positive effect of the 2011 Dear Colleague Letter on the number of forcible sex offenses reported under the Clery Act. However, once we allow for a quadratic specification for *t* in Column 3, we no longer identify any effects of $POST_T$. Indeed, when variables for institutional control and level are added in Column 4 and controls for overall level

of crime on campus and institutional enrollment are added in Columns 5 and 6, $POST_t$ is the only variable which does not have a significant relationship with FSO_{ICT}. Based on these results, we can say that the overall number of reported forcible sex offenses is increasing over time at an increasing rate (positive coefficient on t^2), private institutions tend to report fewer incidents of forcible sex offenses than public institutions (negative coefficients for dummy variables for private, non-profit and private, for-profit), four-year institutions report more forcible sex offenses than two-year and less-than-two-year institutions (negative coefficients on dummy variables for two-year and less-than-two-year), campuses with higher crime rates report more forcible sex offenses (positive coefficient on robbery), and institutions with higher enrollment report more forcible sex offenses (positive coefficient on enrollment). The only variable in the model which fails to explain any variation is $POST_t$.

The results with respect to $POST_t$ do not appear to be the result of low statistical power. The standard error on the term is relatively small and would detect significant effects of less than 0.08 offenses per year. Controlling for all of the other variables in the model, the coefficient for $POST_t$ is near zero. However, we continue to acknowledge limitations of the model as discussed below.

2011 Dear Colleague Letter Analysis – Conclusion and Limitations

Based on the analyses presented herein, we can find no basis on which to reject the null hypothesis (that is, to reject the contention that the 2011 Dear Colleague Letter had no effect on the underlying number of incidents of sexual harassment and assault). Given the information available, the Department has insufficient evidence to assume the final regulations will have an effect on the underlying rate of sexual harassment. We understand that any analysis of the 2011 Dear Colleague Letter could not definitively determine the effects of the final regulations on the

underlying incidents of sexual harassment due to the significant differences in these two sets of policies. We are presenting the 2011 Dear Colleague Letter analysis as a means to show the best possible information and analysis available to the Department, as well as the Department's limitations in assessing the effects of the final regulations on the underlying incidents of sexual harassment.

Potential limitations of our analysis include:

- Potential omitted variables. As depicted in Figures I and II, the number of forcible sex offenses reported under the Clery Act is non-linear over time, decreasing from 2007 through 2009 and then increasing again. This relationship was established before the release of the 2011 Dear Colleague Letter and continued thereafter. A linear specification to the model would ignore the underlying trends in the data and incorrectly attribute baseline variation to the 2011 Dear Colleague Letter, as evidenced in Column 2 of Table V. However, we did not interrogate what may have happened in 2009 that led to such a change in trend and the associated implications for the quality of the data or its suitability for the hypothesis-testing being attempted.
- Quality of Clery Act data. Our results might differ with different or higher quality data. An ideal data set would include information on each institution's pre- and post-2011 Dear Colleague Letter Title IX compliance framework as well as the actual number of incidents of sexual harassment and assault (and not only those reported by the institution under the Clery Act). It is widely understood that a large number of incidents of sexual harassment and assault go unreported to institutional or legal authorities and are therefore not captured in our data.

Further, if the implementation of the 2011 Dear Colleague Letter changed the reporting behaviors of either victims or institutions, then our analyses herein would be invalid.

- Correlation between Clery Act data and the underlying incidents of sexual harassment. Notwithstanding the preceding limitation of using Clery Act data, our analysis also assumes a correlation that we are unable to substantiate between Clery Act data and the underlying incidents of sexual harassment. This limitation is discussed at greater length above.
- Appropriateness of controls. Assuming that robberies represent a reasonable control for other criminal offenses on campus, despite the varying time trends across types of crime reported by the National Center for Education Statistics.[1908] Our analysis used an ordinary least squares specification, without additional augmentation (e.g., Tobit regression). However, we have no reason to believe that such a specification would have allowed us to make definitive conclusions about the potential effects of the final regulations.

[1908] Institute of Education Sciences, National Center for Education Statistics, "Fast Facts," https://nces.ed.gov/fastfacts/display.asp?id=804.

TABLE I
CLERY ACT REPORTS OF FORCIBLE SEX OFFENSES BY YEAR AND GEOGRAPHY

Geography	2007	2008	2009	2010	2011	2012	2013
On Campus	2,736	2,670	2,602	2,981	3,425	4,075	5,052
Non Campus	294	271	296	308	379	445	588
Public Property	448	329	366	331	394	429	376
Total	3,478	3,270	3,264	3,620	4,198	4,949	6,016

TABLE II
AVERAGE NUMMBER OF CLERY ACT REPORTS BY PERIOD

Geography	2007-2011 Average	2012-2013 Average	*p*
On Campus	2,883	4,564	0.15
Non Campus	310	517	0.19
Public Property	374	403	0.47
Total	3,3,566	5,483	0.15

Each p-value is for an F-test of the null hypothesis that the averages are the same across time periods.

FIGURE I
CLERY ACT REPORTS OF FORCIBLE SEX OFFENSES BY YEAR AND GEOGRAPHY

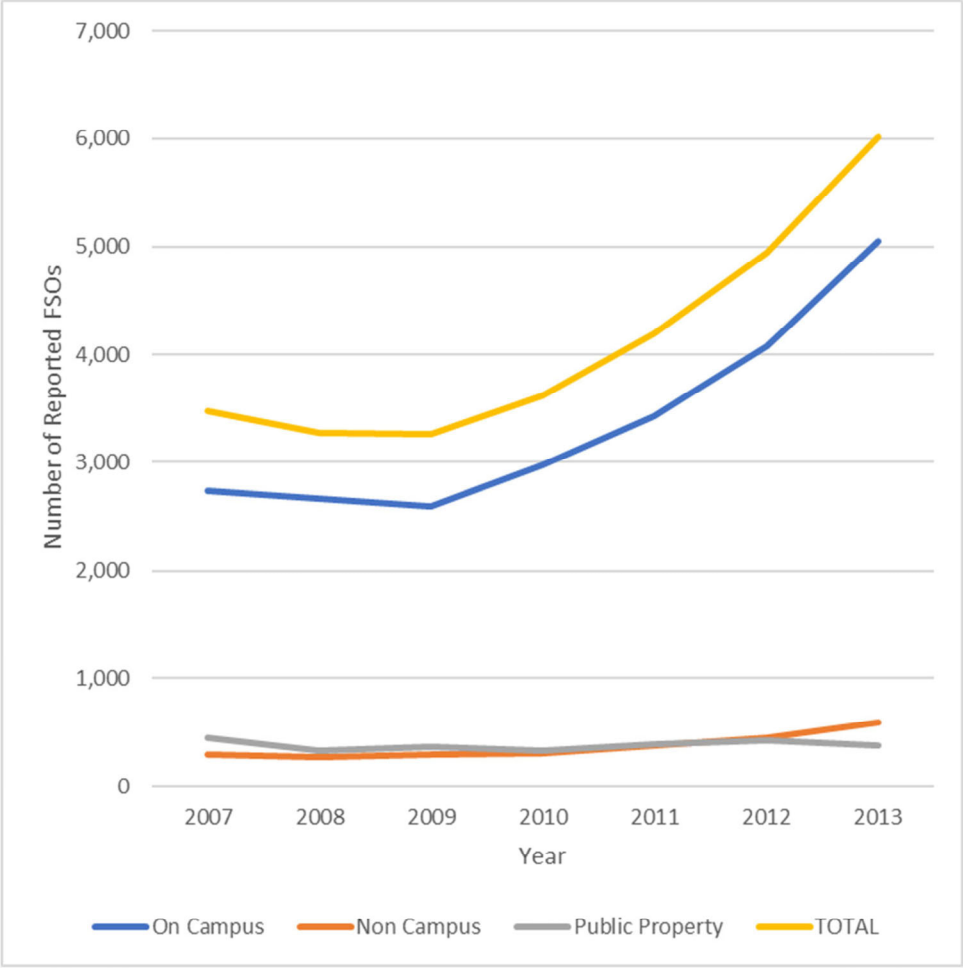

TABLE III
AGGREGATE DATA REGRESSION RESULTS BY CLERY GEOGRAPHY

Variable	(1)	(2)	(3)	(4)
		A. On Campus		
Post-2011	1681**	954	-85	-136
	(360)	(471)	(126)	(145)
Year	--	207	-447622**	-380702*
		(106)	(40376)	(89421)
$Year^2$	--	--	111**	95*
			(10)	(22)
Enrollment	--	--	--	-0.00
				(-0.83)
R^2	0.81	0.86	0.99	0.99
		B. Non Campus		
Post-2011	207**	114	-32	-27
	(49)	(67)	(26)	(34)
Year	--	27	-62688**	-69378*
		(15)	(8327)	(20837)
$Year^2$	--	--	16**	17*
			(2)	(5)
Enrollment	--	--	--	0.00
				(0.00)
R^2	0.78	0.88	0.99	0.99
		C. Public Property		
Post-2011	29	73	35.4	58
	(40)	(67)	(12)	(45)
Year	--	-13	-16230	-45713

		(15)	(35896)	(89678)
Year^2	--	--	4	11
			(9)	(22)
Enrollment	--	--	--	0.00
				(0.00)
R^2	0.10	0.23	0.28	0.32
		D. Total		
Post-2011	1376	-298	-622	363
	(1010)	(1509)	(2601)	(306)
Year	---	478	-138800	-143072
		(341)	(834473)	(1890451)
Year^2	---	--	35	356
			(208)	(470)
Enrollment	---	--	--	0.0028
				(0.0036)
R^2	0.27	0.51	0.56	0.63

*p<0.10 ** p<0.05

TABLE IV
TOTAL NUMBER OF FORCIBLE SEX OFFENSES REPORTED UNDER CLERY BY INSTITUTIONAL CONTROL AND LEVEL OF INSTITUTION, 2007-2013

	Level of Institution			
Control	four-year	two-year	Less than 2 year	TOTAL
Public	11,267	1,551	56	12,874
Private, non-profit	10,100	47	1	10,148
Private, for-profit	102	25	12	139
TOTAL	21,469	1,623	69	23,161

FIGURE II
AVERAGE NUMBER OF FORCIBLE SEX OFFENSES REPORTED PER CAMPUS BY YEAR

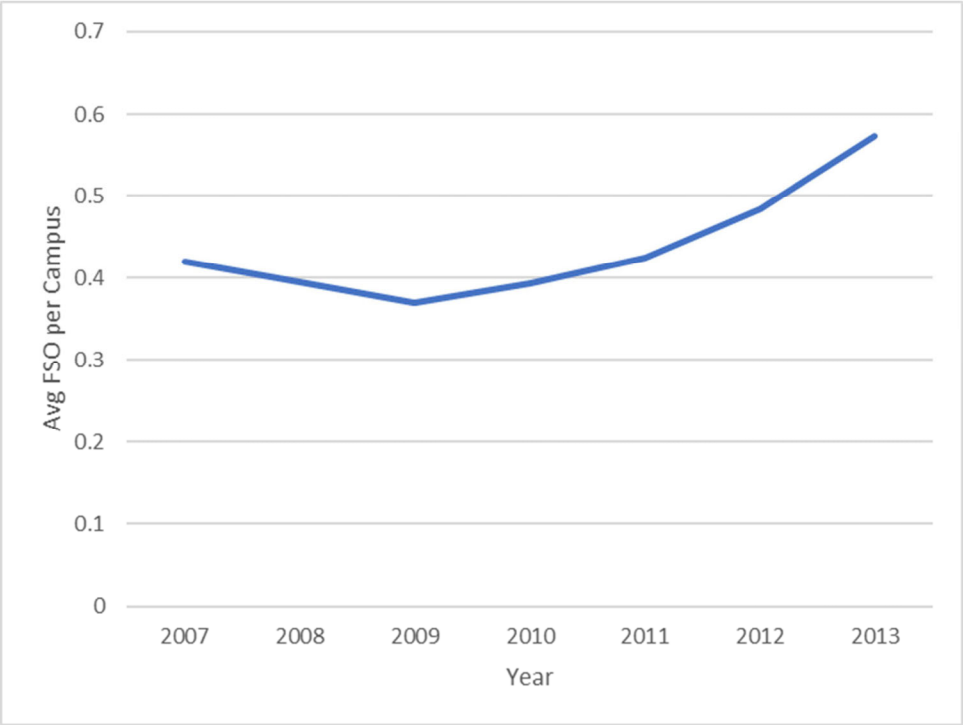

TABLE V
CAMPUS LEVEL DATA REGRESSION RESULTS

Explanatory Variable	(1)	(2)	(3)	(4)	(5)	(6)
Post-2011	0.13***	0.15***	-0.00	-0.00	0.01	0.01
	(0.02)	(0.03)	(0.04)	(0.10)	(0.04)	(0.04)
Year	--	0.01	-48.88***	-46.49***	-44.95***	-49.25***
		(0.01)	(13.49)	(13.08)	(12.62)	(12.53)
$Year^2$	--	--	0.01***	0.01***	0.01***	0.01***
			(0.00)	(0.00)	(0.00)	(0.00)
Private, non-profit (1=yes)	--	--	--	-0.47***	-0.33***	-0.14***
				(0.02)	(0.02)	(0.02)
Private, for-profit (1=yes)	--	--	--	-0.51***	-0.41***	-0.23***
				(0.02)	(0.02)	(0.02)
Two-year (1=yes)	--	--	--	-0.94***	-0.78***	-0.70***
				(0.02)	(0.02)	(0.02)
Less than two year (1=yes)	--	--	--	-0.75***	-0.62***	-0.47***
				(0.03)	(0.03)	(0.03)
Robbery	--	--	--	--	0.48***	0.45***
					(0.01)	(0.01)
Enrollment	--	--	--	--	--	0.00***
						(0.00)
R^2	0.00	0.00	0.00	0.06	0.13	0.14

*** $P<0.1$

Changes: None.

Comments: Other commenters cited studies that found that 34 percent of students who have experienced sexual assault drop out of college, a rate that is higher than the overall dropout rate

for college students.[1909] Commenters also asserted that 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.[1910] Further, more than 40 percent of college students who were sexually victimized also reported experiences of institutional betrayal, which impacts their abilities to continue their education. One commenter argued that when students do not complete college, their lifetime earning potential is significantly reduced and, if most students take out student loans, then the lowered income potential would impact these students' ability to repay the loans they borrowed from the Federal government.

Other commenters asserted that some students may choose to transfer out of a hostile environment by opting to pursue their education at a different institution. However, there are costs associated with this strategy. Some commenters stated that the bulk of the upfront costs relate to credits that become 'stranded assets,' when the investment that students, families, and public institutions make to help students acquire skills is lost. These students will need additional credits in order to receive a degree – if they receive one at all – and will spend more time out of the labor market. One commenter cited a 2014 study, stating that the Department, itself, found that the average transfer student loses 27 earned credits after transferring.[1911] The commenter also cited the Government Accountability Office study that found that transfer students spend an

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[1909] Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18 JOURNAL OF COLL. STUDENT RETENTION: RESEARCH, THEORY & PRACTICE 2 (2015).
[1910] *See* U.S. Department of Education, *et al.*, *Key Policy Letters Signed by the Education Secretary or Deputy Secretary* 1 (Oct. 7, 2015) [archived information], https://www2.ed.gov/policy/elsec/guid/secletter/151007.html; 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.
[1911] Institute of Education Sciences, National Center for Education Statistics, *Transferability of Postsecondary Credit Following Student Transfer or Coenrollment: Statistical Analysis Report* (August 2014), https://nces.ed.gov/pubs2014/2014163.pdf.

extra 0.25 years in school before graduating.[1912] Additionally, while pointing to a 2017 analysis from Complete College America, a commenter asserted that each additional year of schooling costs roughly $51,000 for students at two-year colleges and $68,000 for students at four-year colleges – and in both cases, the majority of those costs come from forgone earnings.

One commenter asserted that the Department failed to attempt to calculate the incremental costs of lost scholarships for those who receive lower grades as a result of sexual violence or other sexual harassment and defaults on student loans as a result of losing tuition and/or scholarships. Another commenter stated that, if a survivor defaults on a Federal student loan, they are restricted from future Federal financial aid, vulnerable to predatory lending in attempts to pay heavy debts, and unable to discharge their student loans in bankruptcy. In addition to lost education and professional growth, the commenter asserted, these losses lead to damaged credit that interferes with their ability to secure housing, employment, and even access utilities or a phone.

Discussion: While we appreciate the commenters' efforts to highlight the very real effects of sexual harassment and assault, the problems identified by the commenters largely arise from the underlying sexual harassment or assault rather than a recipient's response to that misconduct. As discussed above, the Department does not have evidence to assume these final regulations would have any effect on the underlying number of incidents of sexual harassment and assault. It is also not apparent that a recipient's response to sexual harassment and assault under these final regulations would be likely to exacerbate the negative effects highlighted by commenters.

[1912] Government Accountability Office, *Transfer Students: Postsecondary Institutions Could Promote More Consistent Consideration of Coursework by Not Basing Determinations on Accreditation* (October 2005), https://www.gao.gov/new.items/d0622.pdf.

Indeed, as described above, we believe it is likely that, if these final regulations were to have any marginal effect on those outcomes, it would be to reduce their negative impacts due to the mandatory offer of supportive measures in § 106.44(a). As such, we decline to add these costs to our estimates.

Changes: None.

Comments: Multiple commenters asserted that the costs for mental health services would largely fall on complainants because of their experience as a victim of sexual harassment and assault. One commenter reported that sexual assault survivors are three times more likely to suffer from depression, six times more likely to have PTSD, 13 times more likely to abuse alcohol, 26 times more likely to abuse drugs, and four times more likely to contemplate suicide.[1913] Several commenters asserted that women who are sexually assaulted or abused are more than twice as likely to experience PTSD, depression, and chronic pain as women who have not experienced such violence.[1914] One commenter reported that an estimated 40 percent of rape victims suffer from severe emotional distress which requires mental health treatment. Another commenter reported that survivors continue to report poorer health, utilize healthcare twice as much, and continue to pay increased health care costs even five years after their abuse has ended.[1915] Several commenters argued that the costs the NPRM shifts to complainants would, in turn, shift to health insurance companies, and society will ultimately bear such costs. Another commenter

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[1913] Feminist Majority Foundation, "Fast facts - Sexual violence on campus" (2018), http://feministcampus.org/wp-content/uploads/2018/11/Fast-Facts.pdf.

[1914] Anne B. Woods *et al.*, *The Mediation Effect of Posttraumatic Stress Disorder Symptoms on the Relationship of Intimate Partner Violence and IFN-γ Levels*, 36 AM. J. OF COMM. PSYCHOL. 1-2 (2005).

[1915] Amy E. Bonomi *et al.*, *Health Outcomes in Women with Physical and Sexual Intimate Partner Violence Exposure Intimate Partner Violence Exposure*, 16 JOURNAL OF WOMEN'S HEALTH 7 (2007); Amy E. Bonomi *et al.*, *Health Care Utilization and Costs Associated with Physical and Nonphysical-Only Intimate Partner Violence*, 44 HEALTH SERVICES RESEARCH 3 (2009).

stated that those who suffer sexual harassment and assault are more likely to require services from already over-burdened health and counseling services. The commenter argued that this will mean greater costs for government and taxpayers, since public colleges and universities rely, in part, on government and tax-payer support.

Several commenters reported that more than one-fifth of intimate partner rape survivors lose an average of eight days of paid work per assault. One commenter asserted that researchers found that women who experience dating violence in adolescence have lower starting salaries as adults than their counterparts and slower salary growth over time.[1916] Similarly, commenters reference other research that found that survivors experience job instability for up to three years after an abusive relationship has ended.[1917] The commenter stated that the costs from the economic ripple effect include $2,084 for forensic exams and $140 or more per counseling session when not offered by schools or covered by health insurance.[1918] The commenter cited a 2017 study which found that the average cost of a victim's sexual assault claim filed against a college or university was approximately $350,000.[1919]

[1916] Adrienne E. Adams *et al.*, *The Effects of Adolescent Intimate Partner Violence on Women's Educational Attainment and Earnings*, 28 JOURNAL OF INTERPERSONAL VIOLENCE 17 (2013).
[1917] Adrienne E. Adams *et al.*, *The Impact of Intimate Partner Violence on Low-Income Women's Economic Well-Being: The Mediating Role of Job Stability*, 18 VIOLENCE AGAINST WOMEN 12 (2012). One commenter conducted a study that found that survivors of sexual harassment and assault face an "economic ripple effect." Sara Shoener & Erika Sussman, *Economic Ripple Effect of IPV: Building Partnerships for Systemic Change* (2013), https://csaj.org/library/view/economic-ripple-effect-of-ipv-building-partnerships-for-systemic-change. *See also* Sara Shoener, *The Price of Safety: Hidden Costs and Unintended Consequences for Women in the Domestic Violence Service System* (Vanderbilt Univ. Press 2016).
[1918] Coreen Farris, *et al.*, *Enemy Within: Military Sexual Assault Inflicts Physical, Psychological, Financial Pain*, 37 RAND REV. 1 (2013); Farran Powell & Emma Kerr, *What You Need to Know About College Tuition Costs*, U.S. NEWS & WORLD REPORT (Sept. 18, 2019) ($5,150 of tuition per lost semester; the average U.S. university tuition in 2017-208 was $11,721.67 per semester), https://www.usnews.com/education/best-colleges/paying-for-college/articles/what-you-need-to-know-about-college-tuition-costs.
[1919] Halley Sutton, *Study Outlines Cost of Sexual Assault Litigation for Universities*, 14 CAMPUS SECURITY REPORT 2 (2017).

Many commenters asserted that the Department did not adequately consider certain costs that result from sexual harassment, including sexual assault. For example, numerous commenters reported that the lifetime costs of intimate partner violence include related health problems, lost productivity, and criminal justice costs, totaling an estimated $103,767 for women and $23,414 for men.[1920] Other commenters reported that the Centers for Disease Control and Prevention estimates that the lifetime cost of rape is $122,461 per survivor, resulting in an annual national economic burden of $263 billion.[1921] One commenter asserted that about one-third of the cost is borne by taxpayers, and more than half of this cost is due to loss of workplace productivity, and the rest is due to medical costs, criminal justice fees, and property loss and damage. Multiple commenters asserted that a single rape costs a victim between $87,000 to $240,776.[1922] Many commenters stated that the average cost of being a rape victim is approximately $110,000 according to the Children's Safety Network Economic and Insurance Resource Center. Comparatively, the average cost of being a robbery victim is $16,000, and the average cost of drunk driving is $36,000.

Discussion: We do not believe it would be appropriate to include estimates regarding the cost of incidents of sexual harassment or assault themselves in our calculation of the likely effects of this regulatory action.

[1920] *See* Cynthia Hess & Alona Del Rosario, Institute for Women's Policy Research, *Dreams Deferred: A Survey on the Impact of Intimate Partner Violence on Survivors' Education, Careers, and Economic Security* 8 (2018), https://iwpr.org/wp-content/uploads/2018/10/C474_IWPR-Report-Dreams-Deferred.pdf.
[1921] *See* Cora Peterson *et al.*, *Lifetime Economic Burden of Rape Among U.S. Adults*, 52 AM. J. PREV. MED. 6, 691, 698 (2017), https://stacks.cdc.gov/view/cdc/45804/cdc_45804_DS1.pdf.
[1922] *See* The White House Council on Women and Girls, *Rape and Sexual Assault: A Renewed Call to Action* (2014), https://www.knowyourix.org/wp-content/uploads/2017/01/sexual_assault_report_1-21-14.pdf; U.S. Dep't. of Justice, National Institute of Justice, *Research Report: Victim Costs and Consequences: A New Look* (1996), https://www.ncjrs.gov/pdffiles/victcost.pdf.

As described above, we have no evidence indicating that Federal Title IX guidance or regulation has an effect on the underlying number of incidents of sexual harassment and assault. To the extent that such effects are relevant to our evaluation of the likely costs of these final regulations, we note that supportive measures, as defined in § 106.30, are "offered . . . without fee or charge to the complainant or the respondent." As such, it could be reasonably argued that these final regulations would actually reduce costs for complainants, especially as § 106.44(a) requires recipients to offer supportive measures to a complainant as more fully explained in the "Section 106.44(a) Deliberate Indifference Standard" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section. Nonetheless, we decline to include such costs, as it is unclear the extent to which such services would be offered as part of supportive measures, the take-up rate on the part of complainants, or the amount of savings that would accrue to complainants as a result. We do, however, revise our cost estimates to include the cost of recipients offering supportive measures to complainants pursuant to § 106.44(a).

Changes: We revise our cost estimates to include the cost of recipients offering supportive measures to complainants pursuant to § 106.44(a).

Comments: Several commenters asserted that the RIA does not appear to account for the lost future tax revenue that would have been collected on the higher salaries of students who are afforded equal access to education free from discrimination, or the reduced future health care costs attributable to campuses that more effectively prevent sexual harassment and assault.

Discussion: We decline to include the costs identified by the commenters. The effects noted by the commenters are sufficiently temporally and causally distant from the implementation of the final regulations that it would be difficult and impractical to quantify. Further, the comments

assume that implementation of the final regulations will deny equal access to education to at least a subset of individuals, a proposition that we resoundingly reject.

Changes: None.

Comments: One commenter asserted that as the Department fails to justify its belief that there will be no quantifiable effect on the rate of underlying harassment, its conclusion about the impact on the underlying rate of sexual harassment is arbitrary and capricious. Moreover, the commenter argued the NPRM failed to consider the effect that its rules will have on perpetrators' incentives, suggesting that the Department has failed to consider relevant issues or factors and that the proposed regulations are arbitrary and capricious. The commenter cited research that shows that offenders are more likely to be deterred from, and thus less likely to engage in, undesirable behaviors when there is reasonable certainty of some kind of accountability. For instance, in the criminal context, an increase in the probability of being apprehended is associated with a decrease in the criminal activity itself.[1923] If, under the Department's proposed rules, an abuser can more easily avoid accountability because schools are not legally required to act, any likelihood of deterrence resulting from the possibility of facing consequences is lowered. The commenter argued that the RIA failed to account for the potential effects of the proposed regulations on perpetrators' incentives, which rendered this analysis arbitrary and capricious.

Discussion: As described above, we have articulated our rationale for not including the costs of sexual harassment or assault itself in our estimates. Further, we have provided additional analysis

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[1923] *See* Valerie Wright, The Sentencing Project, *Deterrence In Criminal Justice* (2010), https://www.sentencingproject.org/wp-content/uploads/2016/01/Deterrence-in-Criminal-Justice.pdf.

that supports our original decision. We do not believe that the exclusion of these costs is arbitrary or capricious.

Regarding "perpetrators' incentives," as noted elsewhere, and confirmed by our analysis of the 2011 Dear Colleague Letter, we do not believe that the behavior of perpetrators is driven by Title IX guidelines or regulations.

We further note that the examples cited by the commenter pertain to the criminal context rather than an administrative one, and it is likely that incentives operate differently across those two contexts.

Changes: None.

Comments: One commenter asserted that the Department needs to perform a more exhaustive cost-benefit and regulatory impact analysis. The commenter suggested that the Department ought to obtain empirical estimates of the depressed rates of positive findings of actual sexual harassment resulting from a requirement of cross-examination, the rates of likely reduction of reporting, the likely effects on under-deterrence of some classes of sexual harassment, and the costs of increased occurrences of sexual harassment. Another commenter, a non-profit that specializes in education law, asserted that the NPRM's cost-benefit analysis was not performed in good-faith, and the commenter called for the Department to start completely anew with a new set of assumptions that will reflect the actual effects of these regulations rather than a desire to minimize cost calculations as much as possible. Another commenter asserted that the Department has an obligation to incorporate an estimate of reduced sexual harassment and sexual assault reporting rates. The commenter asserted that the estimated baseline fails to recognize unreported assaults. One commenter cited a recent report by one university on campus assault that stated that a significant percentage of individuals who do not report stated it was not

reported because they did not think anything would be done about it (29.9 percent) or feared it would not be kept confidential (17.7 percent).[1924] The same study concluded that a significant number of victims who do not report felt embarrassed or ashamed (32.9 percent). Fewer victims of penetrative acts involving incapacitation felt nothing would be done about it (8.9 percent) or felt embarrassed (20.5 percent). Additionally, the survey found that roughly 50 percent of sexual violence occurred off campus. The commenter argued that the proposed regulations, by allowing schools to ignore sexual violence off campus, would ignore 50 percent of already reported incidences of sexual violence. The commenter wished to see the RIA account for these findings.

Discussion: We appreciate the commenters' feedback, but we do not see sufficient cause across the entirety of public comment to warrant establishing a new model. Where commenters have identified clear deficiencies or inaccuracies with our estimates related to the effects of the final regulations, we have adjusted our assumptions accordingly. We note that the model was not derived based on a desire to minimize costs, but rather to effectively capture the likely impacts of this regulatory action.

Regarding the impact of the final regulations and cross-examination on findings of responsibility, we are not aware of research establishing a clear causality or directionality in this relationship. Further, even if it were established that cross-examination reduced findings of responsibility in Title IX enforcement cases, it would not be immediately clear that such a reduction would be inherently negative. It is just as likely that such a reduction would be driven by a decrease in false positives (findings of responsibility where none exists) as a reduction in

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[1924] *See* The Association of American Universities, *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct: University of Virginia* (Westat 2015), https://ias.virginia.edu/sites/ias.virginia.edu/files/University%20of%20Virginia_2015_climate_final_report.pdf.

true positives (findings of responsibility where it exists). In fact, there is good reason to believe that cross-examination improves adjudicators' ability to effectively assess the results of an investigation.[1925]

As discussed elsewhere, the Department does not have any information to reliably suggest that the final regulations would result in a change in the number of incidents of sexual harassment and assault each year. However, our analysis takes into consideration an effect on the number of incidents that would result in a formal complaint. The NPRM assumed that a subset of investigations currently being conducted by recipients will result in reports (with supportive measures offered to the complainants) rather than formal complaints (although every complainant has the option of filing a formal complaint) and would, therefore, not trigger the grievance procedures described in § 106.45. We recognize that there are a number of reasons why a complainant may opt not to file a formal complaint and, in our view, our initial analysis took this effect into account.

Changes: None.

Comments: Another commenter asserted that the Department's estimate that the proposed rules will reduce the number of off-campus investigations by 0.18 is arbitrary and is generated without clear explanation. The commenter argued that the RIA failed to provide a complete accounting of all estimated costs and how the costs were determined. For example, the RIA does not state whether the salary rates are market rates or rates provided under the Federal GS Schedule, nor

[1925] *See* Nicole Smith, *The Old College Trial: Evaluating the Investigative Model for Adjudicating Claims of Sexual Misconduct*, 117 COLUMBIA L. REV. 4 (2017).

does it state whether the Federal revenue per full-time equivalent (FTE) is based on an inflation adjustment.

Discussion: We disagree. We fully explained the basis for that estimate in the NPRM.[1926] The estimate relied, in part, on the estimated number of investigations currently occurring and the relative number of incidents reported under the Clery Act that occur on campus and off campus.

Changes: None.

Overall Net Effects/Characterization of Savings

Comments: Regarding the Paperwork Reduction Act, one commenter asserted that the commenter's employer, a large non-profit, believes that the burden estimates are accurate, the quality and usefulness of the information collected is justifiable, and that the reporting burden is appropriately minimized.

Discussion: We appreciate the commenter's support for our estimates.

Changes: None.

Comments: One commenter stated that they could not understand how the Department arrived at its projected cost totals. The NPRM stated that the Regulatory Impact Analysis estimates "the total monetary 'cost-savings' of these regulations over ten years would be in the range of $286.4 million to $367.7 million"; however, the commenter could not find that cost savings figure reflected in the accounting statement. The commenter asked the Department to clarify how it arrived at its estimated total costs.

Discussion: We recognize that the discrepancy between the total cost figures and those included in the accounting statement could be confusing to some commenters. The cost savings

[1926] 83 FR 61487.

calculation of $286.4 to $367.7 million were calculated over a ten-year window. By contrast, the Accounting Statement included an annualized (per year) calculation of those same costs.

Changes: None.

Comments: Multiple commenters expressed concerns that the final regulations will increase operating costs for recipients. Several commenters asserted that the proposed procedural requirements will cost institutions more over time to implement than they currently pay in Title IX-related legal fees, settlements, and damage awards. One large State-coordinating body for higher education estimated the costs for implementing the proposed rules at $500,000 for institutions with few cases (0-4) to $1.8 million for institutions with many cases (up to 45). The range of costs was estimated per institution for implementation of investigation, hearing, and adjudication processes.

Discussion: We appreciate commenters concerns and note that, in fact, the estimates in the NPRM assumed that a subset of institutions would not experience any cost savings as a result of the proposed rules. In the NPRM, we assumed that 50 percent of institutions of higher education (IHEs) would not see any reduction in the number of Title IX investigations per year as a result of the proposed rule. Although our analytical model generates different estimates for costs than those cited by the commenter (lower estimates for institutions with few cases, higher estimates for institutions with many cases), we do not have sufficient information at this time to identify the source of these differences. However, we are concerned about the possibility that such burdens, where they do accrue, would be potentially difficult for recipients to bear. Based on the assumptions included herein, and discussed at further length in the Regulatory Flexibility Act section of this notice, we do not believe that such burdens would pose significant challenges for most institutions.

Changes: We have included additional information in the Regulatory Flexibility Act section to more clearly describe the likely magnitude of the effects of the final regulations on institutions of varying sizes.

Comments: Numerous commenters argued that the cost savings estimated by the NPRM's RIA is really just cost-shifting to complainants, respondents, and other parties. Several commenters asserted that the proposed rules would not reduce costs but simply shift costs from schools to the victims of sexual harassment. One commenter asserted that, by ignoring the NPRM's costs to complainants, the Department "entirely failed to consider an important aspect of the problem," which the commenter stated is a hallmark of arbitrary and capricious action. One commenter asserted that, while the Department acknowledged in the NPRM that 22 percent of survivors seek psychological counseling, it did not account for additional costs sexual harassment and assault survivors bear: 11 percent move residences and eight percent drop a class.

Discussion: We agree that it would be inappropriate to consider transfers of costs or burdens across entities or individuals as cost savings. However, the cost estimates in the NPRM did not do as the commenter suggested. Even so, the commenters' point is well taken that our estimates failed to take into account time burdens on complainants and respondents.

For example, our initial estimates of the time associated with a hearing assumed time and costs for the Title IX Coordinator, a decision-maker, and advisors, but did not include the time required on the part of complainants and respondents to participate in the hearing. Therefore, we have added burden associated with the participation of complainants and respondents throughout the cost estimates. For K-12 students, we assume costs at the Federal minimum wage. For students enrolled in postsecondary institutions, we assume median hourly wage for all workers ($18.58 per hour). These costs are intended to represent the opportunity cost associated with

devoting time to the particular activity measured as potential lost wages. Again, as discussed at length in the NPRM and elsewhere in this notice, the Department declines to include costs associated with underlying incidents of sexual harassment and assault in our estimate of the potential costs of this regulatory action as doing so would be inappropriate.

As previously explained, the Department also revised its cost estimates and has determined that the final regulations imposes net costs.

Changes: We have added two additional categories of individuals to our cost models: K-12 students and postsecondary students. We revised our cost estimates and have concluded that the final regulations impose net costs.

Comments: One commenter asserted that, under the proposed rules, schools will spend more time and resources engaging in a bureaucratic process instead of taking measures that would make the campus safer. The same commenter argued that publicly funded educational institutions should be allotting more time and resources to help tackle the issue of sexual misconduct and funds should be spent on better counseling, prevention measures, and implementing changes that will make schools safer such as lighting for walkways, sexual misconduct education, and specialized law enforcement services for survivors.

One commenter asserted that institutions with more resources, such as private universities and charter schools, will be able to make more robust commitments to cross-examination in Title IX hearings – such as keeping a law firm on retainer to act as advisors for complainants and respondents – resulting in inequity in how sexual harassment is addressed nationwide. Another commenter stated that some recipients under these new regulations will feel obligated to provide attorneys to protect students and ensure fairness, even if it is not mandated by the final

regulations, and the Department incorrectly underestimated the costs of retaining attorneys to serve as advisors.

Discussion: We agree with the commenter that a broad range of activities and efforts can be undertaken by recipients to address issues of sexual misconduct. Those activities and efforts though are better determined by recipients themselves based on their own local context. We revised § 106.44(a) to require recipients to offer supportive measures to complainants as part of their non-deliberately indifferent response to sexual harassment. Supportive measures, as defined in §106.30, are designed to restore or preserve equal access to the recipient's education program or activity. Section 106.44(a) requires the Title IX Coordinator to promptly contact a complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. As a result of these and other revisions, the Department has concluded that these final regulations impose net costs.

Regarding the differential response to these final regulations by different types of entities, we note that regulated entities often vary in their response to new rules. In the NPRM, we specifically discussed entities that, for a variety of reasons, opt to engage in activities above and beyond those required. At the postsecondary level, we assumed that approximately 45 percent of recipients fell into this group.[1927] Further, as noted elsewhere in this document, our initial estimates already assumed attorneys would serve as advisors.

[1927] *See* 83 FR 61486.

Changes: As a result of revisions to the proposed regulations, the Department revised its analysis and has determined that these final regulations impose net costs.

Comments: Several commenters argued that the Department's analysis both underestimates the cost of implementation and overestimates the savings. Commenters predicted that it is likely that the costs from the proposed rules would exceed any savings. One commenter asserted that the RIA never clearly relayed to the public that recipient-institutions covered by Title IX may be private education programs or other institutions such as museums, libraries, or science labs that have education programs and receive Federal financial assistance from the Department or other Federal agencies, such as the Department of Agriculture. The commenters asserted that the public should be aware of how broadly Title IX reaches across various institutions, and therefore, how great the scope of the costs will be.

Discussion: We agree that our initial analysis failed to account for recipients that are not LEAs or IHEs. Therefore, we conducted an analysis of the grants made by the Department in FY 2018. In that year, the Department made 15,266 awards to 8,324 entities. Of those, 537 were identified as "other" entities (e.g., museums, libraries, cultural centers, and other non-profit organizations). We have therefore added 600 additional entities to our analysis. We assume that approximately 90 percent of these entities will be in Group 1, as described in the NPRM, with an additional five percent in each of Groups 2 and 3. We note that we have no meaningful, systematic data on the number of incidents or investigations of sexual harassment occurring in these entities, though we note that many are small organizations devoted to providing technical assistance and outreach to

families and have very few employees. Given the lack of information, we assume a baseline of two investigations per year per entity with a reduction to one under the final regulations.[1928]

As previously explained, as a result of changes from the proposed regulations to these final regulations, we also have revised our analysis and concluded that the final regulations impose net costs.

Changes: We have added a new category of recipients to our model. As a result of revisions to the proposed regulations, the Department revised its analysis and has determined that these final regulations impose net costs.

Comments: One commenter asserted that the RIA violates Executive Order 12866, which requires agencies to assess all costs and benefits of a proposed rule "to the fullest extent that these can be usefully estimated," as the RIA fails to accurately estimate the true and full burden of the required policy changes.

Discussion: We disagree. The Department has made a good-faith effort to fully and accurately account for all costs and benefits likely to accrue as a result of this regulatory action and, as a result, we believe we have met our burdens under Executive Order 12866. We also have revised our analysis and have concluded that these final regulations are economically significant and impost net costs.

Changes: None.

Comments: One commenter asserted that the Department has touted the savings of $286.4-$367.7 million dollars as a "selling point" for these rule changes. And yet, in relation to the

[1928] For more information about the impact of this assumption on our estimates, see Table 5 in the Discussion of Costs, Benefits, and Transfers section below.

endowments of most private colleges, the commenter asserted that the budgets of public university systems and the Department's own request for $63 billion for FY 2019, show how the projected savings amount is a paltry sum.

Discussion: We agree that the savings calculated in the NPRM do not constitute a significant percentage of overall revenues for elementary and secondary schools and postsecondary institutions in this country. Additionally, as a result of revisions to the proposed regulations, we have revised our analysis and determined that the final regulations impose net costs.

Changes: We have revised our analysis and determined that the final regulations impose net costs.

Comments: Another commenter asserted that, if the estimated savings of $286.4 to $367.7 million were distributed evenly across the 23,000 total universities, colleges, elementary, and secondary school districts, the savings would total $1,598.69 per institution per year. In the commenter's view, this meager lump sum would not begin to cover the financial burden that the proposed rules would inflict upon institutions of higher education.

Discussion: We believe the commenter may have misunderstood the estimates presented in the NPRM. We anticipated net cost savings of approximately $286.4 to $367.7 million. That figure takes into account all increases and decreases in costs. Therefore, it is not necessary that the net cost savings figure be sufficient to cover cost increases, as such an analysis would double count costs. We believe the commenter mistook our calculations for gross cost savings, rather than net. We note that our final cost estimates reflect a net cost of between $48.6 and $62.2 million over ten years.

Changes: None.

Comments: Another commenter, a law school, whose students currently benefit from over $10 million in scholarship awards, stated that compliance with the proposed regulations will reduce the amount of aid the school will be able to pay to future students.

Discussion: We recognize that, to the extent recipients or parties realize costs as a result of the final regulations, they will need to identify sources of funding to cover those costs.

Changes: None.

Comments: Numerous commenters stated that the increase in requirements will cause schools to increase the funds they allocate for Title IX compliance. If they increase them, the cost will likely be passed onto students in the form of higher tuition or fees. If schools instead do not increase funding, they risk compliance gaps resulting from inadequate technology, staffing, or training. The commenters requested that the Department pay particular attention to the impact of the proposed rules on smaller institutions and to be sensitive to the measures that will increase costs.

Discussion: In accordance with the Regulatory Flexibility Act, we have reviewed the potential effects of this regulatory action on small entities. While we recognize that the burden on small entities may represent a larger proportion of their overall revenues, as discussed elsewhere, we do not believe that these final regulations impose an unreasonable burden on such entities.

The Department believes that addressing sex discrimination in the form of sexual harassment, including sexual assault, is of paramount importance and is worth the cost.

Changes: None.

Motivation for Rulemaking

Comments: Several commenters asserted that the NPRM's monetary savings comes at the unacceptable cost of stripping Title IX protections from many sexual harassment and assault

victims. They argue that the proposed changes undermine the purpose for which Title IX was designed. One commenter stated that cost-savings is an irrelevant consideration when it comes to the application of civil rights law. Another commenter argued that it is unethical to consider, much less draw up, economic estimates in such a matter of human well-being. The commenter argued that financial incentives should not determine how schools and universities handle sexual misconduct accusations. Another commenter stated, hyperbolically, that it would also save money if universities provided no education for women.

One commenter asserted that the cost-savings projections reflect fewer reports, not fewer assaults. Another commenter stated that the framework of these proposed regulations have an aim to reduce the financial cost of Title IX complaints through the mechanism of reducing the number of Title IX investigations, and therefore, Title IX protections available to students. Another commenter cited statistics that show approximately 61 percent of sexual assaults occur off campus. The commenter believed that the NPRM's requirement that schools investigate only on-campus or school-related incidents will reduce the number of sexual harassment and assault reports, but will also significantly impair colleges' ability to maintain a safe, non-discriminatory environment for all students. Moreover, the commenter argued that the on-campus requirement could function to enable predatory behavior off campus.

Other commenters asserted that, because sexual assault and other forms of sexual harassment are already vastly underreported, the Department should be working to combat the problems of underreporting and under-investigation instead of trying to reduce the number of investigations. One commenter pointed out that, even when students do report sexual harassment, schools often choose not to investigate their reports. The commenter cited a 2014 Senate Report, first cited by the Department, in which 21 percent of the largest private

institutions of higher education conducted fewer investigations of sexual violence than reports received with some of these schools conducting seven times fewer investigations than reports received.

Another commenter disputed the Department's prediction that the number of sexual harassment investigations would fall. The commenter asserted that the Department's focus on investigation outcomes ignores the prevalence of both sexual harassment and sexual assault and underreporting of both kinds of offenses on campuses.

Discussion: While we recognize the commenters' concerns with quantifying the effects of these regulations, which pertain to civil rights protections, we note that we are bound to do so by Executive Order. Further, in deciding among alternative approaches, the Department is bound to choose the option that maximizes benefits and minimizes costs. While discussing civil rights protections in such terms may cause discomfort for particular commenters, we are required to do so as part of the rulemaking process.

Although we may not have cited the statistics regarding the prevalence of sexual harassment and sexual assault cited by the commenters, we note that we cited statistics relevant to our estimates. We are not required under the Administrative Procedure Act, relevant Executive Orders, or OMB circulars, to cite all statistics regarding an underlying issue when conducting rulemaking. We do not believe citing other such statistics would have materially affected the public's ability to provide comment on the proposed regulations.

We agree that our estimates assumed a reduction in the number of Title IX investigations conducted by recipients each year for the reasons detailed in the NPRM. However, we strongly disagree that such an effect means that fewer students are protected by Title IX. As explained in more detail in the section "Section 106.44(a) 'education program or activity'" subsection of the

"Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this document, these final regulations align the scope of "education program or activity" with Supreme Court case law and the current statutory and regulatory definitions of "program or activity" in 20 U.S.C. 1687 and 34 CFR 106.2(h).

The Department revised § 106.44(a) to require recipients to offer supportive measures to complainants as part of recipients' non-deliberately indifferent response to sexual harassment. Even if a complainant chooses not to file a formal complaint to initiate the grievance process under § 106.45, including an investigation, the Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. The Department revised its analysis to account for such changes from the proposed regulations to the final regulations, and the Department concludes that these final regulations impose net costs.

Recipients may be required to respond to incidents that occur off campus under these final regulations, as off-campus incidents of sexual harassment are not categorically excluded in these final regulations.[1929] Title IX, 20 U.S.C. 1681(a), requires all recipients to address sex discrimination, including sexual harassment, in the recipient's education program or activity. Pursuant to § 106.44(a), 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 promptly

[1929] *See, e.g.*, the discussion in "Section 106.44(a) 'education program or activity'" subsection in "Section 106.44 Recipient's Response to Sexual Harassment Generally" section.

in a manner that is not deliberately indifferent. An "education program or activity" includes, but is not limited to, locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution, whether such a building is on campus or off campus. Accordingly, an education program or activity may be an on-campus program or activity or an off-campus program or activity. Recipients must respond to any allegation of sexual harassment against a person in the United States in its education program or activity, regardless of whether such education program or activity is on campus or off campus.

While we recognize that a large number of incidents of sexual harassment and sexual assault go unreported, we do not believe it is an appropriate Federal role to compel individuals to report those incidents. Rather, we believe it is important to ensure that when recipients do receive reports, they have clear policies and procedures in place to promote a safe and supportive environment while also ensuring due process protections are applied whenever the recipient investigates and adjudicates sexual harassment allegations. We believe that ensuring recipients respond to such reports in a consistent and supportive manner is the best way to support potential complainants and respondents. We believe that, absent these regulations, complainants would face a far more uncertain response from their school and have far less clarity regarding whether the school has actually met its burdens under Title IX. As noted elsewhere, the Department's primary goal in promulgating these regulations was never to reduce the number of investigations, but rather to ensure clear guidelines under Title IX for recipients to effectively address sexual harassment.

Changes: The Department concludes that these final regulations impose net costs.

The Department's Model and Baseline Assumptions

Comments: One commenter argued that the Department arbitrarily assumed a reduction in the number of off-campus investigations by IHEs of 0.18 per year. This commenter requested that the Department generate a more reliable figure with a clear explanation to justify the significant number of victims who can no longer seek Title IX recourse.

