DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Washington DC 20201

September 5, 2018

TO: Paula Stannard, Senior Counselor to the Secretary
Roger Severino, Director, Office of Civil Rights
Bob Charrow, General Counsel
Francis Collins, Director, National Institutes of Health
George Sigounas, Administrator, Health Resources and Services Administration
Robert Redfield, Director, Centers for Disease Control and Prevention
Brett Giroir, Assistant Secretary for Health
Gopal Khanna, Director, Agency for Healthcare Research and Quality
Brenda Destro, Acting Assistant Secretary for Planning and Evaluation

FROM: Ann C. Agnew
Executive Secretary to the Department

SUBJECT: HHS Review: Department of Education Regulation – Noon, September 10

Close Hold Review

The Department of Education is seeking the Department's comments on a draft regulation concerning Title IX. I ask that you personally review the regulation and restrict sharing it only with others who will significantly contribute to your division's comments.

You are asked to review the proposed regulation and submit comments to Jamar Hawkins (Jamar.Hawkins@hhs.gov) by noon September 10. Please limit your comments to serious concerns. Comments will be evaluated by leadership in advance of sharing them with the Department of Education.

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DEPARTMENT OF EDUCATION

34 CFR Part 106

RIN 1870–AA14

[Docket ID ED-2018-OCR—0064]

Title IX of the Education Amendments of 1972

AGENCY: Office for Civil Rights, Department of Education.

ACTION: Notice of proposed rulemaking.

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

DATES: We must receive your comments on or before [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

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

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

- *Federal eRulemaking Portal*: Go to www.regulations.gov to submit your comments electronically. Information on using Regulations.gov, including instructions for finding a rule on the site and submitting comments, is available on the site under "How to use Regulations.gov" in the Help section.
- *Postal Mail, Commercial Delivery, or Hand Delivery:*

The Department strongly encourages commenters to submit their comments electronically. If, however, you mail or deliver your comments about these proposed

regulations, address them to Candice Jackson, U.S. Department of Education, 400 Maryland Avenue S.W., Room 6E309, Washington, D.C. 20202. Telephone: (202) 453-7100.

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

FOR FURTHER INFORMATION CONTACT: Candice Jackson, U.S. Department of Education, 400 Maryland Avenue S.W., Room 6E309, Washington, D.C. 20202. Telephone: (202) 453-7100.

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

SUPPLEMENTARY INFORMATION:

Executive Summary

Purpose of this regulatory action

Based on its extensive review of the critical issues addressed in this rulemaking, the Department has determined that current regulations and subregulatory guidance do not provide appropriate standards for how recipients must respond to incidents of sexual harassment. To address this concern, we propose regulations addressing sexual harassment under Title IX to better align the Department's regulations with the text and

purpose of Title IX and Supreme Court case law. This will ensure that recipients understand their legal obligations including what conduct is actionable as harassment under Title IX, the conditions that activate a mandatory response by the recipient, and particular requirements that such a response must meet so that recipients protect the rights of their students to access education free from sex discrimination.

Summary of the Major Provisions of This Regulatory Action:

With regard to sexual harassment, the proposed regulations would:

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

In addition, the proposed regulations would: clarify that in responding to any claim of sex discrimination under Title IX, recipients are never required to deprive an individual of rights that would be otherwise guaranteed under the U.S. Constitution; prohibit the Department's Office for Civil Rights (OCR) from requiring a recipient to pay money damages as a remedy for a violation of any Title IX regulation; and eliminate the requirement that religious institutions submit a written statement to qualify for the Title

IX religious exemption.

To minimize the potential for confusion or potential conflict between existing regulations and these proposed regulations, the proposed regulations align with requirements already imposed upon institutions of higher education under the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act), where appropriate. Where appropriate, the regulations would also now apply those requirements to elementary and secondary schools.

Costs and Benefits

As further detailed in the *Regulatory Impact Analysis*, we estimate that the total monetary cost savings of these regulations over ten years would be in the range of $327.7 million to $408.9 million. In addition, the major benefits of these proposed regulations, taken as a whole, include achieving the protective purposes of Title IX via equitable, just, and fair procedures that provide adequate due process protections for those involved in grievance processes.

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

We invite you to assist us in complying with the specific requirements of Executive Orders 12866 and 13563 (explained further below), and their overall goal of

reducing the regulatory burden that might result from these proposed regulations. Please let us know of any further ways that we may reduce potential costs or increase potential benefits, while preserving the effective and efficient administration of the Department's programs and activities.

During and after the comment period, you may inspect all public comments about these proposed regulations by accessing Regulations.gov. You also may inspect the comments in person at 400 Maryland Avenue S.W., Room 6E309, Washington, D.C., between the hours of 8:30 a.m. and 4:00 p.m., Eastern Time, Monday through Friday of each week, except Federal holidays. Please contact the person listed under FOR FURTHER INFORMATION CONTACT.

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

Background

Title IX prohibits discrimination on the basis of sex in education programs and activities that receive Federal financial assistance. *See* 20 U.S.C. 1681(a). Existing Title IX regulations contain specific provisions regarding (i) remedies the Assistant Secretary can determine necessary to overcome effects of discrimination (34 CFR 106.3), (ii) the effect

of other requirements (34 CFR 106.6), (iii) designation of a responsible employee (34 CFR 106.8(a)), (iv) adoption of grievance procedures (34 CFR 106.8(b)), (v) dissemination of policy (34 CFR 106.9), and (vi) exemption for religious schools (34 CFR 106.12). For reasons described in this preamble, the Secretary proposes to amend the Title IX regulations at 34 CFR 106.3, 106.6, 106.8, 106.9, and 106.12, as well as add new sections 106.44 and 106.45.

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

When the current regulations were issued in 1975, the Federal courts had not yet addressed recipients' Title IX obligations to address sexual harassment as a form of sex discrimination. The Supreme Court subsequently elaborated on the scope of Title IX, ruling that money damages were available for private actions under Title IX based on sexual harassment by a teacher against a student, *Franklin v. Gwinnett Cty. Pub. Sch.*,

[1] 40 Fed. Reg. 24128 (June 4, 1975) (codified at 45 C.F.R. Part 86). In 1980, Congress created the United States Department of Education. Pub. L. No. 96-88, § 201, 93 Stat. 669, 671 (Oct. 17, 1979); E.O. 12212, 45 Fed. Reg. 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 C.F.R. Part 106. See 45 Fed. Reg. 30802, 30955-30965 (May 9, 1980).

503 U.S. 60 (1992); that such damages may only be recovered under Title IX when a school official with authority to institute corrective measures has actual notice of the harassment but is deliberately indifferent to it, *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274 (1998); and that a school can likewise be liable under Title IX based on sexual harassment by a *student* against a student but only if "the recipient is deliberately indifferent to known acts of student-on-student sexual harassment," "the harasser is under the school's disciplinary authority," and "the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect." *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 647, 652 (1999).

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

access and opportunities of large numbers of students in elementary, secondary, and postsecondary schools across the nation.

Beginning in mid-2017, the Department started to examine how schools and colleges were applying Title IX to sexual harassment under then-current subregulatory guidance. The Department conducted listening sessions and discussions with stakeholders expressing a variety of positions for and against the status quo, including advocates for survivors of sexual violence; advocates for accused students; organizations representing schools and colleges; attorneys representing survivors, the accused, and institutions; Title IX Coordinators and other school and college administrators; child and sex abuse prosecutors; scholars and experts in law, psychology, and neuroscience; and numerous individuals who have experienced school-level Title IX proceedings as a complainant or respondent. The Department also reviewed white papers, reports, and recommendations issued over the past several years by legal and public policy scholars, civil rights groups, and committees of nonpartisan organizations[2] as well as books detailing case studies of campus Title IX proceedings.[3]

[2] E.g., Jacob Gersen and Jeannie Suk, *The Sex Bureaucracy*, 104 Calif. L. Rev. 881 (2016); John Villasenor, "A probabilistic framework for modelling false Title IX 'convictions' under the preponderance of the evidence standard," *Law, Probability and Risk*, Volume 15, Issue 4, 1 December 2016, Pages 223–237, https://doi.org/10.1093/lpr/mgw006; Open Letter from Members of the Penn Law School Faculty, *Sexual Assault Complaints: Protecting Complainants and the Accused Students at Universities*, Wall St. J. Online (Feb. 18, 2015), http://online.wsj.com/public/resources/documents/2015_0218_upenn.pdf (statement of 16 members of the University of Pennsylvania Law School faculty); *Rethink Harvard's Sexual Harassment Policy*, Boston Globe (Oct. 15, 2014) (Statement Of 28 Members Of The Harvard Law School Faculty); ABA Criminal Justice Section Task Force On College Due Process Rights And Victim Protections, Recommendations For Colleges And Universities In Resolving Allegations Of Campus Sexual Misconduct (2017); American College Of Trial Lawyers, Task Force On The Response Of Universities And Colleges To Allegations Of Sexual Violence, White Paper On Campus Sexual Assault Investigations (2017); Elizabeth Bartholet, Nancy Gertner, Janet Halley & Jeannie Suk Gersen, Fairness For All Students

The Department learned that its subregulatory guidance to schools and colleges left uncertainty about whether the guidance was or was not legally binding.

To the extent that subregulatory guidance was being enforced by the Department as mandatory, the obligations set forth in previous guidance had been imposed by the Department without following rulemaking processes that permit the public and all stakeholders to comment on the feasibility and effectiveness of requirements. Several of the prescriptions set forth in previous guidance (for example, a 60-day requirement for completing campus investigations; compulsory use by all schools and colleges of the preponderance of the evidence standard; and prohibition of mediation in Title IX sexual assault cases) generated particular criticism and controversy among stakeholders as to whether such requirements were the most appropriate Federal mandates to impose on schools and colleges.

Under Title IX (Aug. 21, 2017), http://nrs.harvard.edu/urn-3:HUL.InstRepos:33789434. See also "2017 NCHERM Group White Paper. Due Process and the Sex Police," https://www.ncherm.org/wp-content/uploads/2017/04/TNG-Whitepaper-Final-Electronic-Version.pdf; "It's Not Just the What but the How: Informing Students about Campus Policies and Resources," Prevention Innovations Research Center, University of New Hampshire (April 2015), https://cola.unh.edu/sites/cola.unh.edu/files/departments/Prevention%20Innovations%20Research%20Center/White_Paper_87367_for_web.pdf; Dana Bolger, *Gender Violence Costs: Schools' Financial Obligations Under Title IX*, 125 Yale L. J. 2106 (2016), https://www.yalelawjournal.org/feature/gender-violence-costs-schools-financial-obligations-under-title-ix; "Title IX and the Preponderance of the Evidence A White Paper," http://www.feministlawprofessors.com/wp-content/uploads/2016/11/Title-IX-Preponderance-White-Paper-signed-11.29.16.pdf (signed by dozens of law professors and scholars).

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

Other criticisms of the previous guidance included that those guidance documents pressured schools and colleges to forego robust due process protections;[4] captured too wide a range of misconduct, resulting in infringement on academic freedom and free speech and government regulation of consensual, noncriminal sexual activity;[5] and removed reasonable options for how schools should structure their grievance processes to

[4] E.g., "[W]e believe that OCR's approach exerts improper pressure upon universities to adopt procedures that do not afford fundamental fairness." Open Letter from Members of the Penn Law School Faculty, *Sexual Assault Complaints: Protecting Complainants and the Accused Students at Universities*, Wall St. J. Online (Feb. 18, 2015), http://online.wsj.com/public/resources/documents/2015_0218_upenn.pdf (statement of 16 members of the University of Pennsylvania Law School faculty). *See also* Elizabeth Bartholet, Nancy Gertner, Janet Halley & Jeannie Suk Gersen, Fairness For All Students Under Title IX (Aug. 21, 2017), http://nrs.harvard.edu/urn-3:HUL.InstRepos:33789434 ("In the past six years, under pressure from the previous Administration, many colleges and universities all over the country have put in place new rules defining sexual misconduct and new procedures for enforcing them. While the Administration's goals were to provide better protections for women . . . the new policies and procedures have created problems of their own, many of them attributable to directives coming from [OCR]. Most of these problems involve unfairness to the accused; some involve unfairness to both accuser and accused[.] OCR has an obligation to address the unfairness that has resulted from its previous actions and the related college and university responses"). *See also Plummer v. Univ. of Houston*, 860 767, 777-78 (5th Cir. 2017) (The 2011 Dear Colleague Letter "was not adopted according to notice-and-comment rulemaking procedures; its extremely broad definition of 'sexual harassment' has no counterpart in federal civil rights case law; and the procedures prescribed for adjudication of sexual misconduct are heavily weighted in favor of finding guilt") (*dissenting opinion*).

[5] E.g., *Unwanted Advances*, Laura Kipness (HarperCollins 2017) ("The reality is that a set of incomprehensible directives, issued by a branch of the federal government, are being wielded in wildly idiosyncratic ways, according to the whims and biases of individual Title IX officers operating with no public scrutiny or accountability. Some of them are also all too willing to tread on academic and creative freedom as they see fit"). *See also* Jacob Gersen and Jeannie Suk, *The Sex Bureaucracy*, 104 Calif. L. Rev. 881 (2016) (Asserting that OCR's guidance requires schools to regulate student conduct "that is not creating a hostile environment and therefore is not sexual harassment and therefore not sex discrimination" and concluding that OCR's guidance oversteps OCR's jurisdictional authority); *see also* Jacob Gersen and Jeannie Suk, "The Sex Bureaucracy," *The Chronicle of Higher Education* (January 6, 2017) (https://www.chronicle.com/article/The-College-Sex-Bureaucracy/238805) (OCR's "broad definition" of sexual harassment has "grown to include most voluntary and willing sexual contact"). *See also* Facts From United Educators Report: Confronting Sexual Assault: An Examination of Higher Education Claims, https://atixa.org/wordpress/wp-content/uploads/2015/11/Facts-From-United-Educators-Sexual-Assault-Claims-Study.pdf (estimating that in 90% of campus sexual assault accusations, the accuser and accused know each other as friends or dating partners; estimating that 78% of campus sexual assaults involve alcohol consumption); *see also* Open Letter from Members of the Penn Law School Faculty, *Sexual Assault Complaints: Protecting Complainants and the Accused Students at Universities*, Wall St. J. Online (Feb. 18, 2015), http://online.wsj.com/public/resources/documents/2015_0218_upenn.pdf (statement of 16 members of the University of Pennsylvania Law School faculty) ("These cases are likely to involve highly disputed facts, and the "he said/she said" conflict is often complicated by the effects of alcohol and drugs").

accommodate each school's unique pedagogical mission, resources, and educational community.[6]

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

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[6] E.g., "Institutional Challenges in Responding to Sexual Violence On College Campuses: Testimony Provided to the Subcommittee on Higher Education and Workforce Training, Committee on Education and the Workforce, United States House of Representatives," Dana Scaduto (September 10, 2015), https://edworkforce.house.gov/uploadedfiles/testimony_scaduto.pdf (discussing the problems with attempting to impose one-size-fits-all rules that fail to account for the wide diversity among various types of institutions of higher education across the country).

[7] Secretary DeVos Prepared Remarks on Title IX Enforcement, September 7, 2017, https://www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement.

[8] Id.

[9] Open Letter from Members of the Penn Law School Faculty, *Sexual Assault Complaints: Protecting Complainants and the Accused Students at Universities*, Wall St. J. Online (Feb. 18, 2015).

inconsistent with a policy that both strongly condemns and punishes sexual misconduct and ensures a fair adjudicatory process."

On September 22, 2017, the Department rescinded previous subregulatory guidance documents that had never had the benefit of the public notice and comment process;[10] left in place OCR's 2001 Guidance that had been subjected to public notice and comment (though not formal rulemaking); issued an interim question and answer document to identify recipients' obligations under Title IX to address sexual harassment as a temporary measure to provide necessary information while proceeding with the time-intensive process of notice and comment rulemaking; and announced its intent to promulgate regulations under Title IX following the rulemaking requirements of the Administrative Procedure Act. The Department has continued to hold listening sessions and discussions with stakeholders and experts since the rescission of the previous guidance to inform the Department's proposed Title IX regulations including hearing from stakeholders who believe the Department should adopt the policies embodied in its previous or current subregulatory guidance. The need to address the serious subject of how schools respond to sexual harassment was well expressed by sixteen law school faculty at University of Pennsylvania Law School:

> Both the legislative process and notice-and-comment rulemaking are transparent, participatory processes that afford the opportunity for input from a diversity of viewpoints. That range of views is critical because this area implicates competing values, including privacy, safety, the functioning of the academic community, and the integrity of the

http://online.wsj.com/public/resources/documents/2015_0218_upenn.pdf (statement of 16 members of the University of Pennsylvania Law School faculty).

