TITLE IX, SEXUAL HARASSMENT TRAINING MATERIALS

JOINTLY PRESENTED BY:

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AND

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

Title IX Training Materials

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1 **TITLE IX**

SEXUAL HARASSMENT AND THE NEW REGULATIONS

2 **PRESENTERS FOR TODAY'S PROGRAM**

- Carl P. Beard, Beard Legal Group
- Michael Levin, Levin Legal Group
- Elizabeth A. Benjamin, Beard Legal Group
- Paul Cianci, Levin Legal Group
- Ronald N. Repak, Beard Legal Group

3 **DISCLAIMERS**

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

4 **DISCLAIMERS**

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

5 **ENSURING THAT YOU ARE LISTENING**

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

6 **TRAINING MATERIALS**

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

7 **TRAINING MATERIALS**

We are providing the following training materials:

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

8 **TRAINING MATERIALS**

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

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

9 **TRAINING MATERIALS—YOUR HOMEWORK**

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

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

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

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

11 **PRACTICAL TIPS**

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

12 **TRAINING**

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

13 **RECOMMENDATIONS**

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

14 **AGENDA FOR TODAY'S PROGRAM**

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

15 **UNDERSTANDING LEGAL CITATIONS**

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

16 **UNDERSTANDING WORD USAGE**

As used in this training, "school" means:

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

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

17 **UNDERSTANDING WORD USAGE**

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

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

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

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

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

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

21 **A SHORT HISTORY**

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

22 **A SHORT HISTORY**

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

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

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

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

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

25 **A SHORT HISTORY**

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

26 **A SHORT HISTORY**

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

27 **A SHORT HISTORY—QUID PRO QUO**

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

28 **A SHORT HISTORY—QUID PRO QUO**

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

29 **A SHORT HISTORY—FIRST REGULATIONS**

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

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

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

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

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

32 **A SHORT HISTORY: MAJOR HOLDINGS**

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

33 **A SHORT HISTORY: MAJOR HOLDINGS**

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

34 **A SHORT HISTORY: MAJOR HOLDINGS**

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

35 **A SHORT HISTORY: MAJOR HOLDINGS**

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

36 **A SHORT HISTORY: MAJOR HOLDINGS**

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

37 **A SHORT HISTORY: MAJOR HOLDINGS**

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

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

39 **SEXUAL WRONGDOING VS. SEXUAL HARASSMENT**

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

40 **THE NEW REGULATIONS**

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

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

1. Title IX Coordinator;
2. Investigator;

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

42 **AIDES TO UNDERSTANDING THESE SLIDES**

➢

➢Defined terms will be in blue font;

➢Action requirements will be in red font.

43 **THE NEW REGULATIONS: FUNDAMENTAL PREMISE**

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

44 **THE NEW REGULATIONS: FUNDAMENTAL PREMISE**

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

45 **THE NEW REGULATIONS: FUNDAMENTAL PREMISE**

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

➢Observations:

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

46 **"COMPLAINANT" DEFINED:**

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

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

➢Yes.

47 **WHAT HAVE WE LEARNED?**

➢A formal complaint can only be made by:

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

➢Why is this important?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Nonforcible: unlawful, nonforcible sexual intercourse includes:

- Incest; and
- Statutory rape.

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

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

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

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

(i) The length of the relationship.

(ii) The type of relationship.

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

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

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

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

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

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

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

58 **THE NEW REGULATIONS: ACTUAL KNOWLEDGE**

"Actual knowledge" means:

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

- What's the difference between the two?

59 **THE NEW REGULATIONS: ACTUAL KNOWLEDGE**

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

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

60 **THE NEW REGULATIONS: FORMAL COMPLAINT**

Formal complaint means:

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

[2]alleging sexual harassment against a respondent; and

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

61 **THE NEW REGULATIONS: FORMAL COMPLAINT**

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

62 **THE NEW REGULATIONS: FORMAL COMPLAINT**

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

63 **THE NEW REGULATIONS: FORMAL COMPLAINT**

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

64 **PRACTICAL TIPS**

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

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

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

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

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

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

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

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

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

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

The school must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the school to provide the supportive measures.

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

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

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

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

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

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

The Title IX Coordinator must promptly contact the complainant to

[1] discuss the availability of supportive measures,

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

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

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

72 **THE NEW REGULATIONS: AUTHORIZED ACTIONS**

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

[1] undertakes an individualized safety and risk analysis,

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

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

73 **THE NEW REGULATIONS: ADMINISTRATIVE LEAVE**

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

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

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

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

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

behaviors.

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

Treat complainants and respondents equitably by:

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

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

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

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

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

Requires:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[The grievance process must] include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"Sufficient details" include:

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

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

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

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

The written notice must inform the parties that:

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

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

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

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

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

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

Complaint must be dismissed:

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

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

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

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

A complaint may be dismissed if:

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

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

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

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

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

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

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

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

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

- Provide the parties with the same opportunities to have others present during *any grievance proceeding,* including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney;
- However, the School Entity may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties;

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

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

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

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

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

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

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

The School Entity must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination.

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

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

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

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

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

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

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

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

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

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

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

Must include:

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

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

Must include:

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

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

Must include:

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

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

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

School Entity must offer both parties an appeal from:

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

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

The following bases for an appeal are required:

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

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

When an appeal is filed, school must:

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

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

When an appeal is filed, school must:

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

119 **THE NEW REGULATIONS: RECORDKEEPING**

Must maintain for minimum of 7 years the following:

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

120 **THE NEW REGULATIONS: RECORDKEEPING**

Must maintain for minimum of 7 years the following:

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

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

121 **THE NEW REGULATIONS: RECORDKEEPING**

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

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

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

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

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

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

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

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

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

125 **THE NEW REGULATIONS: CONFIDENTIALITY**

Schools must keep confidential the following:

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

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

Disclosure can be made under the following circumstances:

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

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

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

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

Schools may not retaliate against an individual who:

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

129

Part 3:

Applying the New Requirement to the Existing School Environment

130 **TO-DO LIST—FOR BOARD**

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

131 **TO DO LIST –FOR ADMINISTRATION**

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

132 **TO DO LIST –FOR ADMINISTRATION**

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

133 **TO DO LIST –FOR ADMINISTRATION**

❑Create templates for:

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

134 **TO DO LIST –FOR ADMINISTRATION**

Templates, cont'd:

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

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

Templates, cont'd:

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

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

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

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

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

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

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

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

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

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

➢ Policy 000 provides:

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

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

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

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

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

142

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

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

Title IX Coordinator:

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

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

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

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

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

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

Informal Facilitator:

- Someone from HR or Pupil Services

147 **ONE PUBLIC SCHOOL, TWO SYSTEMS**

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

148 **ONE PUBLIC SCHOOL, TWO SYSTEMS**

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

149 **ONE PUBLIC SCHOOL, TWO SYSTEMS**

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

150 **ONE PUBLIC SCHOOL, TWO SYSTEMS**

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

151 **CODE OF STUDENT CONDUCT**

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

152 **CODE OF EMPLOYEE CONDUCT**

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

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

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

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

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

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

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

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

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

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

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

158 **THE INVESTIGATION; INVESTIGATIVE INTERVIEWS**

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

159 **THE INVESTIGATION; INVESTIGATIVE PLAN**

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

- witness list

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

160 **THE INVESTIGATION; INVESTIGATIVE PLAN**

Investigative plan, cont'd:

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

161 **THE INVESTIGATION; INVESTIGATIVE PLAN**

Investigative plan, cont'd:

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

162 **THE INVESTIGATION; MISC. ISSUES**

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

163 **THE INVESTIGATION; INVESTIGATIVE INTERVIEWS**

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

164 **THE INVESTIGATION; NOTE TAKERS**

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

165 **THE INVESTIGATION**

Investigations include more than interviews—they may involve:

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

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

166 **THE INVESTIGATION**

Investigations include more than interviews—they may involve:

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

167 **THE INVESTIGATION**

Investigations include more than interviews—they may involve:

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

168 **THE INVESTIGATION**

Investigations include more than interviews—they may involve:

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

169 **THE INVESTIGATION; SCHOOL COUNSEL**

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

170 **THE INVESTIGATION; SCHOOL COUNSEL**

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

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

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

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

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

173 **MUST BE IMPARTIAL AND FAIR**

All investigations, decisions and actions must be fair and impartial

174 **MUST BE FAIR AND IMPARTIAL**

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

175 **MUST BE FAIR AND IMPARTIAL**

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

176 **SCHOOL ATTORNEY**

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

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

177 **SCHOOL ATTORNEY**

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

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

178 **EFFECT OF CRIMINAL PROCEEDINGS OR INVESTIGATION**

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

179 **MUST BE FAIR AND IMPARTIAL**

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

180 **MUST BE FAIR AND IMPARTIAL**

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

181 **MUST BE FAIR AND IMPARTIAL**

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

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

When must you "recuse" yourself?

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

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

When must you recuse yourself?

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

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

When must you recuse yourself?

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

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

When must you recuse yourself?

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

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

When must you recuse yourself?

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

187 **PRACTICAL TIPS**

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

188 **RULES OF EVIDENCE**

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

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

189 **RULES OF EVIDENCE**

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

190 **RULES OF EVIDENCE--RELEVANCY**

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

191 **RULES OF EVIDENCE--RELEVANCY**

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

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

192 **RULES OF EVIDENCE--RELEVANCY**

Relevancy, cont'd:

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

193 **RULES OF EVIDENCE--RELEVANCY**

Relevancy, cont'd:

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

194 **RULES OF EVIDENCE--PRIVILEGE**

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

195 **RULES OF EVIDENCE—JUDICIAL CODE**

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

196 **RULES OF EVIDENCE—JUDICIAL CODE**

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

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

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

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

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

199 **RULES OF EVIDENCE**

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

200 **RULES OF EVIDENCE—OTHER PRIVILEGES**

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

201 **RULES OF EVIDENCE—STUDENT RECORDS**

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

202 **PRACTICAL TIPS**

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

203 **RULES OF EVIDENCE—ILLEGAL RECORDINGS**

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

204 **PRACTICAL TIPS--RECORDINGS**

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

205 **RULES OF EVIDENCE--HEARSAY**

What is hearsay?

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

206 **RULES OF EVIDENCE--EXCEPTIONS**

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

207 **PRACTICAL TIPS**

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

208 **RULES OF EVIDENCE**

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

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

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

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

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

211 **RULES OF EVIDENCE**

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

212 **BURDEN OF PROOF—PREPONDERANCE**

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

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

213 **BURDEN OF PROOF--PREPONDERANCE**

- Judges explain it as follows:

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

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

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

215 **PRACTICAL TIPS**

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

216 **SHE SAID—HE SAID**

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

217 **"LIVE HEARING"**

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

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

218 **PRACTICAL TIPS**

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

219 **DECIDING CREDIBILITY**

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

220 **DECIDING CREDIBILITY**

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

221 **DECIDING CREDIBILITY**

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

222 **DECIDING CREDIBILITY**

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

223 **DECIDING CREDIBILITY**

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

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

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

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

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

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

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

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

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

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

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

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

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

Understanding our perspective and assumptions:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Usually not an issue, but consider:

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

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

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

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

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

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

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

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

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

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

Track 1:

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

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

Track 1:

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

250 **NO CONTACT ORDERS**

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

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

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

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

252 **THANK YOU AND STAY SAFE!**

DISCRIMINATION
COMPLAINT PROCEDURES

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

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

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

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

Definitions

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

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

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

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

1. Sufficiently severe, persistent or pervasive; and

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

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

Reasonable Accommodations

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

Required Reporting Under Other Policies

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

Timeframes

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

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

1. The absence of a party or a witness.

2. Concurrent law enforcement activity.

3. Need for language assistance or accommodation of disabilities.

PROCEDURES FOR COMPLAINTS OF DISCRIMINATION

Step 1 – Reporting

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

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

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

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

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

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

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

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

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

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

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

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

Step 2 – Initial Communications/Supports

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

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

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

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

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

Informal Remedies -

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

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

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

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

Step 3 – Investigation

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

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

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

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

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

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

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

Step 4 – Investigative Report

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

{ } twenty (20) school days

{ } thirty (30) school days

{ } _____ school days

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

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

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

Step 5 – District Action

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

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

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

Appeal Procedure

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

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

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

{ } five (5) school days.

{ } ten (10) school days.

{ } twenty (20) school days.

{ } _____ school days.

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

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

4000-01-U

DEPARTMENT OF EDUCATION

34 CFR Part 106

[Docket ID ED-2018-OCR-0064]

RIN 1870-AA14

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

AGENCY: Office for Civil Rights, Department of Education.

ACTION: Final rule.

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

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

DATES: These regulations are effective August 14, 2020.

FOR FURTHER INFORMATION CONTACT**:**

Alejandro Reyes, U.S. Department of Education, 400 Maryland Avenue SW, Room 4E308, Washington, DC 20202. Telephone: (202) 453-6639. Email: Alejandro.Reyes@ed.gov.

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:

Effective Date

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

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

Executive Summary

Purpose of this Regulatory Action

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

[1] 20 U.S.C. 1681 ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .").
[2] 441 U.S. 677 (1979).
[3] *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979).

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

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

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

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[4] 20 U.S.C. 1682 ("Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity . . . is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.").

[5] 40 FR 24128 (June 4, 1975) (codified at 45 CFR part 86). In 1980, Congress created the United States Department of Education. Public Law 96-88, sec. 201, 93 Stat. 669, 671 (1979); Exec. Order No. 12212, 45 FR 29557 (May 2, 1980). By operation of law, all of HEW's determinations, rules, and regulations continued in effect and all functions of HEW's Office for Civil Rights, with respect to educational programs, were transferred to the Secretary of Education. 20 U.S.C. 3441(a)(3). The regulations implementing Title IX were recodified without substantive change in 34 CFR part 106. 45 FR 30802, 30955-65 (May 9, 1980).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Summary of the Major Provisions of This Regulatory Action

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

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

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

Regarding sexual harassment, the final regulations:

- Define the conduct constituting sexual harassment for Title IX purposes;
- Specify the conditions that activate a recipient's obligation to respond to allegations of sexual harassment and impose a general standard for the sufficiency of a recipient's response, and specify requirements that such a response much include, such as offering supportive measures in response to a report or formal complaint of sexual harassment;
- Specify conditions that require a recipient to initiate a grievance process to investigate and adjudicate allegations of sexual harassment; and
- Establish procedural due process protections that must be incorporated into a recipient's grievance process to ensure a fair and reliable factual determination when a recipient investigates and adjudicates a formal complaint of sexual harassment.

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

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

Timing, Comments, and Changes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[48] 526 U.S. 629 (1999).
[49] *Id.* at 650 (holding that "funding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.").
[50] *See id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[57] The final regulations define sexual harassment in § 106.30 as follows: Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:
(1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
(2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
(3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

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

[59] The final regulations define "actual knowledge" in § 106.30 as notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary or secondary school.

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

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

Differences Between Standards in Department Guidance and These Final Regulations

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

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

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

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

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

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

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

[64] 1997 Guidance ("Once a school has notice of possible sexual harassment of students – whether carried out by employees, other students, or third parties – it should take immediate and appropriate steps to investigate or otherwise determine what occurred and take steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again.").

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

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

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

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

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

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

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

The 2017 Q&A used the definition of actionable sexual harassment as described in the 2001 Guidance, stating that "when sexual misconduct is so severe, persistent, or pervasive as to deny or limit a student's ability to participate in or benefit from the school's programs or activities, a hostile environment exists and the school must respond."[77] The 2017 Q&A relied on the 2001 Guidance's condition of constructive notice rather than actual knowledge.[78] Although the 2017 Q&A did not expressly address the deliberate indifference versus strict liability standard, it directed recipients to the 2001 Guidance for topics not addressed in the 2017 Q&A,[79] including what it means for a school to "respond appropriately" when the school "knows or

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

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

[77] 2017 Q&A at 1.