Discussion: The Department rejects the contention that its calculation of a reduction in the number of off-campus investigations by IHEs of 0.18 per year under the NPRM was arbitrary. As the preamble in the NPRM made clear, this calculation rested on a series of assumptions and data sources, which were clearly detailed. The reduction referenced by the commenter was based, in part, on assumptions about the current compliance structure across institutions of varying sizes and an assumption that Clery Act reports correlate with all incidents of sexual harassment.

All data that the Department relied upon is publicly available and was identified in the NPRM to ensure that the general public had the necessary information to assess the validity of our assumptions and estimates. Furthermore, the Department provided alternative estimates, detailed in the "Sensitivity Analysis" section, which were designed to ensure the public understood the likely effect of our particular assumptions on the overall magnitude of our final estimates. We acknowledge, as we did in the NPRM, that we do not have high-quality, comprehensive data on the current number of investigations being conducted by IHEs, and so the Department had to rely on estimates. This is why we previously requested that the general public provide us with any alternative data that they believed would more accurately capture the baseline.

Changes: As discussed elsewhere, the Department has revised its estimate of the baseline number of investigations currently occurring at IHEs to 5.70 and the estimated number of formal complaints occurring after implementation of the final regulations to 3.82.

Comments: A number of commenters voiced agreement with the RIA that the changes proposed by the NPRM are likely to result in a net cost savings for recipients. Some of these commenters pointed to the more than two hundred lawsuits that have been filed since the 2011 Dear Colleague Letter alleging lack of due process as well as sex discrimination against respondents. One commenter asserted that, at the time the comment was written, colleges had lost more than 90 such lawsuits, and the commenter predicted that the due process protections implemented by the changes to Title IX would result in additional cost savings for colleges in the form of averted litigation costs. Another commenter asserted that, because of the changes set forth by the NPRM, schools would be able to divert resources away from lawsuits and towards other uses that would more directly benefit students.

Discussion: We appreciate the support from some commenters.

Changes: None.

Comments: Numerous commenters asserted that reports and investigations will decrease under the proposed regulations because of additional obstacles to reporting and the costs of pursuing investigations. One commenter stated the RIA should estimate the rates for which sexual harassment and assault would increase and should also account for the burden of such increased rates on the parties. One commenter argued that sexual harassment and assault can be deterred, but the proposed rules would create obstacles to reporting sexual harassment and sexual assault and, therefore, will reduce the amount of specific and general deterrence around such misconduct. Another commenter cited numerous articles, as well as the NPRM, for the

proposition that sexual harassment and sexual assault can be deterred showing that the Department also acknowledges that proposition.

Several commenters stated that, if the Department decides to implement §106.45(b)(6), the predicted harms of re-traumatization must be factored into a new cost-benefit and regulatory impact analysis. Other commenters argued that requiring complainants to submit to cross-examination will reduce the number of students pursing formal complaints of sexual harassment on campuses and will make campuses less safe. One commenter asserted that the Department omitted the cost to schools of students' greater demand for psychological and medical services as a result of recipients investigating fewer complaints of sexual harassment and sexual assault. The commenter asserted that institutions of higher education are already spending significant amounts of money on campus mental health services. The commenter argued that imposing new barriers and creating new stressors would exacerbate the rising costs of mental health services.

Discussion: We disagree that the proposed and final regulations create obstacles to reporting incidents of sexual harassment and sexual assault. Rather, both the proposed and final regulations clarify recipients' burdens under Title IX. To address potential confusion regarding what constitutes a formal complaint, we have revised the definition of "formal complaint" in §106.30. As noted elsewhere, we have no reason to conclude that these final regulations would increase the number of incidents of sexual harassment and assault. As discussed above, fundamental respect for due process will not result in trauma for complainants or an increased need for mental health services. Such claims are speculative, at best, to be appropriately included in Departmental estimates. Further, we note that complainants are not required under the final regulations to participate in cross-examination, and decision-makers are prohibited from basing a determination regarding responsibility on the absence of a party. Accordingly, to the extent

complainants believed participation would likely cause harm, they could opt not to participate in the cross-examination, while still receiving supportive measures designed to restore or preserve the complainant's equal educational access.

Changes: We have revised the definition of the term "formal complaint" in §106.30. The definition of "formal complaint" in § 106.30 is revised to mean a document filed by a complainant, or signed by the Title IX Coordinator, requesting that the recipient investigate sexual harassment allegations; a formal complaint may be filed in person, by mail, or e-mail; and the formal complaint may be a document or electronic submission with the complainant's physical or digital signature or otherwise indicating that the complainant is the person filing the formal complaint.

Comments: One commenter stated that the Department failed to use the term "transgender" in the proposed regulations. The commenter cautioned that this overt exclusion may make transgender students less likely to report on campus sexual harassment or sexual assault to the designated Title IX Coordinator. The commenter also cited a recent survey of transgender people, showing that 17 percent of K-12 students and 16 percent of college or vocational school students who were "out" or perceived as transgender reported leaving school because of mistreatment.[1930]

Discussion: We appreciate commenters' concerns for the diverse range of students covered under Title IX. We agree that the term "transgender" did not appear in the NPRM. Such an omission does not, in any way, indicate that a student's gender identity would cause them not to be

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[1930] *See* National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey* (Dec. 2016), http://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF.

protected from sex discrimination under Title IX. As more fully explained in the "Gender-based harassment" subsection of the "Sexual Harassment" subsection of the "Section 106.30 Definitions" section of this preamble, these final regulations focus on prohibited conduct, and anyone may experience sexual harassment as defined in § 106.30.

Changes: None.

Comments: One commenter asserted that one of the commenter's non-profit's clients has investigated over 650 cases since data tracking systems were developed in 2014 in response to a resolution agreement with OCR. Since that time, this K-12 district, which enrolls about 35,000 students in over 50 schools, has investigated and remediated an average of 33 complaints and 89 reports each year for the past four years. In the 2015-2016 school year, the district investigated and remediated 73 complaints and 126 reports of sexual and/or gender-based harassment. The same commenter asserted that recipients generally have poor or underdeveloped data management systems that result in the significant underreporting of the number of cases to Civil Rights Data Collection (CRDC) and other stakeholders. The commenter recommended that the Department increase the baseline estimate, as the commenter's data shows recipients investigate, on average, 3.5 cases per week.

This commenter asserted that the Centers for Disease Control and Prevention's (CDC's) Youth Risk Behavior Survey (YRBS) provides important context across a few key indicators.[1931] Based on the most recently available national data from 2017, the commenter asserted that the CDC estimates that over 11 percent of female students and 3.5 percent of male students reported

[1931] Commenter cited: Centers for Disease Control & Prevention, Division of Adolescent & School Health, *Youth Risk Behavior Survey Data Summary and Trends Report: 2007-2017* (2018).

being physically forced to have sexual intercourse.[1932] Across the recipients and States that participate in the YRBS, the indicators ranged from 7.5 percent to 15.3 percent for female students and from 2.5 percent to 16.1 percent for male students.[1933] While not a direct indicator of the number of incidents of forced sexual intercourse that result in a Title IX complaint or report, the commenter reported this data to show that the number of potential Title IX sexual assault cases are likely significantly higher than the current baseline estimate of 3.5 cases annually.[1934]

This commenter also cited the California Department of Health Services and California Department of Education's California Healthy Kids Survey (CHKS), which also provides contextual indicators. Statewide, about eight percent of students reported being bullied or harassed at school due to their gender at least once, and over four percent reported two or more instances of gender-based bullying or harassment.[1935] Applying the four percent rate to the entire population of public school K-12 students in California, which was 6,220,413 in the 2017-18 school year, the commenter argued that there are likely over 240,800 students who have been repeatedly bullied or harassed due to their gender in California. The commenter stated that the prevalence of gender-based harassment also ranges significantly by the race/ethnicity of survey respondents, from 6.1 percent among Asian students to 12.8 percent among Native Hawaiian/Pacific Islander students.

[1932] *Id*.
[1933] *Id*.
[1934] *Id*.
[1935] Commenter cited: Austin, G., Polik, *et al*., *School climate, substance use, and student well-being in California, 2015-17* (WestEd 2018).

Discussion: We recognize that, as with any diverse group of entities, there will be some level of variation. There will undoubtedly be LEAs that conduct more Title IX related investigations than average. In developing our assumptions, we did not intend to imply that the specific number we employed would apply to every recipient in every instance. Rather, we attempted to determine a reasonable average, based on the data available to us, of the effect across 15,505 LEAs nationwide. Further, while anecdotal evidence or data from the YRBS may be informative, it does not necessarily improve upon the systematic data reported by LEAs through the CRDC. Based on the commenter's statement, the LEA being described is one of the largest LEAs in the country, which would necessarily place them as an outlier and not particularly helpful to inform our analysis.

YRBS data do not represent all LEAs, and we have reason to believe that patterns in participation in YRBS may indicate problems with its external validity – that is, LEAs which participate in YRBS do not necessarily look the same as LEAs that do not participate and, therefore, the YRBS data may skew in important ways. Additionally, the prevalence of incidents of sexual harassment does not necessarily indicate the number of investigations that recipients perform. The YRBS data represents student self-reports on a confidential questionnaire, and it is very likely that a high number of the incidents that students may confidentially report as part of the study would never have been reported to a responsible employee of the recipient under the Department's 2001 Revised Guidance on Sexual Harassment and 2017 Q&A, which represents the baseline against which the Department promulgates these final regulations. If a responsible employee did not know or reasonably should not have known about the alleged sexual harassment, then the recipient would not have investigated the alleged sexual harassment under the 2001 Revised Guidance and 2017 Q&A. Therefore, the data from YRBS does not clearly or

predictably correlate with the number of investigations conducted by LEAs. Rather, a data collection reported by LEAs such as the CRDC is much more likely to capture the alleged incidents that recipients are required to investigate. Accordingly, the CRDC remains a better source to inform the baseline assumptions for these final regulations.

Changes: None.

Comments: One commenter asserted that the RIA's cost savings estimates ignore the obligations the Clery Act imposes on schools to respond appropriately to complaints involving stalking, dating violence, domestic violence, and sexual assault. The commenter stated that, at the same time, recipients also remain obligated by Title IX to respond appropriately to general sex discrimination claims. The commenter stated that the NPRM's purported cost savings are premised on the proposed rules' more narrow definition of sexual harassment and sexual assault, as well as the mandate that institutions dismiss cases without any investigation if the complaint fails to state an actionable claim.

One commenter asserted that the proposed regulations introduce potential for confusion as employees and administrative staff try to sort through which process to use in different circumstances. For example, if a student accused the student's spouse of both sexual assault and domestic violence not amounting to sexual harassment, the commenter requested clarification as to whether the institution would be compelled to bifurcate the investigation into one that complies with the Department's proposed formal complaint process and one that does not.

Discussion: We appreciate that the definition of sexual harassment in the proposed rules may have generated some confusion, particularly with regard to its omission of particular incidents otherwise covered under the Clery Act. Therefore, we have revised the definition of "sexual harassment" to include sexual assault, dating violence, domestic violence, and stalking as

defined in the Clery Act and VAWA, respectively, and have updated our estimates of the number of investigations to encompass the broader array of incidents that constitute sexual harassment under the final regulations. To do so, we used Clery Act data to identify a multiplier that could be used on our initial estimate to account for the new definition. Using 2017 Clery Act data, the Department found that there were approximately 1.416 reported incidents of dating violence, domestic violence, or stalking reported for every incident of sexual assault. We multiplied our estimated number of investigations per year in the NPRM by 2.416 to arrive at a new baseline of 5.70 investigations per institution of higher education per year.

Changes: We have revised the definition of "sexual harassment" under §106.30 and revised our estimate of the number of investigations occurring annually.

Comments: Many commenters asserted that the Clery Act and Title IX's general prohibition against sex discrimination will require schools to continue to investigate complaints involving stalking, dating violence, domestic violence, and sexual assault.

Discussion: We recognize that the distinction between incidents covered under the Clery Act and these final regulations may have generated some confusion. We have therefore amended the definition of "sexual harassment" to include sexual assault, dating violence, domestic violence, and stalking, as defined by the Clery Act and VAWA, respectively. A recipient's obligations, however, remain different under the Clery Act and Title IX. Under these final regulations, implementing Title IX, a recipient must conduct an investigation, which is part of the grievance process in § 106.45, after a formal complaint is filed by a complainant or signed by the Title IX Coordinator. A recipient's obligations under the Clery Act may be different, and the Department is not issuing regulations to implement the Clery Act through this notice-and-comment rulemaking.

Changes: We have amended the definition of "sexual harassment" in §106.30 to include sexual assault, dating violence, domestic violence, and stalking, as defined by the Clery Act and VAWA, respectively.

Comments: One commenter asserted that the Department significantly inflated the current number of Title IX investigations in order to inflate the "cost savings" of reducing these investigations. Another commenter stated that, to estimate the number of Title IX investigations at institutions of higher education, the Department relied on a 2014 Senate report that allowed institutions of higher education to report whether they had conducted "0," "1," "2-5," "6-10," or ">10" investigations of sexual violence in the previous five years.[1936] The commenter argued that the Department, without justification, rounded up for each of these categories. If a school reported that it had conducted "2-5" or ">10" investigations, the Department inputted "5" and "50," respectively, into its model, far higher than the medians of 3.5 and 30 investigations for those two categories. Elsewhere, the Department inexplicably assumed that there are twice as many "sexual harassment investigations" as there are "sexual misconduct investigations," without defining what these terms mean. Subsequently, the commenter argued that the "estimate" that each institution of higher education conducts 2.36 investigations per year is highly inflated.

Discussion: Regarding the Department's treatment and coding of the survey data available from the Senate subcommittee report, our analysis in the NPRM went into great detail regarding our

[1936] Claire McCaskill, S. Subcomm. on Financial Contracting Oversight – *Majority Staff, Sexual Violence on Campus, 113th Cong*. (2014).

rationales.[1937] In addition, we provided the public with information regarding the sensitivity of our analyses to these decisions.[1938]

While we understand that some commenters may have thought that our estimated number of Title IX investigations was inflated, we note that many others thought we underestimated the current number. In either case, our assumptions were made using the best data available and were not made in the hopes of reaching a particular conclusion with regards to the likely effects of the proposed rules. Further, our categorization and description of terms were intended to align with the definitions used in the proposed regulations. We note that "sexual assault" is a subpart of the definition of "sexual harassment," and we were attempting to distinguish between the two.

As a result of revisions to the proposed regulations, the Department has revised its analysis and concluded that these final regulations impose net costs.

Changes: None.

Comments: Several commenters at small universities stated that the proposed regulations incorrectly assume that the proposed regulations will produce a decrease in costs due to a decrease in the number of formal investigations schools must perform. Although the proposed regulations and final regulations would not require schools to investigate allegations of sexual harassment that occurred outside of a recipient's education program or activity or outside the United States, the commenters' student conduct codes would compel them to continue to investigate such incidents, even if outside the purview of Title IX, so the proposed regulations and these final regulations would result in a net increase of duties and tasks for those schools that

[1937] *See* 83 FR 61485.
[1938] *See* 83 FR 61485 fn. 18, 61489.

wish to investigate allegations of sexual harassment that occurred outside the recipient's education program or activity or outside the United States.

Discussion: We appreciate that, for a variety of reasons, some subset of postsecondary institutions and elementary and secondary schools may not experience any reduction in the number of investigations conducted annually. These recipients were included in analytical group 3 as discussed in the NPRM.[1939] Given that such effects were already accounted for in our initial analysis, we do not believe a change is necessary.

The Department has made revisions to its analysis based on the revisions to the proposed regulations. For example, the Department takes into account incidents that may occur in any building owned or controlled by a student organization that is officially recognized by a postsecondary institution as a result of changes to § 106.44(a), describing a recipient's education program or activity. The Department used Clery Act data that captures reports from geographic areas such as noncampus property to err on the side of caution because noncampus property as defined in 34 CFR 668.46(a) includes more than just buildings owned or controlled by a student organization that is officially recognized by a postsecondary institution.

In the NPRM, the Department assumed that a proportion of current investigations, equivalent to the proportion of total incidents reported under the Clery Act in the noncampus or public property geographies, would no longer require investigation under the proposed rules because of the scope of education program or activity under the proposed rules. The change in the final regulations would require some, but not all, incidents reported on noncampus property, as defined in 34 CFR 668.46(a), to be investigated by the recipient. While ideally the Department

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[1939] *See* 83 FR 61486.

would be able to subdivide the incidents reported under the noncampus geography to isolate those occurring in buildings owned or controlled by student organizations that are officially recognized by the institution, we do not have data with that granularity of detail. Rather than arbitrarily identify a percentage of incidents occurring in such locations, the Department is now assuming that the reduction in investigations due to their occurring outside of the education program or activity of a recipient is equivalent to the proportion of total incidents reported under the Clery Act that occurred on public property. This approach effectively assumes that recipients will continue to investigate formal complaints of all incidents occurring on noncampus property, as defined in 34 CFR 668.46(a), which includes but is not limited to off-campus buildings owned or controlled by a student organization that is officially recognized by a postsecondary institution.

Changes: The Department revised its analysis to include incidents that may occur in buildings owned or controlled by a student organization that is officially recognized by a postsecondary institution The Department has revised its estimate of the reduction in the number of investigations occurring under the final regulations. The Department now assumes that the number of investigations occurring each year will decrease from 5.70 to 3.82.

Comments: Several commenters noted that the NPRM referenced "administrative assistants" several times as additional personnel to whom Title IX Coordinators can delegate tasks, but the commenters asserted that most Title IX Coordinators, especially those at small institutions, do not have administrative assistants and a majority handle all of their administrative work on their own.

Discussion: We appreciate that many Title IX Coordinators may not have dedicated administrative assistants to accomplish tasks. However, our intention was to identify work that

was likely to be passed off to another employee of the organization, such as an administrative assistant or office administrator, whose typical work activities are more likely to include administrative tasks, such as reserving rooms, coordinating meeting times, recordkeeping, and sending and tracking correspondence. To the extent that such staff are not utilized, recipients may realize costs that are either higher or lower than those described herein. If Title IX Coordinators accomplish the work more efficiently than would be possible with the aid of an administrative assistant, recipients may experience lower costs. To the extent that it will take Title IX Coordinators the same amount of time to accomplish tasks as it would take an administrative assistant to do the same task, recipients are likely to see higher costs as a result of the higher wage rates assumed for Title IX Coordinators. We continue to believe that many of the tasks associated with coordinating the grievance process – including scheduling facilities, staff, and resources and ensuring all appropriate notices are provided to all parties in a timely manner – would most appropriately fall to an employee in a position such as an administrative assistant, and we continue to include these positions in our analysis.

Changes: None.

Comments: Multiple commenters asserted that the RIA's estimate for hourly costs of an attorney is too low. One commenter asserted that in the commenter's State, the average hourly rate for civil attorneys is between $250 and $325. Based on the Department's own estimate that a case would require 40 hours of attorney time for each party, and assuming that the parties qualified for the commenter's State bar's modest means program (which charges no more than $60, $80, or $100 per hour), parties would still be spending between $2,400 and $4,000. Another commenter stated that the Department provides no basis for this assumed rate for an attorney,

which is significantly lower than the average hourly rate of attorneys in the commenter's area.[1940]

Some commenters from small and rural colleges asserted that they lack in-house legal counsel and must hire outside counsel to assist when legal questions arise. Numerous commenters from several small universities stated that, while a larger institution might be able to employ a full-time attorney for the $90.71 hourly rate the proposed rules assumed, small institutions that retain attorneys on an *ad hoc* basis for a limited number of cases will likely pay a much higher rate. For example, one commenter's institution typically pays attorneys between $250 and $400 per hour, meaning that this institution's costs are likely to significantly exceed the Department's estimates. Another commenter at a small college asserted that the college typically retains attorneys for an amount averaging somewhere between $360 per hour and $530 per hour. Additional commenters from small institutions reported attorneys costing somewhere between $200 and $600 an hour. One commenter stated that, to calculate the cost of the proposed regulations, the average school attorney's rate in the commenter's State is about $300, which is much higher than the Department's estimate.

Discussion: We appreciate commenters' concerns and recognize that many attorneys may charge hourly rates for services in excess of those used in our estimates. However, as discussed on page 61486 of the NPRM, we are relying on data from the Bureau of Labor Statistics (BLS) and

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[1940] *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.lawjournalnewsletters.com/2017/11/01/read-this-before-you-set-your-2018-billing-rates/ (indicating first year associates cost their employers approximately $111/hour).

utilized the median hourly wage rate for attorneys in the education sector. It is our general practice to use wage rates available from BLS for these types of estimates.

Changes: None.

Comments: One commenter, speaking for a community college that serves as the largest institution of higher education in the commenter's State, asserted that the Department's citation of Angela F. Amar *et al.*, *Administrators' perceptions of college campus protocols, response, and student prevention efforts for sexual assault*, 29 VIOLENCE & VICTIMS 579 (2014), is problematic because it assumes that hearing boards are commonplace at institutions of higher education. The commenter's review of the above article showed that 51 percent of respondents to the research study were from four-year private colleges and 38 percent were from four-year public colleges. The commenter asserted that the underlying assumptions cited by the Department on how colleges respond to conduct cases is skewed toward four-year, primarily residential institutions and did not take into account the context in which many community colleges operate. The commenter asserted that the proposed regulations will require schools to create a hearing system for a small subset of cases, which will impose administrative and financial burdens as boards must be created from scratch, trained on the legal nuances of sexual harassment and discrimination, and would respond to a small portion of conduct cases.

Discussion: We appreciate the commenter's input and did not intend, by citation to a particular source, to indicate that the proposed regulations or our analysis were only pertinent to, or only considered, four-year institutions. The purpose of that particular citation was to help inform our understanding of the status quo. Our analysis assumed that 60 percent of IHEs use the Title IX Coordinator as the decision-maker in their current enforcement structure.

We believe that assumption readily comports with the commenter's concern about community colleges that may not have formal hearing boards or independent decision-makers currently in place. We recognize that at least some subset of institutions will have to create new processes to comply with the final regulations, and our initial estimates took this into account. Specifically, we note that our estimates include development or revision of grievance procedures and include training for Title IX Coordinators, investigators, decision-makers, or any person designated by a recipient to facilitate an informal resolution process. We believe that these estimates capture the concerns raised by the commenter.

Changes: None.

Comments: Several commenters also disputed the RIA's estimate that an IHE will perform 2.36 investigations each year. At the University of Iowa, according to the Office of Sexual Misconduct Response Coordinator 2017 annual report, 444 reports were taken and 58 investigations were completed in one year.[1941] One commenter asked how the RIA sets the estimated average at 2.36 investigations of sexual harassment for each IHE per year, when statistics show sexual harassment and assault occurs much more often. One commenter reported that, according to the National Sexual Violence Resource Center, one in five women and one in 16 men are sexually assaulted while in college and more than 90 percent of sexual assault victims on college campuses do not report the assault.[1942] Another commenter disagreed with the

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[1941] *See* University of Iowa Office of the Sexual Misconduct Response Coordinator, "Report Resolution and Outcomes," https://osmrc.uiowa.edu/about-us/2017-annual-report/osmrc-case-and-outcome-data/report-resolution-and-outcomes.

[1942] National Sexual Violence Resource Center, *Info and Stats for Journalists: Statistics About Sexual Violence* 2 (2015), https://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_statistics-about-sexual-violence_0.pdf.

Department's calculation of 2.36 investigations of sexual harassment per year, as most four-year institutions have well over 2.36 investigations each year.

Discussion: As noted elsewhere, we are very aware that a subset of the nation's largest IHEs will annually conduct more investigations than the average IHE. Such an outcome is assumed in any distribution. We clearly described in the NPRM our process for arriving at the estimated number of investigations occurring per year.[1943] However, we have, for other reasons described elsewhere in these final regulations, revised our estimated number of investigations occurring per year.

Changes: None.

Comments: One commenter asserted that, while the Department assumes an approximate reduction of 0.18 of the number of IHE investigations by disregarding off-campus sexual harassment, the Department fails to allocate time for the investigation that would need to occur for the jurisdictional analysis to establish where the incident occurs.

Discussion: As explained earlier in the RIA, these final regulations do not categorically exclude allegations of sexual harassment that occur off campus. Recipients must respond to any allegations of sexual harassment in their education program or activity, whether the alleged sexual harassment occurs on campus or off campus.[1944] We agree that, in some instances, recipients may need to expend resources to determine whether a particular incident occurred outside of the recipient's education program or activity. We have added time for Title IX

[1943] 83 FR 61485-88.

[1944] *See, e.g.*, the discussion in "Section 106.44(a) 'education program or activity'" subsection in "Section 106.44 Recipient's Response to Sexual Harassment Generally" section.

Coordinators and investigators to engage in such an analysis in approximately 50 percent of incidents.

Changes: We have added a new cost category designed to capture the efforts of recipients to determine whether a particular incident occurred in a recipient's education program or activity.

Data Sources

Comments: Several commenters argued that Clery Act data inaccurately reflects the number of investigations because it only tracks on-campus conduct, and, as a result, should not be used to estimate the general rate of investigations per reported sexual offense at four-year IHEs. Commenters pointed out that many cases that lead to investigations involve off-campus behavior. Numerous commenters also noted that Clery data fails to include instances of sexual harassment and discrimination.

One commenter asserted that, while Clery Act data is an important resource, any user must seriously consider the limitations of that data source. The commenter stated that the American Association of University Women (AAUW) has investigated underreporting related to the Clery Act and concluded that reported campus safety and crime statistics reflect the fact that "some schools have built the necessary systems to . . . disclose accurate statistics – and others have not."[1945] The commenter cited other studies of Clery Act data and educational institutions

[1945] *See, e.g.*, American Association of University Women, *89 Percent of Colleges Reported Zero Incidents of Rape in 2015* (May 10, 2017), https://www.aauw.org/article/clery-act-data-analysis-2017/; American Association of University Women, *91 Percent of Colleges Reported Zero Incidents of Rape in 2014* (Nov. 23, 2015), https://www.aauw.org/article/clery-act-data-analysis/.

that have identified similar concerns about underreporting, overreporting, and misreporting of data around sexual assault.[1946]

On the LEA level, commenters reported that the Department is even less clear about its calculations, simply stating that it "assumes that only 50 percent 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." The commenter asserted that the basis of the Department's assumption regarding formal complaints is not provided. The commenter argued that, while the CRDC provides another important source of data for the public, it is also limited by the quality of data it imports.[1947] Other commenters stated that inaccurate data is particularly a problem with the sexual harassment reports, on which the proposed regulations so heavily rely. Commenters reported that the AAUW has analyzed the CRDC sexual harassment data and determined that many school districts were simply reporting no incidents rather than collecting and reporting the true numbers of cases of sexual harassment that were reported or resulted in discipline. These commenters argued that to rely on such datasets to enact sweeping changes to Title IX law means that the projected costs are not being conducted in a rigorous or high-quality manner and are likely to be inaccurate.[1948]

[1946] *See, e.g.*, California State Auditor, *Clery Act Requirements and Crime Reporting: Compliance Continues to Challenge California's Colleges and Universities*, Report 2017-032 (May 2018); National Academies of Sciences, Engineering, and Medicine, *Innovations in Federal Statistics: Combining Data Sources While Protecting Privacy* 44 (2017) ("the data on sexual violence reported by many institutions in response to the [Clery] act's requirements is of questionable quality").

[1947] *See, e.g.*, Evie Blad, *How Bad Data from One District Skewed National Rankings on Chronic Absenteeism*, EDUCATION WEEK (Jan. 9, 2019), http://blogs.edweek.org/edweek/rulesforengagement/2019/01/chronic_absenteeism.html.

[1948] *See, e.g.*, American Association of University Women, *Three-Fourths of Schools Report Zero Incidents of Sexual Harassment in Grades 7-12* (Oct. 24, 2017), https://www.aauw.org/article/schools-report-zero-incidents-of-

One commenter asserted that the Department must seek to adopt the same attitude and standard as the Equal Employment Opportunity Commission Task Force on the study of harassment in the workplace, which issued a report in 2016 that explicitly acknowledged the dearth of data as it related to workplace harassment and did not accept data at face value, instead acknowledging that not all claims will be represented in available datasets given rampant underreporting and systemic data collection challenges. The commenter requested that the Department halts its rulemaking while it revisits its cost calculations, reviews the accuracy of the Clery Act and CRDC data on which its calculations rely, and makes its underlying calculations available to the public.

One commenter contended that the Department relies on unreliable estimates of the number of reported sexual assaults to gauge the number of sexual assault investigations per year. The commenter admits that the Department is limited by a dearth of reliable evidence but asserts that the Department's projections likely underestimate the average number of investigations universities perform each year. The same commenter asserted that, since many of the other costs are computed based on this average number of investigations, a gross underestimate of the number of investigations would have a large effect on the overall cost-savings analysis, suggesting lower costs of implementation than is true.

Discussion: As an initial matter, it is important to note that the Department clearly identified data limitations in the NPRM and requested that members of the public identify any comprehensive

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sexual-harassment/; Lisa Maatz, American Association of University Women, *Why Are So Many Schools Not Reporting Sexual Harassment and Bullying Allegations?*, THE HUFFINGTON POST (October 24, 2016), https://www.huffingtonpost.com/lisa-maatz/why-are-so-many-schoolsn_b_12626620.html; American Association of University Women, *Two-Thirds of Public Schools Reported Zero Incidents of Sexual Harassment in 2013-14* (July 12, 2016), https://www.aauw.org/article/schools-report-zero-sexual-harassment/.

data sources which might improve our estimates. We also should note that Clery Act data was not used as the primary basis for our assessment of the number of investigations currently being conducted per year. Rather, the data was used to help provide context to the calculations derived from the Senate subcommittee report.[1949] Regarding the CRDC data, we equally recognized and acknowledged data quality issues, but in the absence of higher quality comprehensive data, we opted to rely upon the information we had. We also explained our rationale for how we coded the survey data at great length in the NPRM and provided alternative estimates in the Sensitivity Analysis section of the NPRM to more clearly highlight for the public the impact of these assumptions on the results of our analysis. While we recognize that outliers exist in the universe of recipients, our assumptions were intended to capture the overall average. We have made other changes to our assumptions as described elsewhere to attempt to address some of the commenters' concerns regarding potential underestimation of implementation costs. Indeed, as a result of revisions to the proposed regulations, the Department has determined that these final regulations are economically significant and impose net costs.

Changes: None.

Comments: Another commenter asked why the Department failed to consult the large and robust body of research produced through the academic, peer-review research process that is the hallmark of the research enterprise.

[1949] *See* 83 FR 61485.

Discussion: The Department consulted relevant research studies in developing cost estimates as evidenced by the citations included in the NPRM.[1950]

Changes: None.

Other

Comments: One commenter contended that the proposed regulations would reduce the number of sexual harassment and sexual assault investigations and, thus, would enable more sexual assaulters to pass background checks and become employed in Federal agencies. The commenter asserted that, pursuant to Executive Order 12866, to make a reliable estimate of the potential costs to Federal agencies, the Department would need to conduct a review of the U.S. Office of Personnel Management background investigations to determine how many allegations of incidences of sexual harassment and assault were discovered through contact with record providers at IHEs and LEAs, and, of those, determine how many would not have been required to be investigated under the proposed regulations. The commenter argued that hiring individuals with a history of sexual assault would be dangerous for Federal workers as well as the public, and criminology literature shows that college-student rapists commonly repeat their offenses against more victims over time.

Discussion: We decline to conduct the analysis suggested by the commenter. We are uncertain that such an analysis could be effectively and efficiently conducted. Even if it could, we are

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[1950] *E.g.,* Jacquelyn D. Wiersma-Mosley & James DiLoreto, *The Role of Title IX Coordinators on College and University Campuses*, 8 BEHAV. SCI. 4, 5-6 (2018), https://www mdpi.com/2076-328X/8/4/38/htm (click on "Full-Text PDF") (page references herein are to this PDF version); Tara N. Richards, *An updated review of institutions of higher education's responses to sexual assault: Results from a nationally representative sample*, 34 JOURNAL OF INTERPERSONAL VIOLENCE 1, 11-12 (2016); Heather M. Karjane *et al.*, *Campus Sexual Assault: How America's Institutions of Higher Education Respond* 62-94, Final Report, NIJ Grant # 1999-WA-VX-0008 (Education Development Center, Inc. 2002); Angela F. Amar *et al.*, *Administrators' perceptions of college campus protocols, response, and student prevention efforts for sexual assault*, 29 VIOLENCE & VICTIMS 579 (2014).

uncertain of its value in completing our analysis. It is unclear how the commenter would expect us to incorporate the results of this review into our estimates. Moreover, the definition of "sexual harassment" in § 106.30 of these final regulations includes sexual assault as defined in the Clery Act, and these final regulations require recipients to respond to allegations of sexual assault pursuant to § 106.44(a).

Changes: None.

Comments: One institution suggested that the Department consider creating a lighter set of procedural requirements to lessen the burden on small schools by allowing schools to apply less strict requirements, if the school has a student body with fewer than 3,000 students and formally investigates fewer than ten Title IX complaints in a year.

Discussion: We appreciate the suggestion but decline to set different standards for small entities. We believe that students at all schools are entitled to reliable determinations regarding responsibility under Title IX and that such determinations should be made in a manner that is consistent with constitutional due process and fundamental fairness. We do not believe that requiring a fair, reliable grievance process for students at small entities creates an unnecessary burden for small schools.

Changes: None.

Comments: One commenter asserted that the proposed regulations should not be exempt from Executive Order 13771, as the cost savings are inaccurate and exaggerated. Therefore, the commenter suggested that the Department should identify two deregulatory actions for each additional regulation added herein, keeping in mind that a review of the plain language of the requirements reveals nearly 50 new regulatory obligations.

Discussion: As a result of revisions to the proposed regulations and other changes, the Department has revised its analysis and has determined that these final regulations are economically significant under Executive Order 12866 and impose net costs under Executive Order 13771. In accordance with Executive Order 13771, the Department will identify two deregulatory actions.

Changes: The Department has revised its analysis and has determined that these final regulations are economically significant and impose net costs.

Comments: One commenter asserted that the RIA failed to clarify that each of the LEA recipient organizations covered by Title IX include many individual public schools and that each school should have a Title IX Coordinator to meet the demands of the proposed regulations. The commenter expressed concern that hiring a Title IX Coordinator for each school in an LEA would be cost prohibitive. One commenter stated that LEAs should also have Title IX Coordinators, and they should have responsibility for helping to train and assist school-level Title IX Coordinators. The commenter asserted the fact that the RIA provided no numbers of schools in LEAs is confusing.

Discussion: We agree that hiring a new staff member to serve as a Title IX Coordinator for each school in the country would generate extremely large expenses above and beyond those estimated in the proposed or final regulations. The final regulations, however, do not require such action. The final regulations do not require that a Title IX Coordinator be a newly hired individual, only that a recipient designate and authorize at least one employee to serve as the Title IX Coordinator.[1951] We do not believe it is likely that recipients will opt to comply with this

[1951] Section 106.8(a).

requirement in the final regulations by hiring an additional staff member whose sole role is to serve as the Title IX Coordinator, given that 34 CFR 106.8 already requires the designation of a responsible employee. Additionally, individual elementary and secondary schools are generally not recipients as defined in the final regulations pursuant to §106.30; they are operational units of the recipient entity, which is the local education agency. These final regulations do not require each operating component of each recipient to independently designate and authorize a Title IX Coordinator. Instead, the LEA is the recipient and would therefore be responsible for designating and authorizing an employee to serve as the Title IX Coordinator.

Changes: None.

Comments: Several commenters asserted that the RIA's estimate that the Title IX Coordinator can review and revise their regulations, in an average time of eight hours, is not tenable because changes to policy and procedures at institutions of higher education require broad consultation and participation of stakeholders across the institution, including but not limited to students, faculty, student affairs staff, academic affairs staff, human resources professionals, senior staff members, and even trustees. Multiple commenters stated that policy changes demand significant time and prescribed processes for approval, adoption, and ratification at the institutional and system level, resulting in the need for substantial human and financial resources to make those changes. One commenter estimated that, at the commenter's institution, changing their policies and procedures would take about two to six months, because changing a policy means involving a board of trustees, the president, a direct supervisor, faculty governance, and receiving student feedback.

Discussion: We recognize that the process for drafting and approving new policies and procedures can vary widely across recipients. We recognize that the estimate of two to six

months provided by the commenter encompasses the overall process and does not represent two to six months of full-time, active work. Therefore, we have revised our estimates of the average amount of time needed by recipients to revise their grievance procedures and have added additional time for administrators to review and approve the final policies and procedures. At the LEA level, we now assume this process will take six hours from the Title IX Coordinator and 24 hours from an attorney. We also assume two hours from an administrator to review and approve the policies. At the IHE level, we assume this process will take 12 hours from the Title IX Coordinator and 48 hours from an attorney. We have also added four hours for an administrator to review and approve the policies. For other entities, we assume the process will take four hours for a Title IX Coordinator, 16 hours from an attorney, and two hours from an administrator.

Changes: We have revised our estimates of the amount of time necessary for recipients to revise their policies and grievance procedures and added time for review and approval of the policies and procedures by administrators.

Comments: Several commenters asserted that the proposed regulations represent a dramatic increase in the cost of administering Title IX, since most Title IX Coordinators at small institutions are smaller roles, often comprising of one of several “hats” a single administrator will wear. One commenter asserted that the proposed regulations would require schools to increase the amount of time spent on each investigation, despite a reduction in formal investigations. Several commenters asserted that under the proposed regulations, many small institutions would be required to employ a dedicated Title IX Coordinator, a separate investigator, and a separate decision-maker, all of whom will need mandatory Title IX training. Additionally, commenters stated that the school will need to provide a mediator to facilitate the informal, mediated resolution, and hearing advisors to both parties if they do not provide one for

themselves. According to comments, under this rubric, small institutions would be required to retain up to six individuals to handle a small number of formal investigations. One commenter stated that, according to a 2018 study, "most Title IX Coordinators were in part-time positions with less than three years of experience."[1952]

Discussion: We have considered the overall impact of these final regulations and, as discussed herein, we believe that the average recipient will see a net decrease in burden under these final regulations and that any increase in time spent by recipients on any individual investigation will be more than offset by the fewer number of investigations. Particularly for smaller entities, we do not believe that the workload for a Title IX Coordinator would necessitate the hiring of a dedicated staff member. While recipients may choose to hire a dedicated staff member as the Title IX Coordinator, we do not believe that in most instances, such an approach would be warranted solely as a result of these final regulations. For example, although the investigator may not be the same person as the decision-maker under § 106.45(b)(7)(i), these final regulations do not preclude the Title IX Coordinator from also serving as the recipient's investigator as long as the Title IX Coordinator does not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent under § 106.45(b)(1)(iii). The same holds true for the other positions described by the commenters. These final regulations do not require a recipient to provide an informal resolution process pursuant to § 106.45(b)(9) and do not preclude the Title IX Coordinator from serving as the person designated by a recipient to facilitate an informal resolution process.

[1952] Jacquelyn D. Wiersma-Mosley & James DiLoreto, *The Role of Title IX Coordinators on College and University Campuses*, 8 BEHAV. SCI. 4 (2018), https://www.mdpi.com/2076-328X/8/4/38/htm (click on "Full-Text PDF") (page references herein are to this PDF version).

The Department acknowledges that many recipients will designate a person other than the Title IX Coordinator to facilitate an informal resolution process and that § 106.45(b)(1)(iii) requires that a recipient to train any person designated by the recipient to facilitate an informal resolution process. Accordingly, the Department adjusts its cost estimates to include the training of the person designated by the recipient to facilitate an informal resolution process and other costs associated with an informal resolution process.

Changes: The Department adjusts its cost estimates to include the training of the person designated by the recipient to facilitate an informal resolution process and other costs associated with an informal resolution process.

Section 106.44(a) Supportive Measures

Comments: Multiple commenters asserted that coordinating supportive measures for complainants, while also accommodating the respondent due to the presumption of innocence, will be time-consuming and costly for schools. One commenter asserted that, if the respondent is found responsible and suspended or expelled, the conflict is removed, which removes the need, and cost, for staff to coordinate additional supportive measures for complainants. The commenter expressed concern that the proposed regulations would require schools to divert additional resources towards supportive measures, including no-contact orders, scheduling checks to ensure students will not cross paths, working with the Registrar's Office and the complainant to switch classes, and making other academic accommodations for multiple semesters, for perhaps multiple years. One commenter reported that providing supportive measures to a student takes one to two hours per semester for each student, for an active caseload of 30 to 40 students per year. At most, the staff member spends two full working weeks at the beginning of each semester coordinating supportive measures by making calls to set up accommodations and checking for

potential conflicts. The commenter projects the tangible financial costs of this work on supportive measures to be about six weeks of the commenter's yearly salary.

Numerous commenters noted that the RIA failed to estimate the costs of providing additional supportive measures, despite the NPRM acknowledging that the proposed rules encouraged recipients to direct complainants towards services that qualify as supportive measures. These commenters also asserted that increasing campus escort services and other security services will require additional staff hires and working hours. One commenter argued that the NPRM's assumption that counseling services are already largely offered for free to students is not accurate, as many students are still responsible for co-pays for mental health services and not all students have health insurance. The commenter cited a news article which reported that, as of 2016, 8.7 percent of all students or 1.7 million individuals remained uninsured.

Discussion: We disagree with commenters that we failed to account for supportive measures in the NPRM. We discussed at great length the complexities of accurately capturing the full range of costs associated with the proposed requirement, solicited specific feedback from the general public, and estimated time burdens for several staff.[1953] We appreciate the commenter who asserted that the provision of supportive measures takes approximately one to two hours per semester per student given that our initial estimates assumed three hours per year per student. Further, we appreciate that the commenter provided a potential upper bound for our estimates – two working days per semester for a caseload of 30 students or approximately two hours per student per year at the beginning of the semester. We recognize that Title IX Coordinators,

[1953] *See* 83 FR 61487.

coordinating the provision of supportive measures for larger numbers of students, will have greater time burdens than those serving fewer students and, therefore, our estimates are intended to capture the average burden across all students and recipients. We are unclear on the specific concern raised by the commenter regarding the provision of supportive measures after a respondent is removed from campus, but we note that our assumptions regarding the provision of supportive measures is not related to the outcome of the grievance process. Regarding the costs of the supportive measures themselves, we note that we did not receive estimates from the public for us to consider. We note that a large number of supportive measures likely to be offered by recipients such as changing class assignments or allowing a complainant to have more time to complete an assignment or to take a test would have little to no cost for the recipient. Other supportive measures, which may be offered less frequently (for example, providing campus security escorts), would necessarily have much higher average costs.

Without information from the public on an appropriate cost, we have opted, in these final estimates, to include an average cost of $250 per provision of supportive measures to reflect the cost to recipients to provide the services. We recognize that, in many instances, this will represent an overestimate of the actual costs borne by recipients and that, in a smaller number of instances, it will represent an underestimate. To provide greater clarity to the public regarding the impact of this assumption on our final cost estimates, we calculated three alternative models, in addition to the mainline estimate, to assess the sensitivity of our analysis to this assumption.

TABLE VI. SENSITIVITY ANALYSIS OF COSTS OF SUPPORTIVE MEASURES

Estimated cost of supportive measures	$100	$250	$1000
Estimated total cost of final regulations	($708,607)	$82,953,995	$501,267,005

Changes: The Department has included a cost of $250 for supportive measures.

Section 106.45(b)(1)(iii) Title IX Coordinators, Investigators, and Decision-makers must be Properly Trained

Comments: Many commenters raised the issue that ending the single investigator model would result in burdensome compliance costs on schools. Commenters emphasized that the NPRM would require schools to hire and train multiple individuals to fill different roles, thus increasing compliance costs. Commenters argued that this would be especially burdensome for smaller community colleges and rural schools with fewer resources and available staff. The NPRM would potentially require recipients to hire and train six people, including a Title IX Coordinator, an investigator, a decision-maker, two party advisors, and an appeals decision-maker.

Commenters noted that schools are not courts of law, and yet training costs would be significant under the NPRM, such as legal training for decision-makers on conducting quasi-judicial proceedings, ruling on objections, and managing attorneys. Schools would have to meet these costs even if they rarely have Title IX complaints and investigations. Staff at many schools necessarily wear multiple hats and perform multiple functions, and conducting simultaneous Title IX investigations could be impossible under the proposed regulations. Further, commenters argued that it is already challenging for recipients to find adequate talent and hiring staff with sufficient expertise in these roles. These commenters asserted the increased litigation risk as a

result of the proposed regulations would discourage people from serving in these roles. One commenter suggested the NPRM would likely require recipients to spend about $400,000 on salary to manage Title IX cases, which undermines the Department's contention that the proposed regulations would save recipients money. One commenter asserted that the compliance burden is especially heavy given the uncertain future funding of IHEs and skepticism of higher education at the State level. Commenters argued that the Department should not impose regulations that require additional staffing and resources without providing the necessary funding, and many institutions may have no choice but to pass along these substantial costs to students.

Discussion: We appreciate the commenters' concerns and agree that the practical effects of proposed regulations on regulated entities should be a primary concern when engaging in rulemaking. As explained throughout this preamble, we believe that the costs and burdens on regulated entities serve the important purpose of furthering Title IX's non-discrimination mandate. We note that, while it is possible that recipients could respond to these final regulations by hiring additional staff, we believe commenters overstate both the likelihood and the magnitude of such a response.

Generally, we believe that the actual regulatory requirements for Title IX Coordinators, investigators, advisors, and decision-makers are flexible and the change in the necessary time commitments at the average recipient entity are so negligible that it is highly unlikely that these final regulations would result in a critical need for more staffing at recipient entities. Recipients are already required to designate a responsible employee under 34 CFR 106.8(a), which is essentially the same person as the Title IX Coordinator in these final regulations, so it is unclear that these final regulations will necessitate hiring an additional staff member to fulfill a role

already fulfilled by another employee. Regarding investigators, it is unclear why that role could not be fulfilled by an individual already conducting other investigations on behalf of the recipient, and as previously stated, these final regulations do not preclude the Title IX Coordinator from also serving as the recipient's investigator. Although the commenters specifically noted hiring attorneys, we believe they are referring to the requirements, under §106.45(b)(6)(i), relating to providing certain parties with advisors for the purposes of conducting cross-examination during live hearings. We note that § 106.45(b)(6)(i) does not require those advisors to be attorneys, nor does it require them to have any specialized legal training. Further, given that recipients are only required to provide advisors in the event that a party does not have an advisor of choice present at the live hearing, we think the number of instances in which such recipients would provide such advisors would be so minimal that institutions would be highly unlikely to hire two additional, highly paid staff to fulfill those roles. Instead, we think that most recipients have administrative and other staff who may serve as an assigned advisor to a party in those instances where a postsecondary institution is required to hold a live hearing and one or both parties appear at the live hearing without the party's own advisor of choice. Finally, with regard to decision-makers, the requirements in the final regulations are flexible enough that it is unclear why an individual already serving in a decision-making capacity would be unable to fill such a role.

We note that recipients may opt to provide additional training to Title IX Coordinators, investigators, decision-makers, and any person designated by a recipient to facilitate an informal resolution process about their roles and how to execute them effectively. As such, we have revised our estimates related to the training of staff.

Regarding the alternative estimate relating to the salary burden on recipients to comply with these final regulations, we disagree. It would be inappropriate to assume such a high burden would be undertaken by the average recipient given the relative cost and time commitments. We note that, based on wage rate data from BLS, hiring a full-time Title IX Coordinator, an investigator, and a decision-maker would cost, on average, less than $325,000 per year. Not including the burden reductions associated with fewer Title IX investigations under these final regulations, we estimate the hour burden across these three roles to be less than 400 hours per year on average, or about six percent of the three full-time equivalents (FTEs).