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

> educational process for both the victim and the accused, as well as the fundamental fairness of the disciplinary process. . . . In addition, adherence to a rule-of-law standard would have resulted in procedures with greater legitimacy and buy-in from the universities subject to the resulting rules.[11]

While implementing regulations under Title IX since 1975 have required schools to provide for a "prompt and equitable" grievance process to resolve complaints of sex discrimination by the school, the Department's subregulatory guidance (both the guidance documents rescinded in 2017 and the ones remaining) fails to provide the clarity, permanence, and prudence of regulation properly informed by public participation in the full rulemaking process. Under the system created by the Department's subregulatory guidance, hundreds of students have had to file complaints with OCR alleging their school failed to provide a prompt or equitable process in response to a report of sexual harassment,[12] and over 200 students have had to file lawsuits against colleges and universities alleging their school disciplined them for sexual misconduct without providing due process protections.[13] High-profile revelations of widespread criminal sexual misconduct perpetrated by college employees (for instance, by Jerry Sandusky at Pennsylvania State University and by Larry Nassar at Michigan State University) and equally high-profile revelations of rape allegations later shown to be false

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

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

[13] See KC Johnson, Academic Wonderland, https://academicwonderland.com/2018/04/03/judge-sinis-outrage/ (over 200 students have sued their colleges over due process issues since the 2011 Dear Colleague Letter); https://academicwonderland.com/2017/12/08/pomona-the-courts-basic-fairness/ (over 90 colleges have lost due process challenges by respondent students since the 2011 Dear Colleague Letter).

(for instance, concerning the Duke University lacrosse team and the fraternity at the University of Virginia) provide additional evidence that the approach created under the Department's subregulatory guidance has failed to protect victims and innocent accused persons alike.

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

Significant Proposed Regulations

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

In discussing the proposed regulations, we first address how recipients must respond to sexual harassment and the procedures for resolving formal complaints of sexual harassment. Under the response provisions, we address: adoption of standards from Title IX Supreme Court case law (proposed 106.44(a), 106.44(e)(1), and 106.44(e)(6)); mandated responses and accompanying safe harbors (proposed 106.44(b) and 106.44(e)(2) through (e)(5)); emergency removals (proposed 106.44(c)); and the use of administrative leave (proposed 106.44(d)). We next turn to grievance procedures for

addressing formal complaints of sexual harassment (proposed 106.45) including: clarification that the recipient's treatment of both complainant and respondent could constitute discrimination on the basis of sex (proposed 106.45(a)); general requirements for grievance procedures (proposed 106.45(b)(1)); notice to the parties (proposed 106.45(b)(2)); and procedures for investigations (proposed 106.45(b)(3)). Also within the grievance procedures section we address evidentiary standards for determinations of responsibility (proposed 106.45(b)(4)(i)), the content of such written determinations (proposed 106.45(b)(4)(ii)), and the timing of providing the determinations to the parties (proposed 106.45(b)(4)(iii)). We next address procedures for appeals of written determinations (proposed 106.45(b)(5)), informal resolution procedures (proposed 106.45(b)(6)), recordkeeping procedures (proposed 106.45(b)(7)), and clarifications on what constitutes retaliation (proposed 106.45(b)(8)).

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

i. Recipient's response to sexual harassment

(Proposed 34 CFR 106.44)

Statute: Title IX states generally that no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, 20 U.S.C. 1681(a), but does not specifically mention sexual harassment.

Current Regulations: None.

A. Adoption of Supreme Court standards for sexual harassment

Section 106.44(a) General; Section 106.44(e)(1); Section 106.44(e)(6)

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

We propose definitions for "sexual harassment" and "actual knowledge" in section 106.44(e). Paragraph (e)(1) defines "sexual harassment" to mean either an employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct; or unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it denies a person access to the recipient's education program or activity; or sexual assault as defined in 34 CFR 668.46(a), implementing the Clery Act. Paragraph (e)(6) defines "actual knowledge" as notice of sexual harassment or allegations of sexual harassment provided

to an official of the recipient who has authority to institute corrective measures on behalf of the recipient. Paragraph (e)(6) states that imputation of knowledge based solely on respondent superior or constructive notice is insufficient to constitute actual knowledge, that the standard is not met when the only official of the recipient with actual knowledge is also the respondent, and that the mere ability or obligation to report sexual harassment does not qualify an employee, even if that employee is an official, as one who has authority to institute corrective measures on behalf of the recipient. Paragraph (e)(6) also states that for recipients that are elementary and secondary schools, teachers are officials with authority to institute corrective measures on behalf of the recipient.

Reasons: The Department believes that the administrative standards governing recipients' responses to third-party sexual harassment should be generally aligned with the standards developed by the Supreme Court in cases assessing liability under Title IX for money damages in private litigation. The Department believes that students and institutions would benefit from the clarity of an essentially uniform standard. More importantly, the Department believes that the Supreme Court's foundational decisions in this area, *Gebser* and *Davis*, are based on textual interpretation of Title IX and on policy considerations that are equally applicable in the administrative context.

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

is thus a recipient's *own* misconduct—not the actions of employees, students, or other third parties—that subjects the recipient to liability under Title IX.

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

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

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

The Department believes that these same principles should govern administrative enforcement of Title IX. To that end, the proposed regulation would provide that actual knowledge – rather than mere constructive knowledge or imputation of knowledge based on a respondeat superior theory – triggers the recipient's duty to respond. Consistent with Title IX's focus on the recipient's own misconduct and with the contractual nature of the duty imposed by Title IX, this standard ensures that the recipient is on clear notice of the discrimination (or alleged discrimination) that it must address. By contrast, as the Court

observed in *Gebser*, a constructive knowledge standard would make a funding recipient liable for misconduct of which it was unaware. *Gebser*, 524 U.S. at 287. Further, applying this standard in the administrative enforcement context is consistent with "Title IX's express means of enforcement – by administrative agencies – [which] operates on the assumption of actual notice to officials of the fund recipient." *Id.* at 288.

Similarly, proposed section 106.44(a) adopts the *Gebser/Davis* standard that actual knowledge means "notice of sexual harassment or allegations of sexual harassment to an official of the recipient who has authority to institute corrective measures on behalf of the recipient." Consistent with the text and purpose of Title IX, this standard ensures that a recipient is liable only for its own misconduct. As the Court noted in *Gebser* and *Davis*, it is only when the recipient makes an intentional decision not to respond to third-party discrimination that the recipient itself can be said to "subject" its students to such discrimination. *Gebser*, 524 U.S. at 291-92; *Davis*, 526 U.S. at 642-43.

The definition in proposed section 106.44(e)(6) also states that the mere ability or obligation to report sexual harassment does not qualify an employee, even if that employee is an official, as one who has authority to institute corrective measures on behalf of the recipient. *Plamp v. Mitchell Sch. Dist. No. 17-2*, 565 F. 3d 450, 459 (8th Cir. 2009) ("After all, each teacher, counselor, administrator, and support-staffer in a school building has the authority, if not the duty, to report to the school administration or school board potentially discriminatory conduct. But that authority does not amount to an authority to take a corrective measure or institute remedial action within the meaning of Title IX. Such a holding would run contrary to the purposes of the statute").

For recipients that are elementary and secondary schools, proposed section 106.44(e)(6)

specifically states that teachers are officials with authority to institute corrective measures on behalf of the recipient. The Department recognizes that the Court has not held definitively that teachers are "appropriate officials with the authority to take corrective action"; however, in the elementary and secondary school setting where school administrators and teachers are more likely to act *in loco parentis*, and exercise a considerable degree of control and supervision over their students, the Department believes this interpretation is reasonable. *Davis*, 526 U.S. at 646, citing *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 655 (1995) (noting that a public school's power over its students is "custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults"). Teachers specifically have a "degree of familiarity with, and authority over, their students that is unparalleled except perhaps in the relationship between parent and child." *New Jersey v. T.L.O.*, 469 U.S. 325, 348 (1985) (Powell, J., concurring). Thus, the Department believes that teachers at elementary and secondary schools should be considered to have the requisite authority to impart actual knowledge on the recipient of conduct that could constitute sexual harassment and to trigger a recipient's obligations under Title IX. Title IX Coordinators are always deemed to be officials with authority to take corrective action.

Further, a recipient's actual knowledge must be regarding conduct of the type proscribed under Title IX. The Department intends that the proposed definition of sexual harassment be consistent with the text of Title IX and with the Court's decisions in *Gebser* and *Davis*. The proposed regulation defines sexual harassment as either an employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct; or unwelcome conduct on the

basis of sex that is so severe, pervasive, and objectively offensive that it denies a person access to the recipient's education program or activity; or sexual assault as defined in 34 CFR 668.46(a) (implementing the Clery Act). In each instance, following the text and purpose of Title IX, the definition thus seeks to include only sex-based discrimination that is sufficiently serious as to deprive a student of access to a funding recipient's educational program or activity.

Once it has been established that a recipient has actual knowledge of sexual harassment, it becomes necessary to evaluate the recipient's response. The Department believes that the "deliberate indifference" standard adopted by the Court in *Gebser* and *Davis* is generally the appropriate measure in the administrative context. As the Court held in *Davis*, a recipient acts with deliberate indifference only when it responds to sexual harassment in a manner that is "clearly unreasonable in light of the known circumstances." *Davis*, 526 U.S. at 648-49. The Department believes this standard holds recipients accountable without depriving them of legitimate and necessary flexibility to make disciplinary decisions and to provide supportive measures that might be necessary in response to sexual harassment. The Court observed in *Davis* that courts must not second guess recipients' disciplinary decisions. *Id.* The Department believes that it would be equally wrong for it to second guess recipients' disciplinary decision through the administrative enforcement process.

The Department acknowledges that proposed section 106.44(a) would adopt standards that depart from those set forth in prior guidance and OCR enforcement of Title IX. The Department's subregulatory guidance and enforcement practices have held that constructive notice – as opposed to actual notice – triggered a recipient's duty to respond

to sexual harassment; that recipients had a duty to respond to a broader range of sex-based misconduct than the sexual harassment defined in the proposed regulation; and that recipients' response to sexual harassment should be judged under a reasonableness standard, rather than under the deliberate indifference standard adopted by the proposed regulation. In 2001, the Department asserted that the Court's decisions in *Gebser* and *Davis* and the liability standard set out for private actions for monetary damages did not preclude the Department from maintaining its administrative enforcement standards reflected in the 1997 guidance. *See* 2001 Guidance at iii-iv.

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

The deliberate indifference standard set forth in *Davis* and in proposed section 106.44(a) allows schools predictably to evaluate their response to sexual harassment for purposes of both civil litigation and administrative enforcement by OCR based on a consistent standard. At the same time the myriad of additional requirements contained in the

proposed regulation clarify that in addition to a general deliberate indifference standard, the Department holds schools to various requirements that courts do not require in private litigation under Title IX (e.g., requiring a designated Title IX Coordinator, requiring written grievance procedures, requiring a school to investigate and adjudicate formal complaints, and other requirements found in proposed sections 106.8 and 106.45.)

The Department has heard from a variety of stakeholders of the importance to both complainants and respondents that students retain the ability to choose to pursue different avenues seeking relief against schools alleged to have failed in their Title IX obligations. Stakeholders emphasized to the Department that an advantage of pursuing a private right of action under Title IX is the potential of a damages award from a court, while advantages of pursuing a Title IX complaint with OCR instead of civil litigation include an administrative process easily accessible by students with no attorney involvement, no litigation costs, and more expedient resolutions. The deliberate indifference standard set forth in *Davis* paired with the many additional requirements imposed on schools in these proposed regulations aligns the basic legal standard to which a school will be held in both court litigation and OCR enforcement while ensuring that students can choose between those forums based on features unique to each. The Department therefore proposes to depart from previous guidance and to adopt the standards in proposed section 106.44(a).

B. Responding to formal complaints of sexual harassment; safe harbors

Section 106.44(b) Specific circumstances; Section 106.44(e)(2) through (e)(5)

Proposed Regulations: We propose adding section 106.44(b) to address specific circumstances under which a recipient will respond to sexual harassment. We propose

adding paragraph (b)(1) stating that a recipient must follow procedures (including implementing any appropriate remedy as required) consistent with section 106.45 in response to a formal complaint as to allegations of conduct within its education program or activity, and that if the recipient follows procedures consistent with section 106.45 in response to a formal complaint, the recipient's response to the formal complaint is not deliberately indifferent. Proposed section 106.44(e)(5) defines "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 section 106.45.

We also propose adding paragraph (b)(2), stating that when a recipient has actual knowledge of reports by multiple complainants of conduct by the same respondent that could constitute sexual harassment, the Title IX Coordinator must file a formal complaint; if the Title IX Coordinator files a formal complaint in response to such allegations, and the recipient follows procedures (including implementing any appropriate remedy where required) consistent with section 106.45 in response to the formal complaint, the recipient's response to the reports is not deliberately indifferent.

We propose adding paragraph (b)(3), which states that in the absence of a formal complaint, a recipient is not deliberately indifferent when it implements supportive measures designed to effectively restore or preserve access to the recipient's education program or activity.

Proposed section 106.44(e)(2) defines "complainant" as an individual who has reported being the victim of conduct that could constitute sexual harassment, or on whose behalf the Title IX Coordinator has filed a formal complaint.

Proposed section 106.44(e)(3) defines "respondent" as an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

Proposed section 106.44(e)(4) defines "supportive measures" as non-disciplinary individualized services offered as appropriate to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Paragraph (e)(4) goes on to explain that such measures are designed to preserve access to the recipient's education program or activity, protect the safety of all parties and the recipient's educational environment, and deter sexual harassment; that supportive measures must be non-punitive, time-limited, and narrowly tailored to support continued access to an education program or activity without unreasonably burdening the other party; and 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 absence, increased security and monitoring of certain areas of the campus, and other similar measures. Paragraph (e)(4) also states that the recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the institution to provide the supportive measures.

Finally, we propose adding section 106.44(b)(4), which explains that the Assistant Secretary will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient merely because the Assistant Secretary reaches a different determination based on an independent weighing of the evidence.

Reasons: To clarify a recipient's responsibilities under this standard, proposed section 106.44(b) would specify two circumstances under which a recipient must initiate its grievance procedures, and in those situations provide a safe harbor from a finding of deliberate indifference where the recipient does in fact implement grievance procedures consistent with the proposed section 106.45. Those two situations are (i) where a formal complaint is filed, or (ii) where the recipient has actual knowledge of a pattern of allegations against the same respondent (in which case the proposed regulations require the recipient's Title IX Coordinator to file a formal complaint if none has already been filed). In response to either of these two situations, if the recipient follows grievance procedures consistent with proposed section 106.45, including implementing any appropriate remedy as required for the complainant, the recipient is given a safe harbor from a finding of deliberate indifference by OCR, because the recipient's response would not be "clearly unreasonable in light of the known circumstances." *Davis*, 526 U.S. at 648-49, 654. The Department believes that including these safe harbors in the regulations emphasizes a recipient's obligation to respond to known sexual harassment and to ensure a complainant's access to the recipient's education program or activity in situations where a finding of responsibility has been made, while preserving the recipient's flexibility to implement its grievance procedures, provided those procedures comply with the requirements of proposed section 106.45.