[78] 2017 Q&A at 2 (citing to the 2001 Guidance for the proposition that "where the school *knows or reasonably should know of an incident* of sexual misconduct, the school must take steps to understand what occurred and to respond appropriately") (emphasis added).

[79] *See* 2017 Q&A at 1 ("The Department of Education intends to engage in rulemaking on the topic of schools' Title IX responsibilities concerning complaints of sexual misconduct, including peer-on-peer sexual harassment and sexual violence. The Department will solicit input from stakeholders and the public during that rulemaking process. *In the interim, these questions and answers – along with the [2001] Revised Sexual Harassment Guidance previously issued by the Office for Civil Rights – provide information about how OCR will assess a school's compliance* with Title IX.") (emphasis added).

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

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

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

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

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

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

Definition of Sexual Harassment

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

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

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

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

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

[89] *Davis*, 526 U.S. at 650 ("We thus conclude that funding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."); § 106.30 (defining "sexual harassment" to include conduct "on the basis of sex" including "unwelcome conduct" that a reasonable person would determine to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity).

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

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

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

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

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

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

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

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

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

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

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

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[96] Janet Napolitano, *"Only Yes Means Yes": An Essay on University Policies Regarding Sexual Violence and Sexual Assault*, 33 YALE L. & POL'Y REV. 387, 388 (2015).
[97] *Id.*
[98] *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) ("For sexual harassment to be actionable, it must be sufficiently severe *or* pervasive to alter the conditions of [the victim's] employment and create an abusive working environment.") (internal quotation marks and citation omitted) (emphasis added).
[99] 2001 Guidance at vi (stating that "the definition of hostile environment sexual harassment found in OCR's 1997 guidance . . . derives from Title VII caselaw").

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

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

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

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

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

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

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

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

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

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

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

Actual Knowledge

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[127] *See* 2001 Guidance at 13.
[128] *Davis*, 526 U.S. at 646 (noting that a public school's power over its students is "custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults") (citing *Veronica Sch. Dist. v. Acton*, 515 U.S. 646, 655 (1995)).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[145] 2001 Guidance at 13.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Deliberate Indifference

Once a recipient is charged with actual knowledge of sexual harassment in its education program or activity, it becomes necessary to evaluate the recipient's response. Although the Department is not required to adopt the deliberate indifference standard articulated in the *Gebser/Davis* framework, we believe that deliberate indifference, with adaptions for administrative enforcement, constitutes the best policy approach to further Title IX's non-discrimination mandate.

As the Supreme Court explained in *Davis*, a recipient acts with deliberate indifference only when it responds to sexual harassment in a manner that is "clearly unreasonable in light of the known circumstances"[161] because for a recipient with actual knowledge to respond in a

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

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

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

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

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

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

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

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

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

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

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

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

[166] 2001 Guidance at 15 (stating recipients "should take immediate and appropriate steps to investigate or otherwise determine what occurred and take prompt and effective steps reasonably calculated to end any harassment, eliminate

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

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

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

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

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

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

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

[171] *See* 2001 Guidance at 16 ("Appropriate steps should be taken to end the harassment. For example, school personnel may need to counsel, warn, or take disciplinary action against the harasser, based on the severity of the harassment or any record of prior incidents or both."); 2011 Dear Colleague Letter at 15 (addressing sexual harassment may necessitate "counseling or taking disciplinary action against the harasser"); 2017 Q&A at 6 ("Disciplinary sanction decisions must be made for the purpose of deciding how best to enforce the school's code of student conduct while considering the impact of separating a student from her or his education. Any disciplinary decision must be made as a proportionate response to the violation.").

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[186] 2001 Guidance at 22.

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

Role of Due Process in the Grievance Process

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

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

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

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

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

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[189] 1997 Guidance ("Schools are required by the Title IX regulations to have grievance procedures through which students can complain of alleged sex discrimination, including sexual harassment."); 2001 Guidance at 19; 2011 Dear Colleague Letter at 6; 2017 Q&A at 3; 34 CFR 106.8(b) ("A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.").

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

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

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

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

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

[192] 2001 Guidance at 22.

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

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

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

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

[194] 2017 Q&A at 1.

[195] 2001 Guidance at 22.

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

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

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

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

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

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

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

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

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

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[201] The Department met with stakeholders expressing a variety of positions for and against the then-applicable Department guidance documents, including advocates for survivors of sexual violence; advocates for accused students; organizations representing schools and colleges; attorneys representing survivors, the accused, and institutions; Title IX Coordinators and other school and college administrators; child and sex abuse prosecutors; scholars and experts in law, psychology, and neuroscience; and numerous individuals who have experienced school-level Title IX proceedings as a complainant or respondent.

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

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

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

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

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

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

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

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

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

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

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

[208] *Id.* at 67.

[209] *Id.* at 77.

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

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

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

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

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

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

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

Due Process Principles

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

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

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

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

[216] *Id.* at 208.

[217] *Id.* at 209.

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

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

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

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

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

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

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

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

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

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

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

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

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

allegations to improve parties' sense of fairness and lead to reliable outcomes, while lessening the risk that sex-based bias will improperly affect outcomes.[237] In the words of the Honorable Ruth Bader Ginsburg, Associate Justice, discussing the #MeToo movement and the search for balance between sex equality and due process, "It's not one or the other. It's both. We have a system of justice where people who are accused get due process, so it's just applying to this field what we have applied generally."[238] The final regulations seek to apply fundamental principles of due process to the "particular situation"[239] of Title IX sexual harassment allegations. We believe the framework of the § 106.45 grievance process furthers Title IX's non-discrimination mandate consistent with constitutional guarantees of due process of law and conceptions of fundamental fairness.

Precisely because due process is a "flexible" concept dictated by the demands of a "particular situation,"[240] the Department recognizes, and these final regulations reflect, that due process protections in the "particular situation" of a recipient's response to sexual harassment may dictate different procedures than what might be appropriate in other situations (e.g., the

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[237] For discussion of sex-based bias in Title IX grievance proceedings, the "Section 106.45(a) Treatment of Complainants or Respondents Can Violate Title IX" subsection of the "General Requirements for § 106.45 Grievance Process" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble.

[238] Jeffrey Rosen, *Ruth Bader Ginsburg Opens Up About #MeToo, Voting Rights, and Millennials*, THE ATLANTIC (Feb. 15, 2018) ("Rosen: What about due process for the accused? Ginsburg: Well, that must not be ignored and it goes beyond sexual harassment. The person who is accused has a right to defend herself or himself, and we certainly should not lose sight of that. Recognizing that these are complaints that should be heard. There's been criticism of some college codes of conduct for not giving the accused person a fair opportunity to be heard, and that's one of the basic tenets of our system, as you know, everyone deserves a fair hearing. Rosen: Are some of those criticisms of the college codes valid? Ginsburg: Do I think they are? Yes. Rosen: I think people are hungry for your thoughts about how to balance the values of due process against the need for increased gender equality. Ginsburg: It's not one or the other. It's both. We have a system of justice where people who are accused get due process, so it's just applying to this field what we have applied generally.").

[239] *Mathews,* 424 U.S. at 334 (internal quotation marks and citations omitted).

[240] *Id*.

noneducational context of a criminal trial[241] or the administrative context of a government agency's determination of eligibility for public benefits,[242] or the educational context involving allegations of student academic misconduct[243]). Allegations of sexual harassment in an educational environment present unique challenges for the individuals involved, and for the recipient, with respect to how to best ensure that parties are treated fairly and accurate outcomes result.

Furthermore, due process protections in the "particular situation"[244] of elementary and secondary schools may differ from protections necessitated by the "particular situation" of postsecondary institutions. Thus, some procedural rules in the § 106.45 grievance process apply only to postsecondary institution recipients,[245] in recognition that postsecondary institutions present a different situation than elementary and secondary schools because, for instance, most students in elementary and secondary schools tend to be under the age of majority such that certain procedural rights generally cannot be exercised effectively (even by a parent acting on

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[241] For instance, in the criminal context, the U.S. Constitution imposes specific due process of law requirements that the Supreme Court has not required to be given to defendants in noncriminal matters, such as the right to be provided with effective assistance of counsel, the right to personally confront witnesses, and the right to have guilt determined under a standard of evidence described as "beyond a reasonable doubt." *See, e.g.*, *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing.").

[242] *E.g.*, *Mathews*, 424 U.S. at 348 ("The ultimate balance [of due process owed] involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness.").

[243] The Supreme Court has distinguished between the level of deference courts should give schools with respect to student discipline resulting from academic misconduct or academic failure, and other types of student misconduct. *E.g.*, *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 86 (1978) (stating that the Court will grant greater deference to public schools in decision making in academic, as opposed to disciplinary, dismissals and, would require more stringent procedural requirements in dismissals based upon purely disciplinary matters).

[244] *Mathews,* 424 U.S. at 334 (internal quotation marks and citations omitted).

[245] Section 106.45(b)(6)(i) requires postsecondary institutions to use a live hearing model to adjudicate formal complaints, while § 106.45(b)(6)(ii) does not require elementary or secondary schools to hold any kind of hearing to adjudicate formal complaints.

behalf of a minor[246]). For example, unlike postsecondary institutions, elementary and secondary schools are not required to hold a hearing under these final regulations.[247] The final regulations aim to accomplish the objective of a consistent, predictable Title IX grievance process while respecting the fact that elementary and secondary schools differ from postsecondary institutions.

However, the Department does not believe that the public or private status of a recipient, or the size of the recipient's student body, constitutes a different "particular situation"[248] that necessitates or advises different procedural protections. The Department recognizes that some recipients are State actors with responsibilities to provide due process of law to students and employees under the U.S. Constitution, including the Fourteenth Amendment, while other recipients are private institutions that do not have constitutional obligations to their students and employees. As previously explained, the Department, as an agency of the Federal government, will not interpret or enforce Title IX in a manner that would require any recipient, including a private recipient, to deprive a person of constitutional due process rights.[249] As a matter of policy, the Department cannot justify requiring a different grievance process for complainants and respondents based on whether the recipient is a public or private entity, or based on whether

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[246] The final regulations expressly recognize legal rights of parents and guardians to act on behalf of an individual with respect to exercising Title IX rights. § 106.6(g).
[247] Section 106.45(b)(6)(i)-(ii).
[248] *Mathews,* 424 U.S. at 334 (internal quotation marks and citations omitted).
[249] The Department also cannot interpret Title IX to compel a private recipient to deprive a person of their due process rights because the Department, as an agency of the Federal government, is subject to the U.S. Constitution. In *Peterson v. City of Greenville*, 373 U.S. 244, 247-48 (1963), the U.S. Supreme Court held that the City of Greenville through an ordinance could not compel a private restaurant to operate in a manner that treated patrons differently on the basis of race in violation of the Equal Protection Clause of the Fourteenth Amendment. Similarly, in *Truax v. Raich*, 239 U.S. 33, 38 (1915), the Supreme Court held that Arizona cannot use a State statute to compel private entities to employ a specific percentage of native-born Americans as employees in violation of the Equal Protection Clause of the Fourteenth Amendment. Like the City of Greenville and the State of Arizona, the Department cannot compel private schools to comply with Title IX in a manner that would require the private recipient to violate a person's due process rights.

the recipient enrolls a large number or small number of students. Additionally, many private schools owe students and employees fundamental fairness, often recognized by contract and under State laws[250] and while conceptions of fundamental fairness may not always equate to constitutional due process requirements, there is conceptual and practical overlap between the two.[251] Title IX applies to all recipients of Federal financial assistance, whether the recipient is a public or private entity and regardless of the size of the recipient's student body. Fair, reliable procedures that best promote the purposes of Title IX are as important in public schools, colleges, and universities as in private ones, and are as important in large institutions as in small ones. The final regulations therefore prescribe a consistent grievance process for application by all recipients without distinction as to public or private status, or the size of the institution.[252]

The grievance process prescribed in the final regulations is important for effective enforcement of Title IX and is consistent with constitutional due process and conceptions of fundamental fairness. The § 106.45 grievance process is designed for the particular "practical matters"[253] presented by allegations of sexual harassment in the educational context. The Department acknowledges that constitutional due process does not require the specific

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[250] *E.g.*, *Doe v. College of Wooster*, 243 F. Supp. 3d 875, 890-91 (N.D. Ohio 2017) ("[C]ourts consider whether the disciplinary process afforded by the [private] academic institution was 'conducted with notions of basic fairness'"); *Psi Upsilon of Pa. v. Univ. of Pa.*, 591 A.2d 755, 758 (Pa. 1991) (holding that "disciplinary procedures established by the [private] institution must be fundamentally fair").

[251] *See* Holly Hogan, *The Real Choice in a Perceived "Catch-22": Providing Fairness to Both the Accused and Complaining Students in College Sexual Assault Disciplinary Proceedings*, 38 JOURNAL OF L. & EDUC. 27 (2009) ("Even when the due process clause does not apply to a private university's disciplinary proceedings, a private university must nevertheless comply with its own procedural rules. . . . Because private higher education institutions often model their disciplinary proceedings on due process requirements, as a practical matter" the same principles apply to both private and public institutions) (internal citations omitted).

[252] As discussed in the "Regulatory Impact Analysis" section of this preamble, the Department considered the impact of these final regulations on small entities, but as a policy matter, does not believe that different procedures should apply based on the size of a recipient's student body or the amount of a recipient's revenues.

[253] *See Goss*, 419 U.S. at 578-79.

procedures included in the § 106.45 grievance process. However, the § 106.45 grievance process is consistent with the constitutional requirement to provide notice and a meaningful opportunity to be heard, and does so for the benefit of complainants and respondents, to address policy considerations unique to sex discrimination in the form of sexual harassment in education programs and activities. For example, if a recipient dismisses a formal complaint or any allegations in the formal complaint, the complainant should know why any of the complainant's allegations were dismissed and should also be able to challenge such a dismissal by appealing on certain grounds.[254] Even though constitutional due process may not require the specific procedure of a written notice of the dismissal stating the reasons for the dismissal, or the right to appeal the dismissal, such strong due process protections help ensure that a recipient is not erroneously dismissing an allegation due to a procedural irregularity, lack of knowledge of newly discovered evidence, or a conflict of interest or bias.[255] As discussed throughout this preamble and especially in the "Section 106.45 Recipient's Response to Formal Complaints" section, each of the procedural requirements in § 106.45 is prescribed because the Department views the requirement as important to ensuring a fair process for both parties rooted in the fundamental due process principles of notice and meaningful opportunities to be heard.[256]

In issuing these final regulations with a standardized grievance process for Title IX sexual harassment, the Department has carefully considered the public comments on the NPRM. The public comments have been crucial in promulgating the procedures that are most needed to

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[254] *See* §106.45(b)(3); § 106.45(b)(8)(i).
[255] *Id*.
[256] *See Goss*, 419 U.S. at 578-79 (holding that in the public school context "the interpretation and application of the Due Process Clause are intensely practical matters" that require at a minimum notice and "opportunity for hearing appropriate to the nature of the case") (internal quotation marks and citations omitted).

(i) improve perceptions that Title IX sexual harassment allegations are resolved fairly and reliably, (ii) avoid intentional or unintentional injection of sex-based biases and stereotypes into proceedings that too often have been biased for or against parties on the basis of sex, mostly because the underlying allegations at issue involve issues of sex-based conduct, and (iii) promote accurate, reliable outcomes so that victims of sexual harassment receive remedies restoring and preserving equal educational opportunities and respondents are not treated as responsible unless a determination of responsibility is factually reliable.

Summary of § 106.45

As a whole, § 106.45 contains ten groups of provisions[257] that together are intended to provide a standardized framework that governs recipients' responses to formal complaints of sexual harassment under Title IX:

(1) Section 106.45(a) acknowledges that a recipient's treatment of a complainant, or a respondent, could constitute sex discrimination prohibited under Title IX.