The Department recognizes that all recipients face a degree of uncertainty in their future funding, and we believe that regulatory actions that reduce costs for recipients, such as these final regulations, provide much needed flexibility for recipients in responding to that uncertainty and help to minimize the financial burden passed onto students.

Changes: We have increased the amount of time estimated for training of Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process from 4 hours to 8 hours and have added additional training in each subsequent year.

Comments: Several commenters asserted the Department's estimate that Title IX Coordinators, investigators, and decision-makers would need only 16 hours of training is unrealistic. Numerous commenters also noted that the RIA's assumption that institutions will only be training one person for each role with respect to the Title IX Coordinator, investigator, and decision-maker is unrealistic for large universities. Additionally, several commenters stated that the NPRM failed to account for the costs associated with retraining members of the campus community who are no longer mandatory reporters because they would not be "responsible employees" or employees who are required to respond to allegations of sexual harassment under the proposed regulations.

Several commenters asserted that the RIA significantly underestimated the amount of time and resources small institutions would need to appropriately train Title IX Coordinators, investigators, and adjudicators. One commenter asserted that the Department projected these trainings as "one time" but neglected to consider the significant ongoing cost of training new staff members as a result of employment attrition and ensuring that all participants in the process have substantive ongoing training and preparation to ensure that their competency reflects the most up-to-date practices.

Discussion: We appreciate that our estimates of training may have been too low. As a result, we have increased our estimates of the time associated with training staff to eight hours for Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. We have also added training for 50 percent of personnel each year to account for turnover in staff or training of additional staff. We do not believe it is reasonable to include retraining for all staff of all recipients to ensure that they are aware that they are not considered "responsible employees" or employees to whom notice of sexual harassment or allegations of sexual harassment conveys actual knowledge to the recipient under the final regulations. We believe that such a purpose could be just as easily achieved by a distribution of the recipient's policies. Further, these final regulations charge an LEA with actual knowledge (and thus obligations to respond to sexual harassment) whenever any employee has notice of sexual harassment, so LEAs that already train nearly all their employees to be "responsible employees" likely will not alter that training under these final regulations, and for IHEs, these final regulations leave each institution flexibility to decide whether the institution desires all (or nearly all, or some subset) of its employees to be "mandatory reporters" who must report notice of

sexual harassment to the Title IX Coordinator. Accordingly, not all IHEs will modify their current policies regarding which employees are considered "responsible employees."

Changes: We have increased the duration and frequency of training activities for Title IX Coordinators, investigators, decision-makers, and any person designated by a recipient to facilitate an informal resolution process. We now assume eight hours of training for each staff member with additional training each subsequent year.

Comments: One commenter asserted that even if K-12 school districts could hire an adequate number of individuals to train, the cost of training and the ability to spare the time for that training is burdensome.

Another commenter stated that the RIA failed to acknowledge the costs that K-12 schools will need to spend to train their Title IX Coordinators. The same commenter also stated that the calculations do not appear to consider the amount of time employees will have to spend scheduling sessions to make information available, going back and forth about follow-up questions, additional travel time, etc. The commenter contended that these calculations do not appear to consider the overall burden this activity will place on already over-extended school personnel.

Discussion: As noted elsewhere, we have revised our estimates to include additional time for training Title IX Coordinators, investigators, decision-makers, and any person designated by a recipient to facilitate an informal resolution process. We are unclear why an LEA would be required under these final regulations to hire multiple staff members to conduct training. Further, it appears that the commenter is assuming the training of multiple Title IX Coordinators within LEAs. While recipients may identify individuals at each school to support Title IX compliance efforts, they are not required to do so under the final regulations, which require each recipient to

designate and authorize "at least one" employee to serve as a Title IX Coordinator pursuant to § 106.8(a). Section 106.30 defines an elementary and secondary school as an LEA, a preschool, or a private elementary or secondary school. Furthermore, the final regulations do not require training to be conducted in-person such that travel to and from training sessions is required; the final regulations also do not preclude training of Title IX Coordinators to be conducted online or virtually. To the extent that LEAs opted to provide training for school-level staff, we believe it is most likely that such trainings would be included in or replace existing training offered by the LEA and therefore the effects associated with the final regulations would be *de minimis*.

Changes: We have revised our estimates to include additional time for training Title IX Coordinators, investigators, decision-makers, and any person designated by a recipient to facilitate an informal resolution process.

Section 106.45(b)(5) Investigation of Formal Complaints

Comments: Some commenters expressed concern about the financial and administrative cost the proposed regulations will impose on recipients. Commenters contend that recipients are better equipped to conduct grievance procedures without outside advisors, and that allowing parties to have advisors will subject recipients to more litigation. Other commenters argued that training advisors, implementing evidentiary rules, and conducting campus procedures like a courtroom would be too costly for many recipients, especially K-12 institutions.

Discussion: We appreciate commenters' concerns, but we do not believe that allowing parties to have advisors will necessarily subject recipients to a greater litigation risk. We believe the final regulations clearly establish the expectations for recipients in a manner that is consistent with constitutional due process for misconduct proceedings, and, in so doing, may actually reduce undue litigation risk. We also note that we have, to the maximum extent possible, calculated the

likely costs of complying with these final regulations and believe that while many recipients will experience net costs, and the final regulations overall impose estimated net costs, the benefits of predictably, transparently protecting every student's civil rights under Title IX in a manner consistent with constitutional rights, outweigh the costs of compliance.

Changes: None.

Comments: Multiple commenters also noted that it would be expensive for universities to provide technology for parties to review the investigative report and other evidence that does not allow the parties to print or otherwise share the evidence with others. Several commenters asserted that, under the proposed regulations, small schools will have to bear the significant costs of electronic file-sharing platforms for making evidence available to parties and advisors. According to comments, services that provide these types of systems can add thousands of extra dollars to administrative systems on an annual basis.

Discussion: We agree that the proposed regulations may have proved confusing with respect to the requirement for recipients to provide the evidence to the parties in an electronic format for inspection and review. The proposed regulations allowed but did not require recipients to use a file-sharing platform, and the Department omits the reference to the file-sharing platform in these final regulations to alleviate any confusion. The Department revised § 106.45(b)(5)(vi) to state that recipients may provide the evidence to the parties in an electronic format or a hard copy.

Changes: We have revised § 106.45(b)(5)(vi) to state that recipients may provide the evidence to the parties in an electronic format or a hard copy for inspection and review.

Comments: One commenter asserted the requirement in the proposed regulations that the Title IX Coordinator must give the parties ten days to inspect and review evidence in § 106.45(b)(5)(vi), and another ten days to respond to the investigative report in §

106.45(b)(5)(vii), would result in a significant drain on resources and would draw out the processing time of every investigation. The commenter claimed that these two ten-day requirements would especially increase the administrative burden on small institutions.

Discussion: The Department is not convinced by the commenter's argument that these two ten-day periods would result in any delays in processing a formal complaint. These two ten-day periods allow both parties to inspect and review the evidence that may support or not support the allegations and also to review and respond to the investigative report. Each recipient may choose whether to give the parties ten calendar days or ten business days, and recipients retain discretion in this regard. It is not clear from the comment why providing parties adequate time to inspect and review the evidence and to review and respond to the investigation report would create a unique administrative burden for small entities.

Changes: None.

Section 106.45(b)(6) Hearings

Comments: Several commenters noted that the NPRM's requirement for live hearings with cross-examination would pose a significant cost to respondents who must hire an advisor competent at cross-examination, which will most likely be an attorney.

Discussion: We believe it is important to note that neither complainants nor respondents are required to hire advisors, and the final regulations expressly state that a party's advisor of choice may be, but need not be, an attorney. If a party does not have an advisor to conduct cross-examination on behalf of that party, it is incumbent upon a postsecondary institution to provide an advisor for that party at a live hearing under § 106.45(b)(6)(i) for the limited purpose of conducting cross-examination on behalf of the party who does not bring an advisor of choice to the hearing. Section 106.45(b)(6)(i) expressly states that such an advisor provided by the

recipient does not need to be an attorney. There are no requirements that advisors (whether a party's advisor of choice or a recipient-provided advisor at a live hearing) have any specialized training. People other than attorneys may conduct cross-examination, and not all attorneys regularly conduct cross-examination. For example, attorneys who special in transactional matters are usually not as skilled in conducting cross-examination. Regardless of these factors, our initial estimates included costs associated with an attorney to fulfill these advisor roles to provide an upper-bound of the likely costs of the live hearings. We note that our model makes no distinction between whether advisors are secured by complainants, respondents, or recipients – such a factor would not affect our estimate.

Changes: None.

Comments: Many commenters asserted that they would need to spend money on training staff to adjudicate at grievance proceedings or on hiring attorneys to adjudicate. One commenter stated that even though the NPRM notes the use of hearing boards has become a relatively common practice at the IHE level, this does not mean that all IHEs are using staff to handle Title IX hearings. The commenter stated that due to the legal liability and complexity of these cases, an increasing number of IHEs have hired outside hearing officers to handle their hearings and appeals. For the commenter's university, the expense per case runs from $5,000 to $20,000. The commenter acknowledges, however, that many IHEs already hire outside hearing officers, and predicts the practice will continue at universities and colleges around the country. Additionally, the same commenter predicted that costs for Title IX hearings have and will continue to increase regardless of whether these specific regulations become effective.

Another commenter disputed the Department's estimate that with respect to 60 percent of IHEs, the Title IX Coordinator also serves as the decision-maker. The commenter argued that

only allowing costs for an additional adjudicator in 40 percent of hearings is arbitrary and in direct contradiction to the proposed regulation, at § 106.45(b)(7)(i), which precludes the decision-maker from being the same person as the Title IX Coordinator or the investigator.

Discussion: We believe it is important to first clarify the Department's estimates and discussion in the NPRM. We note that the commenter may have misunderstood the Department's discussion of the individual serving as the decision-maker in the NPRM. In the NPRM, we noted that "we also assume that the Title IX Coordinator serves as the decision-maker in 60 percent of IHEs."[1954] That statement was intended to address our assumption regarding the baseline, and our underlying estimates and calculations assumed that Title IX Coordinators would no longer serve in such capacities. As noted in the NPRM, the assumption that Title IX Coordinators currently serve as decision-makers in 60 percent of IHEs was based on research cited in the notice.[1955] We also note that our estimates, which assume that all live hearings will be conducted with independent decision-makers moving forward was consistent with the proposed regulations. Further, whether or not recipients currently use decision-makers who are employees, or contract out to use independent or professional decision-makers, recipients retain these options under the final regulations. Finally, regarding the specific individual conducting the live hearing, we assumed that such an individual would be an adjudicator employed in the education sector. We believe that this assumption aligns with the commenter's recommendation.

Changes: None.

[1954] 83 FR 61488.
[1955] *Id*.

Comments: Several commenters asserted that many schools would need to spend significant funds on either training existing faculty and staff to perform cross-examinations or on hiring attorneys to perform cross-examinations. Many commenters stated that due to the nature of the proposed hearing and the legal acumen that would be required of advisors to effectively represent their party, that advisor would likely be an attorney. Commenters noted that providing one or more attorneys with the requisite knowledge will come at considerable expense to the recipient. At the same time, multiple commenters warned that the RIA's estimate for hourly costs of an attorney are too low.

Discussion: We appreciate commenters' concerns regarding the requirements in §106.45(b)(6)(i) that if a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party. Such advisors need not be provided with specialized training or be attorneys because the essential function of such an advisor provided by the recipient is not to "represent" a party but rather to relay the party's cross-examination questions that the party wishes to have asked of other parties or witnesses so that parties never personally question or confront each other during a live hearing.

While it would be within the discretion of recipients to hire attorneys to fulfill these roles, we believe it is more likely that recipients will opt to assign another member of its faculty or staff to conduct the cross-examination. In the NPRM, we estimated the costs of the proposed regulations using attorneys to fulfill these roles in order to provide a conservative estimate of the costs of each of these hearings. Regarding the hourly cost of attorneys used in the NPRM, those figures were based on the median hourly wage for attorneys in the education sector as reported by the BLS. BLS wage data is widely considered to be reliable estimates for use in such

analyses, and we do not believe it would be appropriate to single out a specific personnel category and use a different, and less rigorous, source.

Changes: None.

Comments: Several commenters asserted that it would be financially burdensome to provide audio-visual technology for the parties to listen and watch the live hearing in a different room while it is not their turn to be cross-examined. One commenter stated that the proposed regulations fail to account for the costs of this additional technology, including not just the purchase of software, but also the costs of launching and maintaining the technology. One commenter asserted that recipients would incur additional costs to create or renovate building space necessary to hold the live hearings and cross-examinations. Numerous commenters also asserted that the technology required to allow cross-examinations in other rooms would be costly for small institutions, as these smaller schools do not have dedicated space or current set-ups with the technology needed to grant a request for parties to be in separate rooms at live hearings. Additionally, several commenters asserted that the NPRM failed to account for the additional costs of money, time, and training that recipients would pay to implement a new system of documentation in its investigations and adjudications. One commenter asserted that the Department never estimated the costs for transcription and translation services that may be needed at the live hearings.

Discussion: We understand that very few recipients, as part of their regular operations, maintain separate hearing rooms equipped with closed-circuit cameras or other live audio and visual conferencing technology. However, the final regulations do not require recipients to construct such spaces or equip them with expensive technology. The final regulations create no requirements on the space in which the hearing is held and, therefore, we believe most recipients

will be able to identify a suitable space within their existing facilities such as an office, classroom, or conference room. Indeed, we believe that it would be the most efficient use of resources for recipients to use their limited available funding for creating new spaces to conduct these live hearings. Section 106.45(b)(6)(i) of these final regulations requires recipients, at the request of either party, to allow for the live hearing, including cross-examination, to occur with the parties in separate rooms and with technology allowing the decision-maker and parties to simultaneously see and hear the party or the witness answering questions. We note that this could be accomplished with an expensive closed-circuit television or video-conferencing system and, to the extent that recipients already possess such technologies, they could use them to meet the requirements of this part. We also recognize that a large number of recipients do not have such technology or equipment readily available to them. In such instances, recipients would be faced with either purchasing such equipment or using existing equipment paired with various software solutions. We believe that very few recipients are likely to, as a result of the final regulations, invest in costly new equipment for a relatively infrequent occurrence – that is, a recipient is unlikely to spend several thousand dollars on equipment and software it only intends to use one to three times per year. We believe it is much more likely that recipients will opt to use existing equipment, such as webcams, laptops, or cell phones, paired with free or relatively inexpensive software solutions. We note that there are more than a dozen free video web conferencing platforms that recipients could use to ensure that decision-makers and parties could simultaneously see and hear the party or witness who is answering questions. Further, the requirements for creating audio or audiovisual recordings or a transcript of hearings can be met at very low or no cost using commonly available voice memo apps or software or tape recorders. However, to ensure that we account for these costs where they may occur, we have revised our

assumptions to include a cost for the various technology requirements associated with the final regulations. As discussed above, we believe that recipients are unlikely to incur these costs and, as such, this approach represents an overestimate of likely costs incurred by recipients to comply with this requirement.

Changes: We have revised our estimates to include a cost of $100 per hearing to meet the audiovisual requirements in §106.45(b)(6)(i).

Comments: One commenter asserted that 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.

Discussion: We appreciate the commenters' feedback. We agree that it is likely that an advisor who may be, but is not required to be, an attorney, may need to spend additional time with a complainant or respondent outside of the hearing itself for a variety of purposes. As such, we have increased our estimated time commitment of advisors to eight hours per hearing at the LEA level and 60 hours at the IHE level.

Changes: We have increased our estimates of the time necessary on the part of an advisor with respect to hearings.

Section 106.45(b)(7) Determinations Regarding Responsibility

Comments: One commenter suggested that moving from the preponderance of the evidence standard to the clear and convincing evidence standard would increase costs to recipients because of the resulting protests, uproar, instability on campus, and litigation risk.

Discussion: The Department revised § 106.45(b)(7)(i) of the final regulations such that recipients would have a clear choice between applying the preponderance of the evidence standard or the clear and convincing evidence standard to reach determinations regarding responsibility. Given

this change, the Department cannot reliably predict how many recipients would choose the clear and convincing evidence standard, the number or degree of protests that would stem from such a choice, or the extent to which recipients would be exposed to litigation. We also presume that a recipient will consider all factors in choosing which standard to apply, including the effects mentioned by the commenter. Ultimately, because the final regulations permit a recipient to choose the standard of evidence it wishes to use, none of the costs mentioned by the commenter are directly attributable to the final regulations.

Changes: The Department has revised § 106.45(b)(7)(i) of the final regulations such that recipients would have a clear choice between applying the preponderance of the evidence standard or the clear and convincing evidence standard to reach determinations regarding responsibility. We have removed the limitation contained in the NPRM that would have permitted recipients to use the preponderance of the evidence standard only if they used that standard for non-sexual misconduct that has the same maximum disciplinary sanction.

Comments: Several commenters asserted that small institutions lack the human resources to comply with the prohibition of the single investigator model, and they expressed concern about how to afford the staff necessary to comply with the requirements in the proposed regulations. Commenters from small to mid-sized rural colleges, and mixed urban and rural colleges, stated that the Title IX Coordinator often wears multiple hats by also serving as the Human Resources Director, Dean of Students, or Administrative Vice President, as well as fulfilling other operational duties.

Discussion: We recognize that these final regulations may require a number of recipients to alter their current policies and practices. We note that although the investigator may not be the same person as the decision-maker under § 106.45(b)(7)(i), these final regulations do not preclude the

Title IX Coordinator from also serving as the recipient's investigator as long as the Title IX Coordinator does not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent under § 106.45(b)(1)(iii). As noted in the "Regulatory Flexibility Act" section of this notice, we do not believe that the costs associated with complying with these final regulations will unnecessarily burden small entities.

Changes: None.

Section 106.45(b)(8) Appeals

Comments: Commenters argued that §106.45(b)(8) of the final regulations will be costly for recipients to implement. Commenters also requested that the Department modify the proposed regulations to allow the same person who made the initial determination of responsibility to also make the appeal determination because otherwise the cost may be too great, especially for smaller and rural K-12 school districts and community colleges.

Discussion: We decline the commenters' suggested change. We believe it is important for the decision-maker reviewing appeals to be a different person than the person who made the initial decision, in part, because the decision-maker on appeal is asked to review the determination reached by the original decision-maker (including based on any claim of bias or conflict of interest on the part of the decision-maker). However, we note that our initial estimates only assumed training for a single decision-maker and did not include training for the additional individual who would be necessary for reviewing appeals because the proposed regulations, unlike the final regulations. Section 106.45(b)(8) of these final regulations requires recipients to offer appeals, equally to both parties, on three specified bases, and to ensure that the decision-maker on appeal is not the same person who served as the Title IX Coordinator, investigator, or decision-maker making the original determination. We have therefore updated our estimates to

include a second decision-maker for appeals. Our initial burden estimates related to the appeals process do not need to be updated to account for this change.

Changes: We have revised our estimates to account for the separate decision-maker necessary to review appeals.

Section 106.45(b)(9) Informal Resolution

Comments: Several commenters asserted that the RIA's estimate that ten percent of all formal complaints at the LEA and IHE level would be resolved through informal resolution is too low. One commenter recommended that the Department utilize the 34 percent figure reported by Wiersma-Mosley and DiLoreto.[1956]

Discussion: The Department is persuaded by these comments that more than ten percent of formal complaints may be resolved through informal resolution and adjusts this assumption upward in the final regulations. The 34 percent figure reported by Wiersma-Mosley and DiLoreto applies only to postsecondary institutions and not elementary and secondary schools, and, thus, is not the most reliable figure.[1957] Additionally, these final regulations do not require recipients to provide an informal resolution process and expressly prohibit recipients from providing an informal resolution process to resolve allegations that an employee sexually harassed a student pursuant to § 106.45(b)(9)(iii). We do not think it is appropriate to assume that 34 percent of all formal complaints will be resolved through informal resolution when the

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[1956] Jacquelyn D. Wiersma-Mosley & James DiLoreto, *The Role of Title IX Coordinators on College and University Campuses*, 8 BEHAV. SCI. 4, 6 (2018), https://www.mdpi.com/2076-328X/8/4/38/htm (click on "Full-Text PDF") (page references herein are to this PDF version).

[1957] *See* the discussion in the "Informal Resolution" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section. There are different views about informal resolution, and the Department does not wish to overestimate the number of recipients that may choose to offer an informal resolution process or assume the scope of any informal resolution process.

Department has precluded at least some formal complaints from being resolved through the informal resolution process. Accordingly, we adjust the assumption in the NPRM that ten percent of all formal complaints will be resolved through informal resolution and assume that 25 percent of all formal complaints will be resolved through informal resolution.[1958]

Changes: The Department assumes that 25 percent of all formal complaints will be resolved through informal resolution.

Executive Orders 12866, 13563, and 13771

Regulatory Impact Analysis

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;

[1958] An assumption of 25 percent will provide a more conservative estimate with respect to the net cost savings that recipients may realize as a result of the informal resolution process. The Department does not wish to overestimate the net cost savings as a result of the informal resolution process.

(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.

This final regulatory action is an economically significant regulatory action subject to review by OMB under section 3(f) of Executive Order 12866.

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 2020, any new incremental costs associated with a new regulation must be fully offset by the elimination of existing costs through deregulatory actions. OMB has determined that the final regulations are a significant regulatory action under Executive 13771.

We have also reviewed these 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 final regulations only on a reasoned determination that their benefits justify their costs. In choosing among alternative regulatory approaches, we selected those approaches that maximize net benefits. The information in this RIA measures the effect of these policy decisions on stakeholders and the Federal government as required by and in accordance with Executive Orders 12866 and 13563.[1959] Based on the analysis that follows, the Department

[1959] Although the Department may designate certain classes of scientific, financial, and statistical information as influential under its Guidelines, the Department does not designate the information in the Regulatory Impact Analysis in these final regulations as influential and provides this information to comply with Executive Orders 12866 and 13563. U.S. Dep't. of Education, Information Quality Guidelines (Oct. 17, 2005), https://www2.ed.gov/policy/gen/guid/iq/iqg html.

believes that these regulations are consistent with the principles in Executive Orders 12866 and 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 the regulatory action, the potential costs and benefits, assumptions, limitations, and data sources. Although the majority of costs associated with information collection are discussed within this RIA, elsewhere in this notice under the Paperwork Reduction Act of 1965, we also identify and further explain burdens specifically associated with information collection requirements.

Consistent with the statement in Executive Order 13563 that the Nation's regulatory system must "measure, and seek to improve, the actual results of regulatory requirements," we also intend to evaluate the economic impact of these final regulations on a voluntary, post-implementation basis. As additional data becomes available, we plan to analyze it and take appropriate steps, including employing the analysis in any future rulemaking.

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 did not provide sufficiently clear standards for how recipients must respond to allegations of sexual harassment, including defining what conduct constitutes sexual harassment. To address this concern, we promulgate these final regulations to recognize and address sexual harassment as a form of sex discrimination under Title IX for the purpose of ensuring that recipients understand their legal obligations, including what conduct is actionable as harassment under Title IX, when and how a recipient must respond to allegations of sexual harassment, and particular requirements that such

a response must meet in order to ensure that the recipient is protecting the rights of all persons, including students, to be free from sex discrimination in the recipient's education program or activity.

In addition to addressing sexual harassment, the Department has concluded it is also necessary to amend some of the existing regulations that apply to all sex discrimination and not just sexual harassment under Title IX. We amend existing regulations by stating that Title IX does not require recipients to infringe upon existing constitutional protections, that the Assistant Secretary for Civil Rights may require a recipient to take remedial action to remedy a violation of 34 CFR part 106, consistent with 20 U.S.C. 1682, 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. Additionally, we amend existing regulations regarding the designation of a Title IX Coordinator (referred to as a responsible employee in existing regulation 34 CFR 106.8(a)), dissemination of the recipient's notice that it does not discriminate on the basis of sex, and adoption of grievance procedures to address sex discrimination and a grievance process to address sexual harassment, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond.

Discussion of Costs, Benefits, and Transfers

The Department has analyzed the costs of complying with the final regulations. Due to uncertainty about the current capacity of recipients, lack of high-quality comprehensive data about the status quo, and the specific choices that recipients will make regarding how to comply with these final regulations, the Department cannot estimate these costs with absolute precision. However, as discussed below, we estimate these final regulations to result in a net cost of between $48.6 and $62.2 million over ten years.

The Department has reviewed the comments submitted in response to the NPRM and has revised some assumptions in response to the feedback we received. Our rationale for such revisions is described elsewhere in this notice. For the sake of transparency of this analysis, even in instances where our estimates did not change, we have provided our initial rationale herein.

To accurately estimate the costs of these final 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 IHEs. In 2014, the U.S. Senate Subcommittee on Financial and Contracting Oversight released a report[1960] 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 the size of the 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

[1960] Claire McCaskill, S. Subcomm. on Financial Contracting Oversight – *Majority Staff, Sexual Violence on Campus, 113th Cong*. (2014).

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 ten 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 institutions in the report. In order to do so, the Department analyzed sexual offenses reported under the Clery Act and combined this data with total enrollment information from the Integrated Postsecondary Education Data System (IPEDS) for all Title IV-eligible institutions within the United States, as these institutions must comply with the Clery Act. 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 institutions in each category to arrive at an estimated average 2.36 investigations of sexual harassment per IHE per year.

A number of commenters indicated that our initial estimate of the current number of investigations occurring at IHEs was too low. As described in this Regulatory Impact Analysis section of this notice, we have upwardly revised this estimate. Based on public comment, it was clear that our coding of the Senate subcommittee data may have been inadequate to fully account for the full range of investigations currently being undertaken by IHEs. We therefore took those data and used Clery data to determine a multiplier which may help us better transform the more limited scope of the Senate subcommittee data into the broader array of incidents that IHEs currently investigate. As noted in the NPRM and elsewhere in this notice, we recognize that there are weaknesses with the Clery data, such as the fact that Clery data may not capture all incidents of sexual harassment that occur on campus. However, we believe it is the best proxy for us to use in transforming the more direct data we have from the Senate subcommittee report. Clery data can provide useful information about the relationships between various types of incidents because Clery data is likely to be positively correlated with the actual underlying number of incidents – that is, when the underlying number of instances of sexual harassment increase (particularly sexual assaults, dating violence, domestic violence, and stalking), the number of incidents reported under the Clery Act will also increase. Although we requested that the public inform us of any better approach to estimating these baselines, we did not receive any quality alternatives. For all of these reasons, we are proceeding with using our initial estimates of the baseline number of investigations increased by a factor of 1.416, which accounts for the

inclusion of dating violence, domestic violence, and stalking incidents. We now assume a baseline of 5.70 investigations per year per IHE.

As noted in the NPRM, 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.

The Department issued guidance regarding Title IX compliance in 2011, which resulted in recipients conducting more investigations of incidents of sexual harassment as the 2011 Dear Colleague Letter provided that "[r]egardless of whether a harassed student, his or her parent, or a third party files a complaint under the school's grievance procedures or otherwise requests action on the student's behalf, a school that knows, or reasonably should know, about possible harassment must promptly investigate to determine what occurred . . . ."[1961] In 2017, the Department rescinded that guidance and published alternative, interim guidance while this regulatory action was underway. The Department reaffirmed that the interim guidance is not legally binding on recipients. Wiersma-Mosley and DiLoreto[1962] did not identify substantial rollback of Title IX activities among IHEs compared to Richards,[1963] who found substantial

[1961] 2011 Dear Colleague Letter at 4.
[1962] Jacquelyn D. Wiersma-Mosley & James DiLoreto, *The Role of Title IX Coordinators on College and University Campuses*, 8 BEHAV. SCI. 4 (2018), https://www.mdpi.com/2076-328X/8/4/38/htm (click on "Full-Text PDF") (page references herein are to this PDF version).
[1963] Tara N. Richards, *An updated review of institutions of higher education's responses to sexual assault: Results from a nationally representative sample*, 34 JOURNAL OF INTERPERSONAL VIOLENCE 1 (2016).

changes relative to Karjane, Fisher, and Cullen.[1964] 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 Dear Colleague Letter 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 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 Dear Colleague Letter 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 Dear Colleague Letter 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 Dear Colleague Letter 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 Dear Colleague Letter 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 final regulations. We therefore

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[1964] Heather M. Karjane *et al.*, *Campus Sexual Assault: How America's Institutions of Higher Education Respond* 62-94, Final Report, NIJ Grant # 1999-WA-VX-0008 (Education Development Center, Inc. 2002), https://www.ncjrs.gov/pdffiles1/nij/grants/196676.pdf.

estimate savings for this group of recipients only. We estimate no cost savings for recipients in the first and third groups.

In estimating the number of recipients in each group, we assume that most LEAs and 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 Dear Colleague Letter or the 2014 Q&A or would have failed to align their activities with the guidance initially. Therefore, we estimate that only five percent of LEAs and five percent of IHEs fall into Group 1. 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 final regulations. Our model accounts for their decision to do so, and we only assume that 50 percent of IHEs experience any cost savings from these final regulations (placing them in Group 2). Therefore, we estimate that Group 3 will consist of five percent of LEAs and 45 percent of IHEs. We did not receive public comment directly responsive to these estimates and have therefore maintained them in this final cost analysis.

We have revised our baseline assumptions by adding entities other than LEAs and IHEs into our model. These entities are recipients of Federal education funding but may not operate a traditional education program (e.g., museums, libraries, cultural centers). We are not aware of the extent to which such entities are currently conducting Title IX investigations and therefore assume that they are conducting two such investigations per year with a reduction of 50 percent after these final regulations become effective. We should note that generally, these other entities

are very small and have few employees and no full-time students. We therefore think it unlikely they would have a baseline number of investigations much higher than our assumption. However, to provide full transparency to the general public, we have included the information in Table VII, which shows the impact on our estimates of alternative assumptions about the baseline number of investigations and the reduction in that number resulting from these final regulations:

TABLE VII. SENSITIVITY ANALYSIS OF OTHER ENTITIES BASELINE ASSUMPTION

		Reduction as a result of the rule		
		90%	50%	10%
Baseline number of investigations	15/YEAR	$116,766,845	$195,526,067	$274,285,289
	2/YEAR	$72,452,766	$82,953,995	$93,455,225
	1/YEAR	$69,043,990	$74,294,605	$79,545,220

We further assume that 90 percent of other entities will be in the first analytical group as discussed in the NPRM, with a remaining five percent in each of the other two groups. This assumption is based on a belief that entities, given their small size and limited capacity, would be more likely to adopt a minimal Title IX compliance framework, to the extent that they have one currently in operation. We maintain our assumption about how LEAs and IHEs fall into those analytical groups.

For comparability purposes between the final regulations and the NPRM, we have retained the number of LEAs and IHEs we used in the NPRM.

Unless otherwise specified, our model uses median hourly wages for personnel employed in the education sector as reported by the Bureau of Labor Statistics[1965] and an employer cost for employee compensation rate of 1.46.[1966]

We assume all recipients will need to take time to review and understand these final regulations. At the LEA level, we assume four hours for the Title IX Coordinator (assuming a loaded wage rate of $65.22 per hour for educational administrators), and eight hours for an attorney (at a rate of $90.71 per hour). At the IHE level, we assume eight hours for the Title IX Coordinator and 16 hours for an attorney. We did not receive public comment on these estimates and have therefore not revised them from the NPRM. For other entities, we assume four hours for the Title IX Coordinator and eight hours for an attorney. We note that our estimates in the NPRM incorrectly omitted costs for reviewing the final regulations at the IHE level and some personnel at the LEA level. We have corrected that error for these estimates. We therefore estimate the cost of this activity as approximately $30,324,610.

We assume that all recipients will need to revise their grievance procedures. We assume that at the LEA level this will take six hours for the Title IX Coordinator and 24 hours for an attorney with an additional two hours for an administrator to review and approve them. At the IHE level, we assume this will take 12 hours for the Title IX Coordinator and 28 hours for an attorney with an additional four hours for an administrator to review and approve them. These estimates were revised from the NPRM in response to public comment. For other entities, we

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[1965] U.S. Dep't. 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.

[1966] U.S. Dep't. 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.

assume this will take four hours for a Title IX Coordinator and 16 hours for an attorney with an additional two hours for an administrator to review and approve them. We therefore estimate the cost of this activity as approximately $82,441,460.

We assume 40 percent of LEAs, 20 percent of IHEs,[1967] and all other entities will need to post their non-discrimination statement. At the LEA level, we assume this will take one half hour each for a Title IX Coordinator and an attorney and two hours for a web developer (at $44.12 per hour). At the IHE level, we assume this will take one hour each for the Title IX Coordinator and an attorney and two hours for a web developer. We did not receive public comment on these estimates and have therefore not revised them from the NPRM. For other entities, we assume this will take one hour each from the Title IX Coordinator and an attorney and two hours for a web developer. We therefore estimate the cost of this activity as approximately $1,494,020.

We assume that all recipients will need to train their Title IX Coordinators, an investigator, any person designated by a recipient to facilitate an informal resolution process (e.g., a mediator), and two decision-makers (assuming an additional decision-maker for appeals). We assume this training will take approximately eight hours for all staff at the LEA and IHE level. These estimates have been revised since the NPRM due to public comment. For other entities, we assume only four hours of training for the Title IX Coordinator, as we believe that their smaller organizational footprint and more limited staffing may result in a shorter training

[1967] Richards, and Wiersma-Mosley & DiLoreto at 5, found that approximately 80 percent of IHEs (81 percent and 79 percent, respectively) posted their policies and procedures. Jacquelyn D. Wiersma-Mosley & James DiLoreto, *The Role of Title IX Coordinators on College and University Campuses*, 8 BEHAV. SCI. 4 (2018), available at https://www.mdpi.com/2076-328X/8/4/38/htm (click on "Full-Text PDF") (page references herein are to this PDF version); Tara N. Richards, *An updated review of institutions of higher education's responses to sexual assault: Results from a nationally representative sample*, 34 JOURNAL OF INTERPERSONAL VIOLENCE 1 (2016).

time for such staff. We therefore estimate the cost of this activity as approximately $52,135,230 in Year 1 and $26,067,620 in each subsequent year.

The final regulations require recipients to conduct an investigation only if a formal complaint of sexual harassment is filed by the complainant or signed by the Title IX Coordinator. 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) at 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 regulations on various institutions. Specifically, we assumed in the NPRM that, under these regulations, the gap in the rate of investigations between large IHEs and smaller ones would decrease by approximately 50 percent.

However, we believe that, given revisions to the definition of "formal complaint" in § 106.30, it will be easier and more likely for complainants to file a formal complaint if they wish to do so. Thus, we now only assume a smaller reduction in the number of investigations than we did in the NPRM – a 40 percent "gap closing" as opposed to the 50 percent included in the NPRM. This figure was not reduced further because we believe that the inclusion of dating violence, domestic violence, and stalking to the definition of "sexual harassment" may offset the effects from an easier formal complaint process. Specifically, we believe that, due to the nature of dating violence and domestic violence, individuals may be less likely to file a formal complaint than they would in instances of sexual assault.

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 1.60. This reduction is equivalent to all IHEs in Group 2 experiencing a reduction in investigations of approximately 28 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 final regulations), we assume a further reduction in the number of investigations per IHE per year of approximately 0.29, using the number of public property and reported-by-police reports as a proxy for the number of off-campus sexual harassment investigations currently being conducted by IHEs.[1968] As noted in our responses to comments, we believe that this approach will result in a likely underestimate of the cost savings from the final regulations as at least some proportion of noncampus incidents reported under the Clery Act would also not have to be investigated under the final regulations, but the Department does not assume any savings from a reduction in such investigations. As a result, we estimate that each IHE in Group 2 will experience a reduction in the number of Title IX investigations of approximately 1.89 per year.

At the LEA level, given the lack of information regarding the actual number of investigations conducted each year, the Department assumes that only 50 percent of the incidents reported in the CRDC would result in a formal complaint, for a reduction in the number of

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[1968] The Department notes that this likely represents a severe under-estimate of the actual proportion of incidents of sexual harassment that occur off campus and recognizes some off-campus incidents may be part of a recipient's education program or activity as described in § 106.44(a). 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/.

investigations of 1.62 per year. We did not receive public comment on this assumption and are therefore retaining it in these final estimates. 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 of sexual harassment. Such responses will not be dictated by the recipient's grievance procedures, and § 106.44(a) requires the Title IX Coordinator to promptly contact the complainant to discuss the availability of the supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.[1969] Although the final 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. Although such costs for supportive measures were not included in the NPRM, the Department has added a flat cost of $250 per set of supportive measures provided in response to public comment. We have also revised our initial estimates to include time burdens for students to each set of supportive measures provided. Further, the number of informal complaints or reports of sexual harassment has been adjusted due to changes in assumptions regarding the baseline number of investigations and the proportion of those that will result in formal complaints under the final regulations. At the LEA level, we assume that each response to a report of sexual harassment will take three hours from

[1969] In Angela F. Amar *et al.*, *Administrators' perceptions of college campus protocols, response, and student prevention efforts for sexual assault*, 29 VIOLENCE & VICTIMS 579 (2014), the most common campus services provided at the IHE level were mental health services, health services, law enforcement, and victim assistance/advocacy.

the Title IX Coordinator, eight hours for an administrative assistant, and 12 hours each for two students (at the K-12 level, we assume the Federal minimum wage for students). At the IHE level, we assume each informal complaint will require three hours from the Title IX Coordinator, 16 hours from an administrative assistant, and 24 hours each for two students (at the postsecondary level, we assume median hourly wage for all workers, or $18.58 per hour). For other entities, we assume each response to an informal complaint will require three hours from the Title IX Coordinator, eight hours from an administrative assistant, and 12 hours each for two students (for other entities, we average the wage rates for K-12 and postsecondary students). Across all recipients, we assume a flat cost of $250 per set of supportive measures provided. We therefore estimate the cost of this activity as approximately $31,164,490 per year.

In response to public comment, we have added a new category of costs not included in the NPRM. We recognize that there may be instances in which recipients expend time and resources to determine if a particular incident occurred within the recipient's education program or activity or in a circumstance in which the recipient would be otherwise required to investigate. At the LEA and IHE level, we assume this would take approximately four hours for a Title IX Coordinator and 12 hours from an investigator. We do not assume that these types of investigations will be likely at other entities, given their small scope and limited activities where they would exercise substantial control over respondents outside of clearly defined events and circumstances. We therefore assume that this activity would cost approximately $10,338,310 per year.

For formal complaints, we made several revisions to our initial assumptions based on public comment. First, we increased the amount of time an attorney or advisor would spend on any individual investigation. Second, we included two students as part of each investigation.

Third, we added a nominal $100 cost per hearing to accommodate the recordkeeping and technology requirements (e.g., video conferencing to meet the cross-examination requirements when parties request separate rooms). Finally, we have revised the number of formal investigations that occur based on the assumptions described above. At the LEA level, we therefore assume that a formal investigation will require eight hours from the Title IX Coordinator, 16 hours from an administrative assistant, eight hours each for two advisors (using the wage rate for attorneys), 20 hours for an investigator, eight hours for the decision-maker, and 12 hours each for two students. At the IHE level, we assume a formal investigation will take 24 hours from a Title IX Coordinator, 40 hours from an administrative assistant, 60 hours each for two advisors, 40 hours for an investigator, 16 hours for a decision-maker, and 24 hours each for two students. For other entities, we assume each formal investigation will require eight hours from a Title IX Coordinator, 16 hours for an administrative assistant, eight hours each for two advisors, 20 hours for an investigator, eight hours for a decision-maker, and 12 hours each for two students. We therefore estimate the reduction in burden associated with the reduced number of investigations as approximately $189,134,990 per year.

As in the NPRM, we assume that some subset of recipients may not currently be conducting investigations in a manner that would comply with the requirements of these final regulations. For those recipients, we assume an increased cost to comply. At the LEA level, we believe these requirements will require an additional two hours for a Title IX Coordinator, three hours from an administrative assistant, eight hours each for two advisors, ten hours from an investigator, and eight hours from a decision-maker. At the IHE level, these requirements will result in an increase of six hours for the Title IX Coordinator, ten hours for an administrative assistant, 60 hours each for two advisors, 20 hours for an investigator, and 16 hours from a

decision-maker. For other entities, we believe this will result in an increase of two hours for the Title IX Coordinator, four hours for an administrative assistant, one hour each for two advisors, ten hours for an investigator, and four hours for a decision-maker. We also assume the same additional nominal charge for all entities associated with recordkeeping and technology requirements. For analytical group one, we therefore estimate formal investigations to result in a cost increase of $21,867,410 per year.

As in the NPRM we assume that 50 percent of all decisions result in appeal. We revised our estimates in this section from the NPRM to increase the time commitment on the part of advisors and to add students. At the LEA level, we assume that each appeal will require 4 hours from the Title IX Coordinator, eight hours from an administrative assistant, eight hours each for two advisors, eight hours for a decision-maker, and 12 hours each for two students. At the IHE level, we assume each appeal would require approximately 12 hours from the Title IX Coordinator, 20 hours from an administrative assistant, 16 hours each for two advisors, 8 hours for a decision-maker, and 24 hours each for two students. For other entities, we assume each appeal will require four hours for the Title IX Coordinator, eight hours for an administrative assistant, 8 hours each for two advisors, eight hours for a decision-maker, and 12 hours each for two students. We therefore estimate a total cost of this activity as approximately $62,024,720 per year.

As in the NPRM, we assume that some proportion of formal complaints will be resolved through an informal resolution process. In response to public comment, we now assume that 25 percent of formal complaints will be resolved through an informal resolution process. In such instances, we assume such a process will reduce half the time burden on investigators and advisors, all of the time burden for decision-makers, and all of the costs associated with

recordkeeping and technology requirements for the live hearing.[1970] We further assume that it will increase the time burdens on administrative assistants and the time for a person designated by a recipient to facilitate an informal resolution process. We note that in the NPRM, we included additional time for the Title IX Coordinator who may help facilitate an informal resolution process. In response to public comment and to changes from the proposed regulations to the final regulations, we acknowledge that recipients may and are likely to designate a person other than the Title IX Coordinator to facilitate an informal resolution process. We have therefore reassigned this time burden to a person other than the Title IX Coordinator designated by the recipient to facilitate an informal resolution process and assume that the informal resolution will not create additional time burdens for the Title IX Coordinator relative to a grievance process under § 106.45. At the LEA level and in other entities, we assume an increase of four hours for an administrative assistant and four hours for a person designated by the recipient to facilitate an informal resolution process. At the IHE level, we assume each informal resolution will require an additional eight hours for an administrative assistant and an additional 8 hours for a person designated by the recipient to facilitate an informal resolution process. We therefore assume that informal resolutions will result in a net cost savings of $29,694,690 per year.

[1970] The Department assumes that 25 percent of formal complaints will be resolved through an informal resolution process under § 106.45(b)(9) because such an assumption will provide a more conservative estimate with respect to the net cost savings that recipients may realize as a result of the informal resolution process. The Department does not wish to overestimate the net cost savings as a result of the informal resolution process. In the "Paperwork Reduction Act of 1965" section, the Department assumes 100 percent participation with respect to the informal resolution process because such an assumption provides the most conservative estimate with respect to burden. Accordingly, the Department errs on the side of underestimating any net cost savings and overestimating burden.

As described in the NPRM, the final regulations require recipients to maintain certain documentation regarding their Title IX activities. We assume that the 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 four hours in Year 1 establishing the system and an administrative assistant would spend eight 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 (at $50.71/hr) to set up the system. 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 two hours and an administrative assistant four hours to do so. At the IHE level, we assume four hours from the Title IX Coordinator, 40 hours from an administrative assistant, and eight hours from a database administrator. We did not receive public comment on these time estimates and, therefore, have not revised these assumptions from the NPRM. Given their size and organizational complexity, we assume that other entities will face the same time burdens associated with complying as LEAs. We therefore estimate the recordkeeping requirements to cost approximately $39,114,530 in Year 1 and $15,189,260 in each subsequent year.

In total, we estimate these final regulations to generate a net cost of between $48.6 and $62.2 million over ten years.

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 Dear Colleague Letter 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 of the NPRM[1971] and for the reasons described throughout this preamble: the procedural and substantive problems with the 2011 Dear Colleague Letter and 2014 Q&A that prompted the Department to rescind that guidance remained as concerning now as when the guidance was rescinded. Additionally, 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 current regulations are entirely silent on whether Title IX and those implementing regulations expressly cover sexual harassment. The Department chose not to address a crucial topic like sexual harassment through guidance which would have left 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 both alleged victims 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., "respond supportively to persons who report sexual harassment" or "provide due process protections before disciplining a student for sexual

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[1971] 83 FR 61489.

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 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, (b) ensuring that schools and colleges take all reports of sexual harassment seriously (including by offering supportive measures to help complainants preserve equal educational access irrespective of whether allegations are investigated), (c) ensuring that schools and colleges treat all persons accused of sexual harassment fairly and provide both parties strong procedural rights in any grievance process resolving sexual harassment allegations, and (d) ensuring that victims of sexual harassment in recipients' education programs or activities are provided with remedies.

Accounting Statement

As required by OMB Circular A-4, in the following table we have prepared an accounting statement showing the classification of expenditures associated with the provisions of these final regulations. This table provides our best estimate of the changes in annual monetized costs, benefits, and transfers as a result of the final regulations.

TABLE VIII. 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 alleged victims are offered supportive measures, all persons accused are treated fairly, and both parties to any grievance process resolving sexual harassment allegations are given due process protections	Not Quantified
Preserve constitutional rights, recognize religious exemptions in the absence of written request	Not Quantified

	Costs	
	3%	7%
Reading and understanding the rule	$3,451,427	$4,035,086
Revision of grievance procedures	$9,383,159	$10,969,915
Posting of non-discrimination statement	$170,044	$198,799
Training of Title IX Coordinators, investigators, decision-makers, and any person designated by a	$29,034,530	$29,536,255

1997

recipient to facilitate an informal resolution process		
Response to informal reports	$70,343,754	$70,343,754
Reduction in the number of investigations	($178,796,679)	($178,796,679)
Increased investigation requirements	$21,867,415	$21,867,415
Appeal process	$62,024,722	$62,024,722
Informal resolution of complaints	($25,665,969)	($25,665,969)
Creation and maintenance of documentation	$17,912,337	$18,372,828

Regulatory Flexibility Act

This analysis, required by the Regulatory Flexibility Act, presents an estimate of the effect of the final 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.

As described in the NPRM, for purposes of assessing the impacts on small entities, the Department is defining a "small" IHE as a two-year IHE with an enrollment of less than 500

FTE or a four-year IHE with an enrollment of less than 1,000 FTE. Pursuant to conversations with the SBA, the Department has opted to define "small" LEAs as those with annual revenues of less than $7,000,000. The Department estimates there are approximately 631 small IHEs and 7,900 small LEAs.

Based on the model described above, an IHE conducting approximately 5.70 investigations per year with no reduction under the new rules and no investigations resulting in informal resolution would see an increase in costs of approximately $28,065 per year. According to data from IPEDS, in FY 2017, small IHEs had, on average, total revenues of approximately $9,925,999. Therefore, we would anticipate that the final regulations could generate a burden on small IHEs equal to approximately 0.28 percent of annual revenue. We therefore do not believe that these regulations would place a substantial burden on small IHEs.