Proposed section 106.44(b)(3) provides a safe harbor against a finding of deliberate indifference where, in the absence of a formal complaint, a school's response to known, reported, or alleged sexual harassment is to offer and provide the complainant supportive measures designed to effectively restore or preserve the complainant's access to the

recipient's education program or activity. This provision is intended to call schools' attention to the importance of offering supportive measures to students who may not wish to file a formal complaint that would initiate a grievance process. The Department has heard from a wide range of stakeholders about the importance of a school taking into account the wishes of the complainant in deciding whether or not a formal investigation and adjudication is warranted. The proposed regulation creates a framework where a complainant has the right to file a formal complaint and the school must then initiate its grievance procedures, but in proposed 106.44(b)(3) the Department also recognizes that for a variety of reasons, not all complainants want to file a formal complaint and that in many situations a complainant's access to his or her education can be effectively restored or preserved through the school providing supportive measures. The proposed regulation requires that, in order to be entitled to this safe harbor, the recipient must first inform the complainant in writing of his or her right to pursue a formal complaint. Proposed 106.44(b)(3) applies only to institution of higher education, in recognition of the fact that college and university students are more likely to be adults capable of deciding whether supportive measures alone suffice to protect the complainant's educational access, whereas in the elementary and secondary school setting, a school may need to consider filing a formal complaint in addition to supportive measures even where the complainant does not wish to proceed formally, in the interest of protecting its population of younger students.

In order to define the respective parties involved in a recipient's grievance procedures, proposed section 106.44(e)(2) defines "complainant" as one who has reported being the victim of sexually harassing conduct, and proposed section 106.44(e)(3) defines

"respondent" as an individual who has been the subject of a report of sexual harassment.

Proposed section 106.44(b)(1) would also clarify that a recipient is only responsible for responding to conduct that occurred within its education program or activity. Consistent with *Davis*, recipients must exercise substantial control over both the alleged harasser and the context in which the known harassment occurs in order to be liable for sexual harassment. *Davis*, 526 U.S. at 644-45. Recipients are not responsible for addressing the continuing effects of conduct that occurred exclusively outside of the education program or activity, unless further conduct that could constitute sexual harassment occurs within the recipient's program or activity. Importantly, nothing in the proposed regulations would prevent a recipient from offering supportive measures to students who report sexual harassment that occurs outside the recipient's education program or activity. The Department wishes to clarify that when determining how to respond to sexual harassment, recipients have flexibility to employ age-appropriate methods, exercise common sense and good judgment, and take into account the needs of the parties involved.

Finally, proposed section 106.44(b)(4) would provide that the Assistant Secretary will not deem a recipient's determination regarding responsibility that results from the implementation of its grievance procedures to be evidence of deliberate indifference by the recipient merely because the Assistant Secretary reaches a different determination based on an independent weighing of the evidence. During a complaint investigation or compliance review, OCR's role is not to conduct a de novo review of the recipient's investigation and determination of responsibility for a particular respondent. *Davis*, 526 U.S. at 648 ("[C]ourts should refrain from second-guessing the disciplinary decisions

made by school administrators"). Rather, OCR's role is to determine whether a recipient has complied with Title IX and its implementing regulations. Thus, OCR will not find a recipient to have violated Title IX or this part solely because OCR may have weighed the evidence differently in a given case. The Department believes it is important to include this provision in the regulations to provide notice and transparency to recipients about OCR's role and standard of review in enforcing Title IX.

C. Additional rules governing recipients' responses to sexual harassment

Section 106.44(c) Emergency removal

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

Reasons: Recognizing that there are situations in which a respondent may pose an immediate threat to the health and safety of the campus community before an investigation concludes, proposed section 106.44(c) would allow recipients to remove such respondents, provided that the recipient undertakes a safety and risk analysis and

provides notice and opportunity to the respondent to challenge the decision immediately following removal. This proposed provision tracks the language in the Clery Act regulations at 34 C.F.R. 668.46(g) and would apply to all recipients subject to Title IX. The Department believes that this provision for emergency removals should be applicable at the elementary and secondary education level as well as the postsecondary education level to ensure the health and safety of all students. When considering removing a respondent pursuant to this provision, the proposed regulations require that a recipient follow the requirements of the IDEA, Section 504, and Title II of the ADA. Thus, a recipient may remove a student on an emergency basis under section 106.44(c), but only to the extent that such removal conforms with the requirements of the IDEA, Section 504 and Title II of the ADA.

Section 106.44(d) Administrative leave

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

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

II. Grievance procedures for formal complaints of sexual harassment

(Proposed 34 CFR 106.45)

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

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

Section 106.45(a) Discrimination on the basis of sex

Proposed Regulations: We propose adding a new section 106.45 addressing the required grievance procedures for formal complaints of sexual harassment. Proposed paragraph (a) states that a recipient's treatment of a complainant in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex, and also states that a recipient's treatment of the respondent may constitute discrimination on the basis of sex under Title IX.

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

A. General requirements for grievance procedures

Section 106.45(b)(1)

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

(i) Treat complainants and respondents equitably; an equitable resolution must include redress for the complainant where a finding of responsibility has been made, and due process for the respondent before any disciplinary sanctions are imposed;

(ii) Require an investigation of the allegations and an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence – and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness;

(iii) Require that any individual designated by a recipient as a coordinator, investigator, or adjudicator not have a conflict of interest or bias for or against complainants or respondents; and that a recipient ensure that coordinators, investigators, and adjudicators receive training on the definition of sexual harassment and how to conduct an investigation and grievance process – including hearings, if applicable – that protect the safety of students, ensure due process for all parties, and promote accountability; and that any materials used to train coordinators, investigators, or adjudicators not rely on sex stereotypes and instead promote impartial investigations and adjudications of sexual harassment;

(iv) Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process;

(v) Include reasonably prompt timeframes, including a process that allows for the extension of timeframes for good cause with written notice to the complainant and the respondent of the delay and the reason for the delay; good cause may include considerations such as the absence of the parties or witnesses, concurrent law enforcement activity, or the need for language assistance or accommodation of disabilities;

(vi) List all of the possible sanctions that the recipient may impose following any determination of responsibility;

(vii) Describe the standard of evidence to be used to determine responsibility;

(viii) Include the procedures and permissible bases for the complainant or respondent to appeal the determination regarding responsibility, if such appeal procedures are available; and

(ix) Describe the range of supportive measures available to complainants and respondents.

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

Proposed section 106.45(b)(1)(i) would require that grievance procedures treat complainants and respondents equitably, echoing the existing requirement in 34 CFR 106.8 that a recipient's grievance procedures provide for "prompt and equitable resolution" of complaints. Stakeholders have urged the Department to protect the interests of both the complainant and the respondent. Because of the differing interests at stake for the complainant and the respondent, paragraph (b)(1)(i) explains that equitable grievance procedures will provide redress for the complainant as appropriate and due process protections for the respondent before any disciplinary action is taken. Since a grievance process could result in a determination that the respondent sexually harassed the complainant, and since the resulting sanctions against the respondent could include a complete loss of access to the education program or activity of the recipient, an equitable grievance procedure will only reach such a conclusion following a process that seriously considers any contrary arguments or evidence the respondent might have, including by providing the respondent with all of the specific due process protections outlined in the rest of the proposed regulations. Likewise, since the complainant's access to the recipient's education program or activity can be limited by sexual harassment, an equitable grievance procedure will provide relief from any sexual harassment found under the procedures required in the proposed regulations and restore access to the complainant accordingly.

Proposed 34 CFR 106.45(b)(1)(ii) requires that a recipient investigate a complaint and that grievance procedures include an objective evaluation of the evidence. Stakeholders have raised concerns that recipients sometimes ignore evidence that does not fit with a predetermined outcome, and that investigators and adjudicators have inappropriately

discounted testimony based on whether it comes from the complainant or the respondent. Paragraph (b)(1)(ii) responds to these concerns by requiring the recipient to conduct an investigation and objectively evaluate all evidence, and by prohibiting the recipient from basing its evaluation of testimony on the person's status as a complainant, respondent, or witness.

Proposed 34 CFR 106.45(b)(1)(iii) would address the problems that have arisen for complainants and respondents as a result of coordinators, investigators, and adjudicators making decisions based on bias by requiring recipients to fill such positions with individuals free from bias or conflicts of interest. This proposed provision generally tracks the language in the Clery Act regulations at 34 C.F.R. 668.646(k)(3)(i)(C) and would apply to all recipients subject to Title IX. Paragraph (b)(1)(iii) would also require that coordinators, investigators, and adjudicators receive training on (1) the definition of sexual harassment and (2) how to conduct the investigation and grievance process in a way that protects student safety, due process, and accountability. This proposed provision generally tracks the language in the Clery Act regulations at 34 C.F.R. 668.646(k)(2)(ii) and would apply to all recipients subject to Title IX. The Department believes that such training will help ensure that those individuals responsible for implementing the recipient's grievance procedures are appropriately informed and focused at the elementary and secondary education level as well as the postsecondary education level. In light of the 2001 Guidance, recipients already are advised to provide training to a range of individuals; accordingly, the Department anticipates that many recipients will already be complying with this requirement, at least in part. Recipients would also be required to use training materials that promote impartial investigations and adjudications

and that do not rely on sex stereotypes, in order to avoid training that would cause the grievance process to favor one side or the other or bias outcomes in favor of complainants or respondents. Recipients would continue to have the discretion to use their own employees to investigate and/or adjudicate matters under Title IX or to hire outside individuals to fulfill these responsibilities.

To ensure that recipients do not unfairly shift the burden of proof in the grievance process to respondents, proposed section 106.45(b)(1)(iv) would require that a recipient's grievance procedures establish a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process. This requirement is added to ensure impartiality by the recipient until a determination is made. A fundamental notion of a fair proceeding is that a legal system does not prejudge a person's guilt or liability.

The proposed regulations recognize that the time that it takes to complete the grievance process will vary depending on, among others things, the complexity of the investigation. Proposed paragraph (b)(1)(v) would require recipients to designate reasonably prompt timeframes for the grievance process, but also provide that timeframes may be extended for good cause with written notice to the parties and an explanation for the delay. This proposed provision generally tracks the language in the Clery Act regulations at 34 C.F.R. 668.646(k)(3)(i)(A), which the Department believes is important to include for all recipients subject to Title IX. Some recipients have felt pressure to resolve the grievance process within 60 days regardless of the particulars of the situation, and in some instances, this resulted in hurried investigations and adjudications, which sacrificed accuracy and fairness for speed. Proposed paragraph (b)(1)(v) specifies examples of

possible reasons for such a delay, such as absence of the parties or witnesses, concurrent law enforcement activity, or the need for language assistance or accommodation of disabilities. For example, if a concurrent law enforcement investigation has uncovered evidence that the police plan to release on a specific timeframe and that evidence would likely be material to determining responsibility, a recipient could reasonably extend the timeframe of the grievance process in order to allow that evidence to be included in the final determination of responsibility. Any reason for a delay must be justified by good cause, and thus, delays caused solely by administrative needs are insufficient to satisfy this standard. Moreover, recipients must meet their legal obligation to provide timely auxiliary aids and services and reasonable accommodations under Title II of the ADA, Section 504, and Title VI of the Civil Rights Act of 1964, and should reasonably consider other services such as meaningful access to language assistance.

It is important for individuals to have a clear understanding of the recipients' policies and procedures related to sexual harassment, including the consequences of being found responsible for sexual harassment, and the procedures the recipient will use to make such a determination; otherwise, the parties may not have a full and fair opportunity to present evidence and arguments in favor of their side, and the accuracy and impartiality of the process could suffer as a result. Proposed paragraphs (b)(1)(vi) through (b)(1)(ix) would require that the parties be informed of the possible sanctions that may be imposed following the determination of responsibility, the standard of evidence to be used during the grievance proceeding, the procedures and permissible bases for any appeal allowed, and the range of supportive measures available to complainants and respondents. These proposed provisions generally track the language in the Clery Act regulations at 34

C.F.R. 668.646(k)(1) and would apply to all recipients subject to Title IX. The Department believes that requiring a recipient to notify the parties of these matters in advance is equally important at the elementary and secondary education level as it is at the postsecondary education level to ensure the parties are fully informed.

B. Notice and investigation

Section 106.45(b)(2) Notice of allegations

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

Reasons: In order to meaningfully participate in the process, all parties must have adequate notice of the allegations and grievance procedures. Without the information

included in the written notice required by this proposed paragraph, a respondent would be unable to adequately respond to allegations. This notice will also ensure that the complainant is able to understand and participate in the grievance process. If, during the investigation, the recipient decides to investigate additional allegations, the recipient must provide notice of those allegations to the parties. This would keep the parties meaningfully informed of any expansion in the scope of the investigation. The requirement to provide the identities of the parties applies whenever a formal complaint is filed against a respondent, whether the complaint is signed by the complainant or by the Title IX Coordinator.

Section 106.45(b)(3) Investigations of a formal complaint

Proposed Regulations: We propose adding section 106.45(b)(3) stating that the recipient must conduct an investigation of the allegations in a formal complaint. Proposed 106.45(b)(3) also states that if the conduct alleged by the complainant would not constitute sexual harassment as defined in section 106.44(e) even if proved, the recipient may terminate its grievance process, and that when investigating a formal complaint, a recipient must—

(i) Ensure that the burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the recipient and not on the parties;

(ii) Provide equal opportunity for the parties to present witnesses and other inculpatory and exculpatory evidence;

(iii) Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;

(iv) Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, and not limit the choice of advisor or presence for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties;

(v) Provide written notice of the date, time, location, participants, and purpose of any hearing; investigative interview; or other meeting with a party, with sufficient time for the party to prepare to participate;

(vi) Provide the complainant and the respondent with the equal opportunity to pose questions to the other party and to witnesses prior to a determination regarding responsibility, permitting each party to ask all relevant questions, and explaining to the party proposing the questions any decision to exclude questions as not relevant;

(vii) For institutions of higher education, if the recipient's grievance procedures provide for a hearing, the recipient must permit cross-examination of any party or witness; if the recipient's grievance procedures do not provide for a hearing, the recipient must permit each party to provide written questions for the investigator to ask the other party and witnesses in a manner that effectively substitutes for cross-examination;

(viii) Provide equal access to the evidence upon which the recipient intends to rely in reaching a determination regarding responsibility and provide each party with an equal opportunity to respond to that evidence prior to any determination regarding

responsibility;

(ix) At the request of the complainant or respondent, promptly disclose to the requesting party any evidence obtained as part of the investigation, including evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility; and

(x) Create an investigative report that fairly summarizes relevant evidence and provide the report to the parties for their review and response prior to a determination regarding responsibility.

Reasons: Proposed section 106.45(b)(3) would set forth specific standards to govern investigations of formal complaints of sexual harassment. To ensure a recipient's resources are directed appropriately at handling complaints of sexual harassment, proposed paragraph (b)(3) would permit recipients to dismiss a formal complaint or an allegation within a complaint without conducting an investigation if the alleged conduct, taken as true, is not sexual harassment as defined in the proposed regulations.

Proposed paragraph (b)(3)(i) would place the burden of gathering evidence to reach a determination regarding responsibility for sexual harassment on the recipient, not the parties. Recipients, not complainants or respondents, must comply with Title IX, so the burden of gathering the evidence necessary to determine responsibility for allegations of sexual harassment under Title IX appropriately falls to the recipient. While a school could contract with a third-party agent to perform an investigation or otherwise satisfy its responsibilities under this section, including to gather evidence, the recipient will be held to the same standards under this section regardless of whether those responsibilities are

performed by the recipient directly through its employees or through a third party such as a contractor. Likewise, although schools will often report misconduct under this section to the appropriate authorities, including as required under state law, a report to police or the presence of a police investigation regarding misconduct under this section does not relieve a recipient of its obligations under this section. Nothing in the proposed regulation prevents a recipient from using evidence merely because it was collected by law enforcement.

With the goal of ensuring fairness and equity for all parties throughout the investigation process, proposed paragraphs (b)(3)(ii), (b)(3)(iii), (b)(3)(iv), and (b)(3)(viii) would require recipients to provide the parties with an equal opportunity to present witnesses and other inculpatory and exculpatory evidence; permit the parties to discuss the investigation; provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied by an advisor of their choice with any restrictions on the advisor's participation being applied equally to both parties; and provide the parties with equal access and an opportunity to respond to any evidence that will be used in making a determination regarding responsibility. If both parties can review and respond to the evidence collected by the recipient, discuss the investigation with others in order to identify additional evidence, introduce any additional evidence into the proceeding, and receive guidance from an advisor of their choice throughout, the process will be substantially more thorough and fair and the resulting outcomes will be more reliable. Proposed paragraph (b)(3)(iv) generally tracks the language in the Clery Act regulations at 34 C.F.R. 688.646(k)(2)(iii) and (iv) and would apply to all recipients subject to Title IX. The Department believes

that permitting both parties to be accompanied by an advisor or other individual of their choice (who may be an attorney) is also important at the elementary and secondary education level to ensure that both parties are treated equitably.