(2) Section 106.45(b)(1)(i)-(x) requires recipients to adopt a grievance process that:

- treats complainants and respondents equitably by recognizing the need for complainants to receive remedies where a respondent is determined responsible and for respondents to face disciplinary sanctions only after a fair process determines responsibility;

[257] Although not located in § 106.45, the final regulations also add § 106.71 to expressly prohibit retaliation against any individual exercising rights under Title IX, specifically protecting any individual's right to participate or refuse to participate in a Title IX grievance process.

- objectively evaluates all relevant evidence both inculpatory and exculpatory, and ensures that rules voluntarily adopted by a recipient treat the parties equally;
- requires Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolutions to be free from conflicts of interest and bias and trained to serve impartially without prejudging the facts at issue;
- presumes the non-responsibility of respondents until conclusion of the grievance process;
- includes reasonably prompt time frames for the grievance process;
- informs all parties of critical information about the recipient's procedures including the range of remedies and disciplinary sanctions a recipient may impose, the standard of evidence applied by the recipient to all formal complaints of sexual harassment under Title IX (which must be either the preponderance of the evidence standard, or the clear and convincing evidence standard), the recipient's appeal procedures, and the range of supportive measures available to both parties; and
- protects any legally recognized privilege from being pierced during a grievance process.

(3) Section 106.45(b)(2) requires written notice of the allegations to both parties, including informing the parties of the right to select an advisor of choice.

(4) Sections 106.45(b)(3)-(b)(4) require recipients to investigate formal complaints, describe when a formal complaint is subject to mandatory or discretionary dismissal, require the recipient to notify the parties of any dismissal, and authorize discretionary

consolidation of formal complaints when allegations of sexual harassment arise out of the same facts or circumstances.

(5) Section 106.45(b)(5)(i)-(vii) requires recipients to investigate formal complaints in a manner that:

- keeps the burden of proof and burden of gathering evidence on the recipient while protecting every party's right to consent to the use of the party's own medical, psychological, and similar treatment records;
- provides the parties equal opportunity to present fact and expert witnesses and other inculpatory and exculpatory evidence;
- does not restrict the parties from discussing the allegations or gathering evidence;
- gives the parties equal opportunity to select an advisor of the party's choice (who may be, but does not need to be, an attorney);
- requires written notice when a party's participation is invited or expected for an interview, meeting, or hearing;
- provides both parties equal opportunity to review and respond to the evidence gathered during the investigation; and
- sends both parties the recipient's investigative report summarizing the relevant evidence, prior to reaching a determination regarding responsibility.

(6) Section 106.45(b)(6) requires a live hearing with cross-examination conducted by the parties' advisors at postsecondary institutions, while making hearings optional for elementary and secondary schools (and other recipients that are not postsecondary institutions) so long as the parties have equal opportunity to submit written questions

for the other parties and witnesses to answer before a determination regarding responsibility is reached.

(7) Section 106.45(b)(7) requires a decision-maker who is not the same person as the Title IX Coordinator or the investigator to reach a determination regarding responsibility by applying the standard of evidence the recipient has designated in the recipient's grievance process for use in all formal complaints of sexual harassment (which must be either the preponderance of the evidence standard or the clear and convincing evidence standard), and the recipient must simultaneously send the parties a written determination explaining the reasons for the outcome.

(8) Section 106.45(b)(8) requires recipients to offer appeals equally to both parties, on the bases that procedural deficiencies, newly discovered evidence, or bias or conflict of interest affected the outcome.

(9) Section 106.45(b)(9) allows recipients to offer and facilitate informal resolution processes, within certain parameters to ensure such informal resolution only occurs with the voluntary, written consent of both parties; informal resolution is not permitted to resolve allegations that an employee sexually harassed a student.

(10) Section 106.45(b)(10) requires recipients to maintain records and documentation concerning sexual harassment reports, formal complaints, investigations, and adjudications; and to publish materials used for training Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolutions on the recipient's website or make these materials available upon request for inspection by members of the public.

The Department has concluded that the above provisions, rooted in due process principles of notice and a meaningful opportunity to be heard and the importance of an impartial process before unbiased officials, set forth the procedures adapted for the practical realities of sexual harassment allegations in an educational context that are most needed to (i) improve perceptions that Title IX sexual harassment allegations are resolved fairly and reliably, (ii) avoid intentional or unintentional injection of sex-based biases and stereotypes into Title IX proceedings, and (iii) promote accurate, reliable outcomes, all of which effectuate the purpose of Title IX to provide individuals with effective protection from discriminatory practices.

Similarities and Differences Between the § 106.45 Grievance Process and Department Guidance

The Department's guidance in 1997, 2001, 2011, and 2017 has interpreted the Department's regulatory requirement in 34 CFR 106.8(b) for recipients to "adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part" as applying to complaints of sexual harassment.[258] The § 106.45 grievance process, and the Department's guidance, largely address the same topics related to an "equitable" grievance process, and the final regulations are in many respects consistent with the Department's guidance. For example, these final regulations and the Department's guidance all address equal opportunity for both parties to present witnesses and evidence.[259] The Department's guidance has always stated that grievance procedures must

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[258] 1997 Guidance (recipients are required by regulations to adopt and publish grievance procedures providing for the "prompt and equitable" resolution of sex discrimination complaints and these procedures apply to complaints of sexual harassment); 2001 Guidance at 19; 2011 Dear Colleague Letter at 8; 2017 Q&A at 3.

[259] 1997 Guidance (to be "equitable" grievance procedures should provide for "the opportunity to present witnesses and other evidence"); 2001 Guidance at 20; 2011 Dear Colleague Letter at 9; 2017 Q&A at 3; *see also* § 106.45(b)(5)(ii) (grievance process must give both parties equal opportunity to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence); § 106.45(b)(5)(iii) (recipients may not restrict the ability of parties to gather evidence).

provide for "adequate, reliable, and impartial investigation of complaints,"[260] and these final regulations adopt that premise and explicitly instruct recipients to investigate and adjudicate in a manner that is (and ensure that Title IX personnel receive training to be) impartial and unbiased,[261] and to objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence.[262] These final regulations also expressly protect information protected by legally recognized privileges,[263] ensure that a party's treatment records are not used in a grievance process without the party's voluntary, written consent,[264] require that both parties receive copies of evidence gathered during the investigation that is "directly related to the allegations" in the formal complaint,[265] require that both parties be sent a copy of the recipient's investigative report that summarizes all relevant evidence including inculpatory and exculpatory evidence,[266] and deem questions and evidence about a complainant's prior sexual behavior to be irrelevant (with two limited exceptions).[267] The Department believes that these requirements build upon the expectation set forth in prior guidance, that grievance procedures must provide for the "adequate, reliable, and impartial investigation of complaints."[268]

Some provisions in § 106.45 address topics by requiring procedures that Department guidance did not address, or addressed as a recommendation. For instance, § 106.45(b)(2)

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[260] 1997 Guidance (grievance procedures must provide for "adequate, reliable, and impartial investigation of complaints"); 2001 Guidance at 20; 2011 Dear Colleague Letter at 9; 2017 Q&A at 3; 2017 Q&A at 4 (adding that an "equitable" investigation should include using a trained investigator to "objectively evaluate the credibility of parties and witnesses, synthesize all available evidence – including both inculpatory and exculpatory evidence – and take into account the unique and complex circumstances of each case.").
[261] Section 106.45(b)(1)(iii).
[262] Section 106.45(b)(1)(ii); § 106.45(b)(5)(vii); § 106.45(b)(6).
[263] Section 106.45(b)(1)(x).
[264] Section 106.45(b)(5)(i).
[265] Section 106.45(b)(5)(vi).
[266] Section 106.45(b)(5)(vii).
[267] Section 106.45(b)(6).
[268] 2001 Guidance at 20.

requires written notice of the allegations with sufficient details to permit parties to prepare for an initial interview, which the recipient must send to both parties "upon receipt of a formal complaint," and § 106.45(b)(5)(v) requires written notice to the parties in advance of any meeting, interview, or hearing conducted as part of the investigation or adjudication. The 1997 Guidance, 2001 Guidance, and withdrawn 2011 Dear Colleague Letter were silent on the need for written notice. The 2017 Q&A stated that recipients "should" send written notice of allegations at the start of an investigation, but only "to the responding party" and stated that both parties "should" receive written notice to enable meaningful participation in any interview or hearing.[269] The final regulations make these written notices mandatory, for the benefit of both parties. As a further example, the 1997 Guidance, 2001 Guidance, and 2017 Q&A did not require any specific adjudicatory model, and while the withdrawn 2011 Dear Colleague Letter referred to "the hearing"[270] (thus presuming that adjudications take place after a hearing), no guidance document specifically addressed whether or not recipients should, or must, hold live hearings. Section 106.45(b)(6) clarifies that only postsecondary institutions must hold live hearings; other recipients (including elementary and secondary schools) may use a hearing or non-hearing model for adjudication. Similarly, the 1997 Guidance, 2001 Guidance, and 2017 Q&A did not address whether the parties have rights to confront or cross-examine other parties and witnesses,[271] and while the withdrawn 2011 Dear Colleague Letter "strongly discourage[d]" recipients "from allowing the parties personally to question or cross-examine each other during

[269] 2017 Q&A at 4.
[270] 2011 Dear Colleague Letter at 12.
[271] The 2017 Q&A did not require a hearing or cross-examination, but stated that any rights regarding procedures such as cross-examination must be given equally to both parties. 2017 Q&A at 5.

the hearing"[272] the withdrawn 2011 Dear Colleague Letter did not discourage or prohibit cross-examination by the parties' advisors, as required for postsecondary institutions under § 106.45(b)(6)(i).

In some significant respects, § 106.45 departs from positions taken in the Department's guidance by allowing recipients flexibility or discretion in a manner discouraged by guidance. For example, § 106.45(b)(1)(v) permits recipients to designate the recipient's own "reasonably prompt time frames" for conclusion of a grievance process. While the 1997 Guidance[273] and 2001 Guidance[274] were silent on what "prompt" resolution of complaints meant, the withdrawn 2011 Dear Colleague Letter recommended a 60 calendar day time frame.[275] The 2017 Q&A did not recommend a particular time frame for "prompt" resolution and referenced the 2001 Guidance approach on this subject.[276] Similarly, § 106.45(b)(1)(vii) and § 106.45(b)(7)(i) permit each recipient to select between one of two standards of evidence to use in resolving formal complaints of sexual harassment. While the 1997 Guidance and 2001 Guidance were silent on the appropriate standard of evidence, the withdrawn 2011 Dear Colleague Letter acknowledged that at the time, many recipients used the preponderance of the evidence standard, some recipients used the clear and convincing evidence standard, and took the position that only the preponderance of the evidence standard could be consistent with Title IX's non-discrimination

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[272] 2011 Dear Colleague Letter at 12.
[273] 1997 Guidance (a recipient's grievance procedures should provide for "designated and reasonably prompt timeframes for the major stages of the complaint process").
[274] 2001 Guidance at 20 (recipients' grievance procedures should provide for "designated and reasonably prompt timeframes for the major stages of the complaint process").
[275] 2011 Dear Colleague Letter at 12 ("Based on OCR experience, a typical investigation takes approximately 60 calendar days following receipt of the complaint. Whether OCR considers complaint resolutions to be timely, however, will vary depending on the complexity of the investigation and the severity and extent of the harassment.").
[276] 2017 Q&A at 3.

mandate.[277] The 2017 Q&A approved of using either the preponderance of the evidence standard or the clear and convincing evidence standard but cautioned recipients not to apply the preponderance of the evidence standard unless the recipient also used that standard for non-sexual misconduct proceedings.[278] Finally, § 106.45(b)(9) allows recipients the option of facilitating informal resolution processes (except as to allegations that an employee sexually harassed a student) so long as both parties voluntarily agree to attempt an informal resolution. Both the 2001 Guidance[279] and withdrawn 2011 Dear Colleague Letter[280] discouraged schools from using mediation (or other informal resolution) to resolve sexual assault allegations. The 2017 Q&A allowed informal resolution[281] but unlike § 106.45(b)(9)(iii), did not prohibit informal resolution of allegations that an employee sexually harassed a student.

For the purpose of ensuring that recipients reach accurate determinations regarding responsibility so that victims of sexual harassment receive remedies in furtherance of Title IX's non-discrimination mandate in a manner consistent with constitutional due process and fundamental fairness, the § 106.45 grievance process prescribes more detailed procedural requirements than set forth in the Department's guidance in some respects, and leaves recipients with greater flexibility than guidance in other respects.

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[277] 2011 Dear Colleague Letter at 11 ("Thus, in order for a school's grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard.").
[278] 2017 Q&A at 5, fn. 19.
[279] 2001 Guidance at 21 ("In some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis.").
[280] 2011 Dear Colleague Letter at 8 ("Moreover, in cases involving allegations of sexual assault, mediation is not appropriate even on a voluntary basis.").
[281] 2017 Q&A at 4.

Public Comment

In response to our invitation in the NPRM, we received more than 124,000 comments on the proposed regulations. We discuss substantive issues under topical headings, and by the sections of the final regulations to which they pertain.

Analysis of Comments and Changes

An analysis of the public comments and changes in the final regulations since the publication of the NPRM follows.

Personal Stories

Comments: Numerous commenters shared with the Department experiences they have had as complainants or respondents, or people supporting complainants or respondents.

Relating to complainants, such personal experiences included the following:

- A wide variety of individuals shared their stories identifying as survivors or victims, whether or not they were also involved as complainants in Title IX proceedings. These included females, males, LGBTQ individuals, individuals with disabilities, persons of color, individuals who grew up in both rural and urban settings, veterans who were assaulted in the military, and individuals who described being sexually assaulted or harassed more than 50 years ago. The personal stories recounted sexual harassment and assault incidents occurring at all stages in life, including elementary school students, high school students, undergraduate students at public and private universities, graduate students at public and private universities, faculty at public and private universities, and other university employees.
- Commenters shared stories as individuals who knew victims and witnessed the aftermath of trauma. These individuals included parents and grandparents of students who had been assaulted, classmates and friends of victims, teachers at all levels, professors, counselors,

coaches, Title IX Coordinators, rape crisis advocates, graduate students and teaching assistants, resident advisors, social workers, and health care professionals.

- The Department received comments from individuals who described harassment or assault by a wide variety of individuals. These included stalkers, intimate partners and ex-partners, friends, classmates, coaches, teachers and professors, non-students or non-employees on campus, and parents or family members.
- The Department received comments from individuals who described harassment or assault from before Title IX existed, after Title IX was enacted, prior to and after the Department's withdrawn 2011 Dear Colleague Letter and withdrawn 2014 Q&A, and prior to and after the Department's 2017 Q&A. We heard from individuals who described harassment or assault in a wide variety of locations, including on campuses of postsecondary institutions in locations such as student housing, classrooms, and, libraries, on elementary and secondary school grounds, locker rooms, off-campus housing and parties, while commuting to and from school, school-sponsored events, bars and parking lots, and study abroad programs.
- The Department received comments from individuals who described a range of traumatic incidents. Some commenters described inappropriate comments, inappropriate text messages or social media communication, and inappropriate touching. Other commenters recounted incidents of rape or attempted rape, gang rape, or forcible rape. Some commenters described being raped while they were passed out, while others described being drugged and raped, waking up with no memory but suffering symptoms of rape, or being pressured or intimidated into consenting to sex.
- The Department received comments from individuals who did not report their experiences for various reasons, including fearing that no one would believe them, not knowing who to

report to or the process for reporting, feeling too ashamed to report, or not wanting to relive the trauma and wanting to put the incident behind them.