Based on the model above, an LEA conducting an average of 3.23 investigations per year with no reduction under the new rules and no investigations resulting in informal resolutions would see an increase in costs of approximately $11,978 per year. In 2015-2016, small LEAs had an average total revenue of approximately $4,565,342. Therefore, we estimate that the final regulations could generate a cost burden on small LEAs of approximately 0.26 percent of total revenues. We therefore do not believe that these final regulations would place a substantial burden on small LEAs.

The Department certifies that this rule, if promulgated, will not have a significant economic impact on a substantial number of small entities.

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 Department's typical practice is to calculate burden over a three-year period. For transparency and to provide full information with respect to impact, the Department provides burden calculations for both a three-year period as well as the seven-year record retention period in the information below.

The following sections contain information collection requirements:

Proposed § 106.44(b)(3) Supportive Measures Safe Harbor in Absence of a Formal Complaint [removed in final regulations]

These final regulations do not include § 106.44(b)(3) as proposed in the NPRM, which provided recipients a safe harbor with respect to supportive measures. Accordingly, there is no burden to include.

§ 106.45(b)(2) Written Notice of Allegations

Section 106.45(b)(2) requires all recipients, upon receipt of a formal complaint, to provide written notice to the complainant and the respondent, informing the parties of the recipient's grievance process 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 recipients will need to create a form, or modify one already used, to comply with these requirements. With respect to all recipients, including elementary and secondary schools, postsecondary institutions, and other recipients of Federal financial assistance, we estimate that it will take the Title IX Coordinator one 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)(10) described below, for a total Year 1 cost of $2,650,654. The total burden for this requirement over three years or over seven years, which is the length of time that a recipient must maintain records under § 106.45(b)(10)(i), is 35,958 hours under OMB Control Number 1870-NEW, because this form only needs to be created once.

§ 106.45(b)(9) Informal Resolution

Section 106.45(b)(9) requires 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 – recipients to allow for voluntary participation in an informal resolution as a method of resolving the allegations in formal complaints without completing the investigation and adjudication. This provision prohibits recipients from offering or facilitating an informal resolution process to resolve allegations that an employee sexually harassed a student.

We estimate that not all elementary and secondary schools, postsecondary institutions, or other recipients will choose to offer informal resolution as a feature of their grievance process; of those recipients that do, we estimate that most recipients will need to create a form, or modify one already used, to comply with the requirements of this section. With respect to all recipients, including elementary and secondary schools, postsecondary institutions, and other recipients of Federal financial assistance, 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)(9). 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)(9) described above, for a total Year 1 cost of $2,650,654. The total burden for this requirement over three years or over seven years, which is the length of time that a recipient must maintain records under § 106.45(b)(10), is 35,958 hours under OMB Control Number 1870-NEW, because this form only needs to be created once. Even though not all recipients may choose to offer an informal resolution process, we are estimating this burden for 100 percent of recipients to provide the most conservative estimate of any burden.

§ 106.45(b)(10) Recordkeeping

Section 106.45(b)(10) requires recipients to maintain certain documentation regarding their Title IX activities. Recipients will be required to maintain for a period of seven years records of: sexual harassment investigations, including any determination regarding responsibility and any audio or audiovisual recording or transcript required under § 106.45(b)(6)(i), any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity; any appeal and the result therefrom; any informal resolution; and

all materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. Additionally, for each response required under § 106.44(a), a recipient must create, and maintain for a period of seven 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 deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity. The Department clarifies in these final regulations that if a recipient does not provide a complainant with supportive measures, then such documentation must include the reasons why such a response was not clearly unreasonable in light of the known circumstances. 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 of sexual harassment, and the necessity for additional or different measures, including any remedial actions under § 106.3(a). We estimate the volume of records to be created and retained may represent a decline from current recordkeeping due to clarification elsewhere in these final regulations 1) that an investigation under § 106.45 needs to be conducted only if a complainant files or a Title IX Coordinator signs a formal complaint and the allegations in the formal complaint are not dismissed under § 106.45(b)(3) and 2) that an informal resolution process may be used to resolve allegations in a formal complaint pursuant to § 106.45(b)(9); both of these provisions will likely result in fewer investigative records being generated.

We estimate that recipients will have a higher first-year cost associated with establishing the system for documentation with a lower out-year cost for maintaining it. With respect to

elementary and secondary schools, we assume that the Title IX Coordinator will spend 4 hours in Year 1 establishing the system and an administrative assistant will spend 8 hours doing so. With respect to postsecondary institutions, 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 of approximately $39,114,530 for 16,606 elementary and secondary schools, 6,766 postsecondary institutions, and 600 other entities that are recipients of Federal financial assistance. Given their size and organizational complexity, we assume that other entities that are recipients of Federal financial assistance that are not elementary and secondary schools or postsecondary institutions will face the same time burdens associated with complying as elementary and secondary schools.

In later years, we assume that the systems will be relatively simple to maintain. At the elementary and secondary school level as well as for other recipients of Federal financial assistance that are not elementary and secondary schools or postsecondary institutions, we assume it will take the Title IX Coordinator 2 hours and an administrative assistant 4 hours to do so. At the postsecondary institution 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 elementary and secondary schools and other recipients of Federal financial assistance will take 12 hours and postsecondary institutions will 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 elementary and secondary schools and other recipients of Federal financial assistance will take 6 hours annually and postsecondary

institutions will take 52 hours annually to maintain the recordkeeping requirement for Title IX sexual harassment documentation. The total burden for this recordkeeping over three years is 398,544 hours for elementary and secondary schools, 1,407,328 hours for postsecondary institutions, and 14,400 for other recipients of Federal financial assistance. The Department calculates burden over a seven-year period because § 106.45(b)(10)(i) requires recipients to maintain certain records for a period of seven years. The total burden for this recordkeeping requirement over seven years is 797,088 hours for elementary and secondary schools, 2,814,656 hours for postsecondary institutions, and 28,800 hours for other recipients of Federal financial assistance. Collectively, we estimate the burden over seven years for elementary and secondary schools, postsecondary institutions, and other recipients of Federal financial assistance for recordkeeping of Title IX sexual harassment documents will be 3,640,544 hours under OMB Control Number 1870-NEW.

Collection of Information

Regulatory section	Information collection	OMB Control Number and estimated burden [change in burden]
106.45(b)(2)	This regulatory provision requires recipients to provide parties with written notice when investigating a formal complaint.	OMB 1870-NEW. The burden over the first seven years will be $2,650,654 and 35,958 hours.
106.45(b)(9)	This regulatory provision requires recipients to provide written notice to	OMB 1870-NEW. The burden over the first seven

	parties wishing to participate in informal resolution of a formal complaint.	years will be $2,650,654 and 35,958 hours.
106.45(b)(10)	This regulatory provision requires recipients to maintain certain documentation related to Title IX activities.	OMB 1870-NEW. The burden over the first seven years will be $130,250,090 and 3,640,544 hours.
TOTAL		$135,551,398 3,712,460 hours

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2006

List of Subjects in 34 CFR Part 106

Education, Sex discrimination, Civil rights, Sexual harassment

_____
Betsy DeVos,
Secretary of Education.

2007

For the reasons discussed in the preamble, the Secretary amends 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 paragraph (a) to read as follows:

§106.3 Remedial and affirmative action and self-evaluation.

(a) *Remedial action*. If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity under this part, or otherwise violated this part, such recipient must take such remedial action as the Assistant Secretary deems necessary to remedy the violation, consistent with 20 U.S.C. 1682.

* * * * *

3. Section 106.6 is amended by revising the section heading and adding paragraphs (d), (e), (f), (g), and (h) 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)*. The obligation to comply with this part is not obviated or alleviated by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99.

(f) *Title VII of the Civil Rights Act of 1964.* Nothing in this part may be read in derogation of any individual's rights under title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* or any regulations promulgated thereunder.

(g) *Exercise of rights by parents or guardians.* Nothing in this part may be read in derogation of any legal right of a parent or guardian to act on behalf of a "complainant," "respondent," "party," or other individual, subject to paragraph (e) of this section, including but not limited to filing a formal complaint.

(h) *Preemptive effect*. To the extent of a conflict between State or local law and title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law.

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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 and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which employee must be referred to as the "Title IX Coordinator." The recipient must notify applicants

for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator pursuant to this paragraph. Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report. Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator.

(b) *Dissemination of policy*—(1) *Notification of policy.* Each recipient must notify persons entitled to a notification under paragraph (a) of this section that the recipient 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 admission (unless subpart C of this part does not apply) and employment, and that inquiries about the application of title IX and this part to such recipient may be referred to the recipient's Title IX Coordinator, to the Assistant Secretary, or both.

(2) *Publications.* (i) Each recipient must prominently display the contact information required to be listed for the Title IX Coordinator under paragraph (a) of this section and 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 (a) 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 title IX or 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 a grievance process that complies with § 106.45 for formal complaints as defined in § 106.30. A recipient must provide to persons entitled to a notification under paragraph (a) of this section notice of the recipient's grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond.

(d) *Application outside the United States.* The requirements of paragraph (c) of this section apply only to sex discrimination occurring against a person in the United States.

5. Section 106.9 is revised to read as follows:

§ 106.9 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

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 an exemption from the Assistant Secretary.

* * * * *

7. Add § 106.18 to subpart B to read as follows:

§ 106.18 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

2012

8. Add § 106.24 to subpart C to read as follows:

§ 106.24 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

9. Add § 106.30 to subpart D to read as follows:

§ 106.30 Definitions.

(a) As used in this part:

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 any employee of an elementary and secondary school. Imputation of knowledge based solely on vicarious liability 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 the respondent. The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient. "Notice" as used in this paragraph includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator as described in § 106.8(a).

Complainant means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.

Consent. The Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault, as referenced in this section.

Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed. A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under § 106.8(a), and by any additional method designated by the recipient. As used in this paragraph, the phrase "document filed by a complainant" means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint. Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party under this part or under § 106.45, and must comply with the requirements of this part, including § 106.45(b)(1)(iii).

Respondent means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

(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 determined by a reasonable person to be 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 20 U.S.C. 1092(f)(6)(A)(v), “dating violence” as defined in 34 U.S.C. 12291(a)(10), “domestic violence” as defined in 34 U.S.C. 12291(a)(8), or “stalking” as defined in 34 U.S.C. 12291(a)(30).

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 equal access to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment, or 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 recipient to provide the supportive measures. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

(b) As used in §§ 106.44 and 106.45:

Elementary and secondary school means a local educational agency (LEA), as defined in the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act, a preschool, or a private elementary or secondary school.

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Postsecondary institution means an institution of graduate higher education as defined in § 106.2(l), an institution of undergraduate higher education as defined in § 106.2(m), an institution of professional education as defined in § 106.2(n), or an institution of vocational education as defined in § 106.2(o).

10. Add § 106.44 to subpart D to read as follows:

§ 106.44 Recipient's response to sexual harassment.

(a) *General response to sexual harassment.* 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 promptly 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. For the purposes of this section, §§ 106.30, and 106.45, "education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. A recipient's response must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. The Department may not deem a

recipient to have satisfied the recipient's duty to not be deliberately indifferent under this part based on the recipient's restriction of rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment.

(b) *Response to a formal complaint.* (1) In response to a formal complaint, a recipient must follow a grievance process that complies with § 106.45. With or without a formal complaint, a recipient must comply with § 106.44(a).

(2) The Assistant Secretary will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient, or otherwise evidence of discrimination under title IX by the recipient, solely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence.

(c) *Emergency removal.* Nothing in this part 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 physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.

(d) *Administrative leave.* Nothing in this subpart precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45. This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.

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11. Add § 106.45 to subpart D to read as follows:

§ 106.45 Grievance process for formal complaints of sexual harassment.

(a) *Discrimination on the basis of sex.* A recipient's treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX.

(b) *Grievance process*. For the purpose of addressing formal complaints of sexual harassment, a recipient's grievance process must comply with the requirements of this section. Any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in § 106.30, must apply equally to both parties.

(1) *Basic requirements for grievance process*. A recipient's grievance process must—

(i) Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. Remedies must be designed to restore or preserve equal access to the recipient's education program or activity. Such remedies may include the same individualized services described in § 106.30 as "supportive measures"; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent;

(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 Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, 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 Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the definition of sexual harassment in § 106.30, the scope of the recipient's education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. A recipient must ensure that decision-makers receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section. A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of this section. Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints 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 time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes, and a process that allows for the

temporary delay of the grievance process or the limited extension of time frames 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 a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities;

(vi) Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility;

(vii) State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment;

(viii) Include the procedures and permissible bases for the complainant and respondent to appeal;

(ix) Describe the range of supportive measures available to complainants and respondents; and

(x) Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

(2) *Notice of allegations*—(i) 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 process that complies with this section, including any informal resolution process.

(B) Notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in § 106.30, 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 conduct allegedly constituting sexual harassment under § 106.30, 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 inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section. The written 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.

(ii) If, in the course of an investigation, the recipient decides to investigate allegations about the complainant or respondent that are 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 whose identities are known.

(3) *Dismissal of a formal complaint*—(i) The recipient must investigate the allegations in a formal complaint. If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient's education program or activity, or did not occur against a person in the United States, then the recipient

must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; such a dismissal does not preclude action under another provision of the recipient's code of conduct.

(ii) The recipient may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by the recipient; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

(iii) Upon a dismissal required or permitted pursuant to paragraph (b)(3)(i) or (b)(3)(ii) of this section, the recipient must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties.

(4) *Consolidation of formal complaints*. A recipient may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances. Where a grievance process involves more than one complainant or more than one respondent, references in this section to the singular "party," "complainant," or "respondent" include the plural, as applicable.

(5) *Investigation of a formal complaint*. When investigating a formal complaint and throughout the grievance process, 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 provided that the recipient cannot access, consider, disclose, or otherwise use a party's records

that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for a grievance process under this section (if a party is not an "eligible student," as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a "parent," as defined in 34 CFR 99.3);

(ii) Provide an equal opportunity for the parties to present witnesses, including fact and expert 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, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor 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 a 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 sufficient time for the party to prepare to participate;

(vi) 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 and inculpatory or exculpatory evidence whether obtained from a party or other source, 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 or a hard copy, and the parties must have at least 10 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 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

(vii) Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.

(6) *Hearings*. (i) For postsecondary institutions, the recipient's grievance process must provide for a live hearing. At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings. At the request of either party, the recipient must provide for the live hearing to occur with the

parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions. Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant. If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party. Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions. Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipient's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other. Recipients must create an audio

or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

(ii) For recipients that are elementary and secondary schools, and other recipients that are not postsecondary institutions, the recipient's grievance process may, but need not, provide for a hearing. With or without a hearing, after the recipient has sent the investigative report to the parties pursuant to paragraph (b)(5)(vii) of this section and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party. With or without a hearing, questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.

(7) *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 the standard of evidence described in paragraph (b)(1)(vii) of this section.

(ii) The written determination must include—

(A) Identification of the allegations potentially constituting sexual harassment as defined in § 106.30;

(B) A description of the procedural steps taken from the receipt of the formal 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 disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and

(F) The recipient's procedures and permissible bases for the complainant and respondent to appeal.

(iii) The recipient must provide the written determination to the parties simultaneously. The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

(iv) The Title IX Coordinator is responsible for effective implementation of any remedies.

(8) *Appeals*. (i) A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases:

(A) Procedural irregularity that affected the outcome of the matter;

(B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and

(C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

(ii) A recipient may offer an appeal equally to both parties on additional bases.

(iii) As to all appeals, the recipient must:

(A) Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;

(B) Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;

(C) Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of this section;

(D) Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;

(E) Issue a written decision describing the result of the appeal and the rationale for the result; and

(F) Provide the written decision simultaneously to both parties.

(9) *Informal resolution*. A recipient may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section. Similarly, a recipient may not require the parties to

participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed. However, 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: 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, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;

(ii) Obtains the parties' voluntary, written consent to the informal resolution process; and

(iii) Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

(10) *Recordkeeping.* (i) A recipient must maintain for a period of seven years records of –

(A) Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required under paragraph (b)(6)(i) of this section, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity;

(B) Any appeal and the result therefrom;

(C) Any informal resolution and the result therefrom; and

(D) All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.

(ii) For each response required under § 106.44, a recipient must create, and maintain for a period of seven 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 deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity. If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.

12. Add § 106.46 to subpart D to read as follows:

§ 106.46 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

13. Add § 106.62 to subpart E to read as follows:

§ 106.62 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

14. Subpart F is revised to read as follows:

Subpart F–Retaliation

Sec.

106.71 Retaliation

106.72 Severability

Subpart F–Retaliation

§ 106.71 Retaliation.

(a) *Retaliation prohibited*. No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part. Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation. The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or

filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder. Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).

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

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

§ 106.72 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

15. Add subpart G to read as follows:

Subpart G – Procedures

Sec.

106.81 Procedures

106.82 Severability

Subpart G – Procedures

§ 106.81 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 34 CFR 100.6-100.11 and 34 CFR part 101. The definitions in § 106.30 do not apply to 34 CFR 100.6-100.11 and 34 CFR part 101.

§ 106.82 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

Subject Index to Title IX Preamble and Regulation [Removed]

16. Remove the Subject Index to Title IX Preamble and Regulation.

17. In addition to the amendments set forth above, in 34 CFR part 106, remove the parenthetical authority citation at the ends of §§ 106.1, 106.2, 106.3, 106.4, 106.5, 106.6, 106.7, , 106.11, 106.12, 106.13, 106.14, 106.15, 106.16, 106.17, 106.21, 106.22, 106.23, 106.31, 106.32, 106.33, 106.34, 106.35, 106.36, 106.37, 106.38, 106.39, 106.40, 106.41, 106.42, 106.43, 106.51, 106.52, 106.53, 106.54, 106.55, 106.56, 106.57, 106.58, 106.59, 106.60, and 106.61.

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Title 34 → Subtitle B → Chapter I → Part 106

Title 34: Education

PART 106—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

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AUTHORITY: 20 U.S.C. 1681 *et seq.,* unless otherwise noted.

SOURCE: 45 FR 30955, May 9, 1980, unless otherwise noted.

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Subpart A—Introduction

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§106.1 Purpose and effective date.

Link to an amendment published at 85 FR 30579, May 19, 2020.

The purpose of this part is to effectuate title IX of the Education Amendments of 1972, as amended by Pub. L. 93-568, 88 Stat. 1855 (except sections 904 and 906 of those Amendments) which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part. This part is also intended to effectuate section 844 of the Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484. The effective date of this part shall be July 21, 1975.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682, as amended by Pub. L. 93-568, 88 Stat. 1855, and sec. 844, Education Amendments of 1974, 88 Stat. 484, Pub. L. 93-380)

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§106.2 Definitions.

Link to an amendment published at 85 FR 30579, May 19, 2020.

As used in this part, the term:

(a) *Title IX* means title IX of the Education Amendments of 1972, Pub. L. 92-318, as amended by section 3 of Pub. L. 93-568, 88 Stat. 1855, except sections 904 and 906 thereof; 20 U.S.C. 1681, 1682, 1683, 1685, 1686.

(b) *Department* means the Department of Education.

(c) *Secretary* means the Secretary of Education.

(d) *Assistant Secretary* means the Assistant Secretary for Civil Rights of the Department.

(e) *Reviewing Authority* means that component of the Department delegated authority by the Secretary to appoint, and to review the decisions of, administrative law judges in cases arising under this part.

(f) *Administrative law judge* means a person appointed by the reviewing authority to preside over a hearing held under this part.

(g) *Federal financial assistance* means any of the following, when authorized or extended under a law administered by the Department:

(1) A grant or loan of Federal financial assistance, including funds made available for:

(i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and

(ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.

(2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

(3) Provision of the services of Federal personnel.

(4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.

(5) Any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

(h) *Program or activity* and *program* means all of the operations of—

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

(ii) The entity of a 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)(i) A college, university, or other postsecondary institution, or a public system of higher education; or

(ii) A local educational agency (as defined in 20 U.S.C. 8801), system of vocational education, or other school system;

(3)(i) An entire corporation, partnership, other private organization, or an entire sole proprietorship—

(A) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(B) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(ii) 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 that is established by two or more of the entities described in paragraph (h)(1), (2), or (3) of this section; any part of which is extended Federal financial assistance.

(Authority: 20 U.S.C. 1687)

(i) *Recipient* means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives such assistance, including any subunit, successor, assignee, or transferee thereof.

(j) *Applicant* means one who submits an application, request, or plan required to be approved by a Department official, or by a recipient, as a condition to becoming a recipient.

(k) *Educational institution* means a local educational agency (LEA) as defined by section 1001(f) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 3381), a preschool, a private elementary or secondary school, or an applicant or recipient of the type defined by paragraph (l), (m), (n), or (o) of this section.

(l) *Institution of graduate higher education* means an institution which:

(1) Offers academic study beyond the bachelor of arts or bachelor of science degree, whether or not leading to a certificate of any higher degree in the liberal arts and sciences; or

(2) Awards any degree in a professional field beyond the first professional degree (regardless of whether the first professional degree in such field is awarded by an institution of undergraduate higher education or professional education); or

(3) Awards no degree and offers no further academic study, but operates ordinarily for the purpose of facilitating research by persons who have received the highest graduate degree in any field of study.

(m) *Institution of undergraduate higher education* means:

(1) An institution offering at least two but less than four years of college level study beyond the high school level, leading to a diploma or an associate degree, or wholly or principally creditable toward a baccalaureate degree; or

(2) An institution offering academic study leading to a baccalaureate degree; or

(3) An agency or body which certifies credentials or offers degrees, but which may or may not offer academic study.

(n) *Institution of professional education* means an institution (except any institution of undergraduate higher education) which offers a program of academic study that leads to a first professional degree in a field for which there is a national specialized accrediting agency recognized by the Secretary.

(o) *Institution of vocational education* means a school or institution (except an institution of professional or graduate or undergraduate higher education) which has as its primary purpose preparation of students to pursue a technical, skilled, or semiskilled occupation or trade, or to pursue study in a technical field, whether or not the school or institution offers certificates, diplomas, or degrees and whether or not it offers fulltime study.

(p) *Administratively separate unit* means a school, department or college of an educational institution (other than a local educational agency) admission to which is independent of admission to any other component of such institution.

(q) *Admission* means selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by a recipient.

(r) *Student* means a person who has gained admission.

(s) *Transition plan* means a plan subject to the approval of the Secretary pursuant to section 901(a)(2) of the Education Amendments of 1972, under which an educational institution operates in making the transition from being an educational institution which admits only students of one sex to being one which admits students of both sexes without discrimination.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980; 45 FR 37426, June 3, 1980, as amended at 65 FR 68056, Nov. 13, 2000]

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§106.3 Remedial and affirmative action and self-evaluation.

Link to an amendment published at 85 FR 30572, May 19, 2020.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *Remedial action.* If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall

take such remedial action as the Assistant Secretary deems necessary to overcome the effects of such discrimination.

(b) *Affirmative action.* In the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex. Nothing herein shall be interpreted to alter any affirmative action obligations which a recipient may have under Executive Order 11246.

(c) *Self-evaluation.* Each recipient education institution shall, within one year of the effective date of this part:

(1) Evaluate, in terms of the requirements of this part, its current policies and practices and the effects thereof concerning admission of students, treatment of students, and employment of both academic and non-academic personnel working in connection with the recipient's education program or activity;

(2) Modify any of these policies and practices which do not or may not meet the requirements of this part; and

(3) Take appropriate remedial steps to eliminate the effects of any discrimination which resulted or may have resulted from adherence to these policies and practices.

(d) *Availability of self-evaluation and related materials.* Recipients shall maintain on file for at least three years following completion of the evaluation required under paragraph (c) of this section, and shall provide to the Assistant Secretary upon request, a description of any modifications made pursuant to paragraph (c)(ii) of this section and of any remedial steps taken pursuant to paragraph (c)(iii) of this section.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§106.4 Assurance required.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *General.* Every application for Federal financial assistance shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Assistant Secretary, that the education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part. An assurance of compliance with this part shall not be satisfactory to the Assistant Secretary if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with §106.3(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior or subsequent to the submission to the Assistant Secretary of such assurance.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended to provide real property or structures thereon, such assurance shall obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used to provide an education program or activity.

(2) In the case of Federal financial assistance extended to provide personal property, such assurance shall obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases such assurance shall obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Form.* The Director will specify the form of the assurances required by paragraph (a) of this section and the extent to which such assurances will be required of the applicant's or recipient's subgrantees, contractors, subcontractors, transferees, or successors in interest.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980, as amended at 45 FR 86298, Dec. 30, 1980; 65 FR 68056, Nov. 13, 2000]

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§106.5 Transfers of property.

Link to an amendment published at 85 FR 30579, May 19, 2020.

If a recipient sells or otherwise transfers property financed in whole or in part with Federal financial assistance to a transferee which operates any education program or activity, and the Federal share of the fair market value of the property is not upon such sale or transfer properly accounted for to the Federal Government both the transferor and the transferee shall be deemed to be recipients, subject to the provisions of subpart B of this part.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§106.6 Effect of other requirements.

Link to an amendment published at 85 FR 30573, May 19, 2020.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *Effect of other Federal provisions.* The obligations imposed by this part are independent of, and do not alter, obligations not to discriminate on the basis of sex imposed by Executive Order 11246, as amended; sections 704 and 855 of the Public Health Service Act (42 U.S.C. 292d and 298b-2); Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et*

seq.); the Equal Pay Act (29 U.S.C. 206 and 206(d)); and any other Act of Congress or Federal regulation.

(Authority: Secs. 901, 902, 905, Education Amendments of 1972, 86 Stat. 373, 374, 375; 20 U.S.C. 1681, 1682, 1685)

(b) *Effect of State or local law or other requirements.* The obligation to comply with this part is not obviated or alleviated by any State or local law or other requirement which would render any applicant or student ineligible, or limit the eligibility of any applicant or student, on the basis of sex, to practice any occupation or profession.

(c) *Effect of rules or regulations of private organizations.* The obligation to comply with this part is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association which would render any applicant or student ineligible to participate or limit the eligibility or participation of any applicant or student, on the basis of sex, in any education program or activity operated by a recipient and which receives Federal financial assistance.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980, as amended at 65 FR 68056, Nov. 13, 2000]

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§106.7 Effect of employment opportunities.

Link to an amendment published at 85 FR 30579, May 19, 2020.

The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for members of one sex than for members of the other sex.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§106.8 Designation of responsible employee and adoption of grievance procedures.

Link to an amendment published at 85 FR 30573, May 19, 2020.

(a) *Designation of responsible employee.* Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part. The recipient shall notify all its students and employees of the name, office address and telephone number of the employee or employees appointed pursuant to this paragraph.

(b) *Complaint procedure of recipient.* 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.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§106.9 Dissemination of policy.

Link to an amendment published at 85 FR 30573, May 19, 2020.

(a) *Notification of policy.* (1) Each recipient shall implement specific and continuing steps to notify applicants for admission and employment, students and parents of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, 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 educational program or activity which it operates, and that it is required by title IX and this part not to discriminate in such a manner. Such notification shall contain such information, and be made in such manner, as the Assistant Secretary finds necessary to apprise such persons of the protections against discrimination assured them by title IX and this part, but shall state at least that the requirement not to discriminate in the education program or activity extends to employment therein, and to admission thereto unless Subpart C does not apply to the recipient, and that inquiries concerning the application of title IX and this part to such recipient may be referred to the employee designated pursuant to §106.8, or to the Assistant Secretary.

(2) Each recipient shall make the initial notification required by paragraph (a)(1) of this section within 90 days of the effective date of this part or of the date this part first applies to such recipient, whichever comes later, which notification shall include publication in:

(i) Local newspapers;

(ii) Newspapers and magazines operated by such recipient or by student, alumnae, or alumni groups for or in connection with such recipient; and

(iii) Memoranda or other written communications distributed to every student and employee of such recipient.

(b) *Publications.* (1) Each recipient shall prominently include a statement of the policy described in paragraph (a) of this section in each announcement, bulletin, catalog, or application form which it makes available to any person of a type, described in paragraph (a) of this section, or which is otherwise used in connection with the recruitment of students or employees.

(2) A recipient shall not use or distribute a publication of the type described in this paragraph which suggests, by text or illustration, that such recipient treats applicants,

students, or employees differently on the basis of sex except as such treatment is permitted by this part.

(c) *Distribution.* Each recipient shall distribute without discrimination on the basis of sex each publication described in paragraph (b) of this section, and shall apprise each of its admission and employment recruitment representatives of the policy of nondiscrimination described in paragraph (a) of this section, and require such representatives to adhere to such policy.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980, as amended at 65 FR 68056, Nov. 13, 2000]

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Subpart B—Coverage

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§106.11 Application.

Link to an amendment published at 85 FR 30579, May 19, 2020.

Except as provided in this subpart, this part 106 applies to every recipient and to the education program or activity operated by such recipient which receives Federal financial assistance.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 86298, Dec. 30, 1980, as amended at 65 FR 68056, Nov. 13, 2000]

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§106.12 Educational institutions controlled by religious organizations.

Link to an amendment published at 85 FR 30573, May 19, 2020.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *Application.* This part does not apply to an educational institution which is controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such organization.

(b) *Exemption.* An educational institution which wishes to claim the exemption set forth in paragraph (a) of this section, shall 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 which conflict with a specific tenet of the religious organization.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§106.13 Military and merchant marine educational institutions.

Link to an amendment published at 85 FR 30579, May 19, 2020.

This part does not apply to an educational institution whose primary purpose is the training of individuals for a military service of the United States or for the merchant marine.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§106.14 Membership practices of certain organizations.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *Social fraternities and sororities.* This part does not apply to the membership practices of social fraternities and sororities which are exempt from taxation under section 501(a) of the Internal Revenue Code of 1954, the active membership of which consists primarily of students in attendance at institutions of higher education.

(b) *YMCA, YWCA, Girl Scouts, Boy Scouts and Camp Fire Girls.* This part does not apply to the membership practices of the Young Men's Christian Association, the Young Women's Christian Association, the Girl Scouts, the Boy Scouts and Camp Fire Girls.

(c) *Voluntary youth service organizations.* This part does not apply to the membership practices of voluntary youth service organizations which are exempt from taxation under section 501(a) of the Internal Revenue Code of 1954 and the membership of which has been traditionally limited to members of one sex and principally to persons of less than nineteen years of age.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; sec. 3(a) of P.L. 93-568, 88 Stat. 1862 amending Sec. 901)

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§106.15 Admissions.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) Admissions to educational institutions prior to June 24, 1973, are not covered by this part.

(b) *Administratively separate units.* For the purposes only of this section, §§106.16 and 106.17, and subpart C, each administratively separate unit shall be deemed to be an

educational institution.

(c) *Application of subpart C.* Except as provided in paragraphs (d) and (e) of this section, subpart C applies to each recipient. A recipient to which subpart C applies shall not discriminate on the basis of sex in admission or recruitment in violation of that subpart.

(d) *Educational institutions.* Except as provided in paragraph (e) of this section as to recipients which are educational institutions, subpart C applies only to institutions of vocational education, professional education, graduate higher education, and public institutions of undergraduate higher education.

(e) *Public institutions of undergraduate higher education.* Subpart C does not apply to any public institution of undergraduate higher education which traditionally and continually from its establishment has had a policy of admitting only students of one sex.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980, as amended at 45 FR 86298, Dec. 30, 1980]

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§106.16 Educational institutions eligible to submit transition plans.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *Application.* This section applies to each educational institution to which subpart C applies which:

(1) Admitted only students of one sex as regular students as of June 23, 1972; or

(2) Admitted only students of one sex as regular students as of June 23, 1965, but thereafter admitted as regular students, students of the sex not admitted prior to June 23, 1965.

(b) *Provision for transition plans.* An educational institution to which this section applies shall not discriminate on the basis of sex in admission or recruitment in violation of subpart C unless it is carrying out a transition plan approved by the Secretary as described in §106.17, which plan provides for the elimination of such discrimination by the earliest practicable date but in no event later than June 23, 1979.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§106.17 Transition plans.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *Submission of plans.* An institution to which §106.16 applies and which is composed of more than one administratively separate unit may submit either a single transition plan applicable to all such units, or a separate transition plan applicable to each such unit.

(b) *Content of plans.* In order to be approved by the Secretary a transition plan shall:

(1) State the name, address, and Federal Interagency Committee on Education (FICE) Code of the educational institution submitting such plan, the administratively separate units to which the plan is applicable, and the name, address, and telephone number of the person to whom questions concerning the plan may be addressed. The person who submits the plan shall be the chief administrator or president of the institution, or another individual legally authorized to bind the institution to all actions set forth in the plan.

(2) State whether the educational institution or administratively separate unit admits students of both sexes, as regular students and, if so, when it began to do so.

(3) Identify and describe with respect to the educational institution or administratively separate unit any obstacles to admitting students without discrimination on the basis of sex.

(4) Describe in detail the steps necessary to eliminate as soon as practicable each obstacle so identified and indicate the schedule for taking these steps and the individual directly responsible for their implementation.

(5) Include estimates of the number of students, by sex, expected to apply for, be admitted to, and enter each class during the period covered by the plan.

(c) *Nondiscrimination.* No policy or practice of a recipient to which §106.16 applies shall result in treatment of applicants to or students of such recipient in violation of subpart C unless such treatment is necessitated by an obstacle identified in paragraph (b) (3) of this section and a schedule for eliminating that obstacle has been provided as required by paragraph (b) (4) of this section.

(d) *Effects of past exclusion.* To overcome the effects of past exclusion of students on the basis of sex, each educational institution to which §106.16 applies shall include in its transition plan, and shall implement, specific steps designed to encourage individuals of the previously excluded sex to apply for admission to such institution. Such steps shall include instituting recruitment which emphasizes the institution's commitment to enrolling students of the sex previously excluded.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980, as amended at 65 FR 68056, Nov. 13, 2000]

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Link to an amendment published at 85 FR 30573, May 19, 2020.

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Subpart C—Discrimination on the Basis of Sex in Admission and Recruitment Prohibited

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§106.21 Admission.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *General.* No person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission, by any recipient to which this subpart applies, except as provided in §§106.16 and 106.17.

(b) *Specific prohibitions.* (1) In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies shall not:

(i) Give preference to one person over another on the basis of sex, by ranking applicants separately on such basis, or otherwise;

(ii) Apply numerical limitations upon the number or proportion of persons of either sex who may be admitted; or

(iii) Otherwise treat one individual differently from another on the basis of sex.

(2) A recipient shall not administer or operate any test or other criterion for admission which has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be unavailable.

(c) *Prohibitions relating to marital or parental status.* In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies:

(1) Shall not apply any rule concerning the actual or potential parental, family, or marital status of a student or applicant which treats persons differently on the basis of sex;

(2) Shall not discriminate against or exclude any person on the basis of pregnancy, childbirth, termination of pregnancy, or recovery therefrom, or establish or follow any rule or practice which so discriminates or excludes;

(3) Shall treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition; and

(4) Shall not make pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is “Miss” or “Mrs.” A recipient may make pre-admission inquiry as to the sex of an applicant for admision, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§106.22 Preference in admission.

Link to an amendment published at 85 FR 30579, May 19, 2020.

A recipient to which this subpart applies shall not give preference to applicants for admission, on the basis of attendance at any educational institution or other school or entity which admits as students only or predominantly members of one sex, if the giving of such preference has the effect of discriminating on the basis of sex in violation of this subpart.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§106.23 Recruitment.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *Nondiscriminatory recruitment.* A recipient to which this subpart applies shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action pursuant to §106.3(a), and may choose to undertake such efforts as affirmative action pursuant to §106.3(b).

(b) *Recruitment at certain institutions.* A recipient to which this subpart applies shall not recruit primarily or exclusively at educational institutions, schools or entities which admit as students only or predominantly members of one sex, if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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Link to an amendment published at 85 FR 30574, May 19, 2020.

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Link to an amendment published at 85 FR 30574, May 19, 2020.

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§106.31 Education programs or activities.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *General.* Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance. This subpart does not apply to actions of a recipient in connection with admission of its students to an education program or activity of (1) a recipient to which subpart C does not apply, or (2) an entity, not a recipient, to which subpart C would not apply if the entity were a recipient.

(b) *Specific prohibitions.* Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

(1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;

(2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

(3) Deny any person any such aid, benefit, or service;

(4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;

(5) Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition;

(6) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;

(7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

(c) *Assistance administered by a recipient educational institution to study at a foreign institution.* A recipient educational institution may administer or assist in the administration of scholarships, fellowships, or other awards established by foreign or domestic wills, trusts, or similar legal instruments, or by acts of foreign governments and restricted to members of one sex, which are designed to provide opportunities to study abroad, and which are awarded to students who are already matriculating at or who are graduates of the recipient institution; *Provided,* a recipient educational institution which administers or assists in the administration of such scholarships, fellowships, or other awards which are restricted to members of one sex provides, or otherwise makes available reasonable opportunities for similar studies for members of the other sex. Such opportunities may be derived from either domestic or foreign sources.

(d) *Aid, benefits or services not provided by recipient.* (1) This paragraph applies to any recipient which requires participation by any applicant, student, or employee in any education program or activity not operated wholly by such recipient, or which facilitates, permits, or considers such participation as part of or equivalent to an education program or activity operated by such recipient, including participation in educational consortia and cooperative employment and student-teaching assignments.

(2) Such recipient:

(i) Shall develop and implement a procedure designed to assure itself that the operator or sponsor of such other education program or activity takes no action affecting any applicant, student, or employee of such recipient which this part would prohibit such recipient from taking; and

(ii) Shall not facilitate, require, permit, or consider such participation if such action occurs.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980, as amended at 47 FR 32527, July 28, 1982; 65 FR 68056, Nov. 13, 2000]

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§106.32 Housing.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *Generally.* A recipient shall not, on the basis of sex, apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing, except as provided in this section (including housing provided only to married students).

(b) *Housing provided by recipient.* (1) A recipient may provide separate housing on the basis of sex.

(2) Housing provided by a recipient to students of one sex, when compared to that provided to students of the other sex, shall be as a whole:

(i) Proportionate in quantity to the number of students of that sex applying for such housing; and

(ii) Comparable in quality and cost to the student.

(c) *Other housing.* (1) A recipient shall not, on the basis of sex, administer different policies or practices concerning occupancy by its students of housing other than provided by such recipient.

(2) A recipient which, through solicitation, listing, approval of housing, or otherwise, assists any agency, organization, or person in making housing available to any of its students, shall take such reasonable action as may be necessary to assure itself that such housing as is provided to students of one sex, when compared to that provided to students of the other sex, is as a whole:

(i) Proportionate in quantity and

(ii) Comparable in quality and cost to the student.

A recipient may render such assistance to any agency, organization, or person which provides all or part of such housing to students only of one sex.

(Authority: Secs. 901, 902, 907, Education Amendments of 1972, 86 Stat. 373, 374, 375; 20 U.S.C. 1681, 1682, 1686)

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§106.33 Comparable facilities.

Link to an amendment published at 85 FR 30579, May 19, 2020.

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374)

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§106.34 Access to classes and schools.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *General standard.* Except as provided for in this section or otherwise in this part, a recipient shall not provide or otherwise carry out any of its education programs or activities separately on the basis of sex, or require or refuse participation therein by any of its students on the basis of sex.

on the basis of sex.

(1) *Contact sports in physical education classes.* This section does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.

(2) *Ability grouping in physical education classes.* This section does not prohibit grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex.

(3) *Human sexuality classes.* Classes or portions of classes in elementary and secondary schools that deal primarily with human sexuality may be conducted in separate sessions for boys and girls.

(4) *Choruses.* Recipients may make requirements based on vocal range or quality that may result in a chorus or choruses of one or predominantly one sex.

(b) *Classes and extracurricular activities*—(1) *General standard.* Subject to the requirements in this paragraph, a recipient that operates a nonvocational coeducational elementary or secondary school may provide nonvocational single-sex classes or extracurricular activities, if—

(i) Each single-sex class or extracurricular activity is based on the recipient's important objective—

(A) To improve educational achievement of its students, through a recipient's overall established policy to provide diverse educational opportunities, provided that the single-sex nature of the class or extracurricular activity is substantially related to achieving that objective; or

(B) To meet the particular, identified educational needs of its students, provided that the single-sex nature of the class or extracurricular activity is substantially related to achieving that objective;

(ii) The recipient implements its objective in an evenhanded manner;

(iii) Student enrollment in a single-sex class or extracurricular activity is completely voluntary; and

(iv) The recipient provides to all other students, including students of the excluded sex, a substantially equal coeducational class or extracurricular activity in the same subject or activity.

(2) *Single-sex class or extracurricular activity for the excluded sex.* A recipient that provides a single-sex class or extracurricular activity, in order to comply with paragraph (b)(1)(ii) of this section, may be required to provide a substantially equal single-sex class or extracurricular activity for students of the excluded sex.

(3) *Substantially equal factors.* Factors the Department will consider, either individually or in the aggregate as appropriate, in determining whether classes or extracurricular activities are substantially equal include, but are not limited to, the following: the policies and criteria of admission, the educational benefits provided, including the quality, range, and content of curriculum and other services and the quality and availability of books, instructional materials, and technology, the qualifications of faculty and staff, geographic accessibility, the quality, accessibility, and availability of facilities and resources provided to the class, and intangible features, such as reputation of faculty.

(4) *Periodic evaluations.* (i) The recipient must conduct periodic evaluations to ensure that single-sex classes or extracurricular activities are based upon genuine justifications and do not rely on overly broad generalizations about the different talents, capacities, or preferences of either sex and that any single-sex classes or extracurricular activities are substantially related to the achievement of the important objective for the classes or extracurricular activities.

(ii) Evaluations for the purposes of paragraph (b)(4)(i) of this section must be conducted at least every two years.

(5) *Scope of coverage.* The provisions of paragraph (b)(1) through (4) of this section apply to classes and extracurricular activities provided by a recipient directly or through another entity, but the provisions of paragraph (b)(1) through (4) of this section do not apply to interscholastic, club, or intramural athletics, which are subject to the provisions of §§106.41 and 106.37(c) of this part.

(c) *Schools*—(1) *General Standard.* Except as provided in paragraph (c)(2) of this section, a recipient that operates a public nonvocational elementary or secondary school that excludes from admission any students, on the basis of sex, must provide students of the excluded sex a substantially equal single-sex school or coeducational school.

(2) *Exception.* A nonvocational public charter school that is a single-school local educational agency under State law may be operated as a single-sex charter school without regard to the requirements in paragraph (c)(1) of this section.

(3) *Substantially equal factors.* Factors the Department will consider, either individually or in the aggregate as appropriate, in determining whether schools are substantially equal include, but are not limited to, the following: The policies and criteria of admission, the educational benefits provided, including the quality, range, and content of curriculum and other services and the quality and availability of books, instructional materials, and technology, the quality and range of extracurricular offerings, the qualifications of faculty and staff, geographic accessibility, the quality, accessibility, and availability of facilities and resources, and intangible features, such as reputation of faculty.

(4) *Definition.* For the purposes of paragraph (c)(1) through (3) of this section, the term “school” includes a “school within a school,” which means an administratively separate school located within another school.

(Authority: 20 U.S.C. 1681, 1682)

(Authority: 20 U.S.C. 1681, 1682)

[71 FR 62542, Oct. 25, 2006]

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§106.35 Access to institutions of vocational education.

Link to an amendment published at 85 FR 30579, May 19, 2020.

A recipient shall not, on the basis of sex, exclude any person from admission to any institution of vocational education operated by that recipient.

(Authority: 20 U.S.C. 1681, 1682)

[71 FR 62543, Oct. 25, 2006]

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§106.36 Counseling and use of appraisal and counseling materials.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *Counseling.* A recipient shall not discriminate against any person on the basis of sex in the counseling or guidance of students or applicants for admission.

(b) *Use of appraisal and counseling materials.* A recipient which uses testing or other materials for appraising or counseling students shall not use different materials for students on the basis of their sex or use materials which permit or require different treatment of students on such basis unless such different materials cover the same occupations and interest areas and the use of such different materials is shown to be essential to eliminate sex bias. Recipients shall develop and use internal procedures for ensuring that such materials do not discriminate on the basis of sex. Where the use of a counseling test or other instrument results in a substantially disproportionate number of members of one sex in any particular course of study or classification, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination in the instrument or its application.

(c) *Disproportion in classes.* Where a recipient finds that a particular class contains a substantially disproportionate number of individuals of one sex, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination on the basis of sex in counseling or appraisal materials or by counselors.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§106.37 Financial assistance.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *General.* Except as provided in paragraphs (b) and (c) of this section, in providing financial assistance to any of its students, a recipient shall not:

(1) On the basis of sex, provide different amount or types of such assistance, limit eligibility for such assistance which is of any particular type or source, apply different criteria, or otherwise discriminate;

(2) Through solicitation, listing, approval, provision of facilities or other services, assist any foundation, trust, agency, organization, or person which provides assistance to any of such recipient's students in a manner which discriminates on the basis of sex; or

(3) Apply any rule or assist in application of any rule concerning eligibility for such assistance which treats persons of one sex differently from persons of the other sex with regard to marital or parental status.

(b) *Financial aid established by certain legal instruments.* (1) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by acts of a foreign government which requires that awards be made to members of a particular sex specified therein; *Provided,* That the overall effect of the award of such sex-restricted scholarships, fellowships, and other forms of financial assistance does not discriminate on the basis of sex.

(2) To ensure nondiscriminatory awards of assistance as required in paragraph (b)(1) of this section, recipients shall develop and use procedures under which:

(i) Students are selected for award of financial assistance on the basis of nondiscriminatory criteria and not on the basis of availability of funds restricted to members of a particular sex;

(ii) An appropriate sex-restricted scholarship, fellowship, or other form of financial assistance is allocated to each student selected under paragraph (b)(2)(i) of this section; and

(iii) No student is denied the award for which he or she was selected under paragraph (b)(2)(i) of this section because of the absence of a scholarship, fellowship, or other form of financial assistance designated for a member of that student's sex.

(c) *Athletic scholarships.* (1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

(2) Separate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with this paragraph and §106.41.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; and Sec. 844, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484)

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§106.38 Employment assistance to students.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *Assistance by recipient in making available outside employment.* A recipient which assists any agency, organization or person in making employment available to any of its students:

(1) Shall assure itself that such employment is made available without discrimination on the basis of sex; and

(2) Shall not render such services to any agency, organization, or person which discriminates on the basis of sex in its employment practices.

(b) *Employment of students by recipients.* A recipient which employs any of its students shall not do so in a manner which violates subpart E of this part.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§106.39 Health and insurance benefits and services.

Link to an amendment published at 85 FR 30579, May 19, 2020.

In providing a medical, hospital, accident, or life insurance benefit, service, policy, or plan to any of its students, a recipient shall not discriminate on the basis of sex, or provide such benefit, service, policy, or plan in a manner which would violate Subpart E of this part if it were provided to employees of the recipient. This section shall not prohibit a recipient from providing any benefit or service which may be used by a different proportion of students of one sex than of the other, including family planning services. However, any recipient which provides full coverage health service shall provide gynecological care.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§106.40 Marital or parental status.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *Status generally.* A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.

(b) *Pregnancy and related conditions.* (1) A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.

(2) A recipient may require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.

(3) A recipient which operates a portion of its education program or activity separately for pregnant students, admittance to which is completely voluntary on the part of the student as provided in paragraph (b)(1) of this section shall ensure that the separate portion is comparable to that offered to non-pregnant students.

(4) A recipient 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 disability with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.