To ensure that the complainant and respondent are able to meaningfully participate in the process and that any witnesses have adequate time to prepare, proposed section 106.45(b)(3)(v) would require recipients to provide written notice of any hearing, investigative interview, or other meeting in which a party is invited, allowed, or expected to appear with sufficient time for the party to prepare to participate in the proceeding. Without this protection, a party's ability to participate in a hearing, interview, or meeting might not be meaningful or add any value to the proceeding. The Department believes that this proposed provision, which is similar to the Clery Act regulation at 34 C.F.R. 688.646(k)(3)(i)(B) with respect to timely notice of meetings, is equally important at the elementary and secondary education level and the postsecondary education level to ensure that both parties are treated equitably.

Cross examination is the "greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158 (1970) (quoting John H. Wigmore, 5 Evidence § 1367, at 29 (3d ed., Little, Brown & Co. 1940)). The Department recognizes the high stakes for all parties involved in a sexual harassment investigation and the need for recipients to reach reliable determinations. The Department has carefully considered how best to incorporate the value of cross-examination for proceedings at both the postsecondary level and the elementary and secondary level. Proposed section 106.45(b)(3)(vi) requires all recipients to provide the complainant and the respondent an equal opportunity to pose questions to the other party and to witnesses prior to a

determination of responsibility, with each party being permitted the opportunity to ask all relevant questions and a requirement that the recipient explain any decision to exclude questions on the basis of relevance.

Beyond that basic requirement, the Department considered the extent to which recipients should be required to allow cross-examination during the grievance process. The Department determined that in institutions of higher education, where most parties and witnesses are adults, grievance procedures should include cross-examination. The Department believes that institutions should retain the discretion whether to adopt a hearing or non-hearing model. Accordingly, where an institution has chosen a non-hearing model, the proposed regulation requires that the recipient must permit each party to provide written questions for the investigator to ask the other party and witnesses in a manner that effectively substitutes for cross-examination.

The Department determined that for elementary and secondary schools, where most parties and many witnesses are minors, sensitivities associated with age and developmental ability may outweigh the benefits of cross-examination. Accordingly, while these schools must comply with the basic requirement to offer parties the opportunity to pose all relevant questions, the proposed regulation does not require their grievance procedures to include cross-examination.

In order to maintain a transparent process, the parties need a complete understanding of the evidence obtained by the recipient and how a determination regarding responsibility is made. For that reason, proposed section 106.45(b)(3)(ix) would require recipients to promptly disclose any evidence obtained by the recipient during the investigation upon

request by a complainant or respondent, including evidence that was not formally relied upon in making a determination. Proposed section 106.45(b)(3)(x) would require recipients to create an investigative report that summarizes relevant evidence and permit the parties to review and respond to the report prior to a determination regarding responsibility. These requirements will put the parties on the same level in terms of access to information and will allow the parties to serve as a check on any decisions the recipient makes regarding the inclusion or relevance of evidence.

C. Standard of evidence

Section 106.45(b)(4)(i)

Proposed Regulations: We propose adding 106.45(b)(4)(i) stating that in reaching a determination regarding responsibility, the recipient must apply either the preponderance of the evidence standard or the clear and convincing evidence standard. However, the recipient may employ the preponderance of the evidence standard only if the recipient uses that standard for all other discriminatory harassment complaints. The recipient must also apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty.

Reasons: The statutory text of Title IX does not dictate a standard of evidence to be used by recipients in investigations of sexual harassment. Past guidance from the Department originally allowed recipients to choose which standard to employ, but was later changed to require recipients to use only the preponderance of the evidence. When the Department issued guidance requiring recipients to use only preponderance of the evidence, it

justified the requirement by comparing the grievance process to civil litigation, and to OCR's own process for investigating complaints against recipients under Title IX. Although it is true that civil litigation generally uses preponderance of the evidence, and that Title IX grievance proceedings are analogous to civil litigation in many ways, it is also true that Title IX grievance proceedings lack certain features that promote reliability in civil litigation. For example, many recipients will choose not to allow active participation by counsel; there are no rules of evidence in Title IX grievance proceedings; and Title IX grievance proceedings do not afford parties discovery to the same extent required by rules of civil procedure.

Moreover, Title IX grievance proceedings are also analogous to various kinds of civil administrative proceedings, which often employ a clear and convincing evidence standard. *E.g., Nguyen v. Washington Dept. of Health*, 144 Wash. 2d 516 (2001) (requiring clear and convincing evidence in sexual misconduct case in a professional disciplinary proceeding for a medical doctor as a way of protecting due process); *Disciplinary Counsel v. Bunstine*, 136 Ohio St. 3d 276 (2013) (clear and convincing evidence applied in sexual harassment case involving lawyer). These cases recognize that, where a finding of responsibility carries particularly grave consequences for a respondent's reputation and ability to pursue a profession or career, a higher standard of proof can be warranted.

After considering this issue, the Department decided that its proposed regulation should leave recipients with the discretion to use either a preponderance or a clear and convincing standard in their grievance procedures. The Department concluded that it

would not be appropriate to impose a preponderance requirement in the absence of all of the features of civil litigation that are designed to promote reliability and fairness. Likewise, the Department concluded that in light of the due process and reliability protections afforded under the proposed regulations, it could be reasonable for recipients to choose the preponderance standard instead of the clear and convincing standard.

To ensure that recipients do not single out respondents in sexual harassment matters for uniquely unfavorable treatment, a recipient would only be allowed to use the preponderance of the evidence standard for sexual harassment complaints if it uses that standard for other discriminatory harassment complaints. Likewise, in order to avoid the specially disfavored treatment of student respondents in comparison to respondents who are employees such as faculty members, who often have superior leverage as a group in extracting guarantees of protection under a recipient's disciplinary procedures, recipients are also required to apply the same standard of evidence for complaints against students as they do for complaints against employees, including faculty. Within these constraints, the proposed regulation recognizes that recipients should be able to choose a standard of proof that is appropriate for investigating and adjudicating complaints of sex discrimination given the unique needs of their community.

D. Additional requirements for grievance procedures

Section 106.45(b)(4) Determination regarding responsibility

Proposed Regulations: We propose adding 106.45(b)(4) stating that the investigator(s) or other adjudicator(s) must issue a written determination regarding responsibility applying

the appropriate standard of evidence as discussed above.

The written determination must include—

(A) Identification of the section(s) of the recipient's sexual misconduct policy alleged to have been violated;

(B) A description of the procedural steps taken from the receipt of the complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;

(C) Findings of fact supporting the determination;

(D) Conclusions regarding the application of the recipient's policy to the facts;

(E) A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any sanctions the recipient imposes on the respondent, and any remedies provided to the complainant designed to restore or preserve access to the recipient's education program or activity; and

(F) The recipient's procedures and permissible bases for the complainant or respondent to appeal the determination, if such appeal procedures are available.

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

Reasons: Proposed section 106.45(b)(4) would address the process that recipients use to make determinations regarding responsibility, with requirements designed to ensure that recipients make sound and supportable decisions through a process that incorporates appropriate protections for all parties while providing adequate notice of such decisions.

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

Proposed section 106.45(b)(4)(ii)(E) requires that the written determination contain a statement of, and rationale for, the result, including any sanctions imposed by the recipient and any remedy given to the complainant. Proposed section 106.45(b)(4)(iii) requires that this written determination be provided simultaneously to the parties. These provisions generally track the language of the Clery Act regulations at 34 C.F.R. 668.646(k)(2)(v) and (3)(iv) already applicable to institutions of higher education. The Department believes that the benefits of these provisions, including promoting transparency and equal treatment of the parties, are equally applicable at the elementary and secondary level.

Section 106.45(b)(5) Appeals

Proposed Regulations: We propose adding 106.45(b)(5) stating that if a recipient allows

appeals from the determination regarding responsibility, the recipient may allow an appeal either solely by the respondent or by both parties; if the recipient allows appeal by both parties, then appeal procedures must be equally available to both parties.

Reasons: Many recipients had a longstanding practice of allowing appeals only by the student who would be the subject of discipline under the recipient's misconduct policy. For many years across different administrations, the Department did not have a policy of prohibiting that practice among recipients. However, in 2011 the Department set forth an express requirement that if a recipient were to allow an appeal, "it must do so for both parties." 2011 Dear Colleague Letter at 12. The 2011 Dear Colleague Letter did not provide a justification for this requirement.

The proposed regulations return to the practice of giving recipients greater discretion with regard to appeals: recipients are not required to allow appeals, and if a recipient chooses to have an appeals process, proposed section 106.45(b)(5) would permit recipients to allow appeal procedures for only the respondent, or for all parties to a complaint in an equal manner. This provides the flexibility to choose procedures that are most appropriate for each recipient's unique characteristics.

A recipient may determine that, in the interest of finality and in light of the enhanced protections in the proposed regulations that increase the reliability of determinations, no appeal is necessary. Alternatively, a recipient may determine it is appropriate to allow appeals, but only by the respondent as the person against whom the recipient seeks to impose formal discipline consequences. Such recipients might believe that a student has a right to appeal before any disciplinary action is taken by a recipient against the student. In light of this view, a recipient may choose to provide a right to respondents to appeal,

but not provide an appeal for complainants because, regardless of determination, the complainant would not face disciplinary action by the recipient. Such recipients might approach their grievance procedures under a prosecutorial model in which it would be unfair to give the recipient itself an opportunity to "retry" a respondent. Finally, a recipient may determine that it is appropriate to permit complainants and respondents to challenge its determination of responsibility in recognition that either party may have a stake in presenting the recipient with valid reasons to reconsider the determination.

Section 106.45(b)(6) Informal resolution

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

(A) The allegations;

(B) The requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, if any; and

(C) Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.

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

Reasons: As mentioned previously, the proposed regulations reflect the Department's

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

protections that would otherwise be provided by these regulations.

Section 106.45(b)(7) Recordkeeping

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

(A) The sexual harassment investigation, including any determination regarding responsibility, disciplinary sanctions imposed on the respondent, and remedies provided to the complainant;

(B) Any appeal and the result therefrom;

(C) Informal resolution, if any; and

(D) All materials used to train investigators, adjudicators, and coordinators with regard to sexual harassment.

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

Reasons: To ensure that the parties, the Department, and recipients have access to relevant information for an appropriate period of time following the completion of the

grievance procedure process, proposed section 106.45(b)(7) would address the recordkeeping requirements related to formal complaints of sexual harassment with which recipients must comply. The required three-year retention period is sufficient to allow the Department and the parties to ensure compliance with the proposed regulations. During the record retention period, these records would continue to be subject to the applicable provisions of the Family Educational Rights and Privacy Act (FERPA), as discussed below.

Section 106.45(b)(8) Retaliation

Proposed Regulations: We propose adding section 106.45(b)(8) stating that nothing in the regulations restricts a recipient's ability to take disciplinary action against a student or employee who intentionally submits a formal complaint in bad faith or a student or employee who knowingly provides false information during the investigation or adjudication of a formal complaint.

Reasons: The current Title IX regulations at 34 CFR 106.71 incorporate by reference the provision in the Title VI regulations at 34 CFR 100.7(e) prohibiting recipients from intimidating, threatening, coercing, or discriminating against any individual because the individual has made a complaint, testified, assisted, or participated in any manner in any investigation or hearing under Title VI. Proposed section 106.45(b)(8) would clarify that the Title IX regulations do not restrict a recipient's ability to take disciplinary action against a student or employee who intentionally submits a formal complaint in bad faith, or who knowingly provides false information during the investigation or adjudication of a formal complaint. The submission of a formal complaint in bad faith, or the knowing provision of false information during an investigation or adjudication pursuant thereto,

would subvert the purposes of Title IX and would not be protected under Title IX.

III. Clarifying amendments to existing regulations

Remedial and affirmative action and self-evaluation (Current 34 CFR 106.3(a) and Proposed 34 CFR 106.3(a))

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

Current Regulations: Current 34 CFR 106.3(a) provides that if the Assistant Secretary for Civil Rights finds that a recipient has discriminated against a person on the basis of sex in an education program or activity, the recipient shall be required to take remedial action that the Assistant Secretary deems necessary "to overcome the effects of such discrimination."

Proposed Regulations: We propose modifying the language to apply to any violation of Part 106 and adding language to 34 CFR 106.3(a) stating that the remedial action deemed necessary by the Assistant Secretary shall not include assessment of damages.

Reasons: The proposed changes would clarify, consistent with the Supreme Court's case law in this area and mindful of the difference between a private right of action opening the door to damages assessed by a court and the Department's role administratively enforcing Title IX without express statutory authority to collect damages, that the

Assistant Secretary shall not assess damages against a recipient. *Gebser*, 524 U.S. at 288–89 ("While agencies have conditioned continued funding on providing equitable relief to the victim, the regulations do not appear to contemplate a condition ordering payment of monetary damages, and there is no indication that payment of damages has been demanded as a condition of finding a recipient to be in compliance with the statute"). This limitation recognizes that the Department does not have the same capacity a court has to determine the appropriateness and measure of money damages, while retaining appropriate discretion on the part of the Department to require a wide range of equitable remedies to correct Title IX violations and bring schools into compliance. For example, the Department retains the discretion to order a noncompliant school to pay for costs or expenses the school would have incurred but for the school's noncompliance.

Effect of other requirements and preservation of rights (Current 34 CFR 106.6 and Proposed 34 CFR 106.6)

Statute: The statute does not directly address the effect of other requirements or the preservation of rights. The Secretary has the authority to regulate with regard to discrimination on the basis of sex in education programs or activities receiving Federal financial assistance specifically under 20 U.S.C. 1682 and generally under 20 U.S.C. 1221e-3 and 3474.

Current Regulations: Current 34 CFR 106.6 provides that the obligations under the Title IX regulations do not alter obligations not to discriminate on the basis of sex under other specified laws and Executive Orders, and the obligation to comply with Title IX is not obviated or alleviated by State or local laws or by a rule or regulation of any organization, club, or league.

Section 106.6(d) Constitutional protections

Proposed Regulations: We are proposing to add paragraph (d) to section 106.6 to affirm that nothing in 34 CFR part 106 requires a recipient to: restrict any rights that are protected from governmental action by the First Amendment of the U.S. Constitution; deprive an individual of rights that would otherwise be protected from governmental action under the Due Process Clause of the Fourteenth Amendment; or restrict any other rights guaranteed against governmental action by the U.S. Constitution.

Reasons: Despite the language in current section 106.6 and the discussions in OCR guidance regarding the due process protections for public school students and employees and free speech rights under the First Amendment (2001 Guidance at 22) there appears to be significant confusion regarding the intersection of individuals' rights under the U.S. Constitution with a recipient's obligations under Title IX. In particular, during listening sessions the Department heard concerns that Title IX enforcement has had a chilling effect on free speech. We are proposing to add paragraph (d) to clarify that nothing in these regulations requires a recipient to infringe upon any individual's rights protected under the First Amendment or the Due Process Clause, or other any other rights guaranteed by the U.S. Constitution. The language also makes it clear that, under the Title IX regulations, recipients – including private recipients – are not obligated by Title IX to restrict speech or other behavior that the Federal government could not restrict directly. Consistent with Supreme Court case law, the government may not compel private actors to restrict conduct that the government itself could not constitutionally restrict. *E.g.*, *Peterson v. City of Greenville*, 373 U.S. 244 (1963); *Truax v. Raich*, 239 U.S. 33, 38 (1915). Thus, recipients that are private entities are not required by Title IX

or its regulations to restrict speech or other behavior that would be protected against restriction by governmental entities. This protection against governmental restrictions on constitutional rights applies to all the civil rights laws that OCR enforces, but we are adding paragraph (d) to the Title IX regulations because the issue arises frequently in the context of sexual harassment. When OCR enforces Title IX and its accompanying regulations, the constitutional rights of individuals involved in a recipient's grievance process will always be considered and protected.