- The Department received comments from individuals about many detrimental effects that sexual harassment and assault can have on victims. Individuals described what it is like to be raped, sexually assaulted, and sexually harassed, what they felt during the attack, and what they felt afterward. Commenters told the Department that rape and sexual assault, in particular, changed their lives forever, and has severe consequences emotionally, physically, academically, and professionally. Commenters also told us about severe post-traumatic stress disorder (PTSD) following sexual assault, about developing disabling physical or mental conditions due to rape, about pregnancy and sexually transmitted diseases resulting from rape, and about the lasting impact on their personal lives. Individuals told us about negative consequences they experienced in the aftermath of sexual assault, including nightmares, emotional breakdowns, lack of sleep, inability to focus or concentrate, changed eating habits, loss of confidence and self-esteem, stress, immense shame, lack of trust, and loneliness.
- Commenters described carrying the pain of victimization with them for life, even after more than half a century. Some commenters shared that they constantly live in fear of seeing their attacker again. Some commenters told us that their experiences affected future relationships and caused them to have trust issues for long periods of time, sometimes for life. Some commenters told us their assaults led to drug and alcohol abuse.
- Some commenters shared stories of friends or loved ones who committed suicide following sexual harassment or assault. Other commenters told us personally about suicidal thoughts and attempted suicide. We heard from some individuals who described still feeling unsafe

once the complaint process began and individuals who suffered increased trauma from having to see their attackers on campus or at a disciplinary proceeding.

- Individuals shared the severe impact of sexual harassment or assault on their educational experience, including the ability to learn and balance pressures of life. Commenters shared that sexual assault or harassment caused them to fail at school, or withdraw or drop out. Some commenters described the lifetime financial costs of dealing with the aftermath of sexual assault including legal and medical costs that exceeded $200,000, and lost income as a result of dropping out of school.
- The Department also received stories from individuals about the dynamics of sexual assault and harassment. Commenters told us that sexual abuse is based on power and inequity and that women are victims of male privilege. Several commenters shared personal stories about how serial offenders keep offending due to the power dynamic. Several commenters shared personal stories describing how sexual harassment by professors at schools was well known, but the schools did nothing.
- The Department also received stories from many individuals about how the current system was inadequate to protect victims of sexual assault or deliver justice. Commenters shared that they did not press charges or report because they had no confidence in the school system or criminal justice system. Commenters told us that they believed their institution was hiding the true numbers of campus rapes. Commenters told us that many Title IX reports are ignored by schools and by police officers. One individual told us that when the individual reported, city police told the individual it was a campus police issue, while campus police refused to take action because the individual had not reported while being raped, leaving the individual to be raped many more times by the same perpetrator while the authorities did nothing.

Individuals told us that perpetrators bully victims into keeping quiet, telling them no one will believe them.

- Individuals shared stories about how their institutions failed them. Some were told by their institutions or teachers that no one would believe them or told not to file a complaint. Some commenters shared that complaints were not taken seriously by school officials and that lack of action caused them to drop out of school to avoid their attacker. Commenters described experiences as complainants and told us that the Title IX Coordinator seemed more interested in proving the respondent innocent than helping the complainant.
- Several complainants told us they were blamed and shamed by authority figures including having their clothing choices questioned, decisions questioned, intelligence questioned, motives questioned, and being told they should have resisted more or been louder in saying "no."
- Individuals shared their experiences showing that it is difficult to prove rape in "he said/she said" situations. Individuals told us that respondents were found to not be at fault by hearing panels, including in instances where insufficient evidence was found despite multiple complainants reporting against the same respondent.
- Several individuals told us the current process took too long, sometimes nine months to over a year or more to get a resolution. One commenter described reporting sexual harassment at a university, along with other women who had reported the same harassing faculty member, but the university's process took so long and was so painful that the commenter left the university without finishing her degree, abandoning her career in a STEM (science, technology, engineering, medicine) field and resulting in $75,000 lost to taxpayers, wasted on funding a degree she did not finish.

- Individuals told us that respondents were given minimal punishment that did not fit the severity of the offense, or that victims were forced to encounter their perpetrators even after the respondents were found responsible. They told us that their perpetrators were well respected students or athletes in school, or prominent professors at universities, which caused the perpetrators to receive light punishments or no punishment at all. They told us they could not get attackers banned from their dorms or classes.
- We also heard from individuals who faced retaliation for filing complaints. These individuals faced continued harassment by respondents, received lower grades from professors reported as harassers, or lost scholarships due to rebuffing sexual advances from teachers.
- We also heard from several commenters about how the Title IX system was able to deliver justice for them in the aftermath of sexual harassment or assault, including commenters who believed that the withdrawn 2011 Dear Colleague Letter was the reason why their school responded appropriately to help them after they had been sexually assaulted. They told us that the counselors and resources available to help victims were the only reason they could survive the trauma or the Title IX process. They told us that the Title IX Coordinator was able to help them in ways that allowed them to stay in school. They also told us of instances where the campus system was finally able to remove a serial sexual predator. The father of a stalked student told us that he feared participation in a Title IX proceeding, but that because of Title IX, the stalker was excluded, and the campus is a safer place. One student stated a college made necessary changes after the student filed a Title IX complaint.
- A number of individuals told us that the proposed regulations would not be adequate to help victims, based on their own experiences with the Title IX process. Commenters expressed concern that the proposed rules would cause students to drop out of school and lose

scholarships. Other commenters asserted the proposed rules would enable serial rapists and harassers.

- Some individuals told us they never would have reported under the proposed rules because of the cross-examination requirement. Individuals who went through cross-examination in the criminal context told us how they suffered to get justice and that it is a traumatic experience that led to PTSD and more therapy. Several of these individuals told us defense attorneys badgered or humiliated them.
- One commenter expressed concern that, under the proposed rules' definition of sexual harassment, it could be argued that the rape that a friend endured was not a sufficiently severe impairment to the friend's educational access to be covered by Title IX.
- One commenter, who was a professor, told us that years ago a professor from another school who was interviewing for a position at the commenter's institution molested the commenter during an off-campus dinner. The commenter believed that under that institution's current policies, the commenter had a clear-cut reporting line, and the offender would, at a minimum, have received no further consideration for this job. This commenter claimed, however, that under the Department's proposed rules, even as a faculty member the commenter would not be protected.
- Commenters were also concerned about confidentiality. Several individuals stated they told a trusted coach or teacher, who was forced under current rules to report even though the individuals wanted the conversation to remain confidential. Other individuals stated they would not have reported under the proposed rules due to fear of backlash because of the public nature of reports or proceedings. One commenter recounted a friend's experience and stated that because the commenter's friend's name was not kept confidential during Title IX

proceedings, the commenter's friend quit playing school basketball and dropped out of school to get mental health counseling, due to the public embarrassment from the Title IX proceeding.

Relating to respondents, such personal experiences included the following:

- A wide variety of individuals submitted personal stories of respondents. These included student-respondents in past or present Title IX proceedings, individuals with disabilities such as autism, male and female respondents, respondents of color, faculty-respondents, and graduate-student respondents. We also heard from individuals who were associated with respondents such as friends and classmates, parents and family members, including parents of both males and females and parents of respondents with disabilities, such as OCD (obsessive-compulsive disorder) and autism. Some personal stories came from professors and teachers who had seen the system in action. Some personal stories came from self-proclaimed liberals, Democrats, feminists, attorneys of respondents, and a religious leader.
- A number of the personal stories shared in comments explained the devastating effects that an allegation of sexual assault or harassment can have on a respondent, even if the respondent is never formally disciplined. Commenters contended that one false accusation can ruin someone's life, and told us that the consequences follow respondents for life. Other commenters stated that false allegations, and resulting Title IX processes, destroyed the futures of respondents and kept them from becoming lawyers, doctors, military officers, academics, and resulted in loss of other career opportunities.
- Many commenters told us that false allegations and the Title IX process caused severe emotional distress for respondents and their families. This included several stories of respondents attempting suicide after allegedly false allegations, several stories of respondents

suffering from severe trauma, including anxiety disorders, stress, and PTSD, several stories of respondents suffering clinical depression, and several stories of respondents suffering from lack of sleep and changed eating habits.

- Several commenters told us that, as to respondents who were allowed to stay in school, being falsely accused of sexual misconduct affected their grades and academic performance, and ability to concentrate. Several commenters described the immense public shame and ridicule that resulted from a false allegation of sexual assault.
- Several professors commented that their academic freedom was curtailed due to unfair anti-sexual harassment policies.
- Several commenters described severe financial consequences to respondents and their families due to needing to hire legal representation to defend against allegedly false allegations. Commenters described incurring costs that ranged from $10,000 in legal fees to over $100,000 in legal and medical bills, including psychological treatment, to complete the process of clearing a respondent's name in the wake of a Title IX complaint. One comment was from parents who described feeling forced to put their house up for sale to pay to exonerate their child from baseless allegations.
- Several commenters stated that the status quo system disproportionately affects certain groups of respondents, including males, males of color, males of lower socioeconomic status, and students with disabilities. One commenter argued that the system is tilted in favor of females of means who are connected to the school's donor base.
- A number of respondents or other commenters described respondents being falsely accused and/or unfairly treated by their school in the Title IX process. Commenters shared numerous situations where there was an abundance of evidence indicating consent from both parties,

but the respondent either was still found responsible for sexual assault or was forced to endure an expensive and traumatic process before being found non-responsible.

- Several commenters told us stories where complainants were ex-intimate partners who did not report sexual assault allegations until weeks or months after a breakup, usually coinciding with the respondent finding a new intimate partner, under circumstances that the commenters believed showed that the complainant's motive was jealousy.
- Commenters shared stories of situations where two students engaged in sexual activity and allegations disputed over consent where both parties had been drinking, and commenters believed that many schools treated any intoxication as making a male respondent automatically liable for sexual assault even when neither party had been drinking so much that they were incapacitated.
- Commenters shared stories of situations where respondents were accused by complainants whom respondents had never met or did not recognize. Commenters shared stories of situations where respondents had befriended or comforted individuals who had experienced trauma and eventually found themselves being accused of sexual assault, harassment, or stalking.
- Commenters described their experiences with Title IX cases using negative terms to portray unfairness such as "Kafka-esque," "1984-like," "McCarthy-esque," and "medieval star chamber."
- We heard from several commenters who specifically argued that the withdrawn 2011 Dear Colleague Letter was the cause of the unfair Title IX process for respondents. One commenter expressed that the withdrawn 2011 Dear Colleague Letter destroyed the commenter's family.

- Many commenters opined that various parts of the proposed regulations would have helped prove their innocence or avoided or lessened the emotional, reputational, and financial hardships they experienced due to false accusations.
- A number of commenters expressed that they believed that Title IX investigations were biased in favor of the complainant and gave examples such as allowing only evidence in the complainant's favor, failing to give the hearing panel any opportunity to gauge the complainant's credibility, disallowing the respondent's witnesses from testifying but allowing testimony from all of the complainant's witnesses, and giving the complainant more time to prepare for a hearing or access to more evidentiary materials than the respondent was given.
- A number of commenters discussed the lack of due process protections in their experience with Title IX proceedings. Several students and professors detailed how they were expelled or fired without being permitted to give their side of the story. Several commenters described cases where respondents were suspended indefinitely from college without due process over an allegedly unprovable and false accusation of sexual harassment. Several commenters expressed how institutions took unilateral disciplinary action against respondents with no investigation. Two commenters noted that respondents' requests for autism accommodations were denied or appropriate disability accommodations were never offered.
- A number of commenters discussed how respondents were not allowed to have representation present when they met with the Title IX investigator or during their hearing. Several commenters stated that their advisor or lawyer was not allowed to speak during the hearing.

- A number of commenters described a lack of notice of the charges against them, of the details of the offenses they had allegedly committed, or of the evidence being used against them. Several commenters noted that the Title IX investigation produced a report describing evidence that respondents were not shown until after the opportunity to respond had passed. Several commenters complained that respondents were given no access to investigation documents.
- A number of commenters wrote that respondents felt like they were presumed guilty from the beginning by their institution. Several commenters expressed that they felt like the burden of proof rested completely on the respondent to prove innocence and they felt this was both unfair and un-American.
- A number of commenters described cases where respondents were denied the ability to cross-examine complainants, and even when the institution asked the complainant some questions, the institution refused to ask follow up questions during the hearing. Several commenters recounted cases where investigators did not ask the complainant follow up questions even though there were inconsistencies in the complainant's story.
- Several commenters told us that the university's Title IX decision-maker did not ask the questions that respondents submitted during the hearing. One commenter described a case where a respondent was not allowed to ask the complainant any questions at all; the respondent had to submit any questions ahead of time to a committee chairperson who, in turn, chose which questions to ask the complainant, and chose not to ask the complainant questions that the commenter had wanted asked.
- One attorney of a respondent described a situation where both the respondent and the complainant were allowed to submit only a written statement before the Title IX office made

the final determination. The complainant stated that the conduct at issue between the two was, at least initially, consensual. But due to the absence of cross-examination, the respondent's attorney was never allowed to ask the complainant how the respondent was supposed to know when the conduct became nonconsensual.

- One commenter stated that the respondent was told by the institution that "hearsay was absolutely admissible" yet the respondent had no opportunity to cross-examine witnesses making hearsay statements.
- Several commenters discussed that it took six to 12 months to clear their names from allegedly false accusations. One commenter stated the process took eight months to clear the respondent's name and the respondent was banned from school during that time.
- Several commenters were fearful of retaliation from institutions because they believed their school was biased in favor of complainants. Several commenters stated that their university invented new charges once the original charges against a respondent fell apart.
- Several commenters contended that a broad definition of sexual harassment led to nonsensical outcomes. One commenter shared that a high school boy was charged with creating a hostile environment on the basis of gender after a group of girls accessed his private social media account and took screen shots of comments that the girls found offensive. Another commenter described how a dedicated young professor, who was very popular with students, was forced to take anger management courses at his own expense and then denied continued employment because a female college student reported him to the Title IX office for making a passionate argument in favor of a local issue of workplace politics. One parent shared a story about their daughter, who was accused of sexual exploitation on her campus, put through a hearing process, and given sanctions, for posting (to a private

account) a video clip of herself walking down a common space hallway when someone was having loud sex in the background. One commenter mentioned an incident where a professor was investigated under Title IX just for disagreeing about another professor's Title IX investigation.

- One respondent, who also identified as a sexual assault survivor, stated that, before her own personal experience told her otherwise, she believed that false or wrongful accusations were unimaginable and rare, but that her personal experience as a respondent showed her that false or wrongful accusations of sexual misconduct are much more common than the general population knows or would believe.

Discussion: The Department has thoughtfully and respectfully considered the personal experiences of the many individuals who have experienced sexual harassment; been accused of it; have looked to their schools, colleges, and universities for supportive, fair responses; and have made the sacrifice in time and mental and emotional effort to convey their experiences and perspectives to the Department through public comment. Many of the themes in these comments echo those raised with the Department in listening sessions with stakeholders, leading to the Secretary of Education's speech in September 2017[282] in which she emphasized the importance of Title IX and the high stakes of sexual misconduct. The Secretary observed, after having personally spoken with survivors, accused students, and school administrators, that "the system established by the prior administration has failed too many students."[283] In the Secretary's words,

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

"One rape is one too many. One assault is one too many. One aggressive act of harassment is one too many. One person denied due process is one too many."[284]

The Secretary stated that in endeavoring to find a "better way forward" that works for all students, "non-negotiable principles" include the right of every survivor to be taken seriously and the right of every person accused to know that guilt is not predetermined.[285] It is with those principles in mind that the Department prepared the NPRM, and because of robust public comment including from individuals personally affected by these issues, these final regulations even better reflect those principles.

Changes: In response to the personal stories shared by individuals affected by sexual harassment, the final regulations ensure that recipients offer supportive measures to complainants regardless of participation in a grievance process, and that respondents cannot be punished until the completion of a grievance process,[286] in addition to numerous changes throughout the final regulations discussed in various sections of this preamble.