(5) In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980, as amended at 65 FR 68056, Nov. 13, 2000]

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§106.41 Athletics.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport.

for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(c) *Equal opportunity.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(2) The provision of equipment and supplies;

(3) Scheduling of games and practice time;

(4) Travel and per diem allowance;

(5) Opportunity to receive coaching and academic tutoring;

(6) Assignment and compensation of coaches and tutors;

(7) Provision of locker rooms, practice and competitive facilities;

(8) Provision of medical and training facilities and services;

(9) Provision of housing and dining facilities and services;

(10) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) *Adjustment period.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; and Sec. 844, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484)

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§106.42 Textbooks and curricular material.

Link to an amendment published at 85 FR 30579, May 19, 2020.

Nothing in this regulation shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§106.43 Standards for measuring skill or progress in physical education classes.

Link to an amendment published at 85 FR 30579, May 19, 2020.

If use of a single standard of measuring skill or progress in physical education classes has an adverse effect on members of one sex, the recipient shall use appropriate standards that do not have that effect.

(Authority: 20 U.S.C. 1681, 1682)

[71 FR 62543, Oct. 25, 2006]

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Link to an amendment published at 85 FR 30574, May 19, 2020.

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Subpart E—Discrimination on the Basis of Sex in Employment in Education Programs or Activities Prohibited

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§106.51 Employment.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *General.* (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives Federal financial assistance.

(2) A recipient shall make all employment decisions in any education program or activity operated by such recipient in a nondiscriminatory manner and shall not limit, segregate, or classify applicants or employees in any way which could adversely affect any applicant's or employee's employment opportunities or status because of sex.

(3) A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by this subpart, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient.

(4) A recipient shall not grant preferences to applicants for employment on the basis of attendance at any educational institution or entity which admits as students only or predominantly members of one sex, if the giving of such preferences has the effect of discriminating on the basis of sex in violation of this part.

(b) *Application.* The provisions of this subpart apply to:

(1) Recruitment, advertising, and the process of application for employment;

(2) Hiring, upgrading, promotion, consideration for and award of tenure, demotion, transfer, layoff, termination, application of nepotism policies, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation, and changes in compensation;

(4) Job assignments, classifications and structure, including position descriptions, lines of progression, and seniority lists;

(5) The terms of any collective bargaining agreement;

(6) Granting and return from leaves of absence, leave for pregnancy, childbirth, false pregnancy, termination of pregnancy, leave for persons of either sex to care for children or dependents, or any other leave;

(7) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(8) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, selection for tuition assistance, selection for sabbaticals and leaves of absence to pursue training;

(9) Employer-sponsored activities, including those that are social or recreational; and

(10) Any other term, condition, or privilege of employment.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980, as amended at 65 FR 68056, Nov. 13, 2000]

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§106.52 Employment criteria.

Link to an amendment published at 85 FR 30579, May 19, 2020.

A recipient shall not administer or operate any test or other criterion for any employment opportunity which has a disproportionately adverse effect on persons on the basis of sex unless:

(a) Use of such test or other criterion is shown to predict validly successful performance in the position in question; and

(b) Alternative tests or criteria for such purpose, which do not have such disproportionately adverse effect, are shown to be unavailable.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§106.53 Recruitment.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *Nondiscriminatory recruitment and hiring.* A recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees. Where a recipient has been found to be presently discriminating on the basis of sex in the recruitment or hiring of employees, or has been found to have in the past so discriminated, the recipient shall recruit members of the sex so discriminated against so as to overcome the effects of such past or present discrimination.

(b) *Recruitment patterns.* A recipient shall not recruit primarily or exclusively at entities which furnish as applicants only or predominantly members of one sex if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§106.54 Compensation.

Link to an amendment published at 85 FR 30579, May 19, 2020.

A recipient shall not make or enforce any policy or practice which, on the basis of sex:

(a) Makes distinctions in rates of pay or other compensation;

(b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§106.55 Job classification and structure.

Link to an amendment published at 85 FR 30579, May 19, 2020.

A recipient shall not:

(a) Classify a job as being for males or for females;

(b) Maintain or establish separate lines of progression, seniority lists, career ladders, or tenure systems based on sex; or

(c) Maintain or establish separate lines of progression, seniority systems, career ladders, or tenure systems for similar jobs, position descriptions, or job requirements which classify persons on the basis of sex, unless sex is a bona-fide occupational qualification for the positions in question as set forth in §106.61.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§106.56 Fringe benefits.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *Fringe benefits defined.* For purposes of this part, *fringe benefits* means: Any medical, hospital, accident, life insurance or retirement benefit, service, policy or plan, any

profit-sharing or bonus plan, leave, and any other benefit or service of employment not subject to the provision of §106.54.

(b) *Prohibitions.* A recipient shall not:

(1) Discriminate on the basis of sex with regard to making fringe benefits available to employees or make fringe benefits available to spouses, families, or dependents of employees differently upon the basis of the employee's sex;

(2) Administer, operate, offer, or participate in a fringe benefit plan which does not provide either for equal periodic benefits for members of each sex, or for equal contributions to the plan by such recipient for members of each sex; or

(3) Administer, operate, offer, or participate in a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex or which otherwise discriminates in benefits on the basis of sex.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§106.57 Marital or parental status.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *General.* A recipient shall not apply any policy or take any employment action:

(1) Concerning the potential marital, parental, or family status of an employee or applicant for employment which treats persons differently on the basis of sex; or

(2) Which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

(b) *Pregnancy.* A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

(c) *Pregnancy as a temporary disability.* A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom and any temporary disability resulting therefrom as any other temporary disability for all job related purposes, including commencement, duration and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

(d) *Pregnancy leave.* In the case of a recipient which does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of

absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status which she held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§106.58 Effect of State or local law or other requirements.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *Prohibitory requirements.* The obligation to comply with this subpart is not obviated or alleviated by the existence of any State or local law or other requirement which imposes prohibitions or limits upon employment of members of one sex which are not imposed upon members of the other sex.

(b) *Benefits.* A recipient which provides any compensation, service, or benefit to members of one sex pursuant to a State or local law or other requirement shall provide the same compensation, service, or benefit to members of the other sex.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§106.59 Advertising.

Link to an amendment published at 85 FR 30579, May 19, 2020.

A recipient shall not in any advertising related to employment indicate preference, limitation, specification, or discrimination based on sex unless sex is a *bona-fide* occupational qualification for the particular job in question.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§106.60 Pre-employment inquiries.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *Marital status.* A recipient shall not make pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is “Miss or Mrs.”

(b) *Sex.* A recipient may make pre-employment inquiry as to the sex of an applicant for employment, but only if such inquiry is made equally of such applicants of both sexes and if

the results of such inquiry are not used in connection with discrimination prohibited by this part.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§106.61 Sex as a bona-fide occupational qualification.

Link to an amendment published at 85 FR 30579, May 19, 2020.

A recipient may take action otherwise prohibited by this subpart provided it is shown that sex is a bona-fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section which is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students, or other persons, but nothing contained in this section shall prevent a recipient from considering an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682

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Subpart F—Procedures [Interim]

Link to an amendment published at 85 FR 30578, May 19, 2020.

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§106.71 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 34 CFR 100.6-100.11 and 34 CFR, part 101.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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Subpart G—XXX

Link to an amendment published at 85 FR 30579, May 19, 2020.

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Subject Index to Title IX Preamble and Regulation[1]

Link to an amendment published at 85 FR 30579, May 19, 2020.

[1]Preamble paragraph numbers are in brackets [ ].

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Appendix A to Part 106—Guidelines for Eliminating Discrimination and Denial of Services on the Basis of Race, Color, National Origin, Sex, and Handicap in Vocational Education Programs

EDITORIAL NOTE: For the text of these guidelines, see 34 CFR part 100, appendix B.

[44 FR 17168, Mar. 21, 1979]

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Need assistance?

FEDERAL RULES

OF EVIDENCE

PROFESSIONAL LEGAL RESEARCH

FEDERAL RULES OF EVIDENCE

FEDERAL RULES OF EVIDENCE

ARTICLE I. GENERAL PROVISIONS

Rule 101. Scope

These rules govern proceedings in the courts of the United States and before the United States bankruptcy judges and United States magistrate judges, to the extent and with the exceptions stated in rule 1101.

Rule 102. Purpose and Construction

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Rule 103. Rulings on Evidence

(a) Effect of Erroneous Ruling. – Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. – In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of Proof. – In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial,

a party need not renew an objection or offer of proof to preserve a claim of error for appeal.
(b) Record of Offer and Ruling. – The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.
(c) Hearing of Jury. – In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.
(d) Plain Error. – Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

Rule 104. Preliminary Questions

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.
(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.
(c) Hearing of jury. Hearings on the admissibility of

confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.
(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.
(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility

Rule 105. Limited Admissibility

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Rule 106. Remainder of or Related Writings or Recorded Statements

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

ARTICLE II. JUDICIAL NOTICE

Rule 201. Judicial Notice of Adjudicative Facts

(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.
(b) Kinds of facts. A judicially noticed fact must be one

not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
(c) When discretionary. A court may take judicial notice, whether requested or not.
(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.
(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.
(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.
(g) Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

ARTICLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

Rule 301. Presumptions in General in Civil Actions and Proceedings

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet

the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

Rule 302. Applicability of State Law in Civil Actions and Proceedings

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.

ARTICLE IV. RELEVANCY AND ITS LIMITS

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading

the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally. – Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. – In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of alleged victim. – In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) Character of witness. – Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts. – Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for

other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Rule 405. Methods of Proving Character

(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

Rule 406. Habit; Routine Practice

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Rule 407. Subsequent Remedial Measures

When, after an injury or harm allegedly caused by an

event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Rule 408. Compromise and Offers to Compromise

(a) Prohibited uses. – Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish – or accepting or offering or promising to accept – a valuable consideration in compromising or attempting to compromise a claim; and

(2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

(b) Permitted uses. – This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention

of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

Rule 409. Payment of Medical and Similar Expenses

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
(1) a plea of guilty which was later withdrawn;
(2) a plea of nolo contendere;
(3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or
(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by

the defendant under oath, on the record and in the presence of counsel.

Rule 411. Liability Insurance

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

Rule 412. Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition

(a) Evidence generally inadmissible. – The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) Exceptions. –

(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;

(B) evidence of specific instances of sexual behavior by the

alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and
(C) evidence the exclusion of which would violate the constitutional rights of the defendant.
(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.
(c) Procedure to determine admissibility. –
(1) A party intending to offer evidence under subdivision (b) must –
(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause, requires a different time for filing or permits filing during trial; and
(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.
(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

Rule 413. Evidence of Similar Crimes in Sexual Assault Cases

(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved –

(1) any conduct proscribed by chapter 109A of title 18, United States Code;

(2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;

(3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;

(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

(5) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4).

Rule 414. Evidence of Similar Crimes in Child Molestation Cases

(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved –

(1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;

(2) any conduct proscribed by chapter 110 of title 18, United States Code;

(3) contact between any part of the defendant's body or an

object and the genitals or anus of a child;
(4) contact between the genitals or anus of the defendant and any part of the body of a child;
(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or
(6) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(5).

Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation

(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.
(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.
(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

ARTICLE V. PRIVILEGES

Rule 501. General Rule

Except as otherwise required by the Constitution of the

United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

ARTICLE VI. WITNESSES

Rule 601. General Rule of Competency

Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

Rule 602. Lack of Personal Knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

Rule 603. Oath or Affirmation

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

Rule 604. Interpreters

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.

Rule 605. Competency of Judge as Witness

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

Rule 606. Competency of Juror as Witness

(a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may

testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

Rule 607. Who May Impeach

The credibility of a witness may be attacked by any party, including the party calling the witness.

Rule 608. Evidence of Character and Conduct of Witness

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for

truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) General rule. For the purpose of attacking the character for truthfulness of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has

elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

Rule 610. Religious Beliefs or Opinions

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

Rule 611. Mode and Order of Interrogation and Presentation

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

Rule 612. Writing Used to Refresh Memory

Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either –

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

Rule 613. Prior Statements of Witnesses

(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need

not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.
(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

Rule 614. Calling and Interrogation of Witnesses by Court

(a) Calling by court. The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.
(b) Interrogation by court. The court may interrogate witnesses, whether called by itself or by a party.
(c) Objections. Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

Rule 615. Exclusion of Witnesses

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a

party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present.

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

Rule 701. Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those

perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Rule 704. Opinion on Ultimate Issue

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Rule 706. Court Appointed Experts

(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury

of the fact that the court appointed the expert witness.
(d) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

ARTICLE VIII. HEARSAY

Rule 801. Definitions

The following definitions apply under this article:
(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
(b) Declarant. A "declarant" is a person who makes a statement.
(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
(d) Statements which are not hearsay. A statement is not hearsay if –
(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.
(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.
(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.
(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.
(6) Records of Regularly Conducted Activity. – A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a

person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the

Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination,

statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) Reputation as to character. Reputation of a person's character among associates or in the community.

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment,

judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.
(23) Judgment as to personal, family, or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.
(24) [Transferred to Rule 807]

Rule 804. Hearsay Exceptions; Declarant Unavailable
(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant –
(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
(3) testifies to a lack of memory of the subject matter of the declarant's statement; or
(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption,

refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly

indicate the trustworthiness of the statement.
(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.
(5) [Transferred to Rule 807]
(6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

Rule 805. Hearsay Within Hearsay

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would

be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

Rule 807. Residual Exception

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

Rule 901. Requirement of Authentication or Identification

(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person

or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute or rule. Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.

Rule 902. Self-authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.
(2) Domestic public documents not under seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.
(3) Foreign public documents. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable

opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

(5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.

(6) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals.

(7) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) Acknowledged documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) Presumptions under Acts of Congress. Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic.
(11) Certified Domestic Records of Regularly Conducted Activity. – The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record –
(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
(B) was kept in the course of the regularly conducted activity; and
(C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.
(12) Certified Foreign Records of Regularly Conducted Activity. – In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record –

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
(B) was kept in the course of the regularly conducted activity; and
(C) was made by the regularly conducted activity as a regular practice.
The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

Rule 903. Subscribing Witness' Testimony Unnecessary
The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1001. Definitions
For purposes of this article the following definitions are applicable:
(1) Writings and recordings. "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse,

mechanical or electronic recording, or other form of data compilation.
(2) Photographs. "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.
(3) Original. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original".
(4) Duplicate. A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

Rule 1002. Requirement of Original

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

Rule 1003. Admissibility of Duplicates

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Rule 1004. Admissibility of Other Evidence of Contents

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if –

(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or

(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.

Rule 1005. Public Records

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

Rule 1006. Summaries

The contents of voluminous writings, recordings, or

photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

Rule 1007. Testimony or Written Admission of Party

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.

Rule 1008. Functions of Court and Jury

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

ARTICLE XI. MISCELLANEOUS RULES

Rule 1101. Applicability of Rules

(a) Courts and judges. These rules apply to the United States district courts, the District Court of Guam, the

District Court of the Virgin Islands, the District Court for the Northern Mariana Islands, the United States courts of appeals, the United States Claims Court, and to United States bankruptcy judges and United States magistrate judges, in the actions, cases, and proceedings and to the extent hereinafter set forth. The terms "judge" and "court" in these rules include United States bankruptcy judges and United States magistrate judges.

(b) Proceedings generally. These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under title 11, United States Code.

(c) Rule of privilege. The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.

(d) Rules inapplicable. The rules (other than with respect to privileges) do not apply in the following situations:

(1) Preliminary questions of fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104.

(2) Grand jury. Proceedings before grand juries.

(3) Miscellaneous proceedings. Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

(e) Rules applicable in part. In the following proceedings

these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority: the trial of misdemeanors and other petty offenses before United States magistrate judges; review of agency actions when the facts are subject to trial de novo under section 706(2)(F) of title 5, United States Code; review of orders of the Secretary of Agriculture under section 2 of the Act entitled "An Act to authorize association of producers of agricultural products" approved February 18, 1922 (7 U.S.C. 292), and under sections 6 and 7(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499f, 499g(c)); naturalization and revocation of naturalization under sections 310-318 of the Immigration and Nationality Act (8 U.S.C. 1421-1429); prize proceedings in admiralty under sections 7651-7681 of title 10, United States Code; review of orders of the Secretary of the Interior under section 2 of the Act entitled "An Act authorizing associations of producers of aquatic products" approved June 25, 1934 (15 U.S.C. 522); review of orders of petroleum control boards under section 5 of the Act entitled "An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes", approved February 22, 1935 (15 U.S.C. 715d); actions for fines, penalties, or forfeitures under part V of title IV of the Tariff Act of 1930 (19 U.S.C. 1581-1624), or under the Anti-Smuggling Act (19 U.S.C. 1701-1711);

criminal libel for condemnation, exclusion of imports, or other proceedings under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301-392); disputes between seamen under sections 4079, 4080, and 4081 of the Revised Statutes (22 U.S.C. 256-258); habeas corpus under sections 2241-2254 of title 28, United States Code; motions to vacate, set aside or correct sentence under section 2255 of title 28, United States Code; actions for penalties for refusal to transport destitute seamen under section 4578 of the Revised Statutes (46 U.S.C. 679); actions against the United States under the Act entitled "An Act authorizing suits against the United States in admiralty for damage caused by and salvage service rendered to public vessels belonging to the United States, and for other purposes", approved March 3, 1925 (46 U.S.C. 781-790), as implemented by section 7730 of title 10, United States Code.

Rule 1102. Amendments

Amendments to the Federal Rules of Evidence may be made as provided in section 2072 of title 28 of the United States Code.

Rule 1103. Title

These rules may be known and cited as the Federal Rules of Evidence.

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U.S. Department of Education Title IX Final Rule Overview

GUIDING PRINCIPLES

- **Historic Recognition of Sexual Harassment as Sex Discrimination**

  For the first time, the Department's Title IX regulations recognize that sexual harassment, including sexual assault, is unlawful sex discrimination. The Department previously addressed sexual harassment only through guidance documents, which are not legally binding and do not have the force and effect of law. Now, the Department's regulations impose important legal obligations on school districts, colleges, and universities (collectively "schools"), requiring a prompt response to reports of sexual harassment. The Final Rule improves the clarity and transparency of the requirements for how schools must respond to sexual harassment under Title IX so that every complainant receives appropriate support, respondents are treated as responsible only after receiving due process and fundamental fairness, and school officials serve impartially without bias for or against any party.

- **Supporting Complainants & Respecting Complainants' Autonomy**

  Under the Final Rule, schools must offer free supportive measures to every alleged victim of sexual harassment (called "complainants" in the Final Rule). Supportive measures are individualized services to restore or preserve equal access to education, protect student and employee safety, or deter sexual harassment. Supportive measures must be offered even if a complainant does not wish to initiate or participate in a grievance process. Every situation is unique, and individuals react to sexual harassment differently. Therefore, the Final Rule gives complainants control over the school-level response best meeting their needs. It respects complainants' wishes and autonomy by giving them the clear choice to file a formal complaint, separate from the right to supportive measures. The Final Rule also provides a fair and impartial grievance process for complainants, and protects complainants from being coerced or threatened into participating in a grievance process.

- **Non-Discrimination, Free Speech, and Due Process**

  The Final Rule reflects core American values of equal treatment on the basis of sex, free speech and academic freedom, due process of law, and fundamental fairness. Schools must operate free from sex discrimination, including sexual harassment. Complainants and respondents must have strong, clear procedural rights in a predictable, transparent grievance process designed to reach reliable outcomes. The Final Rule ensures that schools do not violate First Amendment rights when complying with Title IX.

A SCHOOL'S RESPONSE TO SEXUAL HARASSMENT

- Under the Final Rule, any of the following conduct on the basis of sex constitutes sexual harassment:
  - A school employee conditioning an educational benefit or service upon a person's participation in unwelcome sexual conduct (often called "*quid pro quo*" harassment);
  - Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school's education program or activity; or
  - Sexual assault, dating violence, domestic violence, or stalking (as those offenses are defined in the Clery Act, 20 U.S.C. § 1092(f), and the Violence Against Women Act, 34 U.S.C. § 12291(a)).

- Consistent with Supreme Court precedent and the text of Title IX, a school must respond when: (1) the school has actual knowledge of sexual harassment; (2) that occurred within the school's education program or activity; (3) against a person in the United States. The Final Rule expands "actual knowledge" to include notice to any elementary or secondary school employee, and states that any person (*e.g.,* the alleged victim or any third party) may report to a Title IX Coordinator in person or by e-mail, phone, or mail. The Final Rule also specifies that a school's "education program or activity" includes situations over which the school exercised substantial control, and also buildings owned or controlled by student organizations officially recognized by a postsecondary institution, such as many fraternity and sorority houses.

- Consistent with Supreme Court precedent, a school violates Title IX when its response to sexual harassment is clearly unreasonable in light of the known circumstances, and the Final Rule adds mandatory response obligations such as offering supportive measures to every complainant, with or without a formal complaint.

- Schools must investigate every formal complaint (which may be filed by a complainant or by a school's Title IX Coordinator). If the alleged conduct does not fall under Title IX, then a school may address the allegations under the school's own code of conduct and provide supportive measures.

A FAIR GRIEVANCE PROCESS

The Final Rule requires schools to investigate and adjudicate formal complaints of sexual harassment using a grievance process that incorporates due process principles, treats all parties fairly, and reaches reliable responsibility determinations. A school's grievance process must:

- Give both parties written notice of the allegations, an equal opportunity to select an advisor of the party's choice (who may be, but does not need to be, an attorney), and an equal opportunity to submit and review evidence throughout the investigation;
- Use trained Title IX personnel to objectively evaluate all relevant evidence without prejudgment of the facts at issue and free from conflicts of interest or bias for or against either party;
- Protect parties' privacy by requiring a party's written consent before using the party's medical, psychological, or similar treatment records during a grievance process;
- Obtain the parties' voluntary, written consent before using any kind of "informal resolution" process, such as mediation or restorative justice, and not use an informal process where an employee allegedly sexually harassed a student;
- Apply a presumption that the respondent is not responsible during the grievance process (often called a "presumption of innocence"), so that the school bears the burden of proof and the standard of evidence is applied correctly;
- Use either the preponderance of the evidence standard or the clear and convincing evidence standard (and use the same standard for formal complaints against students as for formal complaints against employees);
- Ensure the decision-maker is not the same person as the investigator or the Title IX Coordinator (i.e., no "single investigator models");
- For postsecondary institutions, hold a live hearing and allow cross-examination by party advisors (never by the parties personally); K-12 schools do not need to hold a hearing, but parties may submit written questions for the other parties and witnesses to answer;
- Protect all complainants from inappropriately being asked about prior sexual history ("rape shield" protections);

- Send both parties a written determination regarding responsibility explaining how and why the decision-maker reached conclusions;
- Effectively implement remedies for a complainant if a respondent is found responsible for sexual harassment;
- Offer both parties an equal opportunity to appeal;
- Protect any individual, including complainants, respondents, and witnesses, from retaliation for reporting sexual harassment or participating (or refusing to participate) in any Title IX grievance process;
- Make all materials used to train Title IX personnel publicly available on the school's website or, if the school does not maintain a website, make these materials available upon request for inspection by members of the public; and
- Document and keep records of all sexual harassment reports and investigations.

SEX DISCRIMINATION REGULATIONS

Relating to sex discrimination generally, and not only to sexual harassment, the final regulations also:

- Affirm that the Department may require schools to take remedial action for discriminating on the basis of sex or otherwise violating the Department's Title IX regulations;
- Expressly state that in response to any claim of sex discrimination under Title IX, schools are never required to deprive an individual of rights guaranteed under the U.S. Constitution;
- Account for the interplay of Title IX, Title VII, and FERPA, as well as the legal rights of parents or guardians to act on behalf of individuals with respect to exercising Title IX rights;
- Update the requirement for schools to designate and identify a Title IX Coordinator, disseminate their non-discrimination policy and the Title IX Coordinator's contact information to ensure accessible channels for reporting sex discrimination (including sexual harassment), and notify students, employees, parents, and others of how the school will respond to reports and complaints of sex discrimination (including sexual harassment); and
- Clarify that an institution controlled by a religious organization is not required to submit a written statement to the Department to qualify for the Title IX religious exemption.

Summary of Major Provisions of the Department of Education's Title IX Final Rule

Issue	The Title IX Final Rule: Addressing Sexual Harassment in Schools
1. Notice to the School, College, University ("Schools"): Actual Knowledge	The Final Rule requires a K-12 school to respond whenever *any* employee has notice of sexual harassment, including allegations of sexual harassment. Many State laws also require all K-12 employees to be mandatory reporters of child abuse. For postsecondary institutions, the Final Rule allows the institution to choose whether to have mandatory reporting for all employees, or to designate some employees to be confidential resources for college students to discuss sexual harassment without automatically triggering a report to the Title IX office. For all schools, notice to a Title IX Coordinator, or to an official with authority to institute corrective measures on the recipient's behalf, charges a school with actual knowledge and triggers the school's response obligations.
2. Definition of Sexual Harassment for Title IX Purposes	The Final Rule defines sexual harassment broadly to include any of three types of misconduct on the basis of sex, all of which jeopardize the equal access to education that Title IX is designed to protect: Any instance of *quid pro quo* harassment by a school's employee; any unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it denies a person equal educational access; any instance of sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA). - The Final Rule prohibits sex-based misconduct in a manner consistent with the First Amendment. *Quid pro quo* harassment and Clery Act/VAWA offenses are <u>not</u> evaluated for severity, pervasiveness, offensiveness, or denial of equal educational access, because such misconduct is sufficiently serious to deprive a person of equal access. - The Final Rule uses the Supreme Court's *Davis* definition (severe *and* pervasive *and* objectively offensive conduct, effectively denying a person equal educational access) as one of the three categories of sexual harassment, so that where unwelcome sex-based conduct consists of speech or expressive conduct, schools balance Title IX enforcement with respect for free speech and academic freedom. - The Final Rule uses the Supreme Court's Title IX-specific definition rather than the Supreme Court's Title VII workplace standard (severe *or* pervasive conduct creating a hostile work environment). First Amendment concerns differ in educational environments and workplace environments, and the Title IX definition provides First Amendment protections appropriate for educational institutions where students are learning, and employees are teaching. Students, teachers, faculty, and others should enjoy free speech and academic freedom protections, even when speech or expression is offensive.

3. Sexual Harassment Occurring in a School's "Education Program or Activity" and "in the United States"	The Title IX statute applies to persons in the United States with respect to education programs or activities that receive Federal financial assistance. Under the Final Rule, schools must respond when sexual harassment occurs in the school's education program or activity, against a person in the United States. - The Title IX statute and existing regulations contain broad definitions of a school's "program or activity" and the Department will continue to look to these definitions for the scope of a school's education program or activity. Education program or activity includes locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurred, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution (such as a fraternity or sorority house). - Title IX applies to all of a school's education programs or activities, whether such programs or activities occur on-campus or off-campus. A school may address sexual harassment affecting its students or employees that falls outside Title IX's jurisdiction in any manner the school chooses, including providing supportive measures or pursuing discipline.
4. Accessible Reporting to Title IX Coordinator	The Final Rule expands a school's obligations to ensure its educational community knows how to report to the Title IX Coordinator. - The employee designated by a recipient to coordinate its efforts to comply with Title IX responsibilities must be referred to as the "Title IX Coordinator." - Instead of notifying only students and employees of the Title IX Coordinator's contact information, the school must also notify applicants for admission and employment, parents or legal guardians of elementary and secondary school students, and all unions, of the name or title, office address, e-mail address, and telephone number of the Title IX Coordinator. - Schools must prominently display on their websites the required contact information for the Title IX Coordinator. - Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by e-mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report. - Such a report may be made at any time, including during non-business hours, by using the telephone number or e-mail address, or by mail to the office address, listed for the Title IX Coordinator.
5. School's Mandatory Response Obligations: The Deliberate Indifference Standard	Schools must respond promptly to Title IX sexual harassment in a manner that is not deliberately indifferent, which means a response that is not clearly unreasonable in light of the known circumstances. Schools have the following mandatory response obligations: - Schools must offer supportive measures to the person alleged to be the victim (referred to as the "complainant").

	- The Title IX Coordinator must promptly contact the complainant confidentially to discuss the availability of supportive measures, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. - Schools must follow a grievance process that complies with the Final Rule before the imposition of any disciplinary sanctions or other actions that are not supportive measures, against a respondent. - Schools must not restrict rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment, when complying with Title IX. - The Final Rule requires a school to investigate sexual harassment allegations in any formal complaint, which can be filed by a complainant, or signed by a Title IX Coordinator. - The Final Rule affirms that a complainant's wishes with respect to whether the school investigates should be respected unless the Title IX Coordinator determines that signing a formal complaint to initiate an investigation over the wishes of the complainant is not clearly unreasonable in light of the known circumstances. - If the allegations in a formal complaint do not meet the definition of sexual harassment in the Final Rule, or did not occur in the school's education program or activity against a person in the United States, the Final Rule clarifies that the school must dismiss such allegations *for purposes of Title IX* but may still address the allegations in any manner the school deems appropriate under the school's own code of conduct.
6. School's Mandatory Response Obligations: Defining "Complainant," "Respondent," "Formal Complaint," "Supportive Measures"	When responding to sexual harassment (e.g., by offering supportive measures to a complainant and refraining from disciplining a respondent without following a Title IX grievance process, which includes investigating formal complaints of sexual harassment), the Final Rule provides clear definitions of complainant, respondent, formal complaint, and supportive measures so that recipients, students, and employees clearly understand how a school must respond to sexual harassment incidents in a way that supports the alleged victim and treats both parties fairly. The Final Rule defines "complainant" as an individual *who is alleged to be the victim* of conduct that could constitute sexual harassment. - This clarifies that any third party as well as the complainant may report sexual harassment. - While parents and guardians do not become complainants (or respondents), the Final Rule expressly recognizes the legal rights of parents and guardians to act on behalf of parties (including by filing formal complaints) in Title IX matters. The Final Rule defines "respondent" as an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

	The Final Rule defines "formal complaint" as a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment and states: - At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the school with which the formal complaint is filed. - A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under the Final Rule, and by any additional method designated by the school. - The phrase "document filed by a complainant" means a document or electronic submission (such as by e-mail or through an online portal provided for this purpose by the school) that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint. - Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or a party during a grievance process, and must comply with requirements for Title IX personnel to be free from conflicts and bias. The Final Rule defines "supportive measures" as individualized services reasonably available that are non-punitive, non-disciplinary, and not unreasonably burdensome to the other party while designed to ensure equal educational access, protect safety, or deter sexual harassment. - The Final Rule evaluates a school's selection of supportive measures and remedies based on what is not clearly unreasonable in light of the known circumstances, and does not second guess a school's disciplinary decisions, but requires the school to offer supportive measures, and provide remedies to a complainant whenever a respondent is found responsible.
7. Grievance Process, General Requirements	The Final Rule prescribes a consistent, transparent grievance process for resolving formal complaints of sexual harassment. Aside from hearings (see Issue #9 below), the grievance process prescribed by the Final Rule applies to all schools equally including K-12 schools and postsecondary institutions. The Final Rule states that a school's grievance process must: - Treat complainants equitably by providing remedies any time a respondent is found responsible, and treat respondents equitably by not imposing disciplinary sanctions without following the grievance process prescribed in the Final Rule. - Remedies, which are required to be provided to a complainant when a respondent is found responsible, must be designed to maintain the complainant's equal access to education and may include the same individualized services described in the Final Rule as supportive measures; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent. - Require objective evaluation of all relevant evidence, inculpatory and exculpatory, and avoid credibility determinations based on a person's status as a complainant, respondent, or witness.

	- Require Title IX personnel (Title IX Coordinators, investigators, decision-makers, people who facilitate any informal resolution process) to be free from conflicts of interest or bias for or against complainants or respondents. - Training of Title IX personnel must include training on the definition of sexual harassment in the Final Rule, the scope of the school's education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. - A school must ensure that decision-makers receive training on any technology to be used at a live hearing. - A school's decision-makers and investigators must receive training on issues of relevance, including how to apply the rape shield protections provided only for complainants. - 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. - Recipients must post materials used to train Title IX personnel on their websites, if any, or make materials available for members of the public to inspect. - Include reasonably prompt time frames for conclusion of the grievance process, including appeals and informal resolutions, with allowance for short-term, good cause delays or extensions of the time frames. - Describe the range, or list, the possible remedies a school may provide a complainant and disciplinary sanctions a school might impose on a respondent, following determinations of responsibility. - State whether the school has chosen to use the preponderance of the evidence standard, or the clear and convincing evidence standard, for all formal complaints of sexual harassment (including where employees and faculty are respondents). - Describe the school's appeal procedures, and the range of supportive measures available to complainants and respondents. - A school's grievance process must not use, rely on, or seek disclosure of information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege. - Any provisions, rules, or practices other than those required by the Final Rule that a school adopts as part of its grievance process for handling formal complaints of sexual harassment, must apply equally to both parties.

8. Investigations	The Final Rule states that the school must investigate the allegations in any formal complaint and send written notice to both parties (complainants and respondents) of the allegations upon receipt of a formal complaint. During the grievance process and when investigating: - The burden of gathering evidence and burden of proof must remain on schools, not on the parties. - Schools must provide equal opportunity for the parties to present fact and expert witnesses and other inculpatory and exculpatory evidence. - Schools must not restrict the ability of the parties to discuss the allegations or gather evidence (e.g., no "gag orders"). - Parties must have the same opportunity to select an advisor of the party's choice who may be, but need not be, an attorney. - Schools must send written notice of any investigative interviews, meetings, or hearings. - Schools must send the parties, and their advisors, evidence directly related to the allegations, in electronic format or hard copy, with at least 10 days for the parties to inspect, review, and respond to the evidence. - Schools must send the parties, and their advisors, an investigative report that fairly summarizes relevant evidence, in electronic format or hard copy, with at least 10 days for the parties to respond. - Schools must dismiss allegations of conduct that do not meet the Final Rule's definition of sexual harassment or did not occur in a school's education program or activity against a person in the U.S. Such dismissal is only for Title IX purposes and does not preclude the school from addressing the conduct in any manner the school deems appropriate. - Schools may, in their discretion, dismiss a formal complaint or allegations therein if the complainant informs the Title IX Coordinator in writing that the complainant desires to withdraw the formal complaint or allegations therein, if the respondent is no longer enrolled or employed by the school, or if specific circumstances prevent the school from gathering sufficient evidence to reach a determination. - Schools must give the parties written notice of a dismissal (mandatory or discretionary) and the reasons for the dismissal. - Schools may, in their discretion, consolidate formal complaints where the allegations arise out of the same facts. - The Final Rule protects the privacy of a party's medical, psychological, and similar treatment records by stating that schools cannot access or use such records unless the school obtains the party's voluntary, written consent to do so.
9. Hearings:	The Final Rule adds provisions to the "live hearing with cross-examination" requirement for postsecondary institutions and clarifies that hearings are optional for K-12 schools (and any other recipient that is not a postsecondary institution).

Summary of Major Provisions of the Department of Education's Title IX Final Rule

(a) Live Hearings & Cross-Examination (for Postsecondary Institutions)	(a) For postsecondary institutions, the school's grievance process must provide for a live hearing: - At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. - Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally. - At the request of either party, the recipient must provide for the entire live hearing (including cross-examination) to occur with the parties located in separate rooms with technology enabling the parties to see and hear each other. - Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker must first determine whether the question is relevant and explain to the party's advisor asking cross-examination questions any decision to exclude a question as not relevant. - If a party does not have an advisor present at the live hearing, the school must provide, without fee or charge to that party, an advisor of the school's choice who may be, but is not required to be, an attorney to conduct cross-examination on behalf of that party. - If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions. - Live hearings may be conducted with all parties physically present in the same geographic location or, at the school's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually. - Schools must create an audio or audiovisual recording, or transcript, of any live hearing.
(b) Hearings are Optional, Written Questions Required (for K-12 Schools)	(b) For recipients that are K-12 schools, and other recipients that are not postsecondary institutions, the recipient's grievance process may, *but need not*, provide for a hearing: - With or without a hearing, after the school has sent the investigative report to the parties and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.
(c) *Rape Shield Protections for Complainants*	(c) The Final Rule provides rape shield protections for complainants (as to all recipients whether postsecondary institutions, K-12 schools, or others), deeming irrelevant questions and evidence about a complainant's prior sexual behavior unless offered to prove that someone other than the respondent committed the alleged misconduct or offered to prove consent.

10. Standard of Evidence & Written Determination	The Final Rule requires the school's grievance process to state whether the standard of evidence to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard. The Final Rule makes each school's grievance process consistent by requiring each school to apply the same standard of evidence for all formal complaints of sexual harassment whether the respondent is a student or an employee (including faculty member). - The decision-maker (who cannot be the same person as the Title IX Coordinator or the investigator) must issue a written determination regarding responsibility with findings of fact, conclusions about whether the alleged conduct occurred, rationale for the result as to each allegation, any disciplinary sanctions imposed on the respondent, and whether remedies will be provided to the complainant. - The written determination must be sent simultaneously to the parties along with information about how to file an appeal.
11. Appeals	The Final Rule states that a school must offer both parties an appeal from a determination regarding responsibility, and from a school's dismissal of a formal complaint or any allegations therein, on the following bases: procedural irregularity that affected the outcome of the matter, newly discovered evidence that could affect the outcome of the matter, and/or Title IX personnel had a conflict of interest or bias, that affected the outcome of the matter. - A school may offer an appeal equally to both parties on additional bases.
12. Informal Resolution	The Final Rule allows a school, in its discretion, to choose to offer and facilitate informal resolution options, such as mediation or restorative justice, so long as both parties give voluntary, informed, written consent to attempt informal resolution. Any person who facilitates an informal resolution must be well trained. The Final Rule adds: - A school may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to a formal investigation and adjudication of formal complaints of sexual harassment. Similarly, a school may not require the parties to participate in an informal resolution process and may not offer an informal resolution process unless a formal complaint is filed. - At any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint. - Schools must not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

13. Retaliation Prohibited	The Final Rule expressly prohibits retaliation. - Charging an individual with code of conduct violations that do not involve sexual harassment, but arise out of the same facts or circumstances as a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX constitutes retaliation. - The school must keep confidential the identity of complainants, respondents, and witnesses, except as may be permitted by FERPA, as required by law, or as necessary to carry out a Title IX proceeding. - Complaints alleging retaliation may be filed according to a school's prompt and equitable grievance procedures. - The exercise of rights protected under the First Amendment does not constitute retaliation. - Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a Title IX grievance proceeding does not constitute retaliation; however, a determination regarding responsibility, alone, is not sufficient to conclude that any party made a bad faith materially false statement.

TITLE IX SEXUAL HARASSMENT PROCEDURES AND GRIEVANCE PROCESS FOR FORMAL COMPLAINTS

The Title IX sexual harassment procedures and grievance process for formal complaints prescribed in this attachment apply only when a report includes allegations of sexual harassment subject to Title IX regulations. (34 CFR 106.44, 106.45)

All other reports or complaints of discrimination or retaliation shall follow the complaint procedures established in Policy 103 Attachment 2 regarding discrimination.

[Note: a live hearing process is not required for the grievance process for formal complaints in the K-12 setting. Language on a live hearing process is <u>not</u> included in these procedures, but the district may add language in consultation with the school solicitor.]

<u>Definitions</u>

Actual knowledge means notice of sexual harassment or allegations of sexual harassment to the district's Title IX Coordinator or any district official who has the authority to institute corrective measures on behalf of the district, or to any employee of an elementary and secondary school, other than the respondent.

Exculpatory evidence means evidence tending to exonerate the accused or helps to establish their innocence.

Inculpatory evidence means evidence tending to incriminate the accused or indicate their guilt.

Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging Title IX sexual harassment and requesting that the district investigate the allegation. The authority for the Title IX Coordinator to sign a formal complaint does not make the Title IX Coordinator the complainant or other party during the grievance process. The phrase "**document filed by a complainant**" refers to a document or electronic submission that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.

Retaliation shall mean actions including, but not limited to, intimidation, threats, coercion, or discrimination against a victim or other person because they report conduct that may constitute discrimination or harassment, including Title IX sexual harassment, in accordance with Board policy and procedures, participate in an investigation or other process addressing discrimination or Title IX sexual harassment, or act in opposition to discriminatory practices.

The following actions shall <u>not</u> constitute retaliation:

1. An individual exercising free speech under the rights protected by the First Amendment.

2. The assignment of consequences consistent with Board policy and the Code of Student Conduct when an individual knowingly makes a materially false statement in bad faith in an investigation. The fact that the charges of discrimination were unfounded or unsubstantiated shall not be the sole reason to conclude that any party made a materially false statement in bad faith.

Supportive measures mean nondisciplinary, nonpunitive 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.

Supportive measures shall be designed to restore or preserve equal access to the education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the educational environment, or to deter sexual harassment. Supportive measures may include, but are not limited to:

1. Counseling.
2. Extensions of deadlines or other course-related adjustments.
3. Modifications of work or class schedules.
4. Campus escort services.
5. Mutual restrictions on contact between the parties.
6. Changes in work or housing locations.
7. Leaves of absence.
8. Increased security.
9. Monitoring of certain areas of the campus.
10. Assistance from domestic violence or rape crisis programs.
11. Assistance from community health resources including counseling resources.

Supportive measures may also include assessments or evaluations to determine eligibility for special education or related services, or the need to review an Individualized Education Program (IEP) or Section 504 Service Agreement based on a student's behavior. This could include, but is not limited to, a manifestation determination or functional behavioral assessment (FBA), in accordance with applicable law, regulations or Board policy. (Pol. 103.1, 113, 113.1, 113.2, 113.3)

Title IX sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

1. A district employee conditioning the provision of an aid, benefit, or district service on an individual's participation in unwelcome sexual conduct, commonly referred to as *quid pro quo sexual harassment*.

2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive and objectively offensive that it effectively denies a person equal access to a district education program or activity.

3. Sexual assault, dating violence, domestic violence or stalking.

    a. **Dating Violence** means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim and where the existence of such a relationship is determined by the following factors:

        1) Length of relationship.

        2) Type of relationship.

        3) Frequency of interaction between the persons involved in the relationship.

    b. **Domestic violence** includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving federal funding, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.

    c. **Sexual assault** means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.

    d. **Stalking,** under Title IX means stalking on the basis of sex, for example when the stalker desires to date a victim. Stalking means engaging in a course of conduct directed at a specific person that would cause a reasonable person to either:

        1) Fear for their safety or the safety of others.

        2) Suffer substantial emotional distress.

Such conduct must have taken place during a district education program or activity and against a person in the United States to qualify as sexual harassment subject to Title IX regulations. An **education program or activity** includes the locations, events or circumstances over which the district exercises substantial control over both the respondent and the context in which the harassment occurs.

TITLE IX SEXUAL HARASSMENT PROCEDURES

General Response – (with or without a formal complaint)

Any person, whether the alleged victim or not, may report Title IX sexual harassment using the Discrimination/Sexual Harassment/Bullying/Hazing/Dating Violence/Retaliation Report Form or by making a general report verbally or in writing to the building principal, or by using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report. Upon receipt of a report, school staff shall immediately notify the building principal.

A report may be made at any time, including during nonbusiness hours. Verbal reports shall be documented by the Title IX Coordinator or employee receiving the report using the Discrimination/Sexual Harassment/Bullying/Hazing/Dating Violence/Retaliation Report Form, and these procedures shall be implemented appropriately.

District staff who become aware of bullying, hazing, harassment or other discrimination affecting a student or staff member shall promptly report it to the building principal.

Parents/Guardians of students have the right to act on behalf of the complainant, the respondent, or other individual at any time.

When the district has actual knowledge of Title IX sexual harassment, the district is required to respond promptly and in a manner that is not deliberately indifferent, meaning not clearly unreasonable in light of the known circumstances.

All sexual harassment reports and complaints received by the building principal shall be promptly directed to the Title IX Coordinator, in accordance with Board policy. The Title IX Coordinator shall use the Discrimination/Sexual Harassment/Bullying/Hazing/Dating Violence/Retaliation Report Form to gather additional information from the reporter and/or other parties identified in the report, to determine if the allegations meet the definition and parameters for Title IX sexual harassment.

The Title IX Coordinator shall promptly contact the complainant regarding the report to gather additional information as necessary, and to discuss the availability of supportive measures. The Title IX Coordinator shall consider the complainant’s wishes with respect to supportive measures.

The Title IX Coordinator shall initially assess whether the reported conduct:

1. Meets the definition of Title IX sexual harassment.

2. Occurred in a district program or activity under the control of the district and against a person in the United States.

3. Involves other Board policies or the Code of Student Conduct.

4. Indicates, based on an individualized safety and risk analysis, that there is an immediate threat to the physical health or safety of an individual.

5. Involves a student identified as a student with a disability under the Individuals with Disabilities Education Act or Section 504 of the Rehabilitation Act. (Pol. 103.1, 113)

If the result of this initial assessment determines that none of the allegations fall within the scope of Title IX sexual harassment, but the matter merits review and possible action under the Code of Student Conduct and other Board policies or Attachment 2 addressing Discrimination Complaints, then the Title IX Coordinator shall redirect the report to the appropriate administrator to address the allegations. (Pol. 103, 103.1, 113.1, 218, 247, 249, 252, 317, 317.1)

If the result of the initial assessment determines that the allegations may constitute Title IX sexual harassment, the Title IX Coordinator shall promptly explain to the complainant the process for filing a formal complaint and inform the complainant of the continued availability of supportive measures with or without the filing of a formal complaint.

The Title IX Coordinator shall contact the parents/guardians and provide them with information regarding the report and Title IX sexual harassment procedures and grievance process for formal complaints.

If the complainant, school staff or others with professional knowledge relating to the complainant's health and well-being indicate that notifying the parents/guardians could cause serious harm to the health or well-being of the complainant or other person(s), the Title IX Coordinator will determine, in consultation with such individuals and upon advice of legal counsel, whether to withhold or delay notification of the report from the complainant's parents/guardians.

The Title IX Coordinator shall also determine what supportive measures may be offered to the respondent.

If either party is an identified student with a disability, or thought to be disabled, the Title IX Coordinator shall contact the Director of Special Education to coordinate the required actions in accordance with Board policy. (Pol. 113, 113.1, 113.2, 113.3)

Confidentiality regarding the supportive measures offered and the identity of the following individuals shall be maintained, except as may be permitted by law or regulations relating to the conduct of any investigation: (20 U.S.C. Sec. 1232g; 34 CFR Parts 99, 106; Pol. 113.4, 216)

1. Individuals making a report or formal complaint.

2. Complainant(s).

3. Respondent(s).

4. Witnesses.

The district shall treat complainants and respondents equitably by:

1. Offering supportive measures to the complainant and may offer such measures to the respondent.

2. Following the grievance process for formal complaints before imposing disciplinary sanctions or other actions that are not supportive measures on the respondent.

Disciplinary Procedures When Reports Allege Title IX Sexual Harassment -

When reports allege Title IX sexual harassment, disciplinary sanctions may not be imposed until the completion of the grievance process for formal complaints. The district shall presume that the respondent is not responsible for the alleged conduct until a determination has been made at the completion of the grievance process for formal complaints.