Section 106.6(e) Interaction with FERPA

Proposed Regulations: We are also proposing to add paragraph (e) to section 106.6 to clarify that the requirements of this part would override FERPA to the extent that they directly conflict.

Reasons: In 1994, as part of the Improving America's Schools Act, Congress amended the General Education Provisions Act (GEPA), of which FERPA is a part, to state that nothing in GEPA "shall be construed to affect the applicability of . . . title IX of the Education Amendments of 1972 . . ." 20 U.S.C. 1221(d). Accordingly, any disclosure of information required under Title IX or this part is not prohibited by any FERPA provision that would otherwise apply.

Section 106.6(f) Interaction with Title VII

Proposed Regulations: We are also proposing to add paragraph (f) to section 106.6 to clarify that nothing in the proposed regulations shall be read in derogation of an employee's rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* and its implementing regulations.

Reasons: Employees of a school may have rights under both Title IX and Title VII. To the extent that any rights, remedies, or procedures differ under Title IX and Title VII, this provision clarifies that nothing about the proposed regulations is intended to diminish, restrict, or lessen any rights an employee may have against his or her school under Title VII.

Designation of coordinator, dissemination of policy, adoption of grievance procedures (Current 34 CFR 106.8 and 106.9 and Proposed 34 CFR 106.8)

Statute: The statute does not directly address the designation of a Title IX Coordinator, the dissemination of policy, or the adoption of grievance procedures. The Secretary has the authority to regulate with regard to discrimination on the basis of sex in education programs or activities receiving Federal financial assistance, specifically under 20 U.S.C. 1682 and generally under 20 U.S.C. 1221e-3 and 3474.

Current Regulations: Current 34 CFR 106.8(a) requires a recipient to designate at least one employee to be the "responsible employee" who has the duty to coordinate the recipient's efforts to comply with and carry out its responsibilities under the regulations, including any investigation of any complaint alleging a recipient's noncompliance with, or actions which would be prohibited by, 34 CFR part 106. Section 106.8(a) also requires recipients to notify all students and employees of the name, office address, and telephone number of such employee or employees.

34 CFR 106.8(b) requires recipients to adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints of sex discrimination.

34 CFR 106.9(a)(1) requires recipients to notify applicants for admission and employment, students and parents of elementary and secondary school students, employees, sources of referral for applicants for admission and employment, and unions or professional organizations holding collective bargaining agreements or professional agreements with the recipient that it does not discriminate on the basis of sex in the education program or activity which it operates. Such notice must state that inquiries about the application of Title IX may be referred to the employee designated pursuant to section 106.8, or to the Assistant Secretary.

34 CFR 106.9(b)(2) lists the types of publications where the recipient shall publish its nondiscrimination policy.

Proposed Regulations: We are proposing to clarify the requirements of 34 CFR 106.8(a). Proposed section 106.8(a) would state that the designated individual is referred to as the "coordinator," and would alter the required methods for notification. Proposed section 106.8(a) would also remove unclear language in the existing regulation that could be read to require that the coordinator must be the one that handles the investigations and otherwise directly carries out the recipient's responsibilities.

We also propose moving the requirement in section 106.9(a)(1) to section 106.8(b)(1). Proposed section 106.8(b)(1) would eliminate the requirement to notify parents of elementary and secondary school students and sources of referral of applicants for admission and employment that it does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by Title IX and this part not to discriminate in such a manner, and clarify that the notice must state that such inquiries may be referred to the employee designated pursuant to section 106.8 (*i.e.*, the

Title IX Coordinator), to the Assistant Secretary, or to both.

We also propose moving the requirements in current 34 CFR 106.8(b) to section 106.8(c). Proposed section 106.8(c) would clarify that with respect to sexual harassment, the grievance procedures requirements specifically apply to formal complaints as defined in section 106.44(e)(5). Proposed section 106.8(c) would also require recipients to provide notice of their grievance procedures to students and employees.

We also propose adding paragraph (d) to section 106.8 to clarify that the policy and grievance procedures described in this section need not apply to persons outside the United States.

Reasons: Proposed section 106.8(a) would reflect the current reality of Title IX compliance – namely, that recipients generally name a Title IX Coordinator and designate that individual to coordinate their efforts to comply with Title IX. It appears that the phrase "and carry out" in the existing regulation could be read to suggest that the Title IX Coordinator must be the one who carries out the recipient's duties under Title IX, rather than allowing the coordinator to coordinate the actions of others in carrying out those duties. Since the phrase is redundant and can be confusing, we propose removing it. In addition, in light of the expansion of the regulations elsewhere to expressly cover investigations of Title IX complaints, the language specifically including coordination of such investigations in the responsibilities of the designated individual would no longer be necessary, and would therefore be removed.

Proposed section 106.8(a) would also modernize the notification requirements. Given the changes in methods of communication since the regulations were issued in 1975, the proposed amendments would require the recipient to notify students and employees of the

electronic mail address of the employee or employees designated as Title IX Coordinators, in addition to providing the coordinator's office address and phone number. To alleviate the administrative and financial burden on a recipient to provide a new notice every time it designates an additional or different coordinator, the proposed amendments permit recipients to provide notice of a coordinator's name and contact information or, alternatively, simply a title with an established method of contacting the coordinator that does not change as the identity of the coordinator changes.

Proposed section 106.8(b)(2) would streamline the list of required publications to include a recipient's website and each student or employee handbook or catalog made available to persons entitled to notification under proposed section 106.8(b)(1). This updated list of publications would reflect the modernization of communication methods and alleviate the burden on recipients while still ensuring that the policy is adequately communicated to all required persons. In addition, proposed section 106.8(b)(2) would replace the existing restriction on publications that *suggest* a policy of sex discrimination (either by text or illustration) with a restriction on publications that *state* a policy of sex discrimination. This change would remove the subjective determination of whether the illustrations in a publication could be construed to suggest a policy of sex discrimination and instead focus the requirement on recipients' express statements of policy. As a result, the requirement would be more clear, both for recipients seeking to comply with the requirement and for those enforcing the requirement.

Proposed section 106.8(d) would clarify that the recipient's policy and grievance procedures apply to all students and employees located in the United States with respect to allegations of sex discrimination in an education program or activity of the recipient.

The statutory language of Title IX limits its application to protecting "person[s] in the United States." 20 U.S.C. 1681(a).

Educational institutions controlled by religious organizations (Current and Proposed 34 CFR 106.12)

Statute: The statute addresses educational institutions controlled by religious organizations, stating that Title IX "shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization," 20 U.S.C. § 1681(a)(3), and that the term "program or activity" "does not include any operation of an entity which is controlled by a religious organization if the application of section 1681 of this title to such operation would not be consistent with the religious tenets of such organization," 20 U.S.C. § 1687.

Current Regulations: Current 34 CFR 106.12(a) provides an exemption for educational institutions controlled by a religious organization, to the extent that application of the regulation would be inconsistent with the religious tenets of the organization. To claim this exemption, section 106.12(b) requires recipients to submit a letter to the Assistant Secretary stating which parts of the regulation conflict with a specific tenet of the religion.

Proposed Regulations: We propose revising 34 CFR 106.12(b) to clarify that an educational institution may – but is not required to – seek assurance of its religious exemption by submitting a written request for such an assurance to the Assistant Secretary. Further, section 106.12(b) is revised to state that even if an institution has not

sought assurance of its exemption, the institution may still invoke its religious exemption during the course of any investigation pursued against the institution by the Department.

Reasons: The current regulations suggest that the recipients may only claim the exemption from paragraph (a) by submitting a letter to the Assistant Secretary. The additional language clarifying that the letter to the Assistant Secretary is not required to assert the exemption brings the regulatory language into alignment with longstanding Department practice. The statutory text of Title IX offers an exemption to religious entities without expressly requiring submission of a letter, and the Department believes such a requirement is unnecessary. The Department should not impose confusing or burdensome requirements on religious institutions that qualify for the exemption.

Exercise of rights by parents/guardians of students

The Department recognizes that when a party is a minor or has been appointed a guardian, recipients have the discretion to look to state law and local educational practice in determining whether the rights of the party shall be exercised by the parent(s) or guardian(s) instead of or in addition to the party. Special considerations arise in responding to sexual harassment in the educational context against minors and other similarly situated students, including students who are under the age of 18, attending an elementary or secondary school, or subject to an applicable guardianship under state law. In such cases, the Department recognizes that state and local officials are best situated to identify and protect the student's interests under the proposed regulation.

Directed Questions

The Department seeks additional comments on the questions below:

1. **Applicability of the rule to institutions of higher education and elementary and secondary schools.** The proposed rule would apply to all recipients of Federal financial assistance, including institutions of higher education and elementary and secondary schools. The Department is interested in the public's perspective as to whether the proposed rule is appropriate for recipients at the higher education and elementary and secondary school levels. In particular, the Department is interested in whether there are parts of the proposed rule that will be unworkable at the elementary and secondary school level, if there are additional parts of the proposed rule where the Department should direct recipients to take into account the age and developmental level of the parties involved and involve parents or guardians, and whether there are other unique aspects of addressing sexual harassment at the elementary and secondary school level that the Department should consider, such as systemic differences between institutions of higher education and elementary and secondary schools.

2. **Applicability of the rule to students and employees.** Like the existing regulations, the proposed regulations would apply to sexual harassment by students, employees, and third parties. The Department seeks the public's perspective on whether there are any parts of the proposed rule that will prove unworkable in the context of sexual harassment by employees, and whether there are any unique circumstances that apply to processes involving employees that the Department should consider.

3. **Training.** The proposed rule would require recipients to ensure that Title IX Coordinators, investigators, and adjudicators receive training on the definition of sexual harassment, and on how to conduct an investigation and grievance process, including hearings, that protect the safety of students, ensures due process for all parties, and promotes accountability. The Department is interested in seeking comments from the public as to whether this requirement is adequate to ensure that recipients will provide necessary training to all appropriate individuals, including those at the elementary and secondary school level.

4. **Individuals with disabilities.** The proposed rule addresses the rights of students with disabilities under the IDEA, Section 504, and Title II of the ADA in the context of emergency removals (proposed 106.44(c)). The Department is interested in comments from the public as to whether the proposed rule adequately takes into account the needs of students and employees with disabilities when such individuals are parties in a sex discrimination complaint, or whether the Department should consider including additional language to address the needs of students and employees with disabilities as complainants and respondents. The Department also requests consideration of the different experiences, challenges, and needs of students with disabilities in elementary and secondary schools and in postsecondary institutions related to sexual harassment.

Executive Orders 12866 and 13563

Regulatory Impact Analysis (RIA)

Under Executive Order 12866, the Secretary must determine whether this regulatory action is "significant" and, therefore, subject to the requirements of the Executive order and subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action likely to result in a rule that may—

(1) Have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities in a material way (also referred to as an "economically significant" rule);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles stated in the Executive order.

Under Executive Order 12866,[14] section 3(f)(1), the changes made in this regulatory action materially alter the rights and obligations of Title IV loan recipients. Therefore, the Secretary certifies that this is a significant regulatory action subject to review by OMB. Also under Executive Order 12866 and the Presidential Memorandum "Plain Language in Government Writing," the Secretary invites comment on how easy these regulations are to understand in the Clarity of the Regulations section.

[14] Exec. Order No. 12866, 58 Fed. Reg. 190 (October 4, 1993). *Regulatory Planning and Review.* Available at: www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf.

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 2018, no regulations exceeding the agency's total incremental cost allowance will be permitted, unless required by law or approved in writing by the Director of the Office of Management and Budget. The final regulations are a significant regulatory action under EO 12866 but do not impose total costs greater than zero. Accordingly, the Department is not required to identify two deregulatory actions under EO 13771.[15]

We have also reviewed these proposed regulations under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency--

(1) Propose or adopt regulations only on a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account--among other things and to the extent practicable--the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

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[15] Exec. Order No. 13771, 82 Fed. Reg. 22 (January 30, 2017). *Reducing Regulation and Controlling Regulatory Costs*. Available at: www.gpo.gov/fdsys/pkg/FR-2017-02-03/pdf/2017-02451.pdf

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives–such as user fees or marketable permits--to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency "to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible." The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include "identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes."

We are issuing these proposed regulations only on a reasoned determination that their benefits justify their costs. In choosing among alternative regulatory approaches, we selected those approaches that maximize net benefits. Based on the analysis that follows, the Department believes that these regulations are consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action does not unduly interfere with State, local, or tribal governments in the exercise of their governmental functions.

In this RIA we discuss the need for regulatory action, the potential costs and benefits, assumptions, limitations, and data sources, as well as regulatory alternatives we considered. Although the majority of the costs related to information collection are discussed within this RIA, elsewhere in this notice under Paperwork Reduction Act of 1995 we also identify and further explain burdens specifically associated with information collection requirements.

1. Need for Regulatory Action

Based on its extensive review of the critical issues addressed in this rulemaking, the Department has determined that current regulations and subregulatory guidance do not provide sufficiently clear standards for how recipients must respond to incidents of sexual harassment, including defining what conduct constitutes sexual harassment. To address this concern, we propose this regulatory action to address sexual harassment under Title IX for the central purpose of ensuring that recipients understand their legal obligations, including what conduct is actionable as harassment under Title IX, the conditions that activate a mandatory response by the recipient, and particular requirements that such a response must meet in order to ensure that the recipient is protecting the rights of all its students to equal access to education free from sex discrimination.

In addition to addressing sexual harassment, the Department has concluded it is also necessary to amend three parts of the existing regulations that apply to all sex discrimination under Title IX. We propose expressly stating that Title IX does not require recipients to infringe existing constitutional protections, that the Department may not require money damages as a remedy for violations under Title IX, and that recipients that qualify for a religious exemption under Title IX need not submit a letter to the Department as a prerequisite to claiming the exemption.

2. Discussion of Costs, Benefits, and Transfers

The Department has analyzed the costs and benefits of complying with these proposed regulations. Due to the number of affected entities, the variation in likely responses, and the limited information available about current practices, particularly at the local education agency (LEA) level, we cannot estimate the likely effects of these proposed

regulations with absolute precision. However, we estimate that these regulations would result in a net cost savings of between $327.7 million to $408.9 million over ten years.

3. Benefits of the Proposed Regulations.

The proposed regulatory action will result in clarity, specificity, and permanence with respect to recipients better understanding their legal obligations to address sexual harassment under Title IX by providing a legal framework for recipients' responses to sexual harassment that ensures all reports of sexual harassment are treated seriously and all persons accused are given due process before being disciplined for sexual harassment. The proposed regulatory action will correct problems identified by the Department with the current framework governing sexual harassment (under current regulations and subregulatory guidance), which problems include lack of robust due process protections in recipient grievance procedures under Title IX, capturing too wide a range of misconduct resulting in infringement on academic freedom and free speech, and lack of reasonable options for how recipients may structure their grievance processes to accommodate each school's unique pedagogical mission, resources, and educational community.

4. Costs of the Proposed Regulations

These proposed regulations would: define sexual harassment for Title IX purposes; clarify when a recipient's obligation to investigate a complaint of sexual harassment is activated; define the minimum requirements of grievance procedures for Title IX purposes; establish a process for informal resolution of sexual harassment claims; and require appropriate documentation of all Title IX complaints and investigations.

4.a. Establishing a Baseline

In order to accurately estimate the costs of these proposed regulations, the Department needed to establish an appropriate baseline for current practice. In doing so, it was necessary to know the current number of Title IX investigations occurring in local educational agencies (LEAs) and institutions of higher education (IHEs) eligible for Federal funding under Title IV of the Higher Education Act of 1965 (Title IV). In 2014, the U.S. Senate Subcommittee on Financial and Contracting Oversight released a report[16] which included survey data from 440 four-year IHEs regarding the number of investigations of sexual violence that had been conducted during the previous five year period. Two of the five possible responses to the survey were definite numbers (0, 1), while the other three were ranges (2-5, 6-10, >10). Responses were also disaggregated by size of institution (Large, Medium, or Small). By top-coding the ranges (e.g., "5" for any respondent indicating "2-5") and assuming 50 investigations for any respondent indicating more than 10 investigations, the Department was able to estimate the average number of 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. However, since the report only surveyed four-year institutions, the Department needed to impute similar data for two-year and less-than-two-year institutions, which represent approximately 57 percent of all Title IV-eligible institutions. In order to do so, the Department analyzed sexual offenses reported under the Clery Act and combined those data with total enrollment information from the Integrated Postsecondary Education

[16] McCaskill, C. (2014) *Sexual Violence on Campus.* Washington, DC: U.S. Senate Subcommittee on Financial Contracting Oversight – Majority Staff. Retrieved from https://www.mccaskill.senate.gov/SurveyReportwithAppendix.pdf.