Notice and Comment Rulemaking Rather Than Guidance

Comments: Many commenters, including some who supported the substance of the proposed rules and others who opposed the substance, commended the Department for following formal rulemaking procedures to implement Title IX reforms instead of imposing rules through sub-regulatory guidance. Many commenters asserted that the notice-and-comment rulemaking

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[284] *Id.*
[285] *Id.*
[286] Section 106.44(a). As discussed throughout this preamble, there are exceptions to this premise: any respondent may be removed from an education program or activity on an emergency basis under § 106.44(c); a non-student employee-respondent may be placed on administrative leave during pendency of a grievance process under § 106.44(d); an informal resolution process, in which the parties voluntarily participate, may end in an agreement under which the respondent agrees to a disciplinary sanction or other adverse consequence, without the recipient completing a grievance process, under § 106.45(b)(9).

process is critical for gathering informed feedback from all stakeholders and strengthening the rule of law, and leads to legal clarity and certainty for institutions and students. Several commenters stated that because the new regulations will be mandatory, they will provide a transparent standard that colleges must meet and a clear standard under which complainants can hold their institutions accountable.

One commenter described the public comment process as demonstrating the values of transparency, fairness, and public dialogue, and appreciated the Department exhibiting those values with this process. One commenter called notice-and-comment a "beautiful tool" which helps Americans participate in the democracy and freedom our land offers; another called it an important step that helps the public have confidence in the Department's rules. One commenter thanked the Department for taking time to solicit public comment instead of rushing to impose rules through guidance because public comment leads to rules that are carefully thought out to ensure that there are not loopholes or irregularities in the process that is adopted.

Another commenter opined that having codified rules will make it easier for colleges and universities to comply with Title IX and will ensure that sexual harassment policies are consistent, making policies and processes related to Title IX sexual harassment investigations more transparent to students, faculty and staff, and the public at large. One commenter, a student conduct practitioner, stated that the management of Title IX cases has felt like a rollercoaster for many years, and having clear regulations will be beneficial for the commenter's profession and the students served by that profession.

Several commenters noted that previous sub-regulatory guidance did not give interested stakeholders the opportunity to provide feedback. One commenter opined that although prior administrations acted in good faith by issuing a series of Title IX guidance documents, prior

administrations missed a critical opportunity by denying stakeholders the opportunity to publicly comment, resulting in many institutions of higher education lacking a clear understanding of their legal obligations; the commenter asserted that public comment reduces confusion for many administrators, Title IX Coordinators, respondents, and complainants, and avoids needless litigation.

One commenter stated that by opening this issue up to the public, the Department has demonstrated sincerity in constructing rules that fully consider the issues and concerns regularly seen by practitioners in the field; the commenter thanked the Department for the time and effort put into clarifying and modifying Title IX regulatory requirements to be relevant and effective for today's issues.

One commenter asserted that the proposed regulations address the inherent problem with "Dear Colleague" letters not being a "regulation." One commenter argued that no administration should have the ability to rewrite the boundaries of statutory law with a mere "Dear Colleague" letter. One commenter applauded the use of the rulemaking process for regulating in this area and encouraged the abandonment of "regulation through guidance." This commenter reasoned that institutions that comply with regulations are afforded certain safe harbors from liability as a matter of law, but institutions that complied with the Department's Title IX guidance were still subjected to litigation. This commenter asserted that recipients were left in a "Catch 22" because Title IX participants' attorneys freely second guessed the Department's Title IX guidance, forcing institutions to choose to follow the Department's guidance yet subject themselves to liability (or at least the prospect of an expensive litigation defense) from parties who had their own theories about discriminatory practices at odds with the Department's guidance, or else

follow a non-discriminatory process different from the Department's guidance and thereby invite enforcement actions from OCR under threat of loss of Federal funds.

Another commenter expressed appreciation that the Department seeks to provide further clarity to a complicated area of civil rights law and contended that since 2001 the Department has made numerous policy pronouncements, some of which have been helpful and others that have caused unnecessary confusion; that the 2001 Guidance was meant to ensure that cases of sexual violence are treated as cases of sexual harassment; that the withdrawn 2011 Dear Colleague Letter rightly addressed the failure of many institutions to address the needs of reporting parties; but by relying on guidance instead of regulations the Department's ability to provide technical assistance to institutions was undermined, and the guidance created further confusion.

One commenter opposed the proposed rules and opined that changing the 1975 Title IX regulations is very serious and change should only be made based on substantial consensus and evidence that any changes are critically needed and cannot be accomplished by traditionally effective guidance such as previous letters and helpful Q&As from the Department. Another commenter opined that under our system of checks and balances, because Congress passed Title IX, Congress should have to approve a regulation like this, issued under Title IX.

Discussion: The Department agrees with the many commenters who acknowledged the importance of prescribing rules for Title IX sexual harassment only after following notice-and-comment rulemaking procedures required by the Administrative Procedure Act ("APA"), 5 U.S.C. 701 *et seq.*, instead of relying on non-binding sub-regulatory guidance. The Department believes that sex discrimination in the form of sexual harassment is a serious subject that deserves this serious rulemaking process. Moreover, the Department believes that sub-regulatory

guidance cannot achieve the goal of enforcing Title IX with respect to sexual harassment because this particular form of sex discrimination requires a unique response from a recipient, and only law and regulation can hold recipients accountable. The Department acknowledges that Congress could address Title IX sexual harassment through legislation, but Congress has not yet done so. Congress has, however, granted the Department the authority and direction to effectuate Title IX's non-discrimination mandate,[287] and the Department is persuaded that the problem of sexual harassment and how recipients respond to it presents a need for the Department to exercise its authority by issuing these final regulations.[288]

Changes: None.

General Support and Opposition

Comments: Many commenters expressed overall support for the proposed rules. One commenter stated that the proposed rules are a reasonable means by which the Department can ensure that colleges and universities do not engage in unlawful discrimination. One commenter supported the proposed rules because they clearly address the problem of sex discrimination, gender bias, and gender stereotyping and asserted that there is widespread public support for the proposed rules based on public polling, opinion editorials, and media articles. Some commenters supported the proposed rules because they protect all students, including LGBTQ students and male

[287] 20 U.S.C. 1682 ("Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity . . . is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.").

[288] The Department notes that the Congress has the opportunity to review these final regulations under the Congressional Review Act, 5 U.S.C. 801 *et seq*.

students. One commenter expressed general support for the proposed rules, but was concerned that changing the rules still will not help victims who are afraid to speak up.

Some commenters expressed support for the proposed rules because they provide clarity and flexibility to institutions of higher education, and some asserted that the proposed rules appropriately establish firm boundaries regarding student safety and protections, while granting institutions flexibility to customize responses based on an institution's unique attributes. These commenters believed the proposed rules included a number of improvements that will assist institutions in advancing these goals. One commenter expressed support for the alignment between the proposed rules and the Clery Act because that will help institutions comply with all regulations and ensure a fair process. One commenter supported the clarity and flexibility in the proposed rules regarding the standards by which schools will be judged in implementing Title IX, the circumstances that require a Title IX response, and the amount of time schools have to resolve a sexual harassment proceeding. One commenter supported the clear directives in the proposed rules regarding how investigations must proceed and the written notice that must be provided to both parties, the opportunity for schools to use a higher evidentiary standard, the definition of sexual harassment, and the discussion of supportive measures. Another commenter characterized the proposed rules as containing several changes to when and where Title IX applies that offer welcome clarification to regulated entities by limiting subjective agency discretion, rolling back previous overreach, and creating certainty by substituting formal rules for nebulous guidance.

Some commenters expressed support for the proposed rules because they represent a return to fairness and due process for both parties, which will benefit everyone. Some of these commenters referenced personal stories in their comments and expressed their opinions that

many accusations are false and lives are being ruined. Some of these commenters also criticized withdrawn Department guidance for not providing adequate due process and for being punitive. One such commenter also criticized the prior Administration for not meeting with organizations or groups advocating for due process or fairness to the accused. Other commenters criticized the status quo system as being arbitrary and capricious, and biased, and stated that decision-makers often do not have the professional autonomy to render decisions incompatible with institutional interests.

Some commenters asserted that the proposed rules would assist victims by ensuring that they are better informed and able to have input in the way their case is handled. Some commenters stated that the proposed rules are important for defining the minimum requirements for campus due process and will help ensure consistency among schools. One commenter asserted that the proposed rules take a crucial step toward addressing systemic bias in favor of complainants who are almost always female and against respondents who are almost always male. The commenter stated that such bias is illustrated by schools that adopt pro-victim processes while claiming that favoring alleged victims is not sex discrimination. One commenter contended that men's rights are under attack and advocacy groups have hijacked Title IX enforcement to engineer cultural change not authorized by the law, engendering hostile relationships and mistrust on campuses between men and women, and contended that current codes of conduct are unconstitutional because of their disparate impact on men.

A number of commenters expressed general support for the proposed rules and suggested additional modifications. Some of these commenters recommended that the Department make the proposed rules retroactive for students who were disciplined unfairly under the previous rules, including requiring schools to reopen and reexamine old cases and then apply these new

rules, if requested to do so by a party involved in the old case. Some commenters stated that colleges should only be responsible for sexual assault or harassment perpetrated by employees of the school, and student-on-student sexual misconduct should not be the school's responsibility because it is outside the scope of Title IX. One of these commenters stated that it would be even better if the Department stopped enforcing Title IX. This commenter asserted that Title IX was passed to ensure that schools do not discriminate against females and it has achieved that objective, and the Department has the right to adopt the minority view in *Davis*,[289] that schools should not be held accountable for student-on-student sexual harassment.

One commenter expressed concern that some education systems are not covered by Title IX even though they receive Federal funding; this commenter specifically referenced fraternities and sororities and stated that this lack of Title IX coverage of Greek life should be reevaluated. One commenter suggested that the Department establish a procedure for the accused to file a complaint with the U.S. Secretary of Education. This commenter also suggested that there be a review board for Title IX accusations, the members of which are detached from the administration of the school. One commenter expressed concern that schools may not comply with the proposed rules and argued that the only lever that will work is a credible threat to cut off Federal funding for lack of compliance. One commenter expressed concern about funds from the U.S. Department of Justice's Office on Violence Against Women (OVW), which the commenter claimed funds studies that are being written only by those who support victims' rights; the

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[289] Commenter cited: *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 661-62 (1999) (Kennedy, J., dissenting) ("Discrimination by one student against another therefore cannot be 'under' the school's program or activity as required by Title IX. The majority's imposition of liability for peer sexual harassment thus conflicts with the most natural interpretation of Title IX's 'under a program or activity' limitation on school liability.") (internal citations omitted).

commenter asserted that OVW funds are being used by campus Title IX offices to investigate and adjudicate allegations of campus sexual assault. This commenter recommended that the Department specify that OVW-funded programs must comply with the new Title IX regulations. One commenter expressed concern over the costs students faced to defend themselves in a Title IX process under the previous rules and suggested that OCR may want to undertake a study on to what extent OCR's previous policies resulted in a serious adverse impact on lower- and moderate-income students and/or students of color since these students likely had fewer resources to pay for their defense.

Discussion: The Department appreciates commenters' variety of reasons expressing support for the Department's approach. The Department agrees that the final regulations will promote protection of all students and employees from sex discrimination, provide clarity as to what Title IX requires of schools, colleges, and universities, help align Title IX and Clery Act obligations, provide consistency while leaving flexibility for recipients, benefit all parties to a grievance process by focusing on a fair, impartial process, and require recipients to offer supportive measures to complainants as part of a response to sexual harassment.

The Department understands commenters' desire to require recipients who have previously conducted grievance processes in a way that the commenters view as unfair to reopen the determinations reached under such processes. However, the Department will not enforce these final regulations retroactively.[290]

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[290] Federal agencies authorized by statute to promulgate rules may only create rules with retroactive effect where the authorizing statute has expressly granted such authority. *See* 5 U.S.C. 551 (referring to a "rule" as agency action with "future effects" in the Administrative Procedure Act); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.").

The Department will continue to recognize, as has the Supreme Court, that sexual harassment, including peer-on-peer sexual harassment, is a form of sex discrimination prohibited under Title IX, and will continue vigorously to enforce Title IX with respect to all forms of sex discrimination.

Commenters questioning whether specific organizations receiving Federal financial assistance (including programs funded through OVW) are covered by Title IX may direct inquiries to the organization's Title IX Coordinator or to the Assistant Secretary, or both, pursuant to § 106.8(b)(1). Complaints alleging that a recipient has failed to comply with Title IX will continue to be evaluated and investigated by the Department. Section 106.45(b)(8) requires appeals from determinations regarding responsibility to be decided by decision-makers who are free from conflicts of interest. Recipients are subject to Title IX obligations, including these final regulations, with respect to all of the recipient's education programs or activities; there is no exemption from Title IX coverage for fraternities and sororities, and in fact these final regulations specify in § 106.44(a) that the education program or activity of a postsecondary institution includes any building owned or controlled by a student organization officially recognized by the postsecondary institution.

The Department appreciates commenters' concerns about the impact of Title IX grievance procedures implemented under withdrawn Department guidance or under status quo policies that commenters believed were unfair. While the Department did not commission a formal study into the impact of previous guidance, the Department conducted extensive stakeholder outreach prior to issuing the proposed rules and has received extensive input through public comment on the NPRM, and believes that the final regulations will promote Title IX enforcement more aligned with the scope and purpose of Title IX (while respecting every

person's constitutional due process rights and right to fundamental fairness) than the Department's guidance has achieved.

Changes: None.

Comments: Numerous commenters, including physicians, parents, students, State coalitions against rape, advocacy groups, sexual assault survivors, ministers, mental health therapists, social workers, and employees at educational institutions expressed general opposition to the proposed rules. A number of commenters emphasized the critical progress spurred on by Title IX. Some commenters emphasized how Title IX has broken down barriers and improved educational access for millions of students for decades, especially for girls and women, including increasing access to higher education, promoting gender equity in athletics, and protecting against sexual harassment. Many of these commenters expressed concern that the proposed rules would undermine this progress towards sex equality and combating sexual harassment when protections are still greatly needed. Some argued that the proposed rules would weaken protections for young women at the very time when the #MeToo movement has shown the pervasiveness of sexual harassment and how much protections are still needed. Other commenters asserted that women and girls still depend on Title IX to ensure equal access in all aspects of education.

A few commenters asserted that the proposed rules violate Christian or Jewish teachings or expressed the view that the proposed rules are immoral, unethical, or regressive. Commenters described the proposed rules using a variety of terms, such as disgusting, unfair, indecent, dishonorable, un-Christian, lacking compassion, callous, sickening, morally bankrupt, cruel, regressive, dangerous, or misguided. Other commenters expressed concern that the proposed rules would "turn back the clock" to a time when schools ignored sexual assault, excused male

misbehavior as “boys will be boys,” and treated sexual harassment as acceptable. Many commenters asserted that the prior Administration’s protections for victims of sexual assault should not be rolled back.

Some commenters expressed the belief that the proposed rules are inconsistent with the purpose and intent of Title IX because they would allow unfair treatment of women, force women to choose between their safety and education, increase the cultural tolerance of sexual assault and predatory behaviors, make it harder for young women to complete their education without suffering the harms of sex-based harassment, and obstruct Title IX’s purpose to protect and empower students experiencing sex discrimination. A few commenters expressed concern that the proposed rules would harm graduate students, who suffer sexual harassment at high rates.

Some commenters expressed the belief that the proposed rules are contrary to sex equality. Commenters asserted that Title IX protects all people from sexual assault, benefits both women and men, and that all students deserve equality and protection from sex discrimination and sexual harassment. Commenters expressed belief that: sexism hurts everyone, including men; men are far more likely to be sexually assaulted than falsely accused of it; both men and women are victims of rape and deserve protection; men on campus are not under attack and need protection as victims more than as falsely accused respondents; and the proposed rules were written to protect males or to protect males more than females, but should protect male and female students equally. Other commenters characterized the proposed rules as part of a broader effort by this Administration to dismantle protections for women and other marginalized groups.

One commenter argued that the Department should spend more time interviewing victims of sexual assault than worrying about whether the accused’s life will be ruined. Other

commenters stated that Title IX should be protected and left alone. One commenter stated that any legislation that limits the rights of the victim in favor of the accused should be scrutinized for intent. One commenter stated that the proposed rules only cater to the Department and its financial bottom line. One commenter supported protecting Title IX and giving girls' sports a future. One commenter asserted that we are losing female STEM (science, technology, engineering, math) leaders that the Nation needs right now.