When an emergency removal, as described below, is warranted to address an immediate threat to the physical health or safety of an individual, and it is not feasible to continue educational services remotely or in an alternative setting, the normal procedures for suspension and expulsion shall be conducted to accomplish the removal, including specific provisions to address a student with a disability where applicable. (Pol. 113.1, 113.2, 113.3, 233)

When an emergency removal is not required, disciplinary sanctions will be considered in the course of the Title IX grievance process for formal complaints. Following the issuance of the written determination and any applicable appeal, any disciplinary action specified in the written determination or appeal decision shall be implemented in accordance with the normal procedures for suspensions, expulsions or other disciplinary actions, including specific provisions to address a student with a disability where applicable. (Pol. 113.1, 113.2, 218, 233)

Supportive Measures -

All supportive measures provided by the district shall remain confidential, to the extent that maintaining such confidentiality would not impair the ability of the district to provide the supportive measures. (34 CFR 106.44)

When any party is an identified student with a disability, or thought to be a student with a disability, the Title IX Coordinator shall notify the Director of Special Education and coordinate to determine whether additional steps must be taken as supportive measures for the party while the Title IX procedures are implemented. Such measures may include, but are not limited to, conducting a manifestation determination, FBA or other assessment or evaluation, in accordance with applicable law, regulations or Board policy. FBAs must be conducted when a student's behavior interferes with the student's learning or the learning of others and information is necessary to provide appropriate educational programming, and when a student's behavior violates the Code of Student Conduct and is determined to be a manifestation of a student's disability. (Pol. 113, 113.1, 113.2, 113.3)

Reasonable Accommodations –

Throughout the Title IX sexual harassment procedures, the district shall make reasonable accommodations for identified physical and intellectual impairments that constitute disabilities for any party, and address barriers being experienced by disadvantaged students such as English learners and homeless students, consistent with the requirements of federal and state laws and regulations and Board policy. (Pol. 103.1, 113, 138, 251, 832)

Emergency Removal –

If the district has determined, based on an individualized safety and risk analysis, that there is an immediate threat to the physical health or safety of any student or other individual due to the allegations of Title IX sexual harassment, the respondent may be removed from the district's education program or activity or moved to an alternative setting, consistent with all rights under federal and state laws and regulations, and Board policy, including but not limited to the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act and the Americans with Disabilities Act. If the respondent is an identified student with a disability, or thought to be disabled, the Title IX Coordinator shall contact the Director of Special Education to coordinate the required actions in accordance with Board policy. The respondent shall be provided with notice and provided an opportunity for due process, in accordance with law, regulations and Board policy. When expulsion is necessary because continuation of educational services is not feasible, the Board's written adjudication of expulsion shall address the pending Title IX process and the impact of the outcome of the Title IX process on a student's emergency removal status. (20 U.S.C. Sec. 1400 et seq. ; 29 U.S.C. Sec. 794 ; 42 U.S.C. Sec. 12101 et seq. ; 34 CFR 106.44 ; Pol. 103.1, 113.1, 233)

Administrative Leave -

When an employee, based on an individualized safety and risk analysis, poses an immediate threat to the health or safety of any student or other individual, the employee may be removed on an emergency basis.

An accused nonstudent district employee may be placed on administrative leave during the pendency of the grievance process for formal complaints, consistent with all rights under Section 504 of the Rehabilitation Act and the Americans with Disabilities Act, and in accordance with

state law and regulations, Board policy and an applicable collective bargaining agreement or individual contract. (29 U.S.C. Sec. 794, 42 U.S.C. Sec. 12101 et seq., 34 CFR 106.44, Pol. 317)

Required Reporting Under Other Policies -

In addition to implementing the Title IX sexual harassment procedures, the Title IX Coordinator shall ensure that reported conduct which meets the definition of other laws, regulations or Board policies, is also appropriately addressed in accordance with the applicable laws, regulations or Board policies, including but not limited to, incidents under the Safe Schools Act, reports of educator misconduct, threats, or reports of suspected child abuse. (Pol. 218, 317.1, 806, 824)

Timeframes

Reasonably prompt timeframes shall be established for the conclusion of the grievance process for formal complaints, including timeframes for the informal resolution process and timeframes for filing and resolving appeals.

The established timeframes included in these procedures may be adjusted to allow for a temporary delay or a limited extension of time for good cause. Written notice of the delay or extension and the reason for such action shall be provided to the complainant and the respondent, and documented with the records of the complaint. Good cause may include, but is not limited to, considerations such as:

1. The absence of a party, a party's advisor or a witness.

2. Concurrent law enforcement activity.

3. Need for language assistance or accommodation of disabilities.

Redirection or Dismissal of Title IX Formal Complaints

Formal complaints may be dismissed, if at any time during the investigation or written determination steps described below:

1. A complainant provides written notification of withdrawal of any allegations or of the formal complaint.

2. The respondent is no longer enrolled or employed by the district in a district program or activity.

3. Specific circumstances prevent the district from gathering evidence sufficient to reach a determination as to the formal complaint or allegations.

Only alleged conduct that occurred in the district's education program or activity, and against a person in the United States, may qualify as Title IX sexual harassment within the district's jurisdiction. If it is determined during the investigation or written determination steps below that

none of the allegations, if true, would meet the definition and parameters of Title IX sexual harassment within the district's jurisdiction, the Title IX Coordinator shall dismiss the formal complaint under Title IX. If the matter merits review and possible action under the Code of Student Conduct and other Board policies or Attachment 2 addressing Discrimination Complaints, then the Title IX Coordinator shall redirect the report to the appropriate administrator to address the allegations.

Written notification shall be promptly issued to the parties simultaneously of any allegations found not to qualify or that are dismissed in compliance with Title IX. Written notification shall state whether the allegations will continue to be addressed pursuant to the Code of Student Conduct and other Board policies or Attachment 2 addressing Discrimination Complaints.

A dismissal may be appealed via the appeal procedures set forth in this Attachment.

Consolidation of Title IX Formal Complaints

The district may consolidate formal complaints against more than one (1) respondent, or by more than one (1) complainant against one or more respondents, or by one (1) individual against another individual, where the allegations of sexual harassment arise out of the same facts or circumstances.

GRIEVANCE PROCESS FOR FORMAL COMPLAINTS

Step 1 – Formal Complaint

The district is required to initiate the grievance process for formal complaints when a complainant or the complainant's parent/guardian files a formal complaint. The Title IX Coordinator is also authorized to initiate this process despite a complainant's wishes when actions limited to supportive measures are not a sufficient response to alleged behavior, or when a formal complaint process is necessary to investigate and address the situation adequately. For example, if disciplinary action would be warranted if allegations are true, if the respondent is an employee, or if further investigation is needed to assess the extent of the behavior and impact on others, it may be clearly unreasonable not to initiate the formal complaint process. Only the Title IX Coordinator is authorized to initiate the formal complaint process despite a complainant's wishes, but the Title IX Coordinator may consult with the school solicitor and other district officials in making this decision.

The complainant or the Title IX Coordinator shall use the designated section of the Discrimination/Sexual Harassment/Bullying/Hazing/Dating Violence/Retaliation Report Form to file or sign a formal complaint.

The Title IX Coordinator shall assess whether the investigation should be conducted by the building principal, another district employee, the Title IX Coordinator or an attorney and shall promptly assign the investigation to that individual.

The Title IX Coordinator, investigator, decision-maker, or any individual designated to facilitate the informal resolution process, each must have completed the required training for such roles as designated in Board policy and shall not have a conflict of interest or bias for or against an individual complainant or respondent, or for or against complainants or respondents in general.

The respondent shall be presumed not responsible for the alleged conduct until a written determination regarding responsibility has been made at the conclusion of the grievance process for formal complaints.

Notice Requirements -

Upon receipt of a formal complaint, or when the Title IX Coordinator signs a formal complaint to initiate the grievance process for formal complaints, the Title IX Coordinator shall provide written notice to all known parties, and the parents/guardians of known parties, where applicable, providing the following information:

1. Notice of the district's grievance process for formal complaints and any informal resolution process that may be available.

2. Notice of the allegations potentially constituting Title IX sexual harassment, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include:

    a. The identity of the parties involved, if known.

    b. The conduct allegedly constituting sexual harassment.

    c. The date and location of the alleged incident(s), if known.

3. A statement that a written determination regarding responsibility shall be made at the conclusion of the grievance process for formal complaints and, until that time, the respondent is presumed not responsible for the alleged conduct.

4. Notice that parties may have an advisor of their choice, who may be, but is not required to be, an attorney. The advisor may inspect and review evidence.

5. Notice that Board policy and the district's Code of Student Conduct prohibits knowingly making false statements or knowingly submitting false information to school officials in connection with reports of misconduct or discrimination complaints.

6. Notice to all known parties of any additional allegations that the district decides to investigate during the course of the investigation.

Step 2 – Informal Resolution Process

[Note: The informal resolution process cannot be offered or used to facilitate a resolution for any formal complaint where the allegations state that an employee sexually harassed a student.]

At any time after a formal complaint has been filed, but prior to reaching a determination of responsibility, if the Title IX Coordinator believes the circumstances are appropriate, the Title IX Coordinator may offer the parties the opportunity to participate in an informal resolution process, which does not involve a full investigation and adjudication of the Title IX sexual harassment complaint.

The district may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal Title IX sexual harassment complaints. Similarly, a district may not require the parties to participate in an informal resolution process.

Informal resolutions can take many forms, depending on the particular case. Examples include, but are not limited to, mediation, facilitated discussions between the parties, restorative practices, acknowledgment of responsibility by a respondent, apologies, a requirement to engage in specific services, or supportive measures.

When offering an informal resolution process, the Title IX Coordinator shall:

1. Provide the parties a written notice disclosing the following:

    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; provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process for formal complaints.

    c. Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.

2. Obtain the parties' voluntary, written consent to the informal resolution process. As part of the consent process, all parties shall be informed of the rights being waived by agreeing to the informal resolution process, and shall acknowledge such agreement in writing.

3. The informal resolution process shall be conducted within

    { } five (5) school days

    { } ten (10) school days

{ } twenty (20) school days

{ } _____ school days

of the parties' signed agreement for the informal resolution process.

If the matter is resolved to the satisfaction of the parties, the district employee facilitating the informal resolution process shall document the nature of the complaint and the proposed resolution of the matter, have both parties sign the documentation and receive a copy, and forward it to the Title IX Coordinator. Within

{ } ten (10) school days

{ } twenty (20) school days

{ } _____ school days

after the complaint is resolved in this manner, the Title IX Coordinator shall contact the complainant to determine if the resolution was effective and to monitor the agreed upon remedies. The Title IX Coordinator shall document the informal resolution process, responses from all parties, and an explanation of why the district's response was not deliberately indifferent to the reported complaint of sexual harassment.

***If Step 2 Informal Resolution Process results in the final resolution of the complaint, the following steps are not applicable.**

Step 3 – Investigation

The designated investigator, if other than the Title IX Coordinator, shall work with the Title IX Coordinator to assess the scope of the investigation, who needs to be interviewed and what records or evidence may be relevant to the investigation. The investigation stage shall be concluded within

{ } twenty (20) school days.

{ } thirty (30) school days.

{ } _____ school days.

When investigating a formal complaint, the investigator shall:

1. Bear the burden of proof and gather evidence and conduct interviews sufficient to reach a written determination. During the process of gathering evidence, unless the district obtains the voluntary, written consent of the party, or the party's parent/guardian when legally required, the district cannot access, consider, disclose or otherwise use a party's records which are protected by legal privilege, such as those records made or maintained by a

physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with providing treatment to the party. (Pol. 113.4, 207, 209, 216, Safe2Say Something Procedures)

2. Objectively evaluate all available evidence, including inculpatory and exculpatory evidence.

3. Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.

4. Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.

   { } However the district may request a nondisclosure agreement be signed by the parties and their advisor(s), if any, stating that they will not disseminate or disclose evidence and documents exchanged in the investigation.

5. Provide the parties with the same opportunities to have others present during any interview or other meeting, including an advisor of the party's choice. The district may establish restrictions, applicable to both parties, regarding the extent to which the advisor may participate.

6. Provide written notice to any party whose participation is invited or expected during the investigation process with the following information, in sufficient time for the party to prepare to participate:

   a. Date.

   b. Time.

   c. Location.

   d. Participants.

   e. Purpose of all investigative interviews or other meetings.

7. 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, including evidence the district does not intend to rely on to reach a determination regarding responsibility and any inculpatory and exculpatory evidence, whether obtained from a party or other source.

If at any point the investigation expands to include additional allegations that were <u>not</u> included in the initial notice provided upon initiation of the grievance process for formal complaints, the investigator shall alert the Title IX Coordinator. The Title IX Coordinator shall provide written notice of the new allegations to the known parties.

Prior to the completion of the investigative report, the investigator shall:

1. Send to each party and the party's advisor, if any, the evidence subject to inspection and review in electronic or hard copy format.

2. Provide the parties at least ten (10) school days following receipt of the evidence to submit a written response.

3. Consider the written response prior to drafting the investigative report.

The investigator shall draft an investigative report that fairly summarizes relevant evidence and shall provide the investigative report to all parties and to the designated decision-maker.

If the investigation reveals that the conduct being investigated may involve a violation of criminal law, the investigator shall promptly notify the Title IX Coordinator, who shall promptly inform law enforcement authorities about the allegations and make any additional required reports, in accordance with law, regulations and Board policy. (Pol. 218, 317.1, 806)

The obligation to conduct this investigation shall not be negated by the fact that a criminal or child protective services investigation of the allegations is pending or has been concluded. The investigator should coordinate with any other ongoing investigations of the allegations, including agreeing to request for a delay in fulfilling the district's investigative responsibilities during the fact-finding portion of a criminal or child protective services investigation. Such delays shall not extend beyond the time necessary to prevent interference with or disruption of the criminal or child protective services investigation and the reason for such delay shall be documented by the investigator.

In the course of an investigation, it is possible that conduct other than, or in addition to, Title IX sexual harassment may be identified as part of the same incident or set of circumstances, The fact that there may be Title IX sexual harassment involved does not preclude the district from addressing other identified violations of the Code of Student Conduct or Board policy. If such other conduct is being investigated and addressed together with Title IX sexual harassment as part of the Title IX grievance process for formal complaints, disciplinary action normally should not be imposed until the completion of the Title IX grievance process for formal complaints. A decision whether and when to take such action should be made in consultation with the school solicitor.

Step 4 – Written Determination and District Action

Designation of Decision-Maker -

To avoid any conflict of interest or bias, the decision-maker cannot be the same person as the Title IX Coordinator or the investigator. The responsibility as the decision-maker for complaints of Title IX sexual harassment shall generally be designated to the

{ } building principal.

{ } Superintendent.

{ } Director of Student Services.

{ } _____Other.

If the _____ has a conflict of interest or is a party in the formal complaint process, they shall disclose the conflict and the Title IX Coordinator shall designate another individual to serve as the decision-maker.

Written Determination Submissions -

A written determination of responsibility (written determination) must not be finalized less than ten (10) days after the investigator completes the investigative report and provides it to all parties. Before the decision-maker reaches a determination regarding responsibility, the decision-maker shall afford each party the opportunity to submit written, relevant questions that a party wants to be asked of any party or witness, shall provide each party with the answers, and shall allow for additional, limited follow-up questions from each party.

Relevant questions for a party or witness must be submitted by each party within

{ } three (3) school days

{ } five (5) school days

{ } _____ school days

following receipt of the investigative report. Follow-up questions must be submitted by each party within

{ } three (3) school days

{ } five (5) school days

{ } _____ school days

of being provided the answers to the initial questions.

Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant as part of the follow-up questions and responses, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

The decision-maker shall explain to the party proposing the questions about any decision to exclude a question as not relevant.

Written Determination -

The decision-maker must issue a written determination for the conduct alleged in formal complaints. To reach this determination, the decision-maker shall apply the preponderance of the evidence standard, meaning that the party bearing the burden of proof must present evidence which is more credible and convincing than that presented by the other party or which shows that the fact to be proven is more probable than not.

{ } *[Note: Districts may consult with their school solicitor and decide to use the "clear and convincing evidence" standard, as permitted by the federal regulations, in place of the "preponderance of the evidence" standard. However, the legal disadvantages of this should be carefully considered with the school solicitor.]* the clear and convincing evidence standard, meaning that the party bearing the burden of proof must show that the truth of the allegations is highly probable.

In considering evidence, the decision-maker shall ensure credibility determinations are not based on an individual's status as a complainant, respondent or witness.

After considering all relevant evidence, the decision-maker shall issue a written determination that includes:

1. Identification of the allegations potentially constituting Title IX sexual harassment.

2. A description of the procedural steps taken from the receipt or signing of the formal complaint through the written determination, including any notifications to the parties, interviews with parties and witnesses, site visits, and methods used to gather other evidence.

3. Findings of fact supporting the determination.

4. Conclusions regarding the application of the district's Code of Student Conduct or Board policies to the facts.

5. A statement of, and rationale for, the result as to each allegation, including:

    a. Determination regarding responsibility.

    b. Disciplinary sanctions.

    c. Remedies designed to restore or preserve equal access to the district's education program or activity that will be provided by the district to the complainant. Such remedies may be punitive or disciplinary and need not avoid burdening the respondent.

6. The procedures, deadline and permissible bases for the complainant and respondent to appeal.

The written determination shall be provided to the parties simultaneously. The determination becomes final either:

1. On the date that the district provides the parties with the written decision of the result of the appeal, if an appeal is filed;

2. Or, if an appeal is not filed, on the date on which an appeal would no longer be considered timely, in accordance with the timeframe established for appeals in this Attachment.

The Title IX Coordinator shall be responsible to ensure that any remedies are implemented by the appropriate district officials and for following up as needed to assess the effectiveness of such remedies. Disciplinary actions shall be consistent with the Code of Student Conduct, Board policies and administrative regulations, district procedures, applicable collective bargaining agreements, and state and federal laws and regulations, including specific requirements and provisions for students with disabilities. (Pol. 113.1, 218, 233, 317, 317.1)

Appeal Process

Districts must offer both parties the right to appeal a determination of responsibility and the right to appeal the district's dismissal of a Title IX formal complaint or any allegation in the Title IX formal complaint. The scope of appeals related to Title IX sexual harassment are limited to the following reasons for appeal as stated in the Title IX regulations:

1. A procedural irregularity that affected the outcome of the matter.

2. New evidence that that could affect the outcome was not reasonably available at the time the decision to dismiss or determination of responsibility was made.

3. The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against the individual complainant or respondent or for or against complainants or respondents generally that affected the outcome of the matter.

Written notice of a party's appeal shall be submitted to the Title IX Coordinator within

{ } five (5) school days

{ } ten (10) school days

{ } _____ school days

after the date of the written determination. Notice of appeal shall include a brief statement describing the basis for the appeal.

The Title IX Coordinator shall ensure that the designated appeal authority is not the same person as the decision-maker that reached the determination, the investigator, or the Title IX Coordinator. The designated appeal authority shall be the:

{ } District solicitor or outside counsel.

{ } Outside hearing officer.

{ } _____ (Other).

For all appeals, the designated appeal authority shall:

1. Provide written notice to the other party when notice of an appeal is filed and implement appeal procedures equally for both parties.

2. Provide both parties a reasonable, equal opportunity to submit a written statement in support of or challenging the stated basis for the appeal. Supporting statements shall describe in detail as applicable the procedural irregularities asserted to have affected the outcome of the determination, the nature of any new evidence asserted to have affected the outcome, and the nature of any bias asserted to have affected the outcome, with an explanation of how the outcome was affected by such factors. If evidence exists supporting the basis for appeal, it shall accompany the supporting statement, or it shall identify where such evidence may be found.

   Supporting statements must be submitted to the appeal authority and provided to the other party within

   { } five (5) school days

   { } ten (10) school days

   { } _____ school days

   of the written notice of appeal.

   Statements in opposition to the appeal shall be submitted within five (5) school days of the submission of supporting statements. If a statement in opposition to an appeal refers to any evidence beyond what is described in a supporting statement, it shall accompany the statement in opposition, or it shall identify where such evidence may be found.

   The appeal authority may accept and consider evidence in support of or in opposition to an appeal in making any conclusions necessary to deciding the appeal. Alternatively, when the appeal authority determines that factors exist making it necessary for the decision-maker to further develop the evidentiary record relevant to the basis for appeal, the appeal authority may return the matter to the decision-maker for that limited purpose.

3. Determine whether the appeal meets the grounds for permitted reasons for appeal and justifies modifying the written determination.

4. Issue a written decision setting forth the respects, if any, in which the written determination is modified and the rationale for the result within

   { } five (5) school days.

   { } ten (10) school days.

   { } twenty (20) school days.

   { } _____ school days.

5. Provide the written decision simultaneously to both parties. A copy of the written decision shall also be provided to the Title IX Coordinator.

Recordkeeping

The district shall maintain the following records for a of a minimum of seven (7) years after conclusion of procedures and implementation of disciplinary sanctions and/or remedies, or in the case of a complainant or respondent who is a minor, until the expiration of the longest statute of limitations for filing a civil suit applicable to any allegation:

1. Each Title IX sexual harassment investigation, including any written determination and any audio or audiovisual recording or transcript, and disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the district's education program or activity.

2. Any appeal and the result.

3. Any informal resolution and the result.

4. All materials used to train the Title IX Coordinator, investigators, decision-makers, and any person who facilitates an informal resolution process.

5. Records of any district actions, including any supportive measures, taken in response to a report or formal complaint of Title IX sexual harassment. In each instance, the district shall document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the district's education program or activity. If a district does not provide a complainant with supportive measures, then the district must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit the district in the future from providing additional explanations or detailing additional measures taken.

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Title 18

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CHAPTER 57
WIRETAPPING AND ELECTRONIC SURVEILLANCE

Subchapter

A. General Provisions
B. Wire, Electronic or Oral Communication
C. Stored Wire and Electronic Communications and Transactional Records Access
D. Mobile Tracking Devices
E. Pen Registers, Trap and Trace Devices and Telecommunication Identification Interception Devices
F. Miscellaneous

Enactment. Present Chapter 57 was added October 4, 1978, P.L.831, No.164, effective in 60 days.

Prior Provisions. Former Chapter 57, which related to invasion of privacy, was added December 6, 1972, P.L.1482, No.334, and repealed October 4, 1978, P.L.831, No.164, effective in 60 days.

Cross References. Chapter 57 is referred to in section 1522 of Title 4 (Amusements); section 3575 of Title 42 (Judiciary and Judicial Procedure).

SUBCHAPTER A
GENERAL PROVISIONS

Sec.

5701. Short title of chapter.
5702. Definitions.

Subchapter Heading. The heading of Subchapter A was added October 21, 1988, P.L.1000, No.115, effective immediately.

§ 5701. Short title of chapter.

This chapter shall be known and may be cited as the "Wiretapping and Electronic Surveillance Control Act."

§ 5702. Definitions.

As used in this chapter, the following words and phrases shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Aggrieved person." A person who was a party to any intercepted wire, electronic or oral communication or a person against whom the interception was directed.

"Aural transfer." A transfer containing the human voice at any point between and including the point of origin and the point of reception.

"Communication common carrier." Any person engaged as a common carrier for hire, in intrastate, interstate or foreign communication by wire or radio or in intrastate, interstate or foreign radio transmission of energy; however, a person engaged in radio broadcasting shall not, while so engaged, be deemed a common carrier.

"Communication service." Any service which provides to users

the ability to send or receive wire or electronic communications.

"Communication system." Any wire, radio, electromagnetic, photo-optical or photoelectronic facilities for the transmission of communications and any computer facilities or related electronic equipment for the electronic storage of such communications.

"Contents." As used with respect to any wire, electronic or oral communication, is any information concerning the substance, purport, or meaning of that communication.

"Court." The Superior Court. For the purposes of Subchapter C only, the term shall mean the court of common pleas.

"Crime of violence." Any of the following:

(1) Any of the following crimes:

(i) Murder in any degree as defined in section 2502(a), (b) or (c) (relating to murder).

(ii) Voluntary manslaughter as defined in section 2503 (relating to voluntary manslaughter), drug delivery resulting in death as defined in section 2506(a) relating to drug delivery resulting in death), aggravated assault as defined in section 2702(a)(1) or (2) (relating to aggravated assault), 2718 (relating to strangulation), kidnapping as defined in section 2901(a) or (a.1) (relating to kidnapping), rape as defined in section 3121(a), (c) or (d) (relating to rape), involuntary deviate sexual intercourse as defined in section 3123(a), (b) or (c) (relating to involuntary deviate sexual intercourse), sexual assault as defined in section 3124.1 (relating to sexual assault), aggravated indecent assault as defined in section 3125(a) or (b) (relating to aggravated indecent assault), incest as defined in section 4302(a) or (b) (relating to incest), arson as defined in section 3301(a) (relating to arson and related offenses), burglary as defined in section 3502(a)(1) (relating to burglary), robbery as defined in section 3701(a)(1)(i), (ii) or (iii) (relating to robbery) or robbery of a motor vehicle as defined in section 3702(a) (relating to robbery of motor vehicle).

(iii) Intimidation of witness or victim as defined in section 4952(a) and (b) (relating to intimidation of witnesses or victims).

(iv) Retaliation against witness, victim or party as defined in section 4953(a) and (b) (relating to retaliation against witness, victim or party).

(v) Criminal attempt as defined in section 901(a) (relating to criminal attempt), criminal solicitation as defined in section 902(a) (relating to criminal solicitation) or criminal conspiracy as defined in section 903(a) (relating to criminal conspiracy) to commit any of the offenses specified in this definition.

(2) Any offense equivalent to an offense under paragraph (1) under the laws of this Commonwealth in effect at the time of the commission of that offense or under the laws of another jurisdiction.

"Electronic communication." Any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photo-optical system, except:

(1) (Deleted by amendment).

(2) Any wire or oral communication.

(3) Any communication made through a tone-only paging device.

(4) Any communication from a tracking device (as defined in this section).

"Electronic communication service." (Deleted by amendment).

"Electronic communication system." (Deleted by amendment).

"Electronic, mechanical or other device." Any device or ~ but not limited to, an induction coi~

apparatus, including, but not limited to, an induction coil or a telecommunication identification interception device, that can be used to intercept a wire, electronic or oral communication other than:

(1) Any telephone or telegraph instrument, equipment or facility, or any component thereof, furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business, or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business, or being used by a communication common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties.

(2) A hearing aid or similar device being used to correct subnormal hearing to not better than normal.

(3) Equipment or devices used to conduct interceptions under section 5704(15) (relating to exceptions to prohibition of interception and disclosure of communications).

"Electronic storage."

(1) Any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof.

(2) Any storage of such a communication by an electronic communication service for purpose of backup protection of the communication.

"Home." The residence of a nonconsenting party to an interception, provided that access to the residence is not generally permitted to members of the public and the party has a reasonable expectation of privacy in the residence under the circumstances.

"In-progress trace." The determination of the origin of a telephonic communication to a known telephone during an interception.

"Intercept." Aural or other acquisition of the contents of any wire, electronic or oral communication through the use of any electronic, mechanical or other device. The term shall include the point at which the contents of the communication are monitored by investigative or law enforcement officers. The term shall not include the acquisition of the contents of a communication made through any electronic, mechanical or other device or telephone instrument to an investigative or law enforcement officer, or between a person and an investigative or law enforcement officer, where the investigative or law enforcement officer poses as an actual person who is the intended recipient of the communication, provided that the Attorney General, a deputy attorney general designated in writing by the Attorney General, a district attorney or an assistant district attorney designated in writing by a district attorney of the county wherein the investigative or law enforcement officer is to receive or make the communication has reviewed the facts and is satisfied that the communication involves suspected criminal activities and has given prior approval for the communication.

"Investigative or law enforcement officer." Any officer of the United States, of another state or political subdivision thereof or of the Commonwealth or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter or an equivalent crime in another jurisdiction, and any attorney authorized by law to prosecute or participate in the prosecution of such offense.

"Judge." When referring to a judge authorized to receive applications for, and to enter, orders authorizing interceptions of wire, electronic or oral communications pursuant to Subchapter B (relating to wire, electronic or oral communication), any judge of the Superior Court.

"Mobile communications tracking information." Information generated by a communication common carrier or a communication service which indicates the location of an electronic device

supported by the communication common carrier or communication service.

"One call system." A communication system established by users to provide a single telephone number for contractors or designers or any other person to call notifying users of the caller's intent to engage in demolition or excavation work.

"Oral communication." Any oral communication uttered by a person possessing an expectation that such communication is not subject to interception under circumstances justifying such expectation. The term does not include the following:

(1) An electronic communication.

(2) A communication made in the presence of a law enforcement officer on official duty who is in uniform or otherwise clearly identifiable as a law enforcement officer and who is using an electronic, mechanical or other device which has been approved under section 5706(b)(4) (relating to exceptions to prohibitions in possession, sale, distribution, manufacture or advertisement of electronic, mechanical or other devices) to intercept the communication in the course of law enforcement duties. As used in this paragraph only, "law enforcement officer" means a member of the Pennsylvania State Police, an individual employed as a police officer who holds a current certificate under 53 Pa.C.S. Ch. 21 Subch. D (relating to municipal police education and training), a sheriff or a deputy sheriff.

"Organized crime."

(1) The unlawful activity of an association trafficking in illegal goods or services, including but not limited to, gambling, prostitution, loan sharking, controlled substances, labor racketeering, or other unlawful activities; or

(2) any continuing criminal conspiracy or other unlawful practice which has as its objective:

(i) large economic gain through fraudulent or coercive practices; or

(ii) improper governmental influence.

"Pen register." A device which is used to capture, record or decode electronic or other impulses which identify the numbers dialed or otherwise transmitted, with respect to wire or electronic communications, on the targeted telephone. The term includes a device which is used to record or decode electronic or other impulses which identify the existence of incoming and outgoing wire or electronic communications on the targeted telephone. The term does not include a device used by a provider or customer of a wire or electronic communication service for billing, or recording as an incident to billing, for communication service provided by the provider, or any device used by a provider, or customer of a wire communication service for cost accounting or other like purposes in the ordinary course of business.

"Person." Any employee, or agent of the United States or any state or political subdivision thereof, and any individual, partnership, association, joint stock company, trust or corporation.

"Readily accessible to the general public." As used with respect to a radio communication, that such communication is not:

(1) scrambled or encrypted;

(2) transmitted using modulation techniques of which the essential parameters have been withheld from the public with the intention of preserving the privacy of the communication;

(3) carried on a subscriber or other signal subsidiary to a radio transmission;

(4) transmitted over a communication system provided by a common carrier, unless the communication is a tone-only paging system communication; or

(5) transmitted on frequencies allocated under 47 CFR Parts 25, 74D, E, F or 94, unless, in the case of a

communication transmitted on a frequency allocated under Part 74 which is not exclusively allocated to broadcast auxiliary services, the communication is a two-way voice communication by radio.

"Remote computing service." The provision to the public of computer storage or processing services by means of an electronic communications system.

"Signed, written record." A memorialization of the contents of any wire, electronic or oral communication intercepted in accordance with this subchapter, including the name of the investigative or law enforcement officer who transcribed the record, kept in electronic, paper or any form. The signature of the transcribing officer shall not be required to be written, but may be electronic.

"State." Any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico and any territory or possession of the United States.

"Suspected criminal activity." A particular offense that has been, is or is about to occur as set forth under section 5709(3)(ii) (relating to application for order), any communications to be intercepted as set forth under section 5709(3)(iii) or any of the criminal activity set forth under section 5709(3)(iv) establishing probable cause for the issuance of an order.

"Telecommunication identification interception device." Any equipment or device capable of intercepting any electronic communication which contains any electronic serial number, mobile identification number, personal identification number or other identification number assigned by a telecommunication service provider for activation or operation of a telecommunication device.

"Tracking device." An electronic or mechanical device which permits only the tracking of the movement of a person or object.

"Trap and trace device." A device which captures the incoming electronic or other impulses which identify the originating number of an instrument or device from which a wire or communication was transmitted. The term includes caller ID, deluxe caller ID or any other features available to ascertain the telephone number, location or subscriber information of a facility contacting the facility whose communications are to be intercepted.

"User." Any person or entity who:

(1) uses an electronic communication service; and

(2) is duly authorized by the provider of the service to engage in the use.

"Wire communication." Any aural transfer made in whole or in part through the use of facilities for the transmission of communication by wire, cable or other like connection between the point of origin and the point of reception, including the use of such a connection in a switching station, furnished or operated by a telephone, telegraph or radio company for hire as a communication common carrier.

(Dec. 23, 1981, P.L.593, No.175, eff. 60 days; Oct. 21, 1988, P.L.1000, No.115, eff. imd.; Feb. 18, 1998, P.L.102, No.19, eff. imd.; Dec. 9, 2002, P.L.1350, No.162, eff. 60 days; Oct. 25, 2012, P.L.1634, No.202, eff. 60 days; July 7, 2017, P.L.304, No.22, eff. 60 days; June 5, 2020, P.L. , No.32, eff. 60 days)

2020 Amendment. Act 32 amended the def. of "crime of violence."

2017 Amendment. Act 22 amended the def. of "oral communication."

2012 Amendment. Act 202 amended the defs. of "intercept," "trap and trace device" and "wire communication," added the defs. of "communication service," "communication system," "crime of violence," "mobile communications tracking information" and "signed, written record" and deleted the defs. of "electronic communication service" and "electronic communication system."

2002 Amendment. Act 162 added the def. of "suspected criminal

activity."

1998 Amendment. Act 19 amended the defs. of "electronic communication," "electronic, mechanical or other device," "intercept," "investigative or law enforcement officer," "judge," "pen register" and "wire communication" and added the defs. of "home," "state" and "telecommunication identification interception device."

Cross References. Section 5702 is referred to in sections 911, 5706, 5903, 6321 of this title; section 901 of Title 34 (Game); section 67A07 of Title 42 (Judiciary and Judicial Procedure); sections 57A12, 57B02 of Title 53 (Municipalities Generally); section 2604.1 of Title 66 (Public Utilities).

SUBCHAPTER B
WIRE, ELECTRONIC OR ORAL COMMUNICATION

Sec.

5703. Interception, disclosure or use of wire, electronic or oral communications.
5704. Exceptions to prohibition of interception and disclosure of communications.
5705. Possession, sale, distribution, manufacture or advertisement of electronic, mechanical or other devices and telecommunication identification interception devices.
5706. Exceptions to prohibitions in possession, sale, distribution, manufacture or advertisement of electronic, mechanical or other devices.
5707. Seizure and forfeiture of electronic, mechanical or other devices.
5708. Order authorizing interception of wire, electronic or oral communications.
5709. Application for order.
5710. Grounds for entry of order.
5711. Privileged communications.
5712. Issuance of order and effect.
5712.1. Target-specific orders.
5713. Emergency situations.
5713.1. Emergency hostage and barricade situations.
5714. Recording of intercepted communications.
5715. Sealing of applications, orders and supporting papers.
5716. Service of inventory and inspection of intercepted communications.
5717. Investigative disclosure or use of contents of wire, electronic or oral communications or derivative evidence.
5718. Interception of communications relating to other offenses.
5719. Unlawful use or disclosure of existence of order concerning intercepted communication.
5720. Service of copy of order and application before disclosure of intercepted communication in trial, hearing or proceeding.
5721. Suppression of contents of intercepted communication or derivative evidence (Repealed).
5721.1. Evidentiary disclosure of contents of intercepted communication or derivative evidence.
5722. Report by issuing or denying judge.
5723. Annual reports and records of Attorney General and district attorneys.
5724. Training.
5725. Civil action for unlawful interception, disclosure or use of wire, electronic or oral communication.
5726. Action for removal from office or employment.
5727. Expiration (Repealed).
5728. Injunction against illegal interception.

Subchapter Heading. The heading of Subchapter B was added

October 21, 1988, P.L.1000, No.115, effective immediately.

Cross References. Subchapter B is referred to in section 5702 of this title.

§ 5703. Interception, disclosure or use of wire, electronic or oral communications.

Except as otherwise provided in this chapter, a person is guilty of a felony of the third degree if he:

(1) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire, electronic or oral communication;

(2) intentionally discloses or endeavors to disclose to any other person the contents of any wire, electronic or oral communication, or evidence derived therefrom, knowing or having reason to know that the information was obtained through the interception of a wire, electronic or oral communication; or

(3) intentionally uses or endeavors to use the contents of any wire, electronic or oral communication, or evidence derived therefrom, knowing or having reason to know, that the information was obtained through the interception of a wire, electronic or oral communication.

(Oct. 21, 1988, P.L.1000, No.115, eff. imd.)

§ 5704. Exceptions to prohibition of interception and disclosure of communications.

It shall not be unlawful and no prior court approval shall be required under this chapter for:

(1) An operator of a switchboard, or an officer, agent or employee of a provider of wire or electronic communication service, whose facilities are used in the transmission of a wire communication, to intercept, disclose or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the provider of wire or electronic communication service. However, no provider of wire or electronic communication service shall utilize service observing or random monitoring except for mechanical or service quality control checks.

(2) Any investigative or law enforcement officer or any person acting at the direction or request of an investigative or law enforcement officer to intercept a wire, electronic or oral communication involving suspected criminal activities, including, but not limited to, the crimes enumerated in section 5708 (relating to order authorizing interception of wire, electronic or oral communications), where:

(i) (Deleted by amendment).

(ii) one of the parties to the communication has given prior consent to such interception. However, no interception under this paragraph shall be made unless the Attorney General or a deputy attorney general designated in writing by the Attorney General, or the district attorney, or an assistant district attorney designated in writing by the district attorney, of the county wherein the interception is to be initiated, has reviewed the facts and is satisfied that the consent is voluntary and has given prior approval for the interception; however, such interception shall be subject to the recording and record keeping requirements of section 5714(a) (relating to recording of intercepted communications) and that the Attorney General, deputy attorney general, district attorney or assistant district attorney authorizing the interception shall be the custodian of recorded evidence obtained therefrom;

(iii) the investigative or law enforcement officer meets in person with a suspected felon and wears a concealed electronic or mechanical device capable of intercepting or recording oral communications. However, no [illegible] under this subparagraph may be used in

interception under this subparagraph may be used in any criminal prosecution except for a prosecution involving harm done to the investigative or law enforcement officer. This subparagraph shall not be construed to limit the interception and disclosure authority provided for in this subchapter; or

(iv) the requirements of this subparagraph are met. If an oral interception otherwise authorized under this paragraph will take place in the home of a nonconsenting party, then, in addition to the requirements of subparagraph (ii), the interception shall not be conducted until an order is first obtained from the president judge, or his designee who shall also be a judge, of a court of common pleas, authorizing such in-home interception, based upon an affidavit by an investigative or law enforcement officer that establishes probable cause for the issuance of such an order. No such order or affidavit shall be required where probable cause and exigent circumstances exist. For the purposes of this paragraph, an oral interception shall be deemed to take place in the home of a nonconsenting party only if both the consenting and nonconsenting parties are physically present in the home at the time of the interception.

(3) Police and emergency communications systems to record telephone communications coming into and going out of the communications system of the Pennsylvania Emergency Management Agency or a police department, fire department or county emergency center, if:

(i) the telephones thereof are limited to the exclusive use of the communication system for administrative purposes and provided the communication system employs a periodic warning which indicates to the parties to the conversation that the call is being recorded;

(ii) all recordings made pursuant to this clause, all notes made therefrom, and all transcriptions thereof may be destroyed at any time, unless required with regard to a pending matter; and

(iii) at least one nonrecorded telephone line is made available for public use at the Pennsylvania Emergency Management Agency and at each police department, fire department or county emergency center.

(4) A person, to intercept a wire, electronic or oral communication, where all parties to the communication have given prior consent to such interception.

(5) Any investigative or law enforcement officer, or communication common carrier acting at the direction of an investigative or law enforcement officer or in the normal course of its business, to use a pen register, trap and trace device or telecommunication identification interception device as provided in Subchapter E (relating to pen registers, trap and trace devices and telecommunication identification interception devices).

(6) Personnel of any public utility to record telephone conversations with utility customers or the general public relating to receiving and dispatching of emergency and service calls provided there is, during such recording, a periodic warning which indicates to the parties to the conversation that the call is being recorded.

(7) A user, or any officer, employee or agent of such user, to record telephone communications between himself and a contractor or designer, or any officer, employee or agent of such contractor or designer, pertaining to excavation or demolition work or other related matters, if the user or its agent indicates to the parties to the conversation that the call will be or is being recorded. As used in this paragraph, the terms "user," "contractor," "demolition work," "designer"

and "excavation work" shall have the meanings given to them in the act of December 10, 1974 (P.L.852, No.287), referred to as the Underground Utility Line Protection Law; and a one call system shall be considered for this purpose to be an agent of any user which is a member thereof.

(8) A provider of electronic communication service to record the fact that a wire or electronic communication was initiated or completed in order to protect the provider, another provider furnishing service toward the completion of the wire or electronic communication, or a user of that service, from fraudulent, unlawful or abusive use of the service.

(9) A person or entity providing electronic communication service to the public to divulge the contents of any such communication:

(i) as otherwise authorized in this section or section 5717 (relating to investigative disclosure or use of contents of wire, electronic or oral communications or derivative evidence);

(ii) with the lawful consent of the originator or any addressee or intended recipient of the communication;

(iii) to a person employed or authorized, or whose facilities are used, to forward the communication to its destination; or

(iv) which were inadvertently obtained by the service provider and which appear to pertain to the commission of a crime, if such divulgence is made to a law enforcement agency.

A person or entity providing electronic communication service to the public shall not intentionally divulge the contents of any communication (other than one directed to the person or entity, or an agent thereof) while in transmission of that service to any person or entity other than an addressee or intended recipient of the communication or an agent of the addressee or intended recipient.

(10) Any person:

(i) to intercept or access an electronic communication made through an electronic communication system configured so that the electronic communication is readily accessible to the general public;

(ii) to intercept any radio communication which is transmitted:

(A) by a station for the use of the general public, or which relates to ships, aircraft, vehicles or persons in distress;

(B) by any governmental, law enforcement, civil defense, private land mobile or public safety communication system, including police and fire systems, readily accessible to the general public;

(C) by a station operating on an authorized frequency within the bands allocated to the amateur, citizens band or general mobile radio services; or

(D) by any marine or aeronautical communication system;

(iii) to engage in any conduct which:

(A) is prohibited by section 633 of the Communications Act of 1934 (48 Stat. 1105, 47 U.S.C. § 553); or

(B) is excepted from the application of section 705(a) of the Communications Act of 1934 (47 U.S.C. § 605(a)) by section 705(b) of that act (47 U.S.C. § 605(b)); or

(iv) to intercept any wire or electronic communication the transmission of which is causing harmful interference to any lawfully operating station, to the extent necessary to identify the source of the interference.

(v) other users of the same frequency to intercept any

(11) Other users of the same frequency to intercept any radio communication made through a system which utilizes frequencies monitored by individuals engaged in the provisions or use of the system, if the communication is not scrambled or encrypted.

(12) Any investigative or law enforcement officer or any person acting at the direction or request of an investigative or law enforcement officer to intercept a wire or oral communication involving suspected criminal activities where the officer or the person is a party to the communication and there is reasonable cause to believe that:

(i) the other party to the communication is either:

(A) holding a hostage; or

(B) has barricaded himself and taken a position of confinement to avoid apprehension; and

(ii) that party:

(A) may resist with the use of weapons; or

(B) is threatening suicide or harm to himself or others.

(13) An investigative officer, a law enforcement officer or employees of the Department of Corrections for State correctional facilities to intercept, record, monitor or divulge any oral communication, electronic communication or wire communication from or to an inmate in a facility under the following conditions:

(i) The Department of Corrections shall adhere to the following procedures and restrictions when intercepting, recording, monitoring or divulging any oral communication, electronic communication or wire communication from or to an inmate in a State correctional facility as provided for by this paragraph:

(A) Before the implementation of this paragraph, all inmates of the facility shall be notified in writing that, as of the effective date of this paragraph, their oral communication, electronic communication or wire communication may be intercepted, recorded, monitored or divulged.

(B) Unless otherwise provided for in this paragraph, after intercepting or recording an oral communication, electronic communication or wire communication, only the superintendent, warden or a designee of the superintendent or warden or other chief administrative official or his or her designee, or law enforcement officers shall have access to that recording.

(C) The contents of an intercepted and recorded oral communication, electronic communication or wire communication shall be divulged only as is necessary to safeguard the orderly operation of the facility, in response to a court order or in the prosecution or investigation of any crime.

(ii) So as to safeguard the attorney-client privilege, the Department of Corrections shall not intercept, record, monitor or divulge an oral communication, electronic communication or wire communication between an inmate and an attorney.

(iii) Persons who are engaging in an oral communication, electronic communication or wire communication with an inmate shall be notified that the communication may be recorded or monitored. Notice may be provided by any means reasonably designed to inform the noninmate party of the recording or monitoring.

(iv) The Department of Corrections shall promulgate guidelines to implement the provisions of this paragraph for State correctional facilities.

(14) An investigative officer, a law enforcement officer or employees of a county correctional facility to intercept,

record, monitor or divulge an oral communication, electronic communication or wire communication from or to an inmate in a facility under the following conditions:

(i) The county correctional facility shall adhere to the following procedures and restrictions when intercepting, recording, monitoring or divulging an oral communication, electronic communication or wire communication from or to an inmate in a county correctional facility as provided for by this paragraph:

(A) Before the implementation of this paragraph, all inmates of the facility shall be notified in writing that, as of the effective date of this paragraph, their oral communications, electronic communications or wire communications may be intercepted, recorded, monitored or divulged.

(B) Unless otherwise provided for in this paragraph, after intercepting or recording an oral communication, electronic communication or wire communication, only the superintendent, warden or a designee of the superintendent or warden or other chief administrative official or his or her designee, or law enforcement officers shall have access to that recording.

(C) The contents of an intercepted and recorded oral communication, electronic communication or wire communication shall be divulged only as is necessary to safeguard the orderly operation of the facility, in response to a court order or in the prosecution or investigation of any crime.

(ii) So as to safeguard the attorney-client privilege, the county correctional facility shall not intercept, record, monitor or divulge an oral communication, electronic communication or wire communication between an inmate and an attorney.

(iii) Persons who are engaging in an oral communication, electronic communication or wire communication with an inmate shall be notified that the communication may be recorded or monitored. Notice may be provided by any means reasonably designed to inform the noninmate party of the recording or monitoring.

(iv) The superintendent, warden or a designee of the superintendent or warden or other chief administrative official of the county correctional system shall promulgate guidelines to implement the provisions of this paragraph for county correctional facilities.

(15) The personnel of a business engaged in telephone marketing or telephone customer service by means of wire, oral or electronic communication to intercept such marketing or customer service communications where such interception is made for the sole purpose of training, quality control or monitoring by the business, provided that one party involved in the communications has consented to such intercept. Any communications recorded pursuant to this paragraph may only be used by the business for the purpose of training or quality control. Unless otherwise required by Federal or State law, communications recorded pursuant to this paragraph shall be destroyed within one year from the date of recording.

(16) (Deleted by amendment).

(17) Any victim, witness or private detective licensed under the act of August 21, 1953 (P.L.1273, No.361), known as The Private Detective Act of 1953, to intercept the contents of any wire, electronic or oral communication, if that person is under a reasonable suspicion that the intercepted party is committing, about to commit or has committed a crime of violence and there is reason to believe that evidence of the crime of violence may be obtained from the interception.

(18) A person to intercept oral communications for

disciplinary or security purposes on a school bus or school vehicle, as those terms are defined in 75 Pa.C.S. § 102 (relating to definitions), if all of the following conditions are met:

(i) The school board has adopted a policy that authorizes audio interception on school buses or school vehicles for disciplinary or security purposes.

(ii) Each school year, the school board includes the policy in a student handbook and in any other publication of the school entity that sets forth the comprehensive rules, procedures and standards of conduct for the school entity.

(iii) The school board posts a notice that students may be audiotaped, which notice is clearly visible on each school bus or school vehicle that is furnished with audio-recording equipment.

(iv) The school entity posts a notice of the policy on the school entity's publicly accessible Internet website.

This paragraph shall not apply when a school bus or school vehicle is used for a purpose that is not school related.