Data System (IPEDS) for all Title IV-eligible institutions within the United States. Assuming that the number of reports of sexual offenses under the Clery Act is positively correlated with the number of investigations, the Department arrived at a general rate of investigations per reported sexual offense at four-year IHEs by institutional enrollment. These rates were then applied to two-year and less-than-two-year institutions within the same category using the average number of sexual offenses reported under the Clery Act for such institutions to arrive at an average number of investigations per year by size and level of institution. These estimates were then weighted by the number of Title IV-eligible institutions in each category to arrive at an estimated average 1.18 investigations of sexual harassment per IHE per year.[17] To the extent that the number of investigations and the number of Clery Act reports of sexual offenses are not uniformly correlated across types of institutions (i.e., less-than-two-year, two-year, and four-year), this may represent an over- or-under-estimate of the actual number of investigations per IHE per year. We invite the public to provide any pertinent evidence on this issue to improve our baseline estimates.

The Department does not have information on the average number of investigations of sexual harassment occurring each year in LEAs. However, as part of the Civil Rights Data Collection (CRDC), the Department does 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

[17] In order to determine the sensitivity of this estimate to our coding of the survey data, the Department also conducted these analyses by coding the data using medians for each range (e.g., 3.5 for the "2-5" range) with a code of 30 for the ">10" group and by top-coding using a 100 for the ">10" group. These alternative approaches would result in baseline estimates ranging from 0.74 to 2.15 investigations per year per IHE.

that LEAs, on average, currently conduct approximately 3.23 Title IX investigations each year. We invite public comment on the extent to which this is a reasonable assumption.

4.b. Developing the Model

In 2011, the Department issued subregulatory guidance regarding Title IX compliance which resulted in a much larger number of incidents of sexual harassment being investigated by LEAs and IHEs each year. In 2017, the Department rescinded that guidance. However, although the Department then provided alternative, interim guidance to institutions, we also reaffirmed that guidance is not legally binding on recipients, and indicated that the replacement guidance issued in 2017 was to assist recipients in the interim while this proposed regulatory action was underway. 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. We also believe it is highly likely that a subset of recipients reduced the scope of their Title IX activities to the current legal and regulatory requirements. However, we do not know with absolute certainty how many recipients fall into each category, making it difficult to accurately predict the likely effects of this proposed regulatory action.

However, in general, the Department assumes that recipients fall into one of three groups: (1) recipients who reduced Title IX activities to the level required by law and will continue to do so; (2) recipients who continued Title IX activities at the level required by the 2011 guidance but will reduce their Title IX activities to the level required under current law and final regulations issued in this proceeding; and (3) recipients who continued Title IX activities at the level required under the 2011 guidance 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 cost savings under these proposed regulations. We therefore only estimate savings for this group of recipients. To the extent that recipients in the other two groups experience savings, we herein underestimate the savings from this proposed action.

In estimating the number of recipients in each group, we assume that most LEAs and Title IV-eligible IHEs are generally risk averse regarding Title IX compliance, and so we assume that very few would have scaled back their enforcement efforts after the rescission of the 2011 guidance. Therefore, we only estimate that 5 percent of LEAs and 5 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 proposed regulations. These institutions are voluntarily assuming higher costs than the regulations require. However, our model does account for their decision to do so, and we only assume that 50 percent of IHEs experience any cost savings from these proposed regulations (placing them in group 2). Therefore, we estimate that group 3 will consist of 5 percent of LEAs and 45 percent of IHEs. We invite public comment on the extent to which the estimated number of entities in each group is appropriate.

Unless otherwise specified, our model uses median hourly wages for personnel employed

in the education sector as reported by the Bureau of Labor Statistics[18] and an employer cost for employee compensation rate of 1.46.[19]

4.c. Cost estimates

We assume that, once the Department issues final regulations, all recipients will need to review the regulations. At the LEA level, we assume this would involve the Title IX Coordinator (assuming a loaded wage rate of $65.22 per hour for educational administrators) for 4 hours and a lawyer (at a rate of $90.71 per hour) for 8 hours. At the IHE level, we assume the Title IX Coordinator and lawyer would spend more time reviewing the regulations, at 8 hours and 16 hours, respectively. This results in a total cost of $29,732,680 in Year 1. We believe this likely represents an overestimate of the actual costs that will be realized by recipients, particularly to the extent that national organizations undertake a review and disseminate relevant information to their members. We also assume that some subset of recipients would be required to revise their grievance procedures to ensure compliance with the proposed regulations. While the requirements of these proposed regulations closely mirror requirements in other regulations and statutes, we assume 50 percent of LEAs and 25 percent of IHEs will need to revise their procedures.[20]. We believe that revising grievance procedures at the LEA level will require the work of the Title IX Coordinator for 2 hours and a lawyer for 8 hours. At the IHE level, we assume this would require the Title IX Coordinator devote 4 hours and a

[18] May 2017 National Industry-Specific Occupational Employment and Wage Estimates: Sector 61 – Educational Services. Retrieved from https://www.bls.gov/oes/current/naics2_61.htm.

[19] Employer Costs for Employee Compensation, Table 1. Retrieved from https://www.bls.gov/news.release/ecec.t01.htm.

[20] We note that McCaskill (2014) found that 95 percent of IHEs had revised their grievance procedures in the past 5 years, so this is likely an over-estimate of the number that will need to do such revision.

lawyer devote 16 hours. In total, we estimate the cost of revising grievance procedures to be approximately $10,004,560 in Year 1.

The proposed regulations also require recipients to post nondiscrimination statements on their websites. However, we assume that for many recipients, this is already standard practice. We assume that 40 percent of LEAs and 40 percent of IHEs will need to do work to post these statements. At the LEA level, we assume that this work will require 0.5 hours from the Title IX Coordinator, 0.5 hours from a lawyer, and 2 hours from a web developer (at $44.12 per hour). At the IHE level, we assume this would require 1 hour from the Title IX Coordinator, 1 hour from a lawyer, and 2 hours from a web developer. We estimate the total cost of posting nondiscrimination statements on the recipient's website will cost $1,591,030 in Year 1.

The proposed regulations also require relevant staff to receive training on the requirements of Title IX. While this has previously been required at the IHE level, we assume that this will be a new activity for 60 percent of LEAs. We assume that the training will take 1 hour each for the Title IX Coordinator, the investigator, and an adjudicator for a total estimated cost of approximately $1,540,950 in Year 1.

The proposed regulations require recipients to conduct an investigation only in the event of a formal complaint of sexual harassment. In reviewing the number of investigations reported by IHEs relative to the number of reports of sexual offenses under the Clery Act, the Department assumed that the rate of investigations by large (more than 10,000 students) four-year institutions was likely the most reflective of a system that investigates only in the event of formal complaint. As a result, we assume that, under these proposed regulations, the rate of investigations at medium and small institutions that align their

compliance structure to the regulation will approach the rate at large institutions. We therefore assume that, under these regulations, the gap in the rate of investigations between large IHEs and smaller ones would decrease by approximately 50 percent. Therefore we estimate that the requirement to investigate only in the event of formal complaints would result in a reduction in the average number of investigations per IHE per year of 0.37. In addition, the proposed regulations only require investigations in the event of sexual harassment on campus. Again, assuming that Clery Act reports correlate with all incidents of sexual harassment (as defined in these proposed regulations), we assume a further reduction in the number of investigations per IHE per year of approximately 0.09, using the number of non-campus, public property, and reported by police reports as a proxy for the number of off-campus sexual harassment investigations currently being conducted by IHEs.[21] As a result, we estimate that each IHE that aligns with the proposed regulations will experience a reduction in the number of Title IX investigations of approximately 0.46 per year.[22]

At the LEA level, given the lack of information regarding the actual number of investigations conducted each year, the Department assumes that only 50% of the incidents reported in the CRDC would result in a formal complaint, for a reduction in the

[21] The Department notes that this likely represents a severe under-estimate of the actual proportion of incidents of sexual harassment that occur off-campus. According to a study from United Educators (available online at https://www.ue.org/sexual_assault_claims_study/), approximately 41 percent of sexual assault claims examined occurred off-campus. Nonetheless, it is possible that some subset of these incidents was related to the recipients' educational program or activity and would still require investigation by the recipient. If the Department were to assume 25 percent of those incidents required investigation under the proposed rules and increased its estimate of the number of off-campus incidents that would no longer require investigation to 30 percent (rather than the current 11 percent), the estimated cost savings of these proposed regulations would increase to approximately $369 to $459 million over ten years.

[22] We note that the alternative coding options discussed above would result in an estimated reduction in the number of investigations each year between 0.24 and 0.62.

number of investigations of 1.62 per year.

While 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 incidents of informal complaints or reports. Such responses will not be dictated by the recipient's grievance procedures, but may involve talking with the reporting party, discussing options, connecting him or her with relevant on- or off-campus resources, and other supportive measures. We assume that such activities will take approximately 3 hours each at the LEA and IHE level for the Title IX Coordinator per case, for an estimated cost of approximately $5,029,540 each year.

At the LEA level, we assume that the average response to a formal complaint will require 8 hours from the Title IX Coordinator, 16 hours for an administrative assistant, one hour each for two lawyers (assuming both parties obtain legal counsel), 20 hours from an investigator, and 8 hours from an adjudicator. Assuming a reduction in the average number of investigations of 1.62 per LEA per year, these proposed regulations would result in a cost savings of $54,374,240 per year at the LEA level.

At the IHE level, we assume that the average response to a formal complaint would require 24 hours from the Title IX Coordinator, 40 hours from an administrative assistant, 40 hours each for 2 lawyers (assuming both parties obtain counsel), 450 hours for an investigator, and 16 hours for an adjudicator. Assuming an average reduction of 0.46 investigations per year per IHE, we estimate these proposed regulations to result in a net cost savings of $19,025,920 per year at the IHE level.

In addition, the proposed regulations allow for formal complaints to be informally resolved. We assume that 10 percent of all formal complaints at the LEA and IHE level

would be closed through informal resolution. In such instances at the LEA level, we assume the Title IX Coordinator and administrative assistant will each have to dedicate 4 hours beyond what they would have in the event of full adjudication in order to reflect the potential addition administrative tasks associated with this approach. However, we estimate that informal resolution will save half of the time outlined above for lawyers and investigators and the full estimated time commitment of adjudicators. At the IHE level, we assume similar time savings for lawyers, investigators, and adjudicators, with Title IX Coordinators and administrative assistants each dedicating an additional 8 hours per case. In total, we assume informal resolution will result in a cost savings of approximately $2,330,190 per year.

The proposed regulations require recipients to maintain certain documentation regarding their Title IX activities. We assume that the proposed recordkeeping and documentation requirements would have a higher first year cost associated with establishing the system for documentation with a lower out-year cost for maintaining it. At the LEA level, we assume that the Title IX Coordinator would spend 4 hours in Year 1 establishing the system and an administrative assistant would spend 8 hours doing so. At the IHE level, we assume recipients are less likely to use a paper filing system and are likely to use an electronic database for managing such information. Therefore, we assume it will take a Title IX Coordinator 24 hours, an administrative assistant 40 hours, and a database administrator ($50.71) 40 hours to set up the system for a total Year 1 estimated cost of approximately $38,836,760.

In later years, we assume that the systems will be relatively simple to maintain. At the LEA level, we assume it will take the Title IX Coordinator 2 hours and an administrative

assistant 4 hours to do so. At the IHE level, we assume 4 hours from the Title IX Coordinator, 40 hours from an administrative assistant, and 8 hours from a database administrator. In total, we estimate an ongoing cost of approximately $15,189,260 per year.

In total, the Department estimates these proposed regulations will result in a net cost savings of approximately $327.7 million to $408.9 million over ten years on a net present value basis.

4.d. Other Issues in the Proposed Regulations

The proposed regulations address three topics that do not involve a school's response to sexual harassment and which the Department estimates will not result in any net cost or benefit to regulated entities.

First, the proposed regulations emphasize that nothing about enforcement of Title IX shall require the Department or a recipient to violate the constitutional rights of any person. The Departments estimates that there are no costs or cost savings arising from this proposed provision because it does not require any new act on the part of a recipient.

Second, the proposed regulations state that money damages shall not be required by the Department as a remedy for a recipient's violation of Title IX or its regulations. The Department's Office for Civil Rights generally does not impose money damages as a remedy under Title IX; however, occasionally OCR does require a recipient to pay sums of money as reimbursement to remedy a Title IX violation. While the number of instances in which OCR imposes money damages is already minimal, the Department wishes to emphasize through the proposed regulation that any remedy involving payment of money must be linked to bringing the recipient into compliance with Title IX, rather

than falling into a category of imposing money damages. There is no cost associated with this proposed regulation because no new act is required of recipients.

Third, the proposed regulations clarify that a religious institution is not required to preemptively submit a written letter to the Department in order to claim the religious exemption from Title IX provided for by statute. There is no cost associated with the proposed regulation concerning religious institutions because the proposed regulation simply clarifies that such institutions do not need to submit a written letter to the Department in order to claim the religious exemption available under the Title IX statute and does not require any new action by recipients.

4.e. Sensitivity Analysis

The Department's estimated costs and benefits for these proposed regulations are largely driven by two assumptions: the number of recipients that will not conduct activities beyond those required for compliance with the final regulations, and the change in the number of investigations conducted each year by each of those recipients. In order to assess the robustness of our estimates, we have conducted nine different simulations of our model with varying combinations of an upper, lower, and current estimate for each of these two factors. Regarding the upper bound for the number of recipients that will not conduct activities beyond those required for compliance with the final regulations, we assume 100 percent of LEAs and 85 percent of IHEs. For the lower bound, we assume 50 percent of LEAs and 33 percent of IHEs. As discussed above, alternative coding of investigation rate data would have resulted in an estimated reduction in the number of investigations per IHE per year ranging from 0.24 to 0.62. Therefore, these estimates served as our upper and lower bound estimates for those institutions with a 25 percent to

75 percent reduction for LEAs. The estimated net present value of each of these alternative models, discounted at seven percent, is included in the table below.[23]

Table 1: Sensitivity Analysis

		Number of recipients reducing number of investigations		
		Upper Bound	Primary Estimate	Lower Bound
Estimated reduction in investigations per recipient	Upper Bound	($821,661,435)	($596,433,078)	$280,748,295)
	Primary Estimate	($464,805,595)	($327,724,854)	($120,610,695)
	Lower Bound	($187,330,672)	($105,331,484)	$8,704,859

Based on this analysis, the Department believes that its evaluation of the likely costs and benefits is accurate in assuming these proposed regulations would result in a net cost savings to recipients over a ten year period. While we believe the estimates presented herein are conservative estimates of savings, we note that only extreme lower bound estimates result in a calculated net cost across the time horizon due to the high discount rate on out-year savings. At a three percent discount rate, even lower bound estimates result in a calculated net cost savings.