One commenter urged the Department to create rules that protect survivors, prevent violence and sexual harassment and punish offenders, teach about boundaries and sexuality, and provide counseling and mental health resources to students. One commenter suggested that the Department should use more resources to educate about sexual consent communication, monitor drinking, and provide sexual education because this will protect both male and female students. Some commenters suggested alternate practices to the approaches advanced in the proposed rules, such as: behavioral therapy for offenders and bystander intervention training; best practices for supporting survivors in schools; community-based restorative justice programs; and independent State investigatory bodies independent of school systems with trained investigators. Some commenters expressed concern that the proposed rules ignore efforts to prevent sexual harassment or to address its root causes.

Discussion: The Department appreciates that many commenters with a range of personal and professional experiences expressed opposition to the proposed regulations. The Department agrees that Title IX has improved educational access for millions of students since its enactment decades ago and believes that these final regulations continue our national effort to make Title IX's non-discrimination mandate a meaningful reality for all students.

The Department notes that although some commenters formed opinions of the proposed rules based on Christian or Jewish teachings or other religious views, the Department does not evaluate legal or policy approaches on that basis. The Department believes that the final regulations mark progress under Title IX, not regression, by treating sexual harassment under Title IX as a matter deserving of legally binding regulatory requirements for when and how recipients must respond. In no way do the final regulations permit recipients to "turn back the clock" to ignore sexual assault or excuse sexual harassment as "boys will be boys" behavior; rather, the final regulations obligate recipients to respond promptly and supportively to complainants and provide a grievance process fair to both parties before determining remedies and disciplinary sanctions.

The Department disagrees that changing the status quo approach to Title IX will negatively impact women, children, students of color, or LGBTQ individuals, because the final regulations define the scope of Title IX and recipients' legal obligations under Title IX without regard to the race, ethnicity, sexual orientation, age, or other characteristic of a person.

The Department is committed to the rule of law and robust enforcement of Title IX's non-discrimination mandate for the benefit of individuals in protected classes designated by Congress in Federal civil rights laws such as Title IX. Contrary to a commenter's assertion, the Department is acutely concerned about the way that sexual harassment – and recipients' responses to it – have ruined lives and deprived students of educational opportunities. The Department aims through these final regulations to create legally enforceable requirements for the benefit of all persons participating in education programs or activities, including graduate students, for whom commenters asserted that sexual harassment is especially prevalent.

The Department understands that some commenters opposed the proposed regulations because they want Title IX to be protected and left alone. For reasons explained in the "Notice and Comment Rulemaking Rather Than Guidance" and "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" sections of this preamble, the Department believes that the final regulations create a framework for responding to Title IX sexual harassment that effectuates the Title IX non-discrimination mandate better than the status quo under the Department's guidance documents.

The Department disagrees that the proposed regulations in any manner limit the rights of alleged victims in favor of the accused; rather, for reasons explained in the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble, the prescribed grievance process gives complainants and respondents equally strong, clear procedural rights during a grievance process.[291] Those procedural rights reflect the seriousness of sexual harassment, the life-altering consequences that flow from a determination regarding responsibility, and the need for each determination to be factually accurate. The Department's intent is to promulgate Title IX regulations that further the dual purposes of Title IX: preventing Federal funds from supporting discriminatory practices, and providing individuals with protections against discriminatory practices. The final regulations in no way cater to the Department or the Department's financial bottom line and the Department will enforce the final regulations vigorously to protect the civil rights of students and employees. While the proposed regulations mainly address sex discrimination in the form of sexual harassment, the Department will also

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

continue to enforce Title IX in non-sexual harassment contexts including athletics and equal access to areas of study such as STEM fields.

The Department believes that the final regulations protect survivors of sexual violence by requiring recipients to respond promptly to complainants in a non-deliberately indifferent manner with or without the complainant's participation in a grievance process, including offering supportive measures to complainants, and requiring remedies for complainants when respondents are found responsible. For reasons discussed in the "Deliberate Indifference" subsection of the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, the Department does not require or prescribe disciplinary sanctions and leaves those decisions to the discretion of recipients, but recipients must effectively implement remedies designed to restore or preserve a complainant's equal educational access if a respondent is found responsible for sexual harassment following a grievance process that complies with § 106.45.

The Department understands commenters' beliefs that the Department should create rules that monitor drinking, teach about interpersonal boundaries, sexuality, bystander intervention, and sexual consent communication, and provide counseling and mental health resources to students. The final regulations do not preclude recipients from offering counseling and mental health services, and while the Department does not mandate educational curricula, nothing in the final regulations impedes recipients' discretion to provide students (or employees) with educational information. While these final regulations are concerned with setting forth requirements for recipients' *responses* to sexual harassment, the Department agrees with commenters that educators, experts, students, and employees should also endeavor to *prevent*

sexual harassment from occurring in the first place. The 2001 Guidance took a similar position on prevention of sexual harassment.[292]

The Department appreciates and has considered the many alternative approaches proposed by commenters, including that the Department should require behavioral therapy for offenders, establish best practices for supporting survivors, require restorative justice programs, require that State investigatory bodies independent of school systems conduct Title IX investigations, and address the root causes of sexual harassment. The Department does not require particular sanctions – or therapeutic interventions – for respondents who are found responsible for sexual harassment, and leaves those decisions in the sound discretion of State and local educators. Under the final regulations, recipients and States remain free to consider alternate investigation and adjudication models, including regional centers that outsource the investigation and adjudication responsibilities of recipients to highly trained, interdisciplinary experts. Some regional center models proposed by commenters and by Title IX experts rely on recipients to form voluntary cooperative organizations to accomplish this purpose, while other, similar models involve independent, professional investigators and adjudicators who operate under the auspices of State governments. The Department will offer technical assistance to recipients with respect to pursuing a regional center model for meeting obligations to investigate and adjudicate sexual harassment allegations under Title IX.

Similarly, recipients remain free to adopt best practices for supporting survivors and standards of competence for conducting impartial grievance processes, while meeting obligations

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[292] The 2001 Guidance under the heading "Prevention" states: "Further, training for administrators, teachers, and staff and age-appropriate classroom information for students can help to ensure that they understand what types of conduct can cause sexual harassment and that they know how to respond." 2001 Guidance at 19.

imposed under the final regulations. The final regulations address recipients' required responses to sexual harassment incidents; identifying the root causes and reducing the prevalence of sexual harassment in our Nation's schools remains within the province of schools, colleges, universities, advocates, and experts.

Changes: None.

Comments: Some commenters contended that the proposed rules would have a negative impact on specific populations, including women, persons of color, children, and LGBTQ individuals, and supported keeping Title IX as-is. One commenter believed that many people hold an inaccurate stereotype that sexual assault does not happen at all-women's colleges and felt that the proposed rules would make it harder for students in such environments to get justice or to feel safe in their own dorms.

Some commenters were concerned about the negative impact of the proposed rules on victims and the message the proposed rules send to the public. Commenters asserted that the proposed rules perpetuate the acceptance of sexual assault and harassment and will result in people not believing victims despite how difficult it is to come forward. Commenters expressed concern that the proposed rules will place an additional burden on victims and make it less likely victims will come forward, allowing perpetrators to go unpunished. One commenter asserted that the proposed rules signal to the public and potential sexual harassers and assaulters that their actions will be excused by the Department and not sufficiently investigated by their campuses. Some commenters contended that the proposed rules, if enacted, would: protect abusers and those accused of assault; insulate harassers from punishment or make them feel like they can sexually harass others without consequence; give boys and young men who behave badly or have a sense of entitlement a free pass when it comes to their actions against girls, rather than teaching

men to respect women; make it easier for harassers to get away with it rather than ensuring accountability; allow rapists to escape consequences; continue a culture of impunity; strengthen rape culture; perpetuate systemic gender oppression; undermine efforts to ensure young people understand consent; disempower survivors and reinforce myths that they are at fault for being assaulted; prevent deterrence of sexual abuse; and be designed to protect rich and privileged boys.

Many commenters expressed general concern that the proposed rules would make schools less safe for all students, including LGBTQ students. Commenters identified an array of harms they believed the proposed rules would impose on victims. Commenters argued the proposed rules would: make it less likely victims will be protected, believed, or supported; make it harder for survivors to report their sexual assaults, to get their cases heard, to prove their claims, and to receive justice, despite a process that is already difficult, painful, convoluted, confusing, and lacking in resources, and in which victims fear coming forward; attack survivors in ways that make it harder for them to get help; restrict their rights and harm them academically and psychologically (e.g., dropping out of school, trauma, post-traumatic stress disorder, institutional betrayal, suicide). Commenters argued that the proposed rules would: discourage survivors from coming forward and subject them to retraumatizing experiences in order to seek redress; make schools dangerous by making it easier for perpetrators to get away with heinous acts of gender-based violence; encourage sexually predatory behavior; fail to prioritize the safety of survivors and students; make students feel less safe at school and on campus; jeopardize students' well-being; increase the helplessness survivors feel; and leave victims without recourse. Commenters argued that the proposed rules: put victims at greater risk of retaliation by schools eager to hide misconduct from the public; treat some people as less than others based on

gender; signal that survivors do not matter and that sexual assault can be ignored; hurt real women or show disdain for women and girls; and deny victims due process. Commenters believed that the proposed rules were antithetical to bodily autonomy and reproductive justice values, fail to advance the goal of stopping sexual violence, and shift the costs and burdens to those already suffering from trauma.

Discussion: The Department disagrees that the proposed regulations will negatively impact women, people of color, LGBTQ individuals, or any other population. The proposed regulations are designed to provide supportive measures for all complainants and remedies for a complainant when a respondent is found responsible for sexual harassment, and the Department believes that, contrary to commenters' assertions, the final regulations will help protect against sex discrimination regardless of a person's race or ethnicity, age, sexual orientation, or gender identity and will give complainants greater autonomy to receive the kind of school-level response to a reported incident of sexual harassment that will best help the complainant overcome the effects of sexual harassment and retain educational access. The Department notes that the final regulations do not differentiate between sexual assault occurring at an all-women's college and sexual assault occurring at a college enrolling women and men.

The Department believes that students, employees, recipients, and the public will benefit from the clarity, consistency, and predictability of legally enforceable rules for responding to sexual harassment set forth in the final regulations, and believes that the final regulations will communicate and incentivize these goals, contrary to some commenters' assertions that the final regulations will communicate negative messages to the public. The final regulations, including the § 106.45 grievance process, are motivated by fair treatment of both parties in order to avoid sex discrimination in the way either party is treated and to reach reliable determinations so that

victims receive remedies that restore or preserve access to education after suffering sex discrimination in the form of sexual harassment. The Department recognizes that anyone can be a victim, and anyone can be a perpetrator, of sexual harassment, and that each individual deserves a fair process designed to accurately resolve the truth of allegations.

The Department disagrees that the proposed regulations perpetuate acceptance of sexual harassment, rape culture, or systemic sex inequality; continue a culture of impunity; will result in people not believing victims; will disempower survivors or increase victim blaming, are designed to protect rich, privileged boys; or will make schools less safe. The Department recognizes that reporting a sexual harassment incident is difficult for many complainants for a variety of reasons, including fear of being blamed, not believed, or retaliated against, and fear that the authorities to whom an incident is reported will ignore the situation or fail or refuse to respond in a meaningful way, perhaps due to negative stereotypes that make women feel shamed in the aftermath of sexual violence. The final regulations require recipients to respond promptly to every complainant in a manner that is not clearly unreasonable in light of the known circumstances, including by offering supportive measures (irrespective of whether a formal complaint is filed) and explaining to the complainant options for filing a formal complaint. The final regulations impose duties on recipients and their Title IX personnel to maintain impartiality and avoid bias and conflicts of interest, so that no complainant or respondent is automatically believed or not believed. Complainants must be offered supportive measures, and respondents may receive supportive measures, whether or not a formal complaint has been filed or a determination regarding responsibility has been made.

The Department is sensitive to the effects of trauma on sexual harassment victims and appreciates that choosing to make a report, file a formal complaint, communicate with a Title IX

Coordinator to arrange supportive measures, or participate in a grievance process are often difficult steps to navigate in the wake of victimization. The Department disagrees, however, that the final regulations place additional burdens on victims or make it more difficult for victims to come forward. Rather, the final regulations place burdens on recipients to promptly respond to a complainant in a non-deliberately indifferent manner. The Department disagrees that the final regulations will excuse sexual harassment or result in insufficient investigations of sexual harassment allegations. Section 106.44(a) obligates recipients to respond by offering supportive measures to complainants, and § 106.45 obligates recipients to conduct investigations and provide remedies to complainants when respondents are found responsible. Thus, a recipient is not permitted under the final regulations to excuse or ignore sexual harassment, nor to avoid investigating where a formal complaint is filed.

Changes: We have revised § 106.44(a) to state that as part of a recipient's response to a complainant, the recipient must offer the complainant supportive measures, irrespective of whether a complainant files a formal complaint, and the Title IX Coordinator must contact the complainant to discuss availability of supportive measures, consider the complainant's wishes regarding supportive measures, and explain to the complainant the process for filing a formal complaint.

Comments: One commenter asked what statistics the proposed rules were based on and stated that the proposed rules seem to not have been thought through. A number of commenters expressed concerns that the proposed rules are not based on sufficient facts, evidence, or research, lack adequate justification, or demonstrate a lack of competence, knowledge, background, and awareness. A number of these commenters suggested gathering further evidence, best practices, and input from students, educators, administrators, advocates, survivors,

and others. One commenter stated that the way to make American life and society safer was to address domestic violence on campuses.

Some commenters expressed concerns that the proposed rules would reduce reporting and investigations of sexual assault. Some commenters argued that many elements of the proposed rules are based on the misleading claim that those accused of sexual misconduct should be protected against false accusations even though research shows that false accusations are rare. Several commenters contended that women are more likely to be sexually assaulted than a man is to be falsely accused and similarly, a man is more likely to be sexually assaulted than to be falsely accused of sexual assault.

One commenter stated that the proposed rules would create a two-tiered system to deal with sexual assault cases and would put undue financial burden on the marginalized to pay for representation in an already flawed reporting system. One commenter stated that Title IX should protect all female students from rape, and they should be believed until facts prove them wrong.

Some commenters expressed opposition because the proposed rules protect institutions. Some of these commenters contended that the proposed rules would allow schools to avoid dealing with cases of sexual misconduct and abdicate their responsibility to take accusations seriously. One of these commenters argued it was the Department's job to protect the civil rights of students, not to help shield schools from accountability. One commenter argued that the proposed regulations had been pushed for by education lobbyists. Some commenters expressed concerns about reducing schools' Title IX obligations noting that schools have a long history of not adequately addressing sexual misconduct, have reputational, financial, and other incentives not to fully confront such behavior, and need to be kept accountable under Title IX. A few commenters felt that the proposed regulations would give school officials too much discretion

and that the proposed regulations would result in inconsistencies among institutions in handling cases and in the support provided to students.

A number of commenters felt that the proposed rules prioritize the interests of schools, by narrowing their liability and saving them money, over protections for students. One commenter stated that universities that discriminate on the basis of sex should get no Federal money. One commenter was concerned that the proposed rules would create an environment in which institutions will refuse to take responsibility to avoid the financial aspect of having to make restitution rather than focusing on the well-being of victims. One commenter contended that the proposed rules enable school administrators to sexually abuse students by reducing a school's current Title IX responsibilities. One commenter stated that the proposed rules would hurt victims and perpetrators and leave institutions vulnerable to lawsuits.

Other commenters expressed a belief that the changes may violate constitutional safeguards, such as the rights to equal protection and to life and liberty. Some commenters believed that the proposed rules are in line with regressive laws regarding rape, sexual assault, and women's rights in less democratic countries. A few commenters felt that the proposed rules would signal an increased tolerance internationally for sexual violence, cause international students to avoid U.S. colleges where sexual assault is more prevalent, or compromise the country's ability to compete internationally in STEM fields where U.S. women are reluctant to focus given the prevalence of sexual harassment.