(July 10, 1981, P.L.227, No.72, eff. 60 days; Dec. 23, 1981, P.L.593, No.175, eff. 60 days; Oct. 21, 1988, P.L.1000, No.115, eff. imd.; Sept. 26, 1995, 1st Sp.Sess., P.L.1056, No.20, eff. 60 days; Dec. 19, 1996, P.L.1458, No.186, eff. 60 days; Feb. 18, 1998, P.L.102, No.19, eff. imd.; June 11, 2002, P.L.367, No.52, eff. imd.; Oct. 25, 2012, P.L.1634, No.202, eff. 60 days; Feb. 4, 2014, P.L.21, No.9; June 23, 2016, P.L.392, No.56, eff. 60 days; July 7, 2017, P.L.304, No.22, eff. 60 days)

2017 Amendment. Act 22 amended pars. (13) and (14) and deleted par. (16).

2016 Amendment. Act 56 amended par. (18).

2014 Amendment. Act 9 amended par. (16) and added par. (18), effective in 60 days as to par. (16) and immediately as to the remainder of the section.

2012 Amendment. Act 202 amended pars. (2)(ii), (12)(ii), (13)(i)(B) and (14)(i)(B) and added par. (17).

1998 Amendment. Act 19 amended the intro. par. and pars. (2), (5) and (9) and added par. (15).

1996 Amendment. Act 186 amended par. (2) and added par. (14).

1995 Amendment. Act 20, 1st Sp.Sess., added par. (13).

Cross References. Section 5704 is referred to in sections 5702, 5706, 5717, 5720, 5721.1, 5742, 5747, 5749, 5782 of this title; section 901 of Title 30 (Fish); section 901 of Title 34 (Game).

§ 5705. Possession, sale, distribution, manufacture or advertisement of electronic, mechanical or other devices and telecommunication identification interception devices.

Except as otherwise specifically provided in section 5706 (relating to exceptions to prohibitions in possession, sale, distribution, manufacture or advertisement of electronic, mechanical or other devices), a person is guilty of a felony of the third degree if he does any of the following:

(1) Intentionally possesses an electronic, mechanical or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of a wire, electronic or oral communication.

(2) Intentionally sells, transfers or distributes an electronic, mechanical or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of a wire, electronic or oral communication.

(3) Intentionally manufactures or assembles an electronic, mechanical or other device, knowing or having reason to know

that the design of such device renders it primarily useful for the purpose of the surreptitious interception of a wire, electronic or oral communication.

(4) Intentionally places in any newspaper, magazine, handbill, or other publication any advertisement of an electronic, mechanical or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of a wire, electronic or oral communication or of an electronic, mechanical or other device where such advertisement promotes the use of such device for the purpose of the surreptitious interception of a wire, electronic or oral communication.

(5) Intentionally possesses a telecommunication identification interception device.

(Oct. 21, 1988, P.L.1000, No.115, eff. imd.; Oct. 25, 2012, P.L.1634, No.202, eff. 60 days)

2012 Amendment. Act 202 amended the section heading and added par. (5).

§ 5706. Exceptions to prohibitions in possession, sale, distribution, manufacture or advertisement of electronic, mechanical or other devices.

(a) Unlawful activities.--It shall not be unlawful under this chapter for:

(1) a provider of wire or electronic communication service or an officer, agent or employee of, or a person under contract with, such a provider, in the normal course of the business of providing the wire or electronic communication service; or

(2) a person under contract with the United States, the Commonwealth or a political subdivision thereof, a state or a political subdivision thereof, or an officer, agent or employee of the United States, the Commonwealth or a political subdivision thereof, or a state or a political subdivision thereof,

to possess, sell, distribute, manufacture, assemble or advertise an electronic, mechanical or other device, while acting in furtherance of the appropriate activities of the United States, the Commonwealth or a political subdivision thereof, a state or a political subdivision thereof or a provider of wire or electronic communication service.

(b) Responsibility.--

(1) Except as provided under paragraph (2), the Attorney General and the district attorney or their designees so designated in writing shall have the sole responsibility to buy, possess and loan any electronic, mechanical or other device which is to be used by investigative or law enforcement officers for purposes of interception as authorized under section 5704(2), (5) and (12) (relating to exceptions to prohibition of interception and disclosure of communications), 5712 (relating to issuance of order and effect), 5713 (relating to emergency situations) or 5713.1 (relating to emergency hostage and barricade situations).

(2) The division or bureau or section of the Pennsylvania State Police responsible for conducting the training in the technical aspects of wiretapping and electronic surveillance as required by section 5724 (relating to training) may buy and possess any electronic, mechanical or other device which is to be used by investigative or law enforcement officers for purposes of interception as authorized under section 5704(2), (5) and (12), 5712, 5713 or 5713.1 for the purpose of training. However, any electronic, mechanical or other device bought or possessed under this provision may be loaned to or used by investigative or law enforcement officers for purposes of interception as authorized under section 5704(2), (5) and (12), 5712, 5713 or 5713.1 only upon written approval by the Attorney General or a deputy attorney general designated in writing

general or a deputy attorney general designated in writing by the Attorney General or the district attorney or an assistant district attorney designated in writing by the district attorney of the county wherein the suspected criminal activity has been, is or is about to occur.

(3) With the permission of the Attorney General or a district attorney who has designated any supervising law enforcement officer for purposes of interceptions as authorized under section 5713.1, the law enforcement agency which employs the supervising law enforcement officer may buy, possess, loan or borrow any electronic, mechanical or other device which is to be used by investigative or law enforcement officers at the direction of the supervising law enforcement officer solely for the purpose of interception as authorized under sections 5704(12) and 5713.1.

(4) The Pennsylvania State Police shall annually establish equipment standards for any electronic, mechanical or other device which is to be used by law enforcement officers for purposes of recording a communication under circumstances within paragraph (2) of the definition of "oral communication" in section 5702 (relating to definitions). The equipment standards shall be published annually in the Pennsylvania Bulletin.

(5) The Pennsylvania State Police shall annually establish and publish standards in the Pennsylvania Bulletin for the secure onsite and off-site storage of an audio recording made in accordance with paragraph (4) or any accompanying video recording. The standards shall comply with the Federal Bureau of Investigation's Criminal Justice Information Services (CJIS) Security Policy.

(6) A vendor to law enforcement agencies which stores data related to audio recordings and video recordings shall, at a minimum, comply with the standards set forth by the Pennsylvania State Police under paragraphs (4) and (5). Law enforcement agencies under contract with a vendor for the storage of data before the effective date of this paragraph shall comply with paragraphs (4) and (5) and this paragraph upon expiration or renewal of the contract.

(Oct. 21, 1988, P.L.1000, No.115, eff. imd.; Feb. 18, 1998, P.L.102, No.19, eff. imd.; June 11, 2002, P.L.367, No.52, eff. imd.; Dec. 9, 2002, P.L.1350, No.162, eff. 60 days; July 7, 2017, P.L.304, No.22, eff. 60 days)

2017 Amendment. Act 22 amended subsec. (b).

Cross References. Section 5706 is referred to in sections 5702, 5705 of this title; section 901 of Title 34 (Game); section 67A07 of Title 42 (Judiciary and Judicial Procedure).

§ 5707. Seizure and forfeiture of electronic, mechanical or other devices.

Any electronic, mechanical or other device possessed, used, sent, distributed, manufactured, or assembled in violation of this chapter is hereby declared to be contraband and may be seized and forfeited to the Commonwealth in accordance with 42 Pa.C.S. §§ 5803 (relating to asset forfeiture), 5805 (relating to forfeiture procedure), 5806 (relating to motion for return of property), 5807 (relating to restrictions on use), 5807.1 (relating to prohibition on adoptive seizures) and 5808 (relating to exceptions).

(Oct. 21, 1988, P.L.1000, No.115, eff. imd.; June 29, 2017, P.L.247, No.13, eff. July 1, 2017)

Cross References. Section 5707 is referred to in section 5803 of Title 42 (Judiciary and Judicial Procedure).

§ 5708. Order authorizing interception of wire, electronic or oral communications.

The Attorney General, or, during the absence or incapacity of the Attorney General, a deputy attorney general designated in writing by the Attorney General, or the district attorney or

during the absence or incapacity of the district attorney, an assistant district attorney designated in writing by the district attorney of the county wherein the suspected criminal activity has been, is or is about to occur, may make written application to any Superior Court judge for an order authorizing the interception of a wire, electronic or oral communication by the investigative or law enforcement officers or agency having responsibility for an investigation involving suspected criminal activities when such interception may provide evidence of the commission of any of the following offenses, or may provide evidence aiding in the apprehension of the perpetrator or perpetrators of any of the following offenses:

(1) Under this title:

Section 911 (relating to corrupt organizations)
Section 2501 (relating to criminal homicide)
Section 2502 (relating to murder)
Section 2503 (relating to voluntary manslaughter)
Section 2702 (relating to aggravated assault)
Section 2706 (relating to terroristic threats)
Section 2709.1 (relating to stalking)
Section 2716 (relating to weapons of mass destruction)
Section 2901 (relating to kidnapping)
Section 3011 (relating to trafficking in individuals)
Section 3012 (relating to involuntary servitude)
Section 3121 (relating to rape)
Section 3123 (relating to involuntary deviate sexual intercourse)
Section 3124.1 (relating to sexual assault)
Section 3125 (relating to aggravated indecent assault)
Section 3301 (relating to arson and related offenses)
Section 3302 (relating to causing or risking catastrophe)
Section 3502 (relating to burglary)
Section 3701 (relating to robbery)
Section 3921 (relating to theft by unlawful taking or disposition)
Section 3922 (relating to theft by deception)
Section 3923 (relating to theft by extortion)
Section 4701 (relating to bribery in official and political matters)
Section 4702 (relating to threats and other improper influence in official and political matters)
Section 5512 (relating to lotteries, etc.)
Section 5513 (relating to gambling devices, gambling, etc.)
Section 5514 (relating to pool selling and bookmaking)
Section 5516 (relating to facsimile weapons of mass destruction)
Section 6318 (relating to unlawful contact with minor)

(2) Under this title, where such offense is dangerous to life, limb or property and punishable by imprisonment for more than one year:

Section 910 (relating to manufacture, distribution or possession of devices for theft of telecommunications services)
Section 2709(a)(4), (5), (6) or (7) (relating to harassment)
Section 3925 (relating to receiving stolen property)
Section 3926 (relating to theft of services)
Section 3927 (relating to theft by failure to make required disposition of funds received)
Section 3933 (relating to unlawful use of computer)
Section 4108 (relating to commercial bribery and breach of duty to act disinterestedly)
Section 4109 (relating to rigging publicly exhibited contest)
Section 4117 (relating to insurance fraud)

Section 4117 (relating to insurance fraud)
Section 4305 (relating to dealing in infant children)
Section 4902 (relating to perjury)
Section 4909 (relating to witness or informant taking bribe)
Section 4911 (relating to tampering with public records or information)
Section 4952 (relating to intimidation of witnesses or victims)
Section 4953 (relating to retaliation against witness or victim)
Section 5101 (relating to obstructing administration of law or other governmental function)
Section 5111 (relating to dealing in proceeds of unlawful activities)
Section 5121 (relating to escape)
Section 5902 (relating to prostitution and related offenses)
Section 5903 (relating to obscene and other sexual materials and performances)
Section 7313 (relating to buying or exchanging Federal Supplemental Nutrition Assistance Program (SNAP) benefit coupons, stamps, authorization cards or access devices)

(3) Under the act of March 4, 1971 (P.L.6, No.2), known as the Tax Reform Code of 1971, where such offense is dangerous to life, limb or property and punishable by imprisonment for more than one year:
Section 1272 (relating to sales of unstamped cigarettes)
Section 1273 (relating to possession of unstamped cigarettes)
Section 1274 (relating to counterfeiting)

(4) Any offense set forth under section 13(a) of the act of April 14, 1972 (P.L.233, No.64), known as The Controlled Substance, Drug, Device and Cosmetic Act, not including the offense described in clause (31) of section 13(a).

(5) Any offense set forth under the act of November 15, 1972 (P.L.1227, No.272).

(6) Any conspiracy to commit any of the offenses set forth in this section.

(7) Under the act of November 24, 1998 (P.L.874, No.110), known as the Motor Vehicle Chop Shop and Illegally Obtained and Altered Property Act.

(Dec. 2, 1983, P.L.248, No.67, eff. imd.; Oct. 21, 1988, P.L.1000, No.115, eff. imd.; Feb. 2, 1990, P.L.4, No.3, eff. imd.; Feb. 18, 1998, P.L.102, No.19, eff. imd.; Dec. 21, 1998, P.L.1086, No.145, eff. 60 days; June 28, 2002, P.L.481, No.82, eff. 60 days; Nov. 20, 2002, P.L.1104, No.134, eff. 60 days; Dec. 9, 2002, P.L.1350, No.162, eff. 60 days; Dec. 9, 2002, P.L.1759, No.218, eff. 60 days; Nov. 9, 2006, P.L.1340, No.139, eff. 60 days; July 2, 2014, P.L.945, No.105, eff. 60 days; Oct. 24, 2018, P.L.1159, No.160, eff. 60 days)

2018 Amendment. Act 160 amended par. (2).

2014 Amendment. Act 105 amended par. (1).

2002 Amendments. Act 82 amended par. (1), Act 134 amended par. (1), Act 162 amended the entire section and Act 218 amended pars. (1) and (2). Act 162 overlooked the amendment by Act 134 and Act 218 overlooked the amendments by Acts 134 and 162, but the amendments do not conflict in substance and have been given effect in setting forth the text of section 5708.

Effective Date. After January 20, 2003, and before February 7, 2003, section 5708 will reflect only the amendment by Act 134, as follows:

§ 5708. Order authorizing interception of wire, electronic or oral communications.

The Attorney General, or, during the absence or incapacity

of the Attorney General, a deputy attorney general designated in writing by the Attorney General, or the district attorney or, during the absence or incapacity of the district attorney, an assistant district attorney designated in writing by the district attorney of the county wherein the interception is to be made, may make written application to any Superior Court judge for an order authorizing the interception of a wire, electronic or oral communication by the investigative or law enforcement officers or agency having responsibility for an investigation involving suspected criminal activities when such interception may provide evidence of the commission of any of the following offenses, or may provide evidence aiding in the apprehension of the perpetrator or perpetrators of any of the following offenses:

(1) Under this title:
Section 911 (relating to corrupt organizations)
Section 2501 (relating to criminal homicide)
Section 2502 (relating to murder)
Section 2503 (relating to voluntary manslaughter)
Section 2702 (relating to aggravated assault)
Section 2706 (relating to terroristic threats)
Section 2709(b) (relating to harassment and stalking)
Section 2716 (relating to weapons of mass destruction)
Section 2901 (relating to kidnapping)
Section 3121 (relating to rape)
Section 3123 (relating to involuntary deviate sexual intercourse)
Section 3124.1 (relating to sexual assault)
Section 3125 (relating to aggravated indecent assault)
Section 3301 (relating to arson and related offenses)
Section 3302 (relating to causing or risking catastrophe)
Section 3502 (relating to burglary)
Section 3701 (relating to robbery)
Section 3921 (relating to theft by unlawful taking or disposition)
Section 3922 (relating to theft by deception)
Section 3923 (relating to theft by extortion)
Section 4701 (relating to bribery in official and political matters)
Section 4702 (relating to threats and other improper influence in official and political matters)
Section 5512 (relating to lotteries, etc.)
Section 5513 (relating to gambling devices, gambling, etc.)
Section 5514 (relating to pool selling and bookmaking)
Section 5516 (relating to facsimile weapons of mass destruction)
Section 6318 (relating to unlawful contact with minor)

(2) Under this title, where such offense is dangerous to life, limb or property and punishable by imprisonment for more than one year:
Section 910 (relating to manufacture, distribution or possession of devices for theft of telecommunications services)
Section 3925 (relating to receiving stolen property)
Section 3926 (relating to theft of services)
Section 3927 (relating to theft by failure to make required disposition of funds received)
Section 3933 (relating to unlawful use of [illegible]

Section 3933 (relating to unlawful use of computer)
Section 4108 (relating to commercial bribery and breach of duty to act disinterestedly)
Section 4109 (relating to rigging publicly exhibited contest)
Section 4117 (relating to insurance fraud)
Section 4305 (relating to dealing in infant children)
Section 4902 (relating to perjury)
Section 4909 (relating to witness or informant taking bribe)
Section 4911 (relating to tampering with public records or information)
Section 4952 (relating to intimidation of witnesses or victims)
Section 4953 (relating to retaliation against witness or victim)
Section 5101 (relating to obstructing administration of law or other governmental function)
Section 5111 (relating to dealing in proceeds of unlawful activities)
Section 5121 (relating to escape)
Section 5504 (relating to harassment by communication or address)
Section 5902 (relating to prostitution and related offenses)
Section 5903 (relating to obscene and other sexual materials and performances)
Section 7313 (relating to buying or exchanging Federal food order coupons, stamps, authorization cards or access devices)

(3) Under the act of March 4, 1971 (P.L.6, No.2), known as the Tax Reform Code of 1971, where such offense is dangerous to life, limb or property and punishable by imprisonment for more than one year:
Section 1272 (relating to sales of unstamped cigarettes)
Section 1273 (relating to possession of unstamped cigarettes)
Section 1274 (relating to counterfeiting)

(4) Any offense set forth under section 13(a) of the act of April 14, 1972 (P.L.233, No.64), known as The Controlled Substance, Drug, Device and Cosmetic Act, not including the offense described in clause (31) of section 13(a).

(5) Any offense set forth under the act of November 15, 1972 (P.L.1227, No.272).

(6) Any conspiracy to commit any of the offenses set forth in this section.

(7) Under the act of November 24, 1998 (P.L.874, No.110), known as the Motor Vehicle Chop Shop and Illegally Obtained and Altered Property Act.

References in Text. The act of November 15, 1972 (P.L.1227, No.272), referred to in this section, amended the act of December 8, 1970 (P.L.874, No.276), known as The Pennsylvania Corrupt Organizations Act of 1970, which was repealed by the act of December 6, 1972 (P.L.1482, No.334). The subject matter is now contained in section 911 of Title 18.

Section 3933, referred to in this section, is repealed.

Section 5504, referred to in this section, is repealed.

The act of November 24, 1998 (P.L.874, No.110), known as the Vehicle Chop Shop and Illegally Obtained and Altered Property Act, referred to in paragraph (7), was repealed by the act of October 25, 2012 (P.L.1645, No.203). The subject matter is now contained in Chapter 77 of this title.

Cross References. Section 5708 is referred to in sections 5704, 5710, 5713, 5742 of this title.

§ 5709. Application for order.

Each application for an order of authorization to intercept a wire, electronic or oral communication shall be made in writing upon the personal oath or affirmation of the Attorney General or a district attorney of the county wherein the suspected criminal activity has been, is or is about to occur and shall contain all of the following:

(1) A statement of the authority of the applicant to make such application.

(2) A statement of the identity and qualifications of the investigative or law enforcement officers or agency for whom the authority to intercept a wire, electronic or oral communication is sought.

(3) A sworn statement by the investigative or law enforcement officer who has knowledge of relevant information justifying the application, which shall include:

(i) The identity of the particular person, if known, committing the offense and whose communications are to be intercepted.

(ii) The details as to the particular offense that has been, is being, or is about to be committed.

(iii) The particular type of communication to be intercepted.

(iv) A showing that there is probable cause to believe that such communication will be communicated on the wire communication facility involved or at the particular place where the oral communication is to be intercepted.

(v) The character and location of the particular wire communication facility involved or the particular place where the oral communication is to be intercepted.

(vi) A statement of the period of time for which the interception is required to be maintained, and, if the character of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular statement of facts establishing probable cause to believe that additional communications of the same type will occur thereafter.

(vii) A particular statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed, or reasonably appear to be unlikely to succeed if tried or are too dangerous to employ.

(4) Where the application is for the renewal or extension of an order, a particular statement of facts showing the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(5) A complete statement of the facts concerning all previous applications, known to the applicant made to any court for authorization to intercept a wire, electronic or oral communication involving any of the same facilities or places specified in the application or involving any person whose communication is to be intercepted, and the action taken by the court on each such application.

(6) A proposed order of authorization for consideration by the judge.

(7) Such additional testimony or documentary evidence in support of the application as the judge may require.

(Oct. 21, 1988, P.L.1000, No.115, eff. imd.; Dec. 9, 2002, P.L.1350, No.162, eff. 60 days)

Cross References. Section 5709 is referred to in sections 5702, 5712.1, 5713.1 of this title.

§ 5710. Grounds for entry of order.

(a) Application.--Upon consideration of an application, the judge may enter an ex parte order, as requested or as modified,

authorizing the interception of wire, electronic or oral communications anywhere within the Commonwealth, if the judge determines on the basis of the facts submitted by the applicant that there is probable cause for belief that all the following conditions exist:

(1) the person whose communications are to be intercepted is committing, has or had committed or is about to commit an offense as provided in section 5708 (relating to order authorizing interception of wire, electronic or oral communications);

(2) particular communications concerning such offense may be obtained through such interception;

(3) normal investigative procedures with respect to such offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ;

(4) the facility from which, or the place where, the wire, electronic or oral communications are to be intercepted, is, has been, or is about to be used, in connection with the commission of such offense, or is leased to, listed in the name of, or commonly used by, such person;

(5) the investigative or law enforcement officers or agency to be authorized to intercept the wire, electronic or oral communications are qualified by training and experience to execute the interception sought, and are certified under section 5724 (relating to training); and

(6) in the case of an application, other than a renewal or extension, for an order to intercept a communication of a person or on a facility which was the subject of a previous order authorizing interception, the application is based upon new evidence or information different from and in addition to the evidence or information offered to support the prior order, regardless of whether such evidence was derived from prior interceptions or from other sources.

(b) Corroborative evidence.--As part of the consideration of an application in which there is no corroborative evidence offered, the judge may inquire in camera as to the identity of any informants or any other additional information concerning the basis upon which the investigative or law enforcement officer or agency has applied for the order of authorization which the judge finds relevant in order to determine if there is probable cause pursuant to this section.

(Oct. 21, 1988, P.L.1000, No.115, eff. imd.)

Cross References. Section 5710 is referred to in sections 5712, 5721.1 of this title.

§ 5711. Privileged communications.

No otherwise privileged communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

§ 5712. Issuance of order and effect.

(a) Authorizing orders.--An order authorizing the interception of any wire, electronic or oral communication shall state the following:

(1) The identity of the investigative or law enforcement officers or agency to whom the authority to intercept wire, electronic or oral communications is given and the name and official identity of the person who made the application.

(2) The identity of, or a particular description of, the person, if known, whose communications are to be intercepted.

(3) The character and location of the particular communication facilities as to which, or the particular place of the communication as to which, authority to intercept is granted.

(4) A particular description of the type of the communication to be intercepted and a statement of the particular offense to which it relates.

(5) The period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

(b) Time limits.--No order entered under this section shall authorize the interception of any wire, electronic or oral communication for a period of time in excess of that necessary under the circumstances. Every order entered under this section shall require that such interception begin and terminate as soon as practicable and be conducted in such a manner as to minimize or eliminate the interception of such communications not otherwise subject to interception under this chapter by making reasonable efforts, whenever possible, to reduce the hours of interception authorized by said order. In the event the intercepted communication is in a code or foreign language and an expert in that code or foreign language is not reasonably available during the interception period, minimization may be accomplished as soon as practicable after such interception. No order entered under this section shall authorize the interception of wire, electronic or oral communications for any period exceeding 30 days. The 30-day period begins on the day on which the investigative or law enforcement officers or agency first begins to conduct an interception under the order, or ten days after the order is entered, whichever is earlier. Extensions or renewals of such an order may be granted for additional periods of not more than 30 days each. No extension or renewal shall be granted unless an application for it is made in accordance with this section, and the judge makes the findings required by section 5710 (relating to grounds for entry of order).

(c) Responsibility.--The order shall require the Attorney General or the district attorney, or their designees, to be responsible for the supervision of the interception.

(d) Progress reports.--Whenever an order authorizing an interception is entered, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. The reports shall be made at such intervals as the judge may require.

(e) Final report.--Whenever an interception is authorized pursuant to this section, a complete written list of names of participants and evidence of offenses discovered, including those not stated in the application for order, shall be filed with the court as soon as practicable after the authorized interception is terminated.

(f) Assistance.--An order authorizing the interception of a wire, electronic or oral communication shall, upon request of the applicant, direct that a provider of communication service shall furnish the applicant forthwith all information, facilities and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such service provider is affording the person whose communications are to be intercepted. The obligation of a provider of communication service under such an order may include, but is not limited to, installation of a pen register or of a trap and trace device, providing caller ID, deluxe caller ID or any other features available to ascertain the telephone number, location or subscriber information of a facility contacting the facility whose communications are to be intercepted, disclosure of a record or other information otherwise available under section 5743 (relating to requirements for governmental access), including conducting an in-progress trace during an interception, provided that such obligation of a provider of communications service is technologically feasible. The order shall apply regardless of whether the electronic service provider is headquartered within this Commonwealth, if the interception is otherwise conducted within this Commonwealth as provided under this chapter. The order

regarding disclosure of a record or other information otherwise available under section 5743 shall apply to all electronic service providers who service facilities which contact or are contacted by the facility whose communications are to be intercepted, regardless of whether the order specifically names any provider of communication service. The order may specify the period of time an electronic service provider has to furnish to the applicant who requests disclosure of a record or other information otherwise available under section 5743. Any provider of communication service furnishing such facilities or technical assistance shall be compensated therefor by the applicant for reasonable expenses incurred in providing the facilities or assistance. The service provider shall be immune from civil and criminal liability for any assistance rendered to the applicant pursuant to this section.

(g) Entry by law enforcement officers.--An order authorizing the interception of a wire, electronic or oral communication shall, if requested, authorize the entry of premises or facilities specified in subsection (a)(3), or premises necessary to obtain access to the premises or facilities specified in subsection (a)(3), by the law enforcement officers specified in subsection (a)(1), as often as necessary solely for the purposes of installing, maintaining or removing an electronic, mechanical or other device or devices provided that such entry is reasonably necessary to accomplish the purposes of this subchapter and provided that the judge who issues the order shall be notified of the time and method of each such entry prior to entry if practical and, in any case, within 48 hours of entry.

(Oct. 21, 1988, P.L.1000, No.115, eff. imd.; Feb. 18, 1998, P.L.102, No.19, eff. imd.; Oct. 25, 2012, P.L.1634, No.202, eff. 60 days)

2012 Amendment. Act 202 amended subsecs. (a) intro. par. and (f).

1998 Amendment. Act 19 amended subsecs. (e), (f) and (g).

Cross References. Section 5712 is referred to in sections 5706, 5712.1, 5713.1, 5721.1 of this title.

§ 5712.1. Target-specific orders.

(a) Target-specific wiretaps.--The requirements of sections 5712(a)(3) (relating to issuance of order and effect) and 5709(3)(iv) and (v) (relating to application for order) shall not apply if:

(1) In the case of an application with respect to the interception of an oral communication, all of the following apply:

(i) The application contains a full and complete statement as to why specification is not practical and identifies the person committing the offense and whose communications are to be intercepted.

(ii) The judge finds the specification is not practical.

(2) In the case of an application with respect to a wire or electronic communication, all of the following apply:

(i) The application identifies the person believed to be committing the offense and whose communications are to be intercepted and the applicant makes a showing that there is probable cause to believe that the person's actions could have the effect of thwarting interception by changing facilities or devices.

(ii) The judge finds that the purpose has been adequately shown.

(b) Supplementary orders.--Following the issuance of a target-specific wiretap order, the judge shall sign supplementary orders upon request and in a timely manner, authorizing the investigative or law enforcement officers or agency to intercept additional communications devices or facilities upon a showing of reasonable suspicion that all of the following apply:

(1) The target of the original order has in fact changed

communications devices or facilities or is presently using additional communications devices, communications facilities or places.

(2) The target of the original order is likely to use the specified communications device or facility for criminal purposes similar to or related to those specified in the original order.

(c) Application for supplementary orders.--An application for a supplementary order shall contain all of the following:

(1) The identity of the investigative or law enforcement officers or agency to whom the authority to intercept wire, electronic or oral communications is given and the name and official identity of the person who made the application.

(2) The identity of or a particular description of the person, if known, whose communications are to be intercepted.

(3) The period of time during which the interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

(4) A showing of reasonable suspicion that the target of the original order has in fact changed communications devices or facilities.

(5) A showing of reasonable suspicion that the target of the original order is likely to use the additional facility or device or place for criminal purposes similar to or related to those specified in the original order.

(d) Time limits.--A supplementary order shall not act as an extension of the time limit identified in section 5712(b).

(e) Responsibility.--The order shall require the Attorney General or the district attorney, or their designees, to be responsible for the supervision of the interception.

(f) Progress reports.--If an order authorizing an interception is entered, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. The reports shall be made at intervals as the judge may require.

(g) Final report.--If an interception is authorized under this section, a complete written list of names of participants and evidence of offenses discovered, including those not stated in the application for order, shall be filed with the court as soon as practical after the authorized interception is terminated.

(h) Assistance.--

(1) An order authorizing the interception of a wire, electronic or oral communication shall, upon request of the applicant, direct that a provider of communication service furnish the applicant with all information, facilities and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that the service provider is affording the person whose communications are to be intercepted.

(2) The obligation of a provider of communication service under an order may include installation of a pen register or trap and trace device and disclosure of a record or other information otherwise available under section 5743 (relating to requirements for governmental access), including conducting an in-progress trace during an interception, if the obligation of a provider of communications service is technologically feasible.

(3) A provider of communication service furnishing facilities or technical assistance shall be compensated by the applicant for reasonable expenses incurred in providing the facilities or assistance.

(4) A service provider shall be immune from civil and criminal liability for any assistance rendered to an applicant under this section.

(i) Law enforcement officers.--An order authorizing

(1) Entry by law enforcement officers.--An order authorizing the interception of a wire, electronic or oral communication shall, if requested, authorize the entry of premises or facilities specified under subsection (c)(3) or premises necessary to obtain access to the premises or facilities specified under subsection (c)(3) by law enforcement officers specified under subsection (c)(1) as often as necessary solely for the purposes of installing, maintaining or removing an electronic, mechanical or other device, if all of the following apply:

(1) The entry is reasonably necessary to accomplish the purposes of this subchapter.

(2) The judge who issues the order is notified of the time and method of each entry prior to entry within 48 hours of entry.

(Oct. 25, 2012, P.L.1634, No.202, eff. 60 days)

2012 Amendment. Act 202 added section 5712.1.

§ 5713. Emergency situations.

(a) Application.--Whenever, upon informal application by the Attorney General or a designated deputy attorney general authorized in writing by the Attorney General or a district attorney or an assistant district attorney authorized in writing by the district attorney of a county wherein the suspected criminal activity has been, is or is about to occur, a judge determines there are grounds upon which an order could be issued pursuant to this chapter, and that an emergency situation exists with respect to the investigation of an offense designated in section 5708 (relating to order authorizing interception of wire, electronic or oral communications), and involving conspiratorial activities characteristic of organized crime or a substantial danger to life or limb, dictating authorization for immediate interception of wire, electronic or oral communications before an application for an order could with due diligence be submitted to him and acted upon, the judge may grant oral approval for such interception without an order, conditioned upon the filing with him, within 48 hours thereafter, of an application for an order which, if granted, shall recite the oral approval and be retroactive to the time of such oral approval. Such interception shall immediately terminate when the communication sought is obtained or when the application for an order is denied, whichever is earlier. In the event no application for an order is made, the content of any wire, electronic or oral communication intercepted shall be treated as having been obtained in violation of this subchapter.

(b) Further proceedings.--In the event no application is made or an application made pursuant to this section is denied, the court shall cause an inventory to be served as provided in section 5716 (relating to service of inventory and inspection of intercepted communications) and shall require the tape or other recording of the intercepted communication to be delivered to, and sealed by, the court. Such evidence shall be retained by the court in accordance with section 5714 (relating to recording of intercepted communications) and the same shall not be used or disclosed in any legal proceeding except in a civil action brought by an aggrieved person pursuant to section 5725 (relating to civil action for unlawful interception, disclosure or use of wire, electronic or oral communication) or as otherwise authorized by court order. In addition to other remedies and penalties provided by this chapter, failure to effect delivery of any such tape or other recording shall be punishable as contempt by the court directing such delivery. Evidence of oral authorization to intercept wire, electronic or oral communications shall be a defense to any charge against the investigating or law enforcement officer for engaging in unlawful interception.

(Oct. 21, 1988, P.L.1000, No.115, eff. imd.; Feb. 18, 1998, P.L.102, No.19, eff. imd.; Dec. 9, 2002, P.L.1350, No.162, eff. 60 days)

2002 Amendment. Act 162 amended subsec. (a).

Cross References. Section 5713 is referred to in sections 5706, 5713.1, 5716, 5721.1, 5747 of this title.

§ 5713.1. Emergency hostage and barricade situations.

(a) Designation.--The Attorney General or a district attorney may designate supervising law enforcement officers for the purpose of authorizing the interception of wire or oral communications as provided in this section.

(b) Procedure.--A supervising law enforcement officer who reasonably determines that an emergency situation exists that requires a wire or oral communication to be intercepted before an order authorizing such interception can, with due diligence, be obtained, and who determines that there are grounds upon which an order could be entered under this chapter to authorize such interception, may intercept such wire or oral communication. An application for an order approving the interception must be made by the supervising law enforcement officer in accordance with section 5709 (relating to application for order) within 48 hours after the interception has occurred or begins to occur. Interceptions pursuant to this section shall be conducted in accordance with the procedures of this subchapter. Upon request of the supervising law enforcement officer who determines to authorize interceptions of wire communications under this section, a provider of electronic communication service shall provide assistance and be compensated therefor as provided in section 5712(f) (relating to issuance of order and effect). In the absence of an order, such interception shall immediately terminate when the situation giving rise to the hostage or barricade situation ends or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this subchapter, and an inventory shall be served as provided in section 5716 (relating to service of inventory and inspection of intercepted communications). Thereafter, the supervising law enforcement officer shall follow the procedures set forth in section 5713(b) (relating to emergency situations).

(c) Defense.--A good faith reliance on the provisions of this section shall be a complete defense to any civil or criminal action brought under this subchapter or any other statute against any law enforcement officer or agency conducting any interceptions pursuant to this section as well as a provider of electronic communication service who is required to provide assistance in conducting such interceptions upon request of a supervising law enforcement officer.

(d) Definitions.--As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Emergency situation." Any situation where:

(1) a person is holding a hostage and is threatening serious physical injury and may resist with the use of weapons; or

(2) a person has barricaded himself and taken a position of confinement to avoid apprehension and:

(i) has the ability to resist with the use of weapons; or

(ii) is threatening suicide or harm to himself or others.

"Supervising law enforcement officer."

(1) For designations by a district attorney, any law enforcement officer trained pursuant to section 5724 (relating to training) to carry out interceptions under this section who has attained the rank of lieutenant or higher in a law enforcement agency within the county or who is in charge of a

county law enforcement agency.

(2) For designations by the Attorney General, any member of the Pennsylvania State Police trained pursuant to section 5724 to carry out interceptions under this section and designated by the Commissioner of the Pennsylvania State Police who:

(i) has attained the rank of lieutenant or higher; or

(ii) is in charge of a Pennsylvania State Police barracks.

(Oct. 21, 1988, P.L.1000, No.115, eff. imd.; Feb. 18, 1998, P.L.102, No.19, eff. imd.; Oct. 25, 2012, P.L.1634, No.202, eff. 60 days)

2012 Amendment. Act 202 amended subsec. (d).

1998 Amendment. Act 19 amended subsecs. (b) and (c).

1988 Amendment. Act 115 added section 5713.1.

Cross References. Section 5713.1 is referred to in sections 5706, 5716, 5721.1 of this title.

§ 5714. Recording of intercepted communications.

(a) Recording and monitoring.--Any wire, electronic or oral communication intercepted in accordance with this subchapter shall, if practicable, be recorded by tape or other comparable method. The recording shall be done in such a way as will protect it from editing or other alteration. Whenever an interception is being monitored, the monitor shall be an investigative or law enforcement officer certified under section 5724 (relating to training), and where practicable, keep a signed, written record which shall include the following:

(1) The date and hours of surveillance.

(2) The time and duration of each intercepted communication.

(3) The participant, if known, in each intercepted conversation.

(4) A summary of the content of each intercepted communication.

(b) Sealing of recordings.--Immediately upon the expiration of the order or extensions or renewals thereof, all monitor's records, tapes and other recordings shall be transferred to the judge issuing the order and sealed under his direction. Custody of the tapes, or other recordings shall be maintained wherever the court directs. They shall not be destroyed except upon an order of the court and in any event shall be kept for ten years. Duplicate tapes, or other recordings may be made for disclosure or use pursuant to section 5717 (relating to investigative disclosure or use of contents of wire, electronic or oral communications or derivative evidence). The presence of the seal provided by this section, or a satisfactory explanation for its absence, shall be a prerequisite for the disclosure of the contents of any wire, electronic or oral communication, or evidence derived therefrom, under section 5717(b).

(Oct. 21, 1988, P.L.1000, No.115, eff. imd.; Feb. 18, 1998, P.L.102, No.19, eff. imd.)

Cross References. Section 5714 is referred to in sections 5704, 5713, 5749, 5773 of this title.

§ 5715. Sealing of applications, orders and supporting papers.

Applications made, final reports, and orders granted pursuant to this subchapter and supporting papers and monitor's records shall be sealed by the court and shall be held in custody as the court shall direct and shall not be destroyed except on order of the court and in any event shall be kept for ten years. They may be disclosed only upon a showing of good cause before a court of competent jurisdiction except that any investigative or law enforcement officer may disclose such applications, orders and supporting papers and monitor's records to investigative or law enforcement officers of this or another state, any of its

political subdivisions, or of the United States to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure. In addition to any remedies and penalties provided by this subchapter, any violation of the provisions of this section may be punished as contempt of the court.
(Oct. 21, 1988, P.L.1000, No.115, eff. imd.; Feb. 18, 1998, P.L.102, No.19, eff. imd.)

§ 5716. Service of inventory and inspection of intercepted communications.

(a) Service of inventory.--Within a reasonable time but not later than 90 days after the termination of the period of the order or of extensions or renewals thereof, or the date of the denial of an order applied for under section 5713 (relating to emergency situations) or 5713.1 (relating to emergency hostage and barricade situations), the issuing or denying judge shall cause to be served on the persons named in the order, application, or final report an inventory which shall include the following:

(1) Notice of the entry of the order or the application for an order denied under section 5713 or 5713.1.

(2) The date of the entry of the order or the denial of an order applied for under section 5713 or 5713.1.

(3) The period of authorized or disapproved interception.

(4) The fact that during the period wire or oral communications were or were not intercepted.

(b) Postponement.--On an ex parte showing of good cause to the issuing or denying judge the service of the inventory required by this section may be postponed for a period of 30 days. Additional postponements may be granted for periods of not more than 30 days on an ex parte showing of good cause to the issuing or denying judge.

(c) Inspections.--The court, upon the filing of a motion, shall make available to such persons or their attorneys for inspection, the intercepted communications and monitor's records to which the movant was a participant and the applications and orders.
(Oct. 21, 1988, P.L.1000, No.115, eff. imd.)

Cross References. Section 5716 is referred to in sections 5713, 5713.1 of this title.

§ 5717. Investigative disclosure or use of contents of wire, electronic or oral communications or derivative evidence.

(a) Law enforcement personnel.--Any investigative or law enforcement officer who, under subsection (a.1), (b), (b.1) or (c), has obtained knowledge of the contents of any wire, electronic or oral communication, or evidence derived therefrom, may disclose such contents or evidence to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(a.1) Use of information.--Any investigative or law enforcement officer who, by any means authorized by this subchapter, has obtained knowledge of the contents of any wire, electronic or oral communication or evidence derived therefrom may use such contents or evidence to the extent such use is appropriate to the proper performance of his official duties.

(b) Evidence.--Any person who by any means authorized by this chapter, has obtained knowledge of the contents of any wire, electronic or oral communication, or evidence derived therefrom, may disclose such contents or evidence to an investigative or law enforcement officer and may disclose such contents or evidence while giving testimony under oath or affirmation in any criminal proceeding in any court of this Commonwealth or of another state or of the United States or before any state or Federal grand jury or investigating grand jury.

(b.1) Criminal cases.--Any person who by means authorized by

section 5704(17) (relating to exceptions to prohibition of interception and disclosure of communications) has obtained knowledge of the contents of any wire, electronic or oral communication, or evidence derived therefrom, may in addition to disclosures made under subsection (b) disclose such contents or evidence, on the condition that such disclosure is made for the purpose of providing exculpatory evidence in an open or closed criminal case.

(c) Otherwise authorized personnel.--

(1) Except as provided under paragraph (2), any person who, by any means authorized by the laws of another state or the Federal Government, has obtained knowledge of the contents of any wire, electronic or oral communication, or evidence derived from any wire, electronic or oral communication, may disclose the contents or evidence to an investigative or law enforcement officer and may disclose the contents or evidence where otherwise admissible while giving testimony under oath or affirmation in any proceeding in any court of this Commonwealth.

(2) The contents of a nonconsensual interception authorized by the laws of the Federal Government or another state shall not be admissible unless the interception was authorized by a court upon a finding of probable cause that the target of the surveillance is engaged or will engage in a violation of the criminal laws of the Federal Government or any state.

(Oct. 21, 1988, P.L.1000, No.115, eff. imd.; Feb. 18, 1998, P.L.102, No.19, eff. imd.; Oct. 25, 2012, P.L.1634, No.202, eff. 60 days)

2012 Amendment. Act 202 amended subsec. (a) and added subsecs. (b.1) and (c).

Cross References. Section 5717 is referred to in sections 5704, 5714, 5718, 5721.1, 5749 of this title.

§ 5718. Interception of communications relating to other offenses.

When an investigative or law enforcement officer, while engaged in court authorized interceptions of wire, electronic or oral communications in the manner authorized herein, intercepts wire, electronic or oral communications relating to offenses other than those specified in the order of authorization, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in section 5717(a) (relating to investigative disclosure or use of contents of wire, electronic or oral communications or derivative evidence). Such contents and evidence may be disclosed in testimony under oath or affirmation in any criminal proceeding in any court of this Commonwealth or of another state or of the United States or before any state or Federal grand jury when authorized by a judge who finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this subchapter. Such application shall be made as soon as practicable.

(Oct. 21, 1988, P.L.1000, No.115, eff. imd.; Feb. 18, 1998, P.L.102, No.19, eff. imd.)

§ 5719. Unlawful use or disclosure of existence of order concerning intercepted communication.

Except as specifically authorized pursuant to this subchapter any person who willfully uses or discloses the existence of an order authorizing interception of a wire, electronic or oral communication is guilty of a misdemeanor of the second degree.

(Oct. 21, 1988, P.L.1000, No.115, eff. imd.; Feb. 18, 1998, P.L.102, No.19, eff. imd.)

§ 5720. Service of copy of order and application before disclosure of intercepted communication in trial, hearing or proceeding.

The contents of any wire, electronic or oral communication

intercepted in accordance with the provisions of this subchapter, or evidence derived therefrom, shall not be disclosed in any trial, hearing, or other adversary proceeding before any court of the Commonwealth unless, not less than ten days before the trial, hearing or proceeding the parties to the action have been served with a copy of the order, the accompanying application and the final report under which the interception was authorized or, in the case of an interception under section 5704 (relating to exceptions to prohibition of interception and disclosure of communications), notice of the fact and nature of the interception. The service of inventory, order, application, and final report required by this section may be waived by the court only where it finds that the service is not feasible and that the parties will not be prejudiced by the failure to make the service. (Oct. 21, 1988, P.L.1000, No.115, eff. imd.; Feb. 18, 1998, P.L.102, No.19, eff. imd.)

Suspension by Court Rule. Section 5720 was suspended by Pennsylvania Rule of Juvenile Court Procedure No. 800(14), amended February 12, 2010, insofar as it is inconsistent with Rule 340(B)(6) relating to pre-adjudicatory discovery and inspection.

Section 5720 was suspended by Pennsylvania Rule of Criminal Procedure No. 1101(5), adopted March 1, 2000, insofar as it is inconsistent with Rule No. 573 only insofar as section 5720 may delay disclosure to a defendant seeking discovery under Rule No. 573(B)(1)(g).

§ 5721. Suppression of contents of intercepted communication or derivative evidence (Repealed).

1998 Repeal. Section 5721 was repealed February 18, 1998 (P.L.102, No.19), effective immediately.

§ 5721.1. Evidentiary disclosure of contents of intercepted communication or derivative evidence.

(a) Disclosure in evidence generally.--

(1) Except as provided in paragraph (2), no person shall disclose the contents of any wire, electronic or oral communication, or evidence derived therefrom, in any proceeding in any court, board or agency of this Commonwealth.

(2) Any person who has obtained knowledge of the contents of any wire, electronic or oral communication, or evidence derived therefrom, which is properly subject to disclosure under section 5717 (relating to investigative disclosure or use of contents of wire, electronic or oral communications or derivative evidence) may also disclose such contents or evidence in any matter relating to any criminal, quasi-criminal, forfeiture, administrative enforcement or professional disciplinary proceedings in any court, board or agency of this Commonwealth or of another state or of the United States or before any state or Federal grand jury or investigating grand jury. Once such disclosure has been made, then any person may disclose the contents or evidence in any such proceeding.

(3) Notwithstanding the provisions of paragraph (2), no disclosure in any such proceeding shall be made so long as any order excluding such contents or evidence pursuant to the provisions of subsection (b) is in effect.

(b) Motion to exclude.--Any aggrieved person who is a party to any proceeding in any court, board or agency of this Commonwealth may move to exclude the contents of any wire, electronic or oral communication, or evidence derived therefrom, on any of the following grounds:

(1) Unless intercepted pursuant to an exception set forth in section 5704 (relating to exceptions to prohibition of interception and disclosure of communications), the interception was made without prior procurement of an order of authorization under section 5712 (relating to issuance of order

and effect) of an order of approval under section 5713(a) (relating to emergency situations) or 5713.1(b) (relating to emergency hostage and barricade situations).

(2) The order of authorization issued under section 5712 or the order of approval issued under section 5713(a) or 5713.1(b) was not supported by probable cause with respect to the matters set forth in section 5710(a)(1) and (2) (relating to grounds for entry of order).

(3) The order of authorization issued under section 5712 is materially insufficient on its face.

(4) The interception materially deviated from the requirements of the order of authorization.

(5) With respect to interceptions pursuant to section 5704(2), the consent to the interception was coerced by the Commonwealth.

(6) Where required pursuant to section 5704(2)(iv), the interception was made without prior procurement of a court order or without probable cause.

(c) Procedure.--

(1) The motion shall be made in accordance with the applicable rules of procedure governing such proceedings. The court, board or agency, upon the filing of such motion, shall make available to the movant or his counsel the intercepted communication and evidence derived therefrom.

(2) In considering a motion to exclude under subsection (b)(2), both the written application under section 5710(a) and all matters that were presented to the judge under section 5710(b) shall be admissible.

(3) The movant shall bear the burden of proving by a preponderance of the evidence the grounds for exclusion asserted under subsection (b)(3) and (4).

(4) With respect to exclusion claims under subsection (b)(1), (2) and (5), the respondent shall bear the burden of proof by a preponderance of the evidence.

(5) With respect to exclusion claims under subsection (b)(6), the movant shall have the initial burden of demonstrating by a preponderance of the evidence that the interception took place in his home. Once he meets this burden, the burden shall shift to the respondent to demonstrate by a preponderance of the evidence that the interception was in accordance with section 5704(2)(iv).