5. Regulatory Alternatives Considered

The Department considered the following alternatives to the proposed regulations: (1) leaving the current regulations and current guidance in place and issuing no proposed regulations at all; (2) leaving the current regulations in place and reinstating the 2011

[23] We note that a three percent discount rate would result in larger estimated savings over the ten year time horizon.

guidance; and (3) issuing proposed regulations that added to the current regulations broad statements of general principles under which recipients must promulgate grievance procedures. Alternative (2) was rejected by the Department for the reasons expressed in the preamble to these proposed regulations; the procedural and substantive problems with the 2011 guidance that prompted the Department to rescind that guidance remained as concerning now as when the guidance was rescinded, and the Department determined that restoring that guidance would once again leave recipients unclear about how to ensure they implemented prompt and equitable grievance procedures. Alternative (1) was rejected by the Department because even though current regulations require recipients to have grievance procedures providing for "prompt and equitable" resolution of sex discrimination complaints, current regulation is entirely silent on whether Title IX and those implementing regulations cover sexual harassment; addressing a crucial topic like sexual harassment through subregulatory guidance unnecessarily would leave this serious issue subject only to non-legally binding guidance rather than regulatory prescriptions. The lack of legally binding standards would leave survivors of sexual harassment with fewer legal protections and persons accused of sexual harassment with no predictable, consistent expectation of the level of fairness or due process available from recipients' grievance procedures. Alternative (3) was rejected by the Department because the type of problems with the status quo identified by numerous stakeholders and experts with recipients' Title IX procedures made it clear that a regulation that was too vague or broad (e.g., "Provide due process protections before disciplining a student for sexual harassment") would not provide sufficient predictability or consistency across recipients to achieve the benefits sought by the Department. After careful consideration

of various alternatives, the Department believes that the proposed regulations represent the most prudent and cost effective way of achieving the desired benefits of (a) ensuring that recipients know their specific legal obligations with respect to responses to sexual harassment and (b) ensuring that all survivors of sexual harassment are taken seriously and all persons accused are treated fairly, by their schools and colleges.

6. Accounting Statement

As required by OMB Circular A-4, in the following table we have prepared an accounting statement showing the classification of the expenditures associated with the provisions of these proposed regulations. This table provides our best estimate of the changes in annual monetized costs, benefits, and transfers as a result of the proposed regulations.

Table 2: Accounting Statement

Category	Benefits
Clarity, specificity, and permanence with respect to recipient schools and colleges knowing their legal obligations under Title IX with respect to sexual harassment	Not Quantified
A legal framework for schools' and colleges' response to sexual harassment that ensures all reports of sexual harassment are treated	Not Quantified

seriously and all persons accused are given due process before being disciplined for sexual harassment		
Preserve constitutional rights, assure recipients that monetary damages will not be required by the Department, recognize religious exemptions in the absence of written request	Not Quantified	
Category	Costs	
	7%	3%
Reading and understanding the rule	$27,787,551	$28,866,680
Revision of grievance procedures	$9,350,054	$9,713,163
Posting of non-discrimination statement	$1,486,946	$1,544,691
Training of Title IX Coordinators, investigators, adjudicators	$1,440,139	$1,496,066
Response to informal reports	$35,325,351	$42,902,956
Reduction in the number of investigations	($515,532.056)	($626,118,311)
Informal resolution of complaints	($16,366,305)	($19,877,024)

Creation and maintenance of documentation	$128,783,466	$152,526,197

Clarity of the Regulations

Executive Order 12866 and the Presidential memorandum "Plain Language in Government Writing" require each agency to write regulations that are easy to understand. The Secretary invites comments on how to make these proposed regulations easier to understand, including answers to questions such as the following:

- Are the requirements in the proposed regulations clearly stated?
- Do the proposed regulations contain technical terms or other wording that interferes with their clarity?
- Does the format of the proposed regulations (use of headings, paragraphing, etc.) aid or reduce their clarity?
- Would the proposed regulations be easier to understand if we divided them into more (but shorter) sections? (A "section" is preceded by the symbol "section" and a numbered heading; for example, section 106.9 Dissemination of policy.)
- Could the description of the proposed regulations in the **SUPPLEMENTARY INFORMATION** section of this preamble be more helpful in making the proposed regulations easier to understand? If so, how?
- What else could we do to make the proposed regulations easier to understand?

To send any comments that concern how the Department could make these proposed regulations easier to understand, see the instructions in the **ADDRESSES** section of the preamble.

Deregulatory Action

Consistent with Executive Order 13771 (82 FR 9339, February 3, 2017), we have estimated that this proposed rule will result in cost savings. Therefore, this proposed rule would be considered an Executive Order 13771 deregulatory action.

Regulatory Flexibility Act (Small business impacts)

This analysis, required by the Regulatory Flexibility Act, presents an estimate of the effect of the proposed regulations on small entities. The U.S. Small Business Administration (SBA) Size Standards define proprietary institutions of higher education as small businesses if they are independently owned and operated, are not dominant in their field of operation, and have total annual revenue below $7,000,000. Nonprofit institutions are defined as small entities if they are independently owned and operated and not dominant in their field of operation. Public institutions and local educational agencies are defined as small organizations if they are operated by a government overseeing a population below 50,000.

Publicly available data from the National Center on Education Statistics' Common Core of Data indicate that, in the 2015-2016 school year, 99.4 percent of local educational agencies had enrollments of less than 50,000 students.

The Department's eZ-Audit data shows that there were 1,522 Title IV proprietary schools with revenue less than $7,000,000 for the 2015-2016 Award Year[34]. However,

[34] studentaid.ed.gov/sa/about/data-center/school/proprietary (extracted from eZ-Audit on June 30, 2017)

the Department lacks data to identify which public and private, nonprofit institutions qualify as small. Given the data limitations, the Department proposes a data-driven definition for "small institution" in each sector.

1. Proposed Definition

The Department has historically assumed that all private nonprofit institutions were small because none were considered dominant in their field. However, this approach masks significant differences in resources among different segments of these institutions. The Department proposes to use enrollment data for its definition of small institutions of postsecondary education. Prior analyses show that enrollment and revenue are correlated for proprietary institutions. Further, enrollment data are readily available to the Department for every postsecondary institution while revenue is not. The Department analyzed a number of data elements available in IPEDS, including Carnegie Size Definitions, IPEDS institutional size categories, total FTE, and its own previous research on proprietary institutions referenced in ED-2017-OPE-0076i. As a result of this analysis, the Department proposes to use this definition to define small institutions:

- Two-year IHEs, enrollment less than 500 FTE; and
- Four-year IHEs, enrollment less than 1,000 FTE.

Table 3 shows the distribution of small institutions under this proposed definition using the 2016 IPEDS institution file.[25]

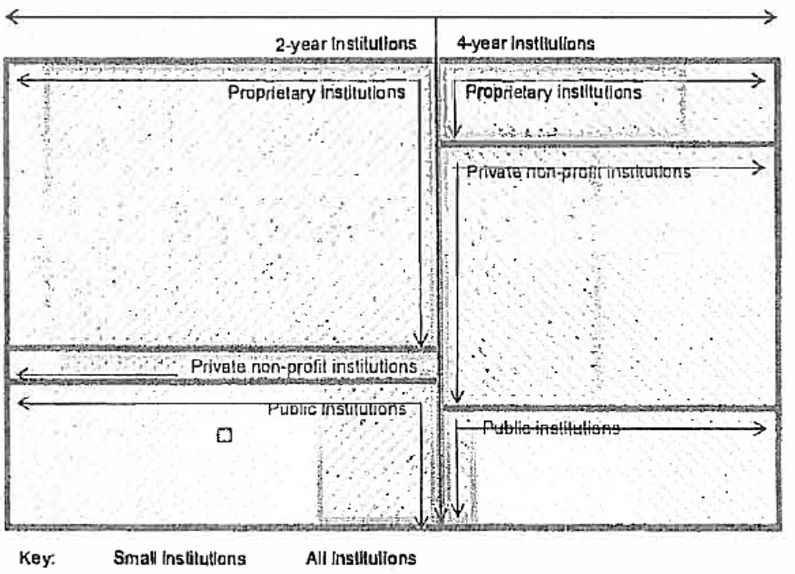
Table 3: Small Institutions under Proposed Definition

[25] U.S. Department of Education, National Center for Education Statistics. Integrated Postsecondary Education Data System 2016 Institutional Characteristics: Directory Information survey file downloaded March 3, 2018. Available at nces.ed.gov/ipeds/datacenter/DataFiles.aspx.

Level	Type	Small	Total	Percent
2-year	Public	342	1,240	28%
2-year	Private	219	259	85%
2-year	Proprietary	2,147	2,463	87%
4-year	Public	64	759	8%
4-year	Private	799	1,672	48%
4-year	Proprietary	425	558	76%
Total		3,996	6,951	57%

Under the proposed definition, the two-year small institutions are 68% of all two-year institutions (2,708/3,962), 68% of all small institutions (2,708/3,996), and 39% of the overall population of institutions (2,708/6,951); whereas, four-year small institutions are 43% of all four-year institutions (1,288/2,989), 32% of all small institutions (1,288/3,996), and 19% of the overall population of institutions (1,288/6,951). Figure 1 shows a visual representation of the universe and the percentage that would be defined as small using the above proposed definition.

Figure 1: Small Institutions as a subset of all institutions



Similarly, small public institutions are 20% of all public institutions (406/1,999), 10% of all small public institutions (406/3,996), and 6% of the overall population of institutions (406/6,951). Small private nonprofit institutions are 53% of all private nonprofit institutions (1,018/1,999), 25% of all small institutions (1,018/3,996), and 15% of the overall population of institutions (1,018/6,951). Finally, and small proprietary institutions are 85% of all proprietary institutions (2,572/1,999), 64% of all small institutions (2,572/3,996), and 37% of the overall population of institutions (2,572/6,951). The Department requests comment on the proposed definition. It will consider these suggestions in development of the final rule.

2. Impact Estimate Using Proposed Definition

2.a. Impact on Local Education Agencies

As disused in the *Discussion of Costs, Benefits, and Transfers* section of the Regulatory Impact Analysis, the Department estimates that these proposed regulations will result in a net cost savings for regulated entities, including LEAs. While the savings accruing to any particular LEA depend on a number of factors, including the LEA's Title IX enforcement history, its response to the proposed regulations, and the number of formal complaints of sexual harassment the LEA receives in the future, the Department was interested in whether the regulations would have a disproportionate effect on small LEAs – that is, whether small LEAs were likely to realize benefits proportionate to their size and number.

Using data from the 2015-2016 Civil Rights Data Collection, we examined the number of allegations of harassment and bullying based on sex by LEA size. Given the extreme upper end of the enrollment distribution that qualifies an LEA as no longer a small entity for these purposes – less than one percent of all LEAs – it is reasonable to expect that the number of reported incidents of such harassment in small LEAs closely aligns with the average number for all LEAs. On average, LEAs reported 3.23 allegations of harassment or bullying on the basis of sex in the 2015-2016 school year. By comparison, large LEAs (those with more than 50,000 students) reported an average of 112.54 such incidents and small LEAs reported 2.64 allegations on average.

Based on the model described in the *Discussion of Costs, Benefits, and Transfers* section above, the Department estimates that a small LEA that experienced only an 8 percent reduction in investigations annually would experience a net cost savings over the ten year time horizon.

2.b. Impact on Institutions of Higher Education

As with LEAs, the Department estimates that these proposed regulations will result in a net cost savings for IHEs over the ten year time horizon. However, the amount of savings that any particular IHE will realize, if any, depend on a wide number of factors, including its Title IX compliance history, its response to the proposed regulations, and the number of formal complaints of sexual harassment the IHE receives in the future. Regardless of these variables, the Department did analyze extant data sources to attempt to analyze the likely differential impact across IHEs of various sizes.

As noted in the *Discussion of Costs, Benefits, and Transfers* section of the Regulatory Impact Analysis, an analysis of data reported by IHEs under the Clery Act found that smaller institutions tended to have, on average, fewer such reports per IHE.[26] Applying the definitions noted above, we also found that small entities had far fewer reports than did large entities.[27]

Table 4: Average Clery Act Reports of Sexual Offenses by Size/Type of Institution

Level	Type	Not Small	Small	Total
4-year	Public	12.1	1.1	11.3
4-year	Private	8.7	0.7	4.7
4-year	Proprietary	0.5	0.1	0.2

[26] We note that while enrollment and the number of Clery Act reports are positively correlated, enrollment alone explains only 26 percent of the observed variation in the number of reports.

[27] We note that this finding is driven largely by institutional size rather than a higher rate of offenses at larger institutions. Across all levels and school types, except for private 4-year institutions, small entities had higher rates of Clery Act reports per enrolled student than did larger ones. Private institutions generally had the highest rates, with private 4-year institutions having the highest rate of Clery Act reports of any category examined.

2-year	Public	0.7	0.2	0.7
2-year	Private	1.2	0.1	0.3
2-year	Proprietary	0.1	0.0	0.0

Assuming that Clery Act reports are correlated with the number of incidents of sexual harassment under Title IX, we would assume that small institutions have a lower number of Title IX complaints each year. As a result, they may experience less cost savings under this proposed rule given the smaller baseline. However, this lower baseline may be offset slightly by the higher relative number of investigations undertaken at smaller institutions, as noted in the McCaskill report. We also note that small institutions also have a higher than average number of Clery Act reports occurring off-campus, indicating that they may also have a larger number of Title IX sexual harassment reports originating off-campus. In examining the model described in the *Discussion of Costs, Benefits, and Transfers Section* above, the Department estimates that, due to the small baseline number of investigations likely conducted by such entities currently, small institutions would need to realize a 37 percent reduction in investigations (equivalent to approximately one fewer investigation every five years) in order to realize a net cost savings across the 10 year time horizon. If the institution did not need to update its grievance procedures, it would only need to recognize a 33 percent reduction (approximately one fewer investigation every six years).

Paperwork Reduction Act of 1995

As part of its continuing effort to reduce paperwork and respondent burden, 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 helps ensure that: the public understands the Department's collection instructions, respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents. The following section contains information collection requirements:

Section 106.45(b)(7)--Recordkeeping.

Section 106.45(b)(7) would require recipients to maintain certain documentation regarding their Title IX activities. LEAs and IHEs would be required to create and maintain for a period of three years records of: sexual harassment investigations; determinations; appeals; informal resolutions; materials used to train investigators, adjudicators and coordinators; any actions, including supportive measures, taken in response to a report or formal complaint of sexual harassment; and documentation of the bases upon which the recipient concluded that its response was not clearly unreasonable and that its measures taken were designed to preserve access to the recipient's educational program or activity. This information will allow a recipient and OCR to assess on a longitudinal basis the prevalence of sexual harassment affecting access to a recipient's programs and activities, whether a recipient is complying with Title IX when responding to reports and formal complaints, and the necessity for additional or different training. We estimate the volume of records to be created and retained may represent a decline from current recordkeeping due to clarification elsewhere in the proposed

regulations that no investigation needs to be conducted where allegations, if true, do not constitute sexual harassment as defined under the regulations, and that informal means may be used to resolve sexual harassment complaints, both changes likely resulting in fewer investigation records being generated.

We estimate that recipients would have a higher first-year cost associated with establishing the system for documentation with a lower out-year cost for maintaining it. At the LEA level, we assume that the Title IX Coordinator would spend 4 hours in Year 1 establishing the system and an administrative assistant would spend 8 hours doing so. At the IHE level, we assume recipients are less likely to use a paper filing system and are likely to use an electronic database for managing such information. Therefore, we assume it will take a Title IX Coordinator 24 hours, an administrative assistant 40 hours, and a database administrator 40 hours to set up the system for a total Year 1 estimated cost for 16,606 LEAs and 6,766 IHEs of approximately $38,836,760.

In later years, we assume that the systems will be relatively simple to maintain. At the LEA level, we assume it will take the Title IX Coordinator 2 hours and an administrative assistant 4 hours to do so. At the IHE level, we assume 4 hours from the Title IX Coordinator, 40 hours from an administrative assistant, and 8 hours from a database administrator. In total, we estimate an ongoing cost of approximately $15,189,260 per year.

We estimate that LEAs would take 12 hours and IHEs would take 104 hours to establish and maintain a recordkeeping system for the required sexual harassment documentation during Year 1. In out-years, we estimate that LEAs would take 6 hours annually and IHEs would take 52 hours annually to maintain the recordkeeping requirement for Title

IX sexual harassment documentation. Total burden for this recordkeeping requirement over three years is 398,544 hours for LEAs and 1,407,328 hours for IHEs. Collectively, we estimate the burden over three years for LEAs and IHEs for recordkeeping of Title IX sexual harassment documents would be 1,805,872 hours under OMB Control Number 1870-NEW.

Collection of Information

Regulatory section	Information collection	OMB Control Number and estimated burden [change in burden]
106.45(b)(7)	This proposed regulatory provision would require LEAs and IHEs to maintain certain documentation related to Title IX activities.	OMB 1870-NEW. The burden over the first three years would be $69,215,280 and 1,805,872 hours.

We have prepared an Information Collection Request (ICR) for these proposed requirements. If you want to review and comment on the ICR(s) please follow the instructions listed under the ADDRESSES section of this notice. Please note the Office of Information and Regulatory Affairs (OMB), and the Department of Education review all comments posted at www.regulations.gov.

When commenting on the information collection requirements, we consider your comments on these collections of information in--

- Deciding whether the collections are necessary for the proper performance of our functions, including whether the information will have practical use;

- Evaluating the accuracy of our estimate of the burden of the collections, including the validity of our methodology and assumptions;
- Enhancing the quality, usefulness, and clarity of the information we collect; and
- Minimizing the burden on those who must respond. This includes exploring the use of appropriate automated, electronic, mechanical, or other technological collection techniques.

ADDRESSES: Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at www.regulations.gov by selecting Docket ID No. ED 2018-OCR-0064 or via postal mail, commercial delivery, or hand delivery. Please specify the Docket ID number and indicate "Information Collection Comments" on the top of your comments if your comment(s) relate to the information collection for this rule. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue, SW., LBJ 216-36, Washington, D.C. 20202-4537. Comments submitted by fax or email and those submitted after the comment period will not be accepted. FOR FURTHER INFORMATION CONTACT: Electronically mail ICDocketMgr@ed.gov. Please do not send comments here.

Intergovernmental Review

This program is not subject to Executive Order 12372 and the regulations in 34 CFR Part 79, because it is not a program or activity of the Department that provides Federal financial assistance.

Assessment of Educational Impact

In accordance with section 411 of the General Education Provisions Act, 20 U.S.C. 1221e-4, the Secretary particularly requests comments on whether these proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

Federalism

Executive Order 13132 requires us to ensure meaningful and timely input by State and local elected officials in the development of regulatory policies that have federalism implications. "Federalism implications" means substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. The proposed regulations in 34 CFR 106.34 and 34 CFR 106.35 may have federalism implications, as defined in Executive Order 13132. We encourage State and local elected officials to review and provide comments on these proposed regulations.

Accessible Format

Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotape, or compact disc) on request to the person listed under FOR FURTHER INFORMATION CONTACT.

Electronic Access to This Document

The official version of this document is the document published in the *Federal Register*. Free internet access to the official edition of the *Federal Register* and the Code of Federal

Regulations is available via the Federal Digital System at: www.gpo.gov/fdsys. You can view this document at that site, as well as all other documents of this Department published in the *Federal Register*, in text or PDF. To use PDF, you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the *Federal Register* by using the article search feature at: www.federalregister.gov. Through the advanced search feature at this site, you can limit your search to documents published by the Department.

List of Subjects in 34 CFR Part 106

Education, Sex discrimination, Civil rights, Sexual harassment

Dated: XX, 2018

Betsy DeVos
Secretary of Education

For the reasons discussed in the preamble, the Secretary proposes to amend part 106 of title 34 of the Code of Federal Regulations as follows:

PART 106—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

1. The authority citation for part 106 continues to read as follows:

Authority: 20 U.S.C. 1681 *et seq.*, unless otherwise noted.

2. Section 106.3 is amended by revising the title and paragraph (a) to read as follows:

§ 106.3 Available remedies

(a) Remedial action. If the Assistant Secretary finds that a recipient has violated this part, such recipient shall take such remedial action as the Assistant Secretary deems necessary to remedy the violation, which shall not include assessment of damages against the recipient.

* * * * *

3. Section 106.6 is amended by revising the title and adding paragraphs (d), (e) and (f) to read as follows:

§ 106.6 Effect of other requirements and preservation of rights.

* * * * *

(d) *Constitutional protections.* Nothing in this part requires a recipient to:

(1) Restrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution;

(2) Deprive a person of any rights that would otherwise be protected from government action under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution; or

(3) Restrict any other rights guaranteed against government action by the U.S. Constitution.

(e) *Effect of Section 444 of General Education Provisions Act (GEPA)/Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g and 34 CFR Part 99.* The obligation to comply with this part, including, but not limited to, providing the parties with the written notice of the allegations and the written determination regarding responsibility and disclosing evidence to the parties as set forth in §106.45(b), is not obviated or alleviated by the FERPA statute or regulations.

(f) *Title VII of the Civil Rights Act of 1964.* Nothing in this part shall be read in derogation of an employee's rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* or any regulations promulgated thereunder.

* * * * *

4. Section 106.8 is revised to read as follows:

§ 106.8 Designation of coordinator, dissemination of policy, and adoption of grievance procedures.

(a) *Designation of coordinator.* Each recipient must designate at least one employee to coordinate its efforts to comply with its responsibilities under this part. The recipient must notify all its students and employees of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated pursuant to this paragraph.

(b) *Dissemination of policy.*

(1) *Notification of policy.* Each recipient must notify applicants for admission and employment, students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by Title IX and this part not to discriminate in such a manner. Such notification must state that the requirement not to discriminate in the education program or activity extends to employment and admission (unless Subpart C does not apply to the recipient) and that inquiries about the application of Title IX and this part to such recipient may be referred to the employee designated pursuant to section 106.8(a), to the Assistant Secretary, or both.

(2) *Publications.*

(i) Each recipient must prominently display a statement of the policy described in paragraph (b)(1) of this section on its website, if any, and in each student or employee handbook or catalog that it makes available to persons entitled to a notification under paragraph (b)(1) of this section.

(ii) A recipient must not use or distribute a publication stating that the recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by this part.

(c) *Adoption of grievance procedures.* A recipient must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part and of formal complaints as defined in section 106.44(e)(6). A recipient must provide notice of

the recipient's grievance procedures, including how to report sex discrimination and how to file or respond to a complaint of sex discrimination, to students and employees.

(d) *Application.* The requirements that a recipient adopt a policy and grievance procedures as described in this section apply only to exclusion from participation, denial of benefits, or discrimination on the basis of sex occurring against a person in the United States.

* * * * *

5. Section 106.9 is removed and reserved.

6. Section 106.12 is amended by revising paragraph (b) to read as follows:

* * * * *

(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 which conflict with a specific tenet or practice 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 or practice of the religious organization, whether or not the institution had previously sought assurance of the exemption from the Assistant Secretary.

* * * * *

7. Subpart D—Discrimination on the Basis of Sex in Education Program or Activities Prohibited is amended by adding sections 106.44 and 106.45 to read as follows:

§ 106.44 Recipient's response to sexual harassment.

(a) *General.* A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States must respond in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

(b) *Specific circumstances.*

(1) A recipient must follow procedures consistent with section 106.45 in response to a formal complaint about conduct within its education program or activity. If the recipient follows procedures (including implementing any appropriate remedy as required) consistent with section 106.45 in response to a formal complaint, the recipient's response to the formal complaint is not deliberately indifferent.

(2) When a recipient has actual knowledge regarding reports by multiple complainants of conduct by the same respondent that could constitute sexual harassment, the Title IX Coordinator must file a formal complaint. If the Title IX Coordinator files a formal complaint in response to the reports, and the recipient follows procedures (including implementing any appropriate remedy as required) consistent with section 106.45 in response to the formal complaint, the recipient's response to the reports is not deliberately indifferent.

(3) For institutions of higher education, a recipient is not deliberately indifferent when in the absence of a formal complaint the recipient offers and implements supportive measures designed to effectively restore or preserve the complainant's access to the recipient's education program or activity. At the time supportive measures are offered the recipient must in writing inform the complainant of his or her right to file a formal complaint and obtain the complainant's written acknowledgement that the complainant does not wish to file a formal complaint. The recipient must also at the same time give written notice to the complainant stating that the complainant can choose to file a formal complaint at a later time despite having declined to file a formal complaint at the time the supportive measures are offered.

(4) The Assistant Secretary will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient merely because the Assistant Secretary reaches a different determination based on an independent weighing of the evidence.

(c) *Emergency removal.* Nothing in this section precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the health or safety of students or employees justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision shall not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or Title II of the Americans with Disabilities Act.

(d) *Administrative leave.* Nothing in this section precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of an investigation.

(e) *Definitions.* As used in this part:

(1) *Sexual harassment* means:

(i) 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;

(ii) Unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it denies a person access to the recipient's education program or activity; or

(iii) Sexual assault, as defined in 34 CFR 668.46(a).

(2) *Complainant* means an individual who has reported being the victim of conduct that could constitute sexual harassment, or on whose behalf the Title IX Coordinator has filed a formal complaint.

(3) *Respondent* means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

(4) *Supportive measures* means non-disciplinary individualized services offered as appropriate 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 preserve access to the recipient's education program or activity, protect the safety of all parties and the recipient's educational environment, and deter sexual harassment. Supportive measures must be non-punitive, time-limited, and narrowly tailored to support continued access to an education program or activity without unreasonably burdening the

other party. Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the institution to provide the supportive measures.

(5) *Formal complaint* means 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 section 106.45.

(6) *Actual knowledge* means notice of sexual harassment or allegations of sexual harassment to an official of the recipient who has authority to institute corrective measures on behalf of the recipient. Imputation of knowledge based solely on respondeat superior or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual knowledge is also the respondent. The mere ability or obligation to report sexual harassment does not qualify an employee, even if that employee is an official, as one who has authority to institute corrective measures on behalf of the recipient. For recipients that are elementary and secondary schools, teachers are officials with authority to institute corrective measures on behalf of the recipient.

§ 106.45 Grievance procedures for formal complaints of sexual harassment.

(a) *Discrimination on the basis of sex.* A recipient's treatment of a complainant in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under Title IX. A recipient's treatment of the respondent may also constitute discrimination on the basis of sex under Title IX.

(b) *Grievance procedures.* For the purpose of addressing formal complaints of sexual harassment, grievance procedures providing for prompt and equitable resolution must comply with the requirements of this section.

(1) *Basic requirements for grievance procedures.* Grievance procedures must—

(i) Treat complainants and respondents equitably. An equitable resolution for a complainant must include remedies where a finding of responsibility for sexual harassment has been made against the respondent; such remedies must be designed to restore or preserve access to the recipient's education program or activity. An equitable resolution for a respondent must include due process before any disciplinary sanctions are imposed;

(ii) Require an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence – and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness;

(iii) Require that any individual designated by a recipient as a coordinator, investigator, or adjudicator not have a conflict of interest or bias for or against complainants or respondents. A recipient must ensure that coordinators, investigators, and adjudicators receive training on both the definition of sexual harassment and how to conduct an investigation and grievance process—including hearings, if applicable, that protect the safety of students, ensure due process for all parties, and promote

accountability. Any materials used to train coordinators, investigators, or adjudicators may not rely on sex stereotypes and must promote impartial investigations and adjudications of sexual harassment;

(iv) Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process;

(v) Include reasonably prompt timeframes, including a process that allows for the extension of timeframes for good cause with written notice to the complainant and the respondent of the delay and the reason for the delay. Good cause may include considerations such as the absence of the parties or witnesses, concurrent law enforcement activity, or the need for language assistance or accommodation of disabilities;

(vi) List all of the possible sanctions that the recipient may impose following any determination of responsibility;

(vii) Describe the standard of evidence to be used to determine responsibility;

(viii) Include the procedures and permissible bases for the complainant or respondent to appeal the determination regarding responsibility, if such appeal procedures are available; and

(ix) Describe the range of supportive measures available to complainants and respondents.

(2) *Notice of allegations.*

(i) *Notice upon receipt of formal complaint.* Upon receipt of a formal complaint, a recipient must provide the following written notice to the parties who are known:

(A) Notice of the recipient's grievance procedures.

(B) Notice of the allegations constituting a potential violation of the recipient's sexual misconduct policy, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved in the incident, if known, the specific section of the recipient's policy allegedly violated, the conduct allegedly constituting sexual harassment under this part and under the recipient's policy, and the date and location of the alleged incident, if known. The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process. The written notice must also inform the parties that they may request disclosure of evidence under paragraph (b)(3)(viii) of this section.

(ii) *Ongoing notice requirement.* If, in the course of an investigation, the recipient decides to investigate allegations not included in the notice provided pursuant to paragraph (b)(2)(i)(B) of this section, the recipient must provide notice of the additional allegations to the parties, if known.

(3) *Investigations of a formal complaint.* The recipient must investigate the allegations in a formal complaint. If the conduct alleged by the complainant would not constitute sexual harassment as defined in section 106.44(e) even if proved or did not occur within the recipient's program or activity, the recipient may dismiss the formal complaint with regard to that conduct. When investigating a formal complaint, a recipient must—

(i) Ensure that the burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the recipient and not on the parties;

(ii) Provide equal opportunity for the parties to present witnesses and other inculpatory and exculpatory evidence;

(iii) Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;

(iv) Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, and not limit the choice of advisor or presence for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties;

(v) Provide written notice of the date, time, location, participants, and purpose of any hearing, investigative interview, or other meeting with a party, with sufficient time for the party to prepare to participate;

(vi) Provide the complainant and the respondent with the equal opportunity to pose questions to the other party and to witnesses prior to a determination regarding responsibility, permitting each party to ask all relevant questions, and explaining to the party proposing the questions any decision to exclude questions as not relevant;

(vii) For institutions of higher education, permit cross-examination of any party or witness if the grievance procedures provide for a hearing; or, if the grievance procedures do not provide for a hearing, permit each party to provide written questions for the

investigator to ask the other party and witnesses in a manner that effectively substitutes for cross-examination;

(viii) Provide equal access to the evidence upon which the recipient intends to rely in reaching a determination regarding responsibility and provide each party with an equal opportunity to respond to that evidence prior to any determination regarding responsibility;

(ix) At the request of the complainant or respondent, promptly disclose to the requesting party any evidence obtained as part of the investigation, including evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility; and

(x) Create an investigative report that fairly summarizes relevant evidence and provide the report to the parties for their review and response prior to a determination regarding responsibility.

(4) *Determination regarding responsibility.*

(i) The investigator(s) or other adjudicator(s) must issue a written determination regarding responsibility. To reach this determination, the recipient must apply either the preponderance of the evidence standard or the clear and convincing evidence standard, although the recipient may employ the preponderance of the evidence standard only if the recipient uses that standard [for all other discriminatory harassment complaints][for other cases of comparable seriousness]. The recipient must also apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty.

Commented [A1]: ED's preferred version is the first clause "only if the recipient uses that standard for all other discriminatory harassment complaints." DOJ-Civil Rights and WHCO prefer the alternate clause ("for other cases of comparable seriousness"), so for this reason ED is presenting both in this draft for OMB review. Changing ED's preferred position would require consultation with the Secretary.

(ii) The written determination must include—

(A) Identification of the section(s) of the recipient's sexual misconduct policy alleged to have been violated;

(B) A description of the procedural steps taken from the receipt of the complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;

(C) Findings of fact supporting the determination;

(D) Conclusions regarding the application of the recipient's policy to the facts;

(E) A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any sanctions the recipient imposes on the respondent, and any remedies provided by the recipient to the complainant designed to restore or preserve access to the recipient's education program or activity;

(F) The recipient's procedures and permissible bases for the complainant or respondent to appeal the determination, if such appeal procedures are available.

(iii) The recipient must provide the written determination to the parties simultaneously.

(5) *Appeals.* If a recipient allows appeals from the determination regarding responsibility, the recipient may allow an appeal either solely by the respondent or by both parties; if the recipient allows appeal by both parties, then appeal procedures must be equally available to both parties.

(6) *Informal resolution.* At any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as

mediation, that does not involve a full investigation and adjudication, provided that the recipient--

(i) Provides to the parties a written notice disclosing--

(A) The allegations;

(B) The requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, if any; and

(C) Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared; and

(ii) Obtains the parties' voluntary, written consent to the informal resolution process.

(7) *Recordkeeping.*

(i) A recipient must create, make available to the complainant and respondent, and maintain for a period of three years records of--

(A) Each sexual harassment investigation including any determination regarding responsibility, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve access to the recipient's education program or activity;

(B) Any appeal and the result therefrom;

(C) Informal resolution, if any; and

(D) All materials used to train investigators, adjudicators, and coordinators with regard to sexual harassment.

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

(8) *Retaliation*. Nothing herein restricts a recipient's ability to take disciplinary action against a student or employee who intentionally submits a formal complaint in bad faith or a student or employee who knowingly provides false information during the investigation or adjudication of a formal complaint.