Discussion: The final regulations reflect the Department's legal and policy decisions of how to best effectuate the non-discrimination mandate of Title IX, after extensive internal deliberation, stakeholder engagement, and public comment. The Department is aware of statistics that describe the prevalence of sexual harassment in educational environments and appreciates the

many commenters who directed the Department's attention to such statistics.[293] The Department believes that these final regulations are needed precisely because statistics support the numerous personal accounts the Department has heard and that commenters have described regarding the problem of sexual harassment. The perspectives of survivors of sexual violence have been prominent in the public comments considered by the Department throughout the process of promulgating these final regulations. In response to commenters concerned about addressing domestic violence, the Department has revised the definition of "sexual harassment" in § 106.30 to expressly include domestic violence (and dating violence, and stalking) as those offenses are defined under VAWA, amending the Clery Act.

The Department does not believe the final regulations will reduce reporting or investigations of conduct that falls under the purview of Title IX. Section 106.44(a) requires recipients to respond supportively to complainants regardless of whether a complainant also wants to file a formal complaint. When a formal complaint is filed, the § 106.45 grievance process prescribes a consistent framework, fair to both complainants and respondents, with respect to the investigation and adjudication of Title IX sexual harassment allegations. Thus, both complainants and respondents receive due process protections, and where a § 106.45 grievance process concludes with a determination that a respondent is responsible, the complainant is entitled to remedies. Whether false accusations of sexual harassment occur frequently or infrequently, the § 106.45 grievance process requires allegations to be investigated

[293] Many such statistics are referenced in the "Commonly Cited Sources" and "Data – Overview" subsections of this "General Support and Opposition" section of the preamble.

and adjudicated impartially, without bias, based on objective evaluation of the evidence relevant to each situation.

As to all sexual harassment covered by Title IX, including sexual assault, the final regulations obligate recipients to respond and prescribe a consistent, predictable grievance process for resolution of formal complaints. Nothing in the final regulations precludes a recipient from applying the § 106.45 grievance process to address sexual assaults that the recipient is not required to address under Title IX. The Department disagrees that the proposed regulations put undue financial burden on marginalized individuals to pay for representation. Contrary to the commenter's assertions, § 106.45(b)(5)(iv) gives each party the right to choose an advisor to assist the party, but does not require that the advisor be an attorney (or other advisor who may charge the party a fee for their representation).[294]

The Department believes that schools, colleges, and universities desire to maintain a safe environment and that many have applied substantial effort and resources to address sexual harassment in particular; however, the Department acknowledges that reputational and financial interests have also influenced recipients' approaches to sexual violence problems. Contrary to some commenters' assertions, the proposed regulations neither "protect institutions" nor shield them from liability, but rather impose clear legal obligations on recipients to protect students' civil rights. The Department disagrees that the proposed regulations give recipients too much discretion; instead, the Department believes that the deliberate indifference standard requiring a

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[294] The Department also notes that where cross-examination is required at a live hearing (for postsecondary institutions), the cross-examination must be conducted by an advisor (parties must never personally question each other), and if a party does not have their own advisor of choice at the live hearing, the postsecondary institution must provide that party (at no fee or charge) with an advisor of the recipient's choice, for the purpose of conducting cross-examination, and such a provided advisor may be, but does not need to be, an attorney. § 106.45(b)(6)(i).

response that is not clearly unreasonable in the light of known circumstances, combined with particular requirements for a prompt response that includes offering supportive measures to complainants, strikes an appropriate balance between requiring all recipients to respond meaningfully to each report, while permitting recipients sufficient flexibility and discretion to address the unique needs of each complainant.

While the Department is required to estimate costs and cost savings associated with the final regulations, cost considerations have not driven the Department's legal and policy approach as to how best to ensure that the benefits of Title IX extend to all persons participating in education programs or activities. With respect to sexual harassment covered by Title IX, the final regulations require recipients to take accusations seriously and deal with cases of sexual misconduct, not avoid them. Regardless of whether a recipient wishes to dodge responsibility (to avoid reputational, financial, or other perceived institutional harms), recipients are obligated to comply with all Title IX regulations and the Department will vigorously enforce Title IX obligations. The Department disagrees with a commenter's contention that the final regulations enable school administrators to sexually abuse students; § 106.30 defines Title IX sexual harassment to include *quid pro quo* harassment by any recipient's employee, and includes sexual assault perpetrated by any individual whether the perpetrator is an employee or not. Indeed, if a school administrator engages in any conduct on the basis of sex that is described in § 106.30, then the recipient must respond promptly whenever any elementary or secondary school employee (or any school, college, or university Title IX Coordinator) has notice of the conduct.

The Department believes that the framework in these final regulations for responding to Title IX sexual harassment effectuates the non-discrimination mandate of Title IX for the protection and benefit of all persons in recipients' education programs and activities and

disagrees that the final regulations leave institutions vulnerable to lawsuits. A judicially implied right of private action exists under Title IX, and other Federal and State laws permit lawsuits against schools, but the Department's charge and focus is to administratively enforce Title IX, not to address the potential for lawsuits against institutions. However, by adapting for administrative purposes the general framework used by the Supreme Court for addressing Title IX sexual harassment (while adapting that framework for administrative enforcement) and prescribing a grievance process rooted in due process principles for resolving allegations, the Department believes that these final regulations may have the ancillary benefit of decreasing litigation.

The Department notes that § 106.6(d) expressly addresses the intersection between the final regulations and constitutional rights, stating that nothing in these final regulations requires a recipient to restrict rights guaranteed under the U.S. Constitution. This would include the rights to equal protection and substantive due process referenced by commenters concerned that the proposed rules violate those constitutional safeguards. The Department does not rely on the laws regarding rape and women's rights in other countries to inform the Department's Title IX regulations, but believes that Title IX's guarantee of non-discrimination on the basis of sex in education programs or activities represents a powerful statement of the importance of sex equality in the United States, and that these final regulations effectuate and advance Title IX's non-discrimination mandate by recognizing for the first time in the Department's regulations sexual harassment as a form of sex discrimination.

Changes: We have revised the definition of "sexual harassment" in § 106.30 to include dating violence, domestic violence, and stalking as those offenses are defined under VAWA, amending

the Clery Act. We have revised § 106.44(a) to require recipients to offer supportive measures to each complainant.

Comments: A few commenters argued that any use of personal blogs as a citation or source in Federal regulation is inappropriate and that using a blog as a source in a footnote in the NPRM (for example, a blog maintained by K.C. Johnson, co-author of the book *Campus Rape Frenzy*), is inappropriate and unprofessional; one commenter contested the accuracy of Professor Johnson's compilation on that blog of information regarding lawsuits filed against institutions relating to Title IX campus proceedings. Commenters argued that although people's personal experiences can be highly valuable, using a blog as a citation in rulemaking does not reflect evidence-based practice. Similarly, a few commenters criticized the Department's footnote reference in the NPRM to Laura Kipnis's book *Unwanted Advances* as, among things, evidence that the Department's sources listed in the NPRM suggest undue engagement with materials that promote pernicious gender stereotypes.

A few commenters referenced media reports of statements made by President Trump, Secretary DeVos, and former Acting Assistant Secretary for Civil Rights Candice Jackson as indications that the Department approached the NPRM with a motive of gender bias against women. A few commenters asserted that the Department's footnote citations in the NPRM suggest systematic inattention to the intersection of race and gender relating to Title IX and urged the Department to adopt an intersectional approach because failure to pay attention to how gender interacts with other social identities will result in a failure to effectively meet the Department's goal that all students are able to pursue their educations in federally-funded institutions free from sex discrimination.

Discussion: The source citations in the NPRM demonstrate a range of perspectives about Title IX sexual harassment and proceedings including views both supportive and critical of the status quo approach to campus sexual harassment, all of which the Department considered in preparing the NPRM. The Department believes that whether commenters are correct or not in characterizing certain NPRM footnoted references as personal opinions instead of case studies, the views expressed in the NPRM references warranted consideration. Similarly, the Department has reviewed and considered the views, perspectives, experiences, opinions, information, analyses, and data expressed in public comments, and the wide range of feedback is beneficial as the Department considers the most appropriate ways in which to regulate recipients' responses to sexual harassment under Title IX in schools, colleges, and universities.

The Department maintains that no reported statement on the part of the President, Secretary, or former Acting Assistant Secretary for Civil Rights suggests bias against women. The Department proceeded with the NPRM, and the final regulations, motivated by the commitment to the "non-negotiable principles" of Title IX regulations that Secretary DeVos stated in a speech about Title IX: the right of every survivor to be taken seriously and the right of every person accused to know that guilt is not predetermined.[295]

The Department appreciates that some commenters made assertions that the impact of sexual harassment, and the impact of lack of due process procedures, may differ across demographic groups based on sex, race, and the intersection of sex and race (as well as other characteristics such as disability status, sexual orientation, and gender identity). The Department

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

emphasizes that these final regulations apply to all individuals reporting, or accused of, Title IX sexual harassment, irrespective of race or other demographic characteristics. The Department believes that these final regulations provide the best balance to supportively, fairly, and accurately address allegations of sexual harassment for the benefit of every individual.

Changes: None.

Comments: Some commenters argued that the proposed regulations will cause social discord and make campuses unsafe because survivors will underreport and rates of sexual harassment will increase. Many commenters expressed concern that the proposed rules will discourage or have a chilling effect on reporting sexual harassment and violence, that reporting rates are already low, that the proposed rules would make things worse, and that schools could use the proposed rules to discourage students from reporting against faculty or staff in order to maintain the school's reputation. Commenters contended that this will adversely impact the ability of victims, especially from marginalized populations, to access their education.

Discussion: The Department disagrees that these final regulations will cause social discord or make campuses unsafe, because a predictable, consistent set of rules for when and how a recipient must respond to sexual harassment increases the likelihood that students and employees know that sexual harassment allegations will be responded to promptly, supportively, and fairly. The Department acknowledges data showing that reporting rates are lower than prevalence rates with respect to sexual harassment, including sexual violence, but disagrees that the final regulations will discourage or chill reporting. In response to commenters' concerns that students need greater clarity and ease of reporting, the final regulations provide that a report to any Title IX Coordinator, or any elementary or secondary school employee, will obligate the school to

respond,[296] require recipients to prominently display the contact information for the Title IX Coordinator on recipients' websites,[297] and specify that any person (i.e., the complainant or any third party) may report sexual harassment by using the Title IX Coordinator's listed contact information, and that a report may be made at any time (including during non-business hours) by using the listed telephone number or e-mail address (or by mail to the listed office address).[298] Recipients must respond by offering the complainant supportive measures, regardless of whether the complainant also files a formal complaint or otherwise participates in a grievance process.[299] Such supportive measures are designed precisely to help complainants preserve equal access to their education.

Changes: The Department has expanded the definition of "actual knowledge" in § 106.30 to include reports to any elementary or secondary school employee. We have revised § 106.8 to require recipients to prominently display on recipient websites the contact information for the recipient's Title IX Coordinator, and to state that any person may report sexual harassment by using the Title IX Coordinator's listed contact information, and that reports may be made at any time (including during non-business hours) by using the telephone number or e-mail address, or by mailing to the office address, listed for the Title IX Coordinator. We have revised § 106.44(a) to require recipients to offer supportive measures to every complainant whether or not a formal complaint is filed.

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[296] Section 106.30 (defining "actual knowledge").
[297] Section 106.8(b).
[298] Section 106.8(a).
[299] Section 106.44(a).

Comments: Many commenters stated that student survivors often rely on their academic institutions to allow them some justice and protection from their assailant and that the provisions provided by Title IX, as enforced under the Department's withdrawn 2011 Dear Colleague Letter and withdrawn 2014 Q&A, are important for the continued safety of student victims during and after assault and harassment investigations.

One commenter shared the commenter's own research showing that one of the benefits of the post-2011 Dear Colleague Letter era is that campuses have prioritized fairness and due process, creating more robust investigative and adjudicative procedures that value neutrality and balance the rights of claimants and respondents. Overall, campus administrators that this commenter has interviewed and surveyed say that the attention to Title IX has led to vast improvements on their campuses. Some commenters urged the Department to codify the withdrawn 2011 Dear Colleague Letter.

Other commenters asserted that research suggests that few accused students face serious sanctions like expulsion. Commenters referred to a study that found up to 25 percent of respondents were expelled for being found responsible of sexual assault prior to the withdrawn 2011 Dear Colleague Letter,[300] while a media outlet reported that data obtained under the Freedom of Information Act showed that among 100 institutions of higher education and 478 sanctions for sexual assault issued between 2012 and 2013, only 12 percent of those sanctions were expulsions.[301] Commenters argued that studies suggest that campuses with strong

[300] Commenters cited: Kristen Lombardi, *A Lack of Consequences for Sexual Assault*, THE CENTER FOR PUBLIC INTEGRITY (Feb. 24, 2010).
[301] Commenters cited: Nick Anderson, *Colleges often reluctant to expel for sexual violence*, THE WASHINGTON POST (Dec. 15, 2014).

protections for victims also have the strongest protections for due process, such that campuses that have devoted the most time and resources to addressing campus sexual assault are, in fact, protecting due process. Inconsistent implementation, commenters argued, is not a reason to change the regulations.

Other commenters argued that there is insufficient factual support for the Department's claim that educational institutions were confused about their legal obligations under previous guidance. They noted that the Department did not commission any research or study to specifically analyze schools' understanding of their legal obligation or determine whether there were any areas in which administrators were confused about their responsibilities. Commenters argued that under the withdrawn 2011 Dear Colleague Letter, compliance with expectations under Title IX significantly increased in nearly every major category including compliance with important aspects of due process, such as providing notice and procedural information to students participating in campus sexual violence proceedings. Commenters stated that under the prior administration, the pendulum did not swing "too far" in favor of victims, but instead was placed exactly where it should have been for a population that had previously been dismissed, ignored, and disenfranchised. Commenters argued that any issues with the Title IX grievance process are the result of individual colleges or Title IX Coordinators not following the process correctly and not due to issues with the process itself. Commenters argued that the solution should be additional resources and training for colleges rather than revising the process to favor respondents and make it more difficult for victims to report thereby increasing the already abysmal rate of under reporting.

Commenters asserted that the current Title IX regulations and withdrawn guidance have been supported by universities and the public. Commenters pointed out that when the

Department called for public comment on Department regulations in 2017 before withdrawing the 2011 Dear Colleague Letter, 12,035 comments were filed: 99 percent (11,893) were in support of Title IX and 96 percent of them explicitly supported the 2011 Dear Colleague Letter. When all of the individual comments as well as the petitions and jointly-signed comments are included, commenters stated that 60,796 expressions of support were filed by the public, and 137 comments were in opposition. Commenters requested that the Department build off the framework of the 2011 Dear Colleague Letter for a fair and compassionate method of reporting and adjudication so that both the victims and the accused are treated justly. Many of these commenters argued that due process is important, yet due process rights were always important in previous Department guidance and certainly are best practice. If the Department moves forward with its plans to revise the regulations regarding sexual assault and harassment, commenters argued the Department would be knowingly encouraging a continued culture of rape on campuses all across our country.

Discussion: The Department agrees with commenters who noted that many student survivors rely on their academic institutions to provide justice and protection from their assailant; for these reasons, the final regulations require recipients to offer supportive measures to every complainant whether or not a grievance process is pending, and prescribe a grievance process under which complainants and respondents are treated fairly and under which a victim of sexual harassment must be provided with remedies designed to restore or preserve the victim's equal access to education. The Department recognizes that educational institutions largely have strived in good faith over the last several years to provide meaningful support for complainants while applying grievance procedures fairly and that many institutions have made improvements in their Title IX compliance over the past several years. However, the Department disagrees with

commenters' assertions that the only deficiency with Department guidance (including withdrawn guidance such as the 2011 Dear Colleague Letter and current guidance such as the 2001 Guidance) was inconsistent implementation. Because guidance documents do not have the force and effect of law, the Department's Title IX guidance could not impose legally binding obligations on recipients. By following the regulatory process, the Department through these final regulations ensures that students and employees can better hold their schools, colleges, and universities responsible for legally binding obligations with respect to sexual harassment allegations. The Department appreciates that members of the public expressed support for the 2011 Dear Colleague Letter in 2017; however, the need for regulations to replace mere guidance on a subject as serious as sexual harassment weighed in favor of undertaking the rulemaking process to develop these final regulations. The Department believes that issuing regulations rather than guidance brings clarity, permanence, and accountability to Title IX enforcement. As discussed in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section and the "Role of Due Process in the Grievance Process" section of this preamble, the approach in these final regulations is similar in some ways, and different in other ways, from Department guidance, including the 1997 Guidance, the 2001 Guidance, the withdrawn 2011 Dear Colleague Letter, the withdrawn 2014 Q&A, and the 2017 Q&A. The Department believes that these final regulations provide protections for complainants while ensuring that investigations and adjudications of sexual harassment are handled in a grievance process designed to impartially evaluate all relevant evidence so that determinations regarding responsibility are accurate and reliable, ensuring that victims of sexual harassment receive justice in the form of remedies.

The Department disputes that the approach in these final regulations governing recipient responses to sexual harassment in any way encourages a culture of rape; to the contrary, the Department specifically included sexual assault in the definition of Title IX sexual harassment to ensure no confusion would exist as to whether even a single instance of rape is tolerable under Title IX.

Changes: None.

Comments: The Department received many comments opposing the proposed rules, including personal experiences shared by: survivors; parents, relatives, and friends of survivors; students; educators (current and retired); medical and mental health professionals who treat and work with sexual assault victims; Title IX college officials; law enforcement officials; business owners; religious figures; and commenters who have been accused of sexual assault, who recounted the devastating effects of sexual assault on survivors, stated their opposition to the proposed rules, and affirmed their belief the proposed rules will retraumatize victims, worsen Title IX protections, and embolden predators by making schools less safe. Some commenters believed that if a student is being harassed in the classroom, the proposed rules would lessen the teacher's ability to protect the class effectively.

Commenters also stated that the proposed rules failed to acknowledge how traumatic experiences like sexual violence can impact an individual's neurobiological and physiological functioning. Such commenters asserted that the brain processes traumatic experiences differently than day-to-day, non-threatening experiences; often physiological reactions, emotional responses, and somatic memories react at different times in different parts of the brain, resulting in a non-linear recall (or lack of recall at all) of the traumatic event. Other commenters argued

that trauma-informed approaches result in sexual harassment investigations and adjudications that prejudge the facts and bias proceedings in favor of complainants.

Commenters viewed the proposed rules as allowing schools to intervene only when they deem the abuse is pervasive and severe enough, leaving many survivors in the position to prove their abuse is worthy of their school's attention and action. These commenters asserted that Title IX needs reformation and greater enforcement so that survivors have more recourse in their healing experiences, in addition to preventing these incidents from occurring in the first place, as this is a deeply cultural and systemic problem. Some commenters asserted that those who start these harassing behaviors at a young age will escalate such behaviors in future years, and, as such, the proposed rules would negatively impact the behaviors of our future generations by curtailing punishment and reporting at an early age.

Some commenters stated that, through the proposed rules, many sexual assaults would not be covered by Title IX, and survivors, especially students of color, would not feel protected against possible discrimination and retaliation should they consider disclosure of sexual crimes against them. These commenters argued this would impact all future statistical reporting on nationwide sexual assaults and harassment, thereby affecting funding sources that support survivors of sexual assault that rely on accurate data collection.

Another commenter asserted that the Centers for Disease Control and Prevention has concluded that while risk factors do not cause sexual violence they are associated with a greater likelihood of perpetration, and that "weak community sanctions against sexual violence perpetrators" was a risk factor at the community level while "weak laws and policies related to

sexual violence and gender equity" is a risk factor at the societal level.[302] The commenter argued that the perception and reality is that the proposed rules will weaken efforts to hold perpetrators accountable and increase the likelihood of sexual violence perpetration.

Discussion: The Department appreciates that commenters of myriad backgrounds and experiences emphasized the devastating effects of sexual assault on survivors and the need for strong Title IX protections that do not retraumatize victims. The Department believes that the final regulations provide victims with strong protections from sexual harassment under Title IX and set clear expectations for when and how a school must respond to restore or preserve complainants' equal educational access. Nothing in the final regulations reduces or limits the ability of a teacher to respond to classroom behavior. If the in-class behavior constitutes Title IX sexual harassment, the school is responsible for responding promptly without deliberate indifference, including offering appropriate supportive measures to the complainant, which may include separating the complainant from the respondent, counseling the respondent about appropriate behavior, and taking other actions that meet the § 106.30 definition of "supportive measures" while a grievance process resolves any factual issues about the sexual harassment incident. If the in-class behavior does not constitute Title IX sexual harassment (for example, because the conduct is not severe, or is not pervasive), then the final regulations do not apply and do not affect a decision made by the teacher as to how best to discipline the offending student or keep order in the classroom.

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[302] Commenters cited: Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, Division of Violence Prevention, *Sexual Violence, Risk and Protective Factors*, https://www.cdc.gov/violenceprevention/sexualviolence/riskprotectivefactors html (last reviewed by the CDC on Jan. 17, 2020); Jenny Dills *et al.*, *Continuing the Dialogue: Learning from the Past and Looking to the Future of Intimate Partner Violence and Sexual Violence Prevention*, National Center for Injury Prevention and Control, Centers for Disease Control and Prevention (2019).

The Department understands from anecdotal evidence and research studies that sexual violence is a traumatic experience for survivors. The Department is aware that the neurobiology of trauma and the impact of trauma on a survivor's neurobiological functioning is a developing field of study with application to the way in which investigators of sexual violence offenses interact with victims in criminal justice systems and campus sexual misconduct proceedings.[303] The final regulations require impartiality in investigations and emphasize the truth-seeking function of a grievance process. The Department wishes to emphasize that treating all parties with dignity, respect, and sensitivity without bias, prejudice, or stereotypes infecting interactions with parties fosters impartiality and truth-seeking. Further, the final regulations contain provisions specifically intended to take into account that complainants may be suffering results of trauma; for instance, § 106.44(a) has been revised to require that recipients promptly offer supportive measures in response to each complainant and inform each complainant of the availability of supportive measures with or without filing a formal complaint. To protect traumatized complainants from facing the respondent in person, cross-examination in live hearings held by postsecondary institutions must never involve parties personally questioning each other, and at a party's request, the live hearing must occur with the parties in separate rooms with technology enabling participants to see and hear each other.[304]

The Department disagrees that the final regulations make survivors prove their abuse is worthy of attention or action, because the § 106.30 definition of sexual harassment includes

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[303] *E.g.*, Jeffrey J. Nolan, *Fair, Equitable Trauma-Informed Investigation Training* (Holland & Knight updated July 19, 2019) (white paper summarizing trauma-informed approaches to sexual misconduct investigations, identifying scientific and media support and opposition to such approaches, and cautioning institutions to apply trauma-informed approaches carefully to ensure impartial investigations).
[304] Section 106.45(b)(6)(i).

sexual assault, domestic violence, dating violence, and stalking. Such abuse jeopardizes a complainant's equal educational access and is not subject to scrutiny or question as to whether such abuse is worthy of a recipient's response. Title IX coverage of sexual assault requires that the recipient have actual knowledge that the incident occurred in the recipient's education program or activity against a person in the United States. We have revised the § 106.30 definition of "actual knowledge" to include notice to any elementary and secondary school employee, and to expressly include a report to the Title IX Coordinator as described in § 106.8(a) (which, in turn, requires a recipient to notify its educational community of the contact information for the Title IX Coordinator and allows any person to report using that contact information, whether or not the person who reports is the alleged victim or a third party). We have revised the § 106.30 definition of "complainant" to mean any individual "who is alleged to be the victim" of sexual harassment, to clarify that a recipient must offer supportive measures to any person alleged to be the victim, even if the complainant is not the person who made the report of sexual harassment. We have revised § 106.44(a) to require the Title IX Coordinator promptly to contact a complainant to discuss supportive measures, consider the complainant's wishes with respect to supportive measures, and explain to the complainant the process and option of filing a formal complaint. Within the scope of Title IX's reach, no sexual assault needs to remain unaddressed.

The Department understands that sexual harassment occurs throughout society and not just in educational environments, that data support the proposition that harassing behavior can escalate if left unaddressed, and that prevention of sexual harassment incidents before they occur is a worthy and desirable goal. The final regulations describe the Title IX legal obligations to which the Department will vigorously hold schools, colleges, and universities accountable in

responding to sexual harassment incidents. Identifying the root causes and reducing the prevalence of sexual harassment across our Nation's schools and campuses remains within the province of schools, colleges, universities, advocates, and experts.

In response to commenters' concerns that many complainants fear retaliation for reporting sexual crimes, the final regulations add § 106.71 expressly prohibiting retaliation, which protects complainants (and respondents and witnesses) regardless of race, ethnicity, or other characteristic. The Department intends for complainants to understand that their right to report under Title IX (including the right to participate or refuse to participate in a grievance process) is protected against retaliation. The Department is aware that nationwide data regarding the prevalence and reporting rates of sexual assault is challenging to assess, but does not believe that these final regulations will impact the accuracy of such data collection efforts.

The Department does not dispute the proposition that weak sanctions against sexual violence perpetrators and weak laws and policies related to sexual violence and sex equality are associated with a greater likelihood of perpetration. The Department believes that Title IX is a strong law, and that these final regulations constitute strong policy, standing against sexual violence and aiming to remedy the effects of sexual violence in education programs and activities. Because Title IX is a civil rights law concerned with equal educational access, these final regulations do not require or prescribe disciplinary sanctions. The Department's charge under Title IX is to preserve victims' equal access to access, leaving discipline decisions within the discretion of recipients.

Changes: We have revised the § 106.30 definition of "actual knowledge" to include notice to any elementary and secondary school employee, and to expressly include a report to the Title IX Coordinator as described in § 106.8(a). We have revised § 106.8(a) to expressly allow any

person (whether the alleged victim, or a third party) to report sexual harassment using the contact information that must be listed for the Title IX Coordinator. We have revised the § 106.30 definition of "complainant" to mean any individual "who is alleged to be the victim" of sexual harassment. We have revised § 106.44(a) to require the Title IX Coordinator promptly to contact a complainant to discuss supportive measures, consider the complainant's wishes with respect to supportive measures, and explain to the complainant the process and option of filing a formal complaint. We have also added § 106.71, prohibiting retaliation against individuals exercising rights under Title IX including participating or refusing to participate in a Title IX grievance process.

Comments: Some commenters suggested alternate approaches to the proposed rules or offered alternative practices. For example, commenters suggested: zero-tolerance policies; requiring schools to install cameras in public or shared spaces on campus to discourage sexual harassment, provide proof and greater fairness for all parties involved, and decrease the cost and time spent in such cases; requiring recipients to provide an accounting of all funds used to comply with Title IX; creating Federal or State-individualized written protocols with directions on interviewing parties in Title IX investigations; requiring schools to adopt broader harassment policies that allow complaints to be addressed by an independent board with parent, educational, medical or law enforcement professionals, and peers with appeal to a second board; providing increased funding and staff for Title IX programs; third-party monitoring of Title IX compliance; and requiring universities to provide more thorough reports on gender-based violence in their systems. Some commenters emphasized the importance of prevention practices, suggesting various approaches such as: adopting the prevention measures in the withdrawn 2011 Dear Colleague Letter; setting incentives to reward schools for fewer Title IX cases; and curtailing

schools' use of confidential sexual harassment settlement payments that hide or erase evidence of harassment and protect predatory behavior.

Other commenters requested more training for organizations such as fraternities, arguing that sexual assault statistics would improve by enforcing better standards of behavior at fraternities. Commenters proposed the Department should rate schools on their compliance to Title IX standards similar to FIRE's "Spotlight on Due Process"[305] or the Human Rights Campaign's Equality Index.[306] Commenters proposed that any new rule should build upon, rather than abrogate, the requirements of the Campus Sex Crimes Prevention Act of 2000, which requires institutions of higher education to advise the campus community where it can obtain information about sex offenders provided by the State. One commenter urged the Department to add into the final regulations the statutory exemptions from the Title IX non-discrimination mandate found in the Title IX statute including Boys State/Nation or Girls State/Nation conferences (20 U.S.C. 1681(a)(7)); father-son or mother-daughter activities at educational institutions (20 U.S.C. 1681(a)(8)); and institution of higher education scholarship awards in "beauty" pageants (20 U.S.C. 1681(a)(9)).

Another commenter requested that the final regulations commit to ensuring culturally-sensitive services for students of color, who experience higher rates of sexual violence and more barriers to reporting, to help make prevention and support more effective. Commenters proposed to have each educational institution follow a guideline when employing staff from "Women

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[305] Commenters cited: Foundation for Individual Rights in Education (FIRE), *Spotlight on Due Process 2018* (2018), https://www.thefire.org/resources/spotlight/due-process-reports/due-process-report-2018/#top.
[306] Commenters referenced how the Human Rights Campaign (HRC) rates workplaces and health care providers on an Equality Index, for example the *Corporate Equality Index Archive*, https://www hrc.org/resources/corporate-equality-index-archives.

Centers" as Title IX Coordinators and staff in Title IX offices, and as student residence hall directors, to ensure that there is fair judgment in every case of sexual misconduct that occurs. Commenters argued that justice for all could be served by less press coverage of high-profile incidents and that investigations should be kept private until all facts are gathered, preserving the reputation of all involved.

Discussion: The Department appreciates and has considered the numerous approaches suggested by commenters, some of whom urged the Department to take additional measures and others who desired alternatives to the proposed rules.

The Department has determined, in light of the Supreme Court's framework for responding to Title IX sexual harassment and extensive stakeholder feedback concerning those procedures most needed to improve the consistency, fairness, and accuracy of Title IX investigations and adjudications, that the final regulations reasonably and appropriately obligate recipients to respond supportively and resolve allegations fairly without encroaching on recipients' discretion to control their internal affairs (including academic, administrative, and disciplinary decisions). Many of the commenters' suggestions for additions or alternatives to the final regulations concern subjects that lie within recipients' discretion and it may be possible for recipients to adopt them while also complying with these final regulations. To the extent that the commenters' suggestions require action by the Department, we decline to implement or require those practices, in the interest of preserving recipients' flexibility and retaining the focus of these regulations on prescribing recipient responses to Title IX sexual harassment. The Department cannot enforce Title IX in a manner that requires recipients to restrict any rights protected under

the First Amendment, including freedom of the press.[307] We have added § 106.71 which prohibits retaliation against an individual for the purpose of interfering with the exercise of Title IX rights. Section 106.71(a) requires recipients to keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness (unless permitted by FERPA, or required under law, or as necessary to conduct proceedings under Title IX), and § 106.71(b) states that exercise of rights protected by the First Amendment is not retaliation. Section 106.30 defining "supportive measures" instructs recipients to keep confidential the provision of supportive measures except as necessary to provide the supportive measures. These provisions are intended to protect the confidentiality of complainants, respondents, and witnesses during a Title IX process, subject to the recipient's ability to meet its Title IX obligations consistent with constitutional protections.

The statutory exceptions to Title IX mentioned by at least one commenter (i.e., Boys State or Girls' State conferences, father-son or mother-daughter activities, certain "beauty" pageant scholarships) have full force and effect by virtue of their express inclusion in 20 U.S.C. 1681(a), and the Department declines to repeat those exemptions in these final regulations, which mainly address a recipient's response to sexual harassment.

Changes: We have added § 106.71 which prohibits