(6) Evidence shall not be deemed to have been derived from communications excludable under subsection (b) if the respondent can demonstrate by a preponderance of the evidence that the Commonwealth or the respondent had a basis independent of the excluded communication for discovering such evidence or that such evidence would have been inevitably discovered by the Commonwealth or the respondent absent the excluded communication.

(d) Appeal.--In addition to any other right of appeal, the Commonwealth shall have the right to appeal from an order granting a motion to exclude if the official to whom the order authorizing the intercept was granted shall certify to the court that the appeal is not taken for purposes of delay. The appeal shall be taken in accordance with the provisions of Title 42 (relating to judiciary and judicial procedure).

(e) Exclusiveness of remedies and sanctions.--The remedies and sanctions described in this subchapter with respect to the interception of wire, electronic or oral communications are the only judicial remedies and sanctions for nonconstitutional violations of this subchapter involving such communications.
(Feb. 18, 1998, P.L.102, No.19, eff. imd.)

1998 Amendment. Act 19 added section 5721.1.

Cross References. Section 5721.1 is referred to in section 5749 of this title.

§ 5722. Report by issuing or denying judge.

Within 30 days after the expiration of an order or an extension or renewal thereof entered under this subchapter or the denial of an order confirming verbal approval of interception, the issuing or denying judge shall make a report to the Administrative Office of Pennsylvania Courts stating the following:

(1) That an order, extension or renewal was applied for.

(2) The kind of order applied for.

(3) That the order was granted as applied for, was modified, or was denied.

(4) The period of the interceptions authorized by the order, and the number and duration of any extensions or renewals of the order.

(5) The offense specified in the order, or extension or renewal of an order.

(6) The name and official identity of the person making the application and of the investigative or law enforcement officer and agency for whom it was made.

(7) The character of the facilities from which or the place where the communications were to be intercepted.

(Oct. 21, 1988, P.L.1000, No.115, eff. imd.; Feb. 18, 1998, P.L.102, No.19, eff. imd.)

§ 5723. Annual reports and records of Attorney General and district attorneys.

(a) Judges.--In addition to reports required to be made by applicants pursuant to Title 18 U.S.C. § 2519, all judges who have issued orders pursuant to this title shall make annual reports on the operation of this chapter to the Administrative Office of Pennsylvania Courts. The reports by the judges shall contain the following information:

(1) The number of applications made.

(2) The number of orders issued.

(3) The effective periods of such orders.

(4) The number and duration of any renewals thereof.

(5) The crimes in connection with which the orders were sought.

(6) The names and official identity of the applicants.

(7) Such other and further particulars as the Administrative Office of Pennsylvania Courts may require.

(b) Attorney General.--In addition to reports required to be made by applicants pursuant to Title 18 U.S.C. § 2519, the Attorney General shall make annual reports on the operation of this chapter to the Administrative Office of Pennsylvania Courts and to the Judiciary Committees of the Senate and House of Representatives. The reports by the Attorney General shall contain the same information which must be reported pursuant to 18 U.S.C. § 2519(2).

(c) District attorneys.--Each district attorney shall annually provide to the Attorney General all of the foregoing information with respect to all applications authorized by that district attorney on forms prescribed by the Attorney General.

(d) Other reports.--The Chief Justice of the Supreme Court and the Attorney General shall annually report to the Governor and the General Assembly on such aspects of the operation of this chapter as they deem appropriate and make any recommendations they feel desirable as to legislative changes or improvements to effectuate the purposes of this chapter and to assure and protect individual rights.

(Oct. 21, 1988, P.L.1000, No.115, eff. imd.)

§ 5724. Training.

The Attorney General and the Commissioner of the Pennsylvania State Police shall establish a course of training in the legal and technical aspects of wiretapping and electronic surveillance as allowed or permitted by this subchapter, shall establish such regulations as they find necessary and proper for such training program and shall establish minimum standards for certification and periodic recertification of Commonwealth investigative or law

enforcement officers as eligible to conduct wiretapping or electronic surveillance under this chapter. The Pennsylvania State Police shall charge each investigative or law enforcement officer who enrolls in this training program a reasonable enrollment fee to offset the costs of such training.
(Oct. 21, 1988, P.L.1000, No.115, eff. imd.; Feb. 18, 1998, P.L.102, No.19, eff. imd.)

Cross References. Section 5724 is referred to in sections 5706, 5710, 5713.1, 5714, 5749 of this title.

§ 5725. Civil action for unlawful interception, disclosure or use of wire, electronic or oral communication.

(a) Cause of action.--Any person whose wire, electronic or oral communication is intercepted, disclosed or used in violation of this chapter shall have a civil cause of action against any person who intercepts, discloses or uses or procures any other person to intercept, disclose or use, such communication; and shall be entitled to recover from any such person:

(1) Actual damages, but not less than liquidated damages computed at the rate of $100 a day for each day of violation, or $1,000, whichever is higher.

(2) Punitive damages.

(3) A reasonable attorney's fee and other litigation costs reasonably incurred.

(b) Waiver of sovereign immunity.--To the extent that the Commonwealth and any of its officers, officials or employees would be shielded from liability under this section by the doctrine of sovereign immunity, such immunity is hereby waived for the purposes of this section.

(c) Defense.--It is a defense to an action brought pursuant to subsection (a) that the actor acted in good faith reliance on a court order or the provisions of this chapter.
(July 10, 1981, P.L.228, No.73, eff. 60 days; Oct. 21, 1988, P.L.1000, No.115, eff. imd.)

Cross References. Section 5725 is referred to in section 5713 of this title.

§ 5726. Action for removal from office or employment.

(a) Cause of action.--Any aggrieved person shall have the right to bring an action in Commonwealth Court against any investigative or law enforcement officer, public official or public employee seeking the officer's, official's or employee's removal from office or employment on the grounds that the officer, official or employee has intentionally violated the provisions of this chapter. If the court shall conclude that such officer, official or employee has in fact intentionally violated the provisions of this chapter, the court shall order the dismissal or removal from office of said officer, official or employee.

(b) Defense.--It is a defense to an action brought pursuant to subsection (a) that the actor acted in good faith reliance on a court order or the provisions of this chapter.
(July 10, 1981, P.L.228, No.73, eff. 60 days)

§ 5727. Expiration (Repealed).

1988 Repeal. Section 5727 was repealed October 21, 1988 (P.L.1000, No.115), effective immediately.

§ 5728. Injunction against illegal interception.

Whenever it shall appear that any person is engaged or is about to engage in any act which constitutes or will constitute a felony violation of this subchapter, the Attorney General may initiate a civil action in the Commonwealth Court to enjoin the violation. The court shall proceed as soon as practicable to the hearing and determination of the action and may, at any time before final determination, enter a restraining order or prohibition, or take such other action, as is warranted to prevent a continuing and substantial injury to the Commonwealth or to any person or class

of persons for whose protection the action is brought. A proceeding under this section is governed by the Pennsylvania Rules of Civil Procedure, except that, if a criminal complaint has been filed against the respondent, discovery is governed by the Pennsylvania Rules of Criminal Procedure.
(Oct. 21, 1988, P.L.1000, No.115, eff. imd.)

1988 Amendment. Act 115 added section 5728.

SUBCHAPTER C
STORED WIRE AND ELECTRONIC COMMUNICATIONS AND TRANSACTIONAL RECORDS ACCESS

Sec.
5741. Unlawful access to stored communications.
5742. Disclosure of contents and records.
5743. Requirements for governmental access.
5743.1. Administrative subpoena.
5744. Backup preservation.
5745. Delayed notice.
5746. Cost reimbursement.
5747. Civil action.
5748. Exclusivity of remedies.
5749. Retention of certain records.

Enactment. Subchapter C was added October 21, 1988, P.L.1000, No.115, effective immediately.

§ 5741. Unlawful access to stored communications.

(a) Offense.--Except as provided in subsection (c), it is an offense to obtain, alter or prevent authorized access to a wire or electronic communication while it is in electronic storage by intentionally:

(1) accessing without authorization a facility through which an electronic communication service is provided; or

(2) exceeding the scope of one's authorization to access the facility.

(b) Penalty.--

(1) If the offense is committed for the purpose of commercial advantage, malicious destruction or damage, or private commercial gain, the offender shall be subject to:

(i) a fine of not more than $250,000 or imprisonment for not more than one year, or both, in the case of a first offense; or

(ii) a fine of not more than $250,000 or imprisonment for not more than two years, or both, for any subsequent offense.

(2) In any other case, the offender shall be subject to a fine of not more than $5,000 or imprisonment for not more than six months, or both.

(c) Exceptions.--Subsection (a) of this section does not apply with respect to conduct authorized:

(1) by the person or entity providing a wire or electronic communication service;

(2) by a user of that service with respect to a communication of or intended for that user; or

(3) in section 5743 (relating to requirements for governmental access) or 5744 (relating to backup preservation).

§ 5742. Disclosure of contents and records.

(a) Prohibitions.--Except as provided in subsection (b) and (c):

(1) A person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service:

(i) On behalf of, and received by means of electronic

transmission from, or created by means of computer processing of communications received by means of electronic transmission from, a subscriber or customer of the service.

(ii) Solely for the purpose of providing storage or computer processing services to the subscriber or customer, if the provider is not authorized to access the contents of any such communication for the purpose of providing any services other than storage or computer processing.

(2) A person or entity providing remote computing service to the public shall not knowingly divulge to any person or entity the contents of any communication which is carried or maintained on that service:

(i) On behalf of, and received by means of electronic transmission from, or created by means of computer processing of communications received by means of electronic transmission from, a subscriber or customer of the service.

(ii) Solely for the purpose of providing storage or computer processing services to the subscriber or customer, if the provider is not authorized to access the contents of any such communication for the purpose of providing any services other than storage or computer processing.

(3) A person or entity providing an electronic communication service or remote computing service to the public shall not knowingly divulge a record or other information pertaining to a subscriber to, or customer of, the service.

(b) Exceptions.--A person or entity may divulge the contents of a communication:

(1) to an addressee or intended recipient of the communication or an agent of the addressee or intended recipient;

(2) as otherwise authorized in section 5704(1) (relating to prohibition of interception and disclosure of communications), 5708 (relating to order authorizing interception of wire, electronic or oral communications) or 5743 (relating to governmental access);

(3) with the lawful consent of the originator or an addressee or intended recipient of the communication, or the subscriber in the case of remote computing service;

(4) to a person employed or authorized or whose facilities are used to forward the communication to its destination;

(5) as may be necessarily incident to the rendition of the service or to the protection of the rights or property of the provider of the service; or

(6) to a law enforcement agency, if the contents:

(i) Were inadvertently obtained by the service provider.

(ii) Appear to pertain to the commission of a crime.

(c) Exceptions for disclosure of records or other information.--A person or entity may divulge a record or other information pertaining to a subscriber to, or customer of, the service if any of the following paragraphs apply:

(1) A record or other information may be divulged incident to any service or other business operation or to the protection of the rights or property of the provider.

(2) A record or other information may be divulged to any of the following:

(i) An investigative or law enforcement official as authorized in section 5743.

(ii) The subscriber or customer upon request.

(iii) A third party, upon receipt from the requester of adequate proof of lawful consent from the subscriber to, or customer of, the service to release the information to the third party.

(iv) A party to a legal proceeding, upon receipt from the requester of a court order entered under subsection (c.1)

the party of a court order entered under subsection (c.1). This subparagraph does not apply to an investigative or law enforcement official authorized under section 5743.

(3) Notwithstanding paragraph (2), a record or other information may be divulged as authorized by a Commonwealth statute or as authorized by a Commonwealth regulatory agency with oversight over the person or entity.

(4) Subject to paragraph (2), a record or other information may be divulged as authorized by Federal law or as authorized by a Federal regulatory agency having oversight over the person or entity.

(c.1) Order for release of records.--

(1) An order to divulge a record or other information pertaining to a subscriber or customer under subsection (c)(2)(iv) must be approved by a court presiding over the proceeding in which a party seeks the record or other information.

(2) The order may be issued only after the subscriber or customer received notice from the party seeking the record or other information and was given an opportunity to be heard.

(3) The court may issue a preliminary order directing the provider to furnish the court with the identity of or contact information for the subscriber or customer if the party does not possess this information.

(4) An order for disclosure of a record or other information shall be issued only if the party seeking disclosure demonstrates specific and articulable facts to show that there are reasonable grounds to believe that the record or other information sought is relevant and material to the proceeding. In making its determination, the court shall consider the totality of the circumstances, including input of the subscriber or customer, if any, and the likely impact of the provider.

(Oct. 9, 2008, P.L.1403, No.111, eff. imd.)

2008 Amendment. Act 111 amended the section heading and subsec. (a) intro. par. and added subsecs. (a)(3), (c) and (c.1).

Cross References. Section 5742 is referred to in section 5746 of this title.

§ 5743. Requirements for governmental access.

(a) Contents of communications in electronic storage.-- Investigative or law enforcement officers may require the disclosure by a provider of communication service of the contents of a communication which is in electronic storage in a communication system for:

(1) One hundred eighty days or less only pursuant to a warrant issued under the Pennsylvania Rules of Criminal Procedure.

(2) More than 180 days by the means available under subsection (b).

(b) Contents of communications in a remote computing service.--

(1) Investigative or law enforcement officers may require a provider of remote computing service to disclose the contents of any communication to which this paragraph is made applicable by paragraph (2):

(i) without required notice to the subscriber or customer if the investigative or law enforcement officer obtains a warrant issued under the Pennsylvania Rules of Criminal Procedure; or

(ii) with prior notice from the investigative or law enforcement officer to the subscriber or customer if the investigative or law enforcement officer:

(A) uses an administrative subpoena authorized by a statute or a grand jury subpoena; or

(B) obtains a court order for the disclosure under subsection (d);

except that delayed notice may be given pursuant to section

5745 (relating to delayed notice).

(2) Paragraph (1) is applicable with respect to a communication which is held or maintained on that service:

(i) On behalf of and received by means of electronic transmission from, or created by means of computer processing of communications received by means of electronic transmission from, a subscriber or customer of the remote computing service.

(ii) Solely for the purpose of providing storage or computer processing services to the subscriber or customer, if the provider is not authorized to access the contents of any such communication for the purpose of providing any services other than storage or computer processing.

(c) Records concerning electronic communication service or remote computing service.--

(1) (Deleted by amendment).

(2) A provider of electronic communication service or remote computing service shall disclose a record or other information pertaining to a subscriber to or customer of the service, not including the contents of communications covered by subsection (a) or (b), to an investigative or law enforcement officer only when the investigative or law enforcement officer:

(i) uses an administrative subpoena authorized by a statute or a grand jury subpoena;

(ii) obtains a warrant issued under the Pennsylvania Rules of Criminal Procedure;

(iii) obtains a court order for the disclosure under subsection (d); or

(iv) has the consent of the subscriber or customer to the disclosure.

(3) An investigative or law enforcement officer receiving records or information under paragraph (2) is not required to provide notice to the customer or subscriber.

(d) Requirements for court order.--A court order for disclosure under subsection (b) or (c) shall be issued only if the investigative or law enforcement officer shows that there are specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation. A court issuing an order pursuant to this section, on a motion made promptly by the service provider, may quash or modify the order if the information or records requested are unusually voluminous in nature or compliance with the order would otherwise cause an undue burden on the provider.

(e) No cause of action against a provider disclosing information under this subchapter.--No cause of action shall lie against any provider of wire or electronic communication service, its officers, employees, agents or other specified persons for providing information, facilities or assistance in accordance with the terms of a court order, warrant, subpoena or certification under this subchapter.

(Feb. 18, 1998, P.L.102, No.19, eff. imd.; Oct. 9, 2008, P.L.1403, No.111, eff. imd.; Oct. 25, 2012, P.L.1634, No.202, eff. 60 days)

2012 Amendment. Act 202 amended subsecs. (a) and (b).

2008 Amendment. Act 111 deleted subsec. (c)(1).

1998 Amendment. Act 19 amended subsecs. (d) and (e).

Cross References. Section 5743 is referred to in sections 5712, 5712.1, 5741, 5742, 5743.1, 5744, 5745, 5746, 5747 of this title.

§ 5743.1. Administrative subpoena.

(a) Authorization.--

(1) In an ongoing investigation that monitors or utilizes online services or other means of electronic communication to

identify individuals engaged in an offense involving the sexual exploitation or abuse of children, the following shall apply:

(i) The following may issue in writing and cause to be served a subpoena requiring the production and testimony under subparagraph (ii):

(A) The Attorney General.

(B) A deputy attorney general designated in writing by the Attorney General.

(C) A district attorney.

(D) An assistant district attorney designated in writing by a district attorney.

(ii) A subpoena issued under subparagraph (i) may be issued to a provider of electronic communication service or remote computing service:

(A) requiring disclosure under section 5743(c)(2) (relating to requirements for governmental access) of a subscriber or customer's name, address, telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address, which may be relevant to an authorized law enforcement inquiry; or

(B) requiring a custodian of the records of the provider to give testimony or affidavit concerning the production and authentication of the records or information.

(2) A subpoena under this section shall describe the information required to be produced and prescribe a return date within a reasonable period of time within which the information can be assembled and made available.

(3) If summoned to appear under paragraph (1)(ii)(B), a custodian of records subpoenaed under this section shall be paid the same fees and mileage that are paid to witnesses in the courts of this Commonwealth.

(4) Prior to the return date specified in the subpoena, the person or entity subpoenaed may, in the court of common pleas of the county in which the person or entity conducts business or resides, petition for an order modifying or setting aside the subpoena or for a prohibition of disclosure ordered by a court under paragraph (7).

(5) The following shall apply:

(i) Except as provided under subparagraph (ii), if no case or proceeding arises from the production of materials under this section within a reasonable time after the materials are produced, the agency to which the materials were delivered shall, upon written demand made by the person producing the materials, return the materials to the person.

(ii) This paragraph shall not apply if the production required was of copies rather than originals.

(6) A subpoena issued under paragraph (1) may require production as soon as possible.

(7) Without court approval, no person or entity may disclose to any other person or entity, other than to an attorney in order to obtain legal advice, the existence of the subpoena for a period of up to 90 days.

(8) A subpoena issued under this section may not require the production of anything that would be protected from production under the standards applicable to a subpoena for the production of documents issued by a court.

(b) Service.--The following shall apply:

(1) A subpoena issued under this section may be served by any person who is at least 18 years of age and is designated in the subpoena to serve it.

(2) Service upon a natural person may be made by personal delivery of the subpoena to the person.

(3) Service may be made upon a domestic or foreign corporation or upon a partnership or other unincorporated

association which is subject to suit under a common name by delivering the subpoena to any of the following:

(i) An officer of the entity.

(ii) A managing or general agent of the entity.

(iii) An agent authorized by appointment or by law to receive service of process in this Commonwealth.

(4) The affidavit of the person serving the subpoena entered on a true copy of the subpoena by the person serving it shall be proof of service.

(c) Enforcement.--The following shall apply:

(1) The Attorney General or a district attorney, or a designee may invoke the aid of a court of common pleas within the following jurisdictions to compel compliance with the subpoena:

(i) The jurisdiction in which the investigation is being conducted.

(ii) The jurisdiction in which the subpoenaed person resides, conducts business or may be found.

(2) The court may issue an order requiring the subpoenaed person to appear before the Attorney General or a district attorney, or a designee to produce records or to give testimony concerning the production and authentication of the records. A failure to obey the order of the court may be punished by the court as contempt of court. All process may be served in a judicial district of the Commonwealth in which the person may be found.

(d) Immunity from civil liability.--Notwithstanding any State or local law, any person receiving a subpoena under this section who complies in good faith with the subpoena and produces the records sought shall not be liable in a court of this Commonwealth to a subscriber, customer or other person for the production or for the nondisclosure of that production to the subscriber, customer or person.

(e) Annual reports and records of Attorney General and district attorneys.--The following shall apply:

(1) On or before April 1 following the effective date of this section and annually thereafter, including the year following the expiration of this section, the Attorney General shall make a report on the operation of this section to the Judiciary Committee of the Senate and the Judiciary Committee of the House of Representatives. The reports by the Attorney General shall contain the following information for the previous calendar year:

(i) The number of administrative subpoenas issued.

(ii) The number of investigations for which an administrative subpoena was issued.

(iii) The number of court orders issued under subsections (a)(4) and (7) and (c)(2).

(iv) The number of arrests made and the type of charge filed in cases in which an administrative subpoena was issued.

(v) The number of cases in which an administrative subpoena was issued and in which no arrests or prosecutions resulted.

(2) On or before March 1 following the effective date of this section and annually thereafter, including the year following the expiration of this section, each district attorney shall provide to the Attorney General all of the information under paragraph (1) with respect to all administrative subpoenas issued by that district attorney on forms prescribed by the Attorney General.

(f) Expiration.--(Deleted by amendment).

(g) Definitions.--As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Offense involving the sexual exploitation or abuse of

Children. An offense, including an attempt, conspiracy or solicitation involving any of the following, in which a victim is an individual who is under the age of 18 years:

(1) Chapter 29 (relating to kidnapping).

(2) Chapter 30 (relating to human trafficking).

(3) Chapter 31 (relating to sexual offenses).

(4) Section 6312 (relating to sexual abuse of children).

(5) Section 6318 (relating to unlawful contact with minor).

(6) Section 6320 (relating to sexual exploitation of children).

(Oct. 22, 2014, P.L.2522, No.151, eff. 60 days; Dec. 22, 2017, P.L.1218, No.67, eff. imd.)

2017 Amendment. Act 67 deleted subsec. (f).

2014 Amendment. Act 151 added section 5743.1.

§ 5744. Backup preservation.

(a) Backup preservation.--

(1) An investigative or law enforcement officer acting under section 5743(b)(2) (relating to requirements for governmental access) may include in its subpoena or court order a requirement that the service provider to whom the request is directed create a backup copy of the contents of the electronic communications sought in order to preserve those communications. Without notifying the subscriber or customer of the subpoena or court order, the service provider shall create the backup copy as soon as practicable, consistent with its regular business practices, and shall confirm to the investigative or law enforcement officer that the backup copy has been made. The backup copy shall be created within two business days after receipt by the service provider of the subpoena or court order.

(2) Notice to the subscriber or customer shall be made by the investigative or law enforcement officer within three days after receipt of confirmation that the backup copy has been made, unless the notice is delayed pursuant to section 5745(a) (relating to delayed notice).

(3) The service provider shall not destroy or permit the destruction of the backup copy until the later of:

(i) the delivery of the information; or

(ii) the resolution of all proceedings, including appeals of any proceeding, concerning the government's subpoena or court order.

(4) The service provider shall release the backup copy to the requesting investigative or law enforcement officer no sooner than 14 days after the officer's notice to the subscriber or customer if the service provider has not:

(i) received notice from the subscriber or customer that the subscriber or customer has challenged the officer's request; and

(ii) initiated proceedings to challenge the request of the officer.

(5) An investigative or law enforcement officer may seek to require the creation of a backup copy under paragraph (1) if in his sole discretion the officer determines that there is reason to believe that notification under section 5743 of the existence of the subpoena or court order may result in destruction of or tampering with evidence. This determination is not subject to challenge by the subscriber, customer or service provider.

(b) Customer challenges.--

(1) Within 14 days after notice by the investigative or law enforcement officer to the subscriber or customer under subsection (a)(2), the subscriber or customer may file a motion to quash the subpoena or vacate the court order, copies to be served upon the officer and written notice of the challenge to be given to the service provider. A motion to vacate a court

order shall be filed in the court which issued the order. A motion to quash a subpoena shall be filed in the court which has authority to enforce the subpoena. The motion or application shall contain an affidavit or sworn statement:

(i) stating that the applicant is a customer of or subscriber to the service from which the contents of electronic communications maintained for the applicant have been sought; and

(ii) containing the applicant's reasons for believing that the records sought are not relevant to a legitimate investigative or law enforcement inquiry or that there has not been substantial compliance with the provisions of this subchapter in some other respect.

(2) Service shall be made under this section upon the investigative or law enforcement officer by delivering or mailing by registered or certified mail a copy of the papers to the person, office or department specified in the notice which the customer has received pursuant to this subchapter. For the purposes of this section, the term "delivery" has the meaning given that term in the Pennsylvania Rules of Civil Procedure.

(3) If the court finds that the customer has complied with paragraphs (1) and (2), the court shall order the investigative or law enforcement officer to file a sworn response, which may be filed in camera if the investigative or law enforcement officer includes in its response the reasons which make in camera review appropriate. If the court is unable to determine the motion or application on the basis of the parties' initial allegations and responses, the court may conduct such additional proceedings as it deems appropriate. All such proceedings shall be completed and the motion or application decided as soon as practicable after the filing of the officer's response.

(4) If the court finds that the applicant is not the subscriber or customer for whom the communications sought by the investigative or law enforcement officer are maintained, or that there is reason to believe that the investigative or law enforcement inquiry is legitimate and that the communications sought are relevant to that inquiry, it shall deny the motion or application and order the process enforced. If the court finds that the applicant is the subscriber or customer for whom the communications sought by the governmental entity are maintained, and that there is not reason to believe that the communications sought are relevant to a legitimate investigative or law enforcement inquiry, or that there has not been substantial compliance with the provisions of this subchapter, it shall order the process quashed.

(5) A court order denying a motion or application under this section shall not be deemed a final order, and no interlocutory appeal may be taken therefrom. The Commonwealth or investigative or law enforcement officer shall have the right to appeal from an order granting a motion or application under this section.

(Feb. 18, 1998, P.L.102, No.19, eff. imd.)

1998 Amendment. Act 19 amended subsec. (b).

Cross References. Section 5744 is referred to in sections 5741, 5746 of this title.

§ 5745. Delayed notice.

(a) Delay of notification.--

(1) An investigative or law enforcement officer acting under section 5743(b) (relating to requirements for governmental access) may:

(i) where a court order is sought, include in the application a request for an order delaying the notification required under section 5743(b) for a period not to exceed 90 days, which request the court shall grant

if it determines that there is reason to believe that notification of the existence of the court order may have an adverse result described in paragraph (2); or

(ii) where an administrative subpoena authorized by a statute or a grand jury subpoena is obtained, delay the notification required under section 5743(b) for a period not to exceed 90 days upon the execution of a written certification of a supervisory official that there is reason to believe that notification of the existence of the subpoena may have an adverse result described in paragraph (2).

(2) An adverse result for the purposes of paragraph (1) is:

(i) endangering the life or physical safety of an individual;

(ii) flight from prosecution;

(iii) destruction of or tampering with evidence;

(iv) intimidation of potential witnesses; or

(v) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

(3) The investigative or law enforcement officer shall maintain a true copy of a certification under paragraph (1)(ii).

(4) Extensions of the delay of notification provided for in section 5743 of up to 90 days each may be granted by the court upon application or by certification by a supervisory official in the case of an administrative or grand jury subpoena.

(5) Upon expiration of the period of delay of notification under paragraph (1) or (4), the investigative or law enforcement officer shall serve upon, or deliver by registered or first class mail to, the customer or subscriber a copy of the process or request together with notice which:

(i) states with reasonable specificity the nature of the investigative or law enforcement inquiry; and

(ii) informs the customer or subscriber:

(A) that information maintained for the customer or subscriber by the service provider named in the process or request was supplied to or requested by the investigative or law enforcement officer and the date on which the supplying or request took place;

(B) that notification of the customer or subscriber was delayed;

(C) the identity of the investigative or law enforcement officer or the court which made the certification or determination pursuant to which that delay was made; and

(D) which provision of this subchapter authorizes the delay.

(6) As used in this subsection, the term "supervisory official" means the investigative agent or assistant investigative agent in charge, or an equivalent, of an investigative or law enforcement agency's headquarters or regional office, or the chief prosecuting attorney or the first assistant prosecuting attorney, or an equivalent, of a prosecuting attorney's headquarters or regional office.

(b) Preclusion of notice to subject of governmental access.-- An investigative or law enforcement officer acting under section 5743, when he is not required to notify the subscriber or customer under section 5743(b)(1), or to the extent that it may delay such notice pursuant to subsection (a), may apply to a court for an order commanding a provider of electronic communication service or remote computing service to whom a warrant, subpoena or court order is directed, not to notify any other person of the existence of the warrant, subpoena or court order for such period as the court deems appropriate. The court shall enter such an order if it determines that there is reason to believe that notification of

the existence of the warrant, subpoena or court order will result in:

(1) endangering the life or physical safety of an individual;

(2) flight from prosecution;

(3) destruction of or tampering with evidence;

(4) intimidation of a potential witness; or

(5) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

Cross References. Section 5745 is referred to in sections 5743, 5744 of this title.

§ 5746. Cost reimbursement.

(a) Payment.--Except as otherwise provided in subsection (c), an investigative or law enforcement officer obtaining the contents of communications, records or other information under section 5742 (relating to disclosure of contents and records), 5743 (relating to requirements for governmental access) or 5744 (relating to backup preservation) shall reimburse the person or entity assembling or providing the information for such costs as are reasonably necessary and which have been directly incurred in searching for, assembling, reproducing and otherwise providing the information. Reimbursable costs shall include any costs due to necessary disruption of normal operations of any electronic communication service or remote computing service in which the information may be stored.

(b) Amount.--The amount of the reimbursement provided for in subsection (a) shall be as mutually agreed upon by the investigative or law enforcement officer and the person or entity providing the information or, in the absence of agreement, shall be as determined by the court which issued the order for production of the information or the court before which a criminal prosecution relating to the information would be brought, if no court order was issued for production of the information.

(c) Applicability.--The requirement of subsection (a) does not apply with respect to records or other information maintained by a communication common carrier which relates to telephone toll records and telephone listings obtained under section 5743. The court may, however, order reimbursement as described in subsection (a) if the court determines the information required is unusually voluminous or otherwise caused an undue burden on the provider.

(d) Regulations.--The Attorney General shall promulgate regulations to implement this section.

(Oct. 9, 2008, P.L.1403, No.111, eff. imd.; Oct. 25, 2012, P.L.1634, No.202, eff. 60 days)

2012 Amendment. Act 202 added subsec. (d).

2008 Amendment. Act 111 amended subsec. (a).

§ 5747. Civil action.

(a) Cause of action.--Except as provided in subsection 5743(e) (relating to requirements for governmental access), any provider of electronic communication service, subscriber or customer aggrieved by any violation of this subchapter in which the conduct constituting the violation is engaged in with a knowing or intentional state of mind may, in a civil action, recover from the person or entity which engaged in the violation such relief as may be appropriate.

(b) Relief.--In a civil action under this section, appropriate relief shall include:

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c); and

(3) reasonable attorney fees and other litigation costs reasonably incurred.

(c) Damages.--The court may assess as damages in a civil action under this section the sum of the actual damages suffered

by the plaintiff and any profits made by the violator as a result of the violation, but in no case shall a person entitled to recover receive less than the sum of $1,000.

(d) Defense.--A good faith reliance on:

(1) a court warrant or order, a grand jury subpoena, a legislative authorization or a statutory authorization;

(2) a request of an investigative or law enforcement officer under section 5713 (relating to emergency situations); or

(3) a good faith determination that section 5704(10) (relating to exceptions to prohibitions of interception and disclosure of communications) permitted the conduct complained of;

is a complete defense to any civil or criminal action brought under this subchapter or any other law.

(e) Limitation.--A civil action under this section may not be commenced later than two years after the date upon which the claimant first discovered or had a reasonable opportunity to discover the violation.

(Feb. 18, 1998, P.L.102, No.19, eff. imd.; Oct. 22, 2014, P.L.2522, No.151, eff. 60 days)

2014 Amendment. Act 151 amended subsec. (b).

1998 Amendment. Act 19 amended subsec. (d).

§ 5748. Exclusivity of remedies.

The remedies and sanctions described in this subchapter are the only judicial remedies and sanctions for nonconstitutional violations of this subchapter.

§ 5749. Retention of certain records.

(a) Retention.--The commander shall maintain all recordings of oral communications intercepted under section 5704(16) (relating to exceptions to prohibition of interception and disclosure of communications) for a minimum of 31 days after the date of the interception. All recordings made under section 5704(16) shall be recorded over or otherwise destroyed no later than 90 days after the date of the recording unless any of the following apply:

(1) The contents of the recording result in the issuance of a citation. Except as otherwise authorized under this subsection, any recording maintained under this paragraph shall be recorded over or destroyed no later than 90 days after the conclusion of the proceedings related to the citation. All recordings under this paragraph shall be maintained in accordance with section 5714(a) (relating to recording of intercepted communications), except that monitors need not be certified under section 5724 (relating to training).

(2) The commander or a law enforcement officer on the recording believes that the contents of the recording or evidence derived from the recording may be necessary in a proceeding for which disclosure is authorized under section 5717 (relating to investigative disclosure or use of contents of wire, electronic or oral communications or derivative evidence) or 5721.1 (relating to evidentiary disclosure of contents of intercepted communication or derivative evidence) or in a civil proceeding. All recordings under this paragraph shall be maintained in accordance with section 5714(a), except that monitors need not be certified under section 5724.

(3) A criminal defendant who is a participant on the recording reasonably believes that the recording may be useful for its evidentiary value at some later time in a specific criminal proceeding and, no later than 30 days following the filing of criminal charges, provides written notice to the commander indicating a desire that the recording be maintained. The written notice must specify the date, time and location of the recording; the names of the parties involved; and, if known, the case docket number.

(4) An individual who is a participant on the recording

intends to pursue a civil action or has already initiated a civil action and, no later than 30 days after the date of the recording, gives written notice to the commander indicating a desire that the recording be maintained. The written notice must specify the date, time and location of the recording; the names of the parties involved; and, if a civil action has been initiated, the case caption and docket number.

(5) The commander intends to use the recording for training purposes.

(b) Disclosure.--In addition to any disclosure authorized under sections 5717 and 5721.1, any recording maintained:

(1) Under subsection (a)(4) shall be disclosed pursuant to an order of court or as required by the Pennsylvania Rules of Civil Procedure or the Pennsylvania Rules of Evidence; and

(2) Under subsection (a)(5) shall be disclosed consistent with written consent obtained from the law enforcement officer and all participants.

(c) Definitions.--As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Commander." The:

(1) commissioner or a designee, if the recording at issue was made by a member of the Pennsylvania State Police; or

(2) chief or a designee of the law enforcement agency which made the recording at issue.

"Law enforcement officer." A member of the Pennsylvania State Police or an individual employed as a police officer who is required to be trained under 53 Pa.C.S. Ch. 21 Subch. D (relating to municipal police education and training).

(June 11, 2002, P.L.370, No.53, eff. imd.)

2002 Amendment. Act 53 added section 5749. Section 3 of Act 53 provided that section 5749 shall apply upon the enactment of a statute providing for the intercepting and recording of oral communications under 18 Pa.C.S. § 5704. Act 52 of 2002, effective June 11, 2002, added provisions relating to the intercepting and recording of oral communications under 18 Pa.C.S. § 5704.

References in Text. The reference to "commissioner" in par. (1) of the def. of "commander" in subsec. (c) probably should have been a reference to Commissioner of the Pennsylvania State Police.

Cross References. Section 5749 is referred to in section 5782 of this title.

SUBCHAPTER D
MOBILE TRACKING DEVICES

Sec.

5761. Mobile tracking devices.

Enactment. Subchapter D was added October 21, 1988, P.L.1000, No.115, effective immediately.

§ 5761. Mobile tracking devices.

(a) Authority to issue.--Orders for the installation and use of mobile tracking devices may be issued by a court of common pleas.

(b) Jurisdiction.--Orders permitted by this section may authorize the use of mobile tracking devices if the device is installed and monitored within this Commonwealth. The court issuing the order must have jurisdiction over the offense under investigation.

(c) Standard for issuance of order.--An order authorizing the use of one or more mobile tracking devices may be issued to an investigative or law enforcement officer by the court of common pleas upon written application. Each application shall be by written affidavit, signed and sworn to or affirmed before the

court of common pleas. The affidavit shall:

(1) state the name and department, agency or address of the affiant;

(2) identify the vehicles, containers or items to which, in which or on which the mobile tracking device shall be attached or be placed, and the names of the owners or possessors of the vehicles, containers or items;

(3) state the jurisdictional area in which the vehicles, containers or items are expected to be found; and

(4) provide a statement setting forth all facts and circumstances which provide the applicant with probable cause that criminal activity has been, is or will be in progress and that the use of a mobile tracking device will yield information relevant to the investigation of the criminal activity.

(d) Notice.--The court of common pleas shall be notified in writing within 72 hours of the time the mobile tracking device has been activated in place on or within the vehicles, containers or items.

(e) Term of authorization.--Authorization by the court of common pleas for the use of the mobile tracking device may continue for a period of 90 days from the placement of the device. An extension for an additional 90 days may be granted upon good cause shown.

(f) Removal of device.--Wherever practicable, the mobile tracking device shall be removed after the authorization period expires. If removal is not practicable, monitoring of the mobile tracking device shall cease at the expiration of the authorization order.

(g) Movement of device.--Movement of the tracking device within an area protected by a reasonable expectation of privacy shall not be monitored absent exigent circumstances or an order supported by probable cause that criminal activity has been, is or will be in progress in the protected area and that the use of a mobile tracking device in the protected area will yield information relevant to the investigation of the criminal activity.

(Oct. 9, 2008, P.L.1403, No.111, eff. imd.; Oct. 25, 2012, P.L.1634, No.202, eff. 60 days)

2012 Amendment. Act 202 amended subsecs. (b) and (c)(4).

SUBCHAPTER E
PEN REGISTERS, TRAP AND TRACE DEVICES AND TELECOMMUNICATION IDENTIFICATION INTERCEPTION DEVICES

Sec.

5771. General prohibition on use of certain devices and exception.
5772. Application for an order for use of certain devices.
5773. Issuance of an order for use of certain devices.
5774. Assistance in installation and use of certain devices.
5775. Reports concerning certain devices.

Enactment. Subchapter E was added October 21, 1988, P.L.1000, No.115, effective immediately.

Subchapter Heading. The heading of Subchapter E was amended February 18, 1998, P.L.102, No.19, effective immediately.

Cross References. Subchapter E is referred to in section 5704 of this title.

§ 5771. General prohibition on use of certain devices and exception.

(a) General rule.--Except as provided in this section, no person may install or use a pen register or a trap and trace device or a telecommunication identification interception device

without first obtaining a court order under section 5773 (relating to issuance of an order for use of certain devices).

(b) Exception.--The prohibition of subsection (a) does not apply with respect to the use of a pen register, a trap and trace device or a telecommunication identification interception device by a provider of electronic or wire communication service:

(1) relating to the operation, maintenance and testing of a wire or electronic communication service or to the protection of the rights or property of the provider, or to the protection of users of the service from abuse of service or unlawful use of service;

(2) to record the fact that a wire or electronic communication was initiated or completed in order to protect the provider, another provider furnishing service toward the completion of the wire communication or a user of the service from fraudulent, unlawful or abusive use of service; or

(3) with the consent of the user of the service.

(b.1) Limitation.--A government agency authorized to install and use a pen register under this chapter shall use technology reasonably available to it that restricts the recording or decoding of electronic or other impulses to the dialing and signaling information utilized in call processing.

(c) Penalty.--Whoever intentionally and knowingly violates subsection (a) is guilty of a misdemeanor of the third degree. (Feb. 18, 1998, P.L.102, No.19, eff. imd.)

Cross References. Section 5771 is referred to in section 5773 of this title.

§ 5772. Application for an order for use of certain devices.

(a) Application.--The Attorney General or a deputy attorney general designated in writing by the Attorney General or a district attorney or an assistant district attorney designated in writing by the district attorney may make application for an order or an extension of an order under section 5773 (relating to issuance of an order for use of certain devices) authorizing or approving disclosure of mobile communications tracking information or, if necessary, the production and disclosure of mobile communications tracking information, the installation and use of a pen register, a trap and trace device or a telecommunication identification interception device under this subchapter, in writing, under oath or equivalent affirmation, to a court of common pleas having jurisdiction over the offense under investigation or to any Superior Court judge when an application for an order authorizing interception of communications is or has been made for the targeted telephone or another application for interception under this subchapter has been made involving the same investigation.

(b) Contents of application.--An application under subsection (a) shall include:

(1) The identity and authority of the attorney making the application and the identity of the investigative or law enforcement agency conducting the investigation.

(2) A certification by the applicant that the information likely to be obtained is relevant to an ongoing criminal investigation being conducted by that agency.

(3) An affidavit by an investigative or law enforcement officer which establishes probable cause for the issuance of an order or extension of an order under section 5773. (Feb. 18, 1998, P.L.102, No.19, eff. imd.; Oct. 25, 2012, P.L.1634, No.202, eff. 60 days)

2012 Amendment. Act 202 amended subsec. (a).

1998 Amendment. Act 19 amended the section heading and subsec. (a).

Cross References. Section 5772 is referred to in section 5773 of this title.

§ 5773. Issuance of an order for use of certain devices.

(a) In general.--Upon an application made under section 5772 (relating to application for an order for use of certain devices), the court shall enter an ex parte order authorizing the disclosure of mobile communications tracking information, the installation and use of a pen register, a trap and trace device or a telecommunication identification interception device within this Commonwealth if the court finds that there is probable cause to believe that information relevant to an ongoing criminal investigation will be obtained by such installation and use on the targeted telephone. If exigent circumstances exist, the court may verbally authorize the disclosure of mobile communications tracking information, the installation and use of a pen register, a trap and trace device or a telecommunication identification interception device. The written order authorizing the disclosure must be entered within 72 hours of the court's verbal authorization.

(b) Contents of order.--An order issued under this section shall:

(1) Specify:

(i) That there is probable cause to believe that information relevant to an ongoing criminal investigation will be obtained from the targeted telephone.

(ii) The identity, if known, of the person to whom is leased or in whose name is listed the targeted telephone, or, in the case of the use of a telecommunication identification interception device, the identity, if known, of the person or persons using the targeted telephone.

(iii) The identity, if known, of the person who is the subject of the criminal investigation.

(iv) In the use of pen registers and trap and trace devices only, the physical location of the targeted telephone.

(v) A statement of the offense to which the information likely to be obtained by the pen register, trap and trace device or the telecommunication identification interception device relates.

(2) Direct, upon the request of the applicant, the furnishing of information, facilities and technical assistance necessary to accomplish the installation of the pen register under section 5771 (relating to general prohibition on use of certain devices and exception).

(3) In the case of a telecommunication identification interception device, direct that all interceptions be recorded and monitored in accordance with section 5714(a)(1) and (2) and (b) (relating to recording of intercepted communications).

(c) Time period and extensions.--

(1) An order issued under this section shall authorize the installation and use of a pen register, trap and trace device or a telecommunication identification interception device for a period not to exceed 60 days.

(2) Extensions of such an order may be granted but only upon an application for an order under section 5772 and upon the judicial finding required by subsection (a). The period of each extension shall be for a period not to exceed 30 days.

(d) Nondisclosure of existence of pen register, trap and trace device or a telecommunication identification interception device.--An order authorizing or approving the installation and use of a pen register, a trap and trace device or a telecommunication identification interception device shall direct that:

(1) The order be sealed until otherwise ordered by the court.

(2) The person owning or leasing the targeted telephone, or who has been ordered by the court to provide assistance to the applicant, not disclose the existence of the pen register, trap and trace device or telecommunication identification interception device or the existence of the investigation to

interception device or the existence of the investigation to the listed subscriber, or to any other person, unless or until otherwise ordered by the court.

(Feb. 18, 1998, P.L.102, No.19, eff. imd.; Oct. 25, 2012, P.L.1634, No.202, eff. 60 days)

2012 Amendment. Act 202 amended subsecs. (a) and (c).

Cross References. Section 5773 is referred to in sections 5771, 5772, 5774 of this title.

§ 5774. Assistance in installation and use of certain devices.

(a) Pen register.--Upon the request of an applicant under this subchapter, a provider of wire or electronic communication service, landlord, custodian or other person shall forthwith provide all information, facilities and technical assistance necessary to accomplish the installation of the pen register unobtrusively and with a minimum of interference with the services that the person so ordered by the court accords the party with respect to whom the installation and use is to take place, if assistance is directed by a court order as provided in section 5773(b)(2) (relating to issuance of an order for use of certain devices).

(b) Trap and trace device.--Upon the request of an applicant under this subchapter, a provider of a wire or electronic communication service, landlord, custodian or other person shall install the device forthwith on the appropriate line and shall furnish all additional information, facilities and technical assistance, including installation and operation of the device unobtrusively and with a minimum of interference with the services that the person so ordered by the court accords the party with respect to whom the installation and use is to take place, if installation and assistance are directed by a court order as provided in section 5773. Unless otherwise ordered by the court, the results of the trap and trace device shall be furnished to the applicant designated in the court order at reasonable intervals during regular business hours for the duration of the order.

(c) Compensation.--A provider of wire or electronic communication service, landlord, custodian or other person who furnishes facilities or technical assistance pursuant to this section shall be reasonably compensated for reasonable expenses incurred in providing the facilities and assistance.

(d) No cause of action against a provider disclosing information under this subchapter.--No cause of action shall lie in any court against any provider of a wire or electronic communication service, its officers, employees, agents or other specified persons for providing information, facilities or assistance in accordance with the terms of a court order under this subchapter.

(e) Defense.--A good faith reliance on a court order or a statutory authorization is a complete defense against any civil or criminal action brought under this subchapter or any other law.

(Feb. 18, 1998, P.L.102, No.19, eff. imd.)

§ 5775. Reports concerning certain devices.

(a) Attorney General.--The Attorney General shall annually report to the Administrative Office of Pennsylvania Courts on the number of orders for pen registers, trap and trace devices and telecommunication identification interception devices applied for by investigative or law enforcement agencies of the Commonwealth or its political subdivisions.

(b) District attorney.--Each district attorney shall annually provide to the Attorney General information on the number of orders for pen registers, trap and trace devices and telecommunication identification interception devices applied for on forms prescribed by the Attorney General.

(Feb. 18, 1998, P.L.102, No.19, eff. imd.)

SUBCHAPTER F
MISCELLANEOUS

Sec.
5781. Expiration of chapter.
5782. Regulations.

Enactment. Subchapter F was added October 21, 1988, P.L.1000, No.115, effective immediately.

§ 5781. Expiration of chapter.

This chapter expires December 31, 2023, unless extended by statute.
(Dec. 12, 1994, P.L.1248, No.148, eff. imd.; Feb. 18, 1998, P.L.102, No.19, eff. imd.; Nov. 29, 2004, P.L.1349, No.173, eff. imd.; Oct. 9, 2008, P.L.1403, No.111, eff. imd.; Nov. 27, 2013, P.L.1147, No.102, eff. imd.; July 7, 2017, P.L.304, No.22, eff. 60 days)

§ 5782. Regulations.

The commissioner of the Pennsylvania State Police, in consultation with the Attorney General, shall promulgate regulations consistent with sections 5704(16) (relating to exceptions to prohibition of interception and disclosure of communications) and 5749 (relating to retention of certain records) setting forth procedures to be followed by law enforcement officers regarding the interception, maintenance and destruction of recordings made under section 5704(16).
(June 11, 2002, P.L.370, No.53, eff. imd.)

2002 Amendment. Act 53 added section 5782. Section 3 of Act 53 provided that section 5782 shall apply upon the enactment of a statute providing for the intercepting and recording of oral communications under 18 Pa.C.S. § 5704. Act 52 of 2002, effective June 11, 2002, added provisions relating to the intercepting and recording of oral communications under 18 Pa.C.S. § 5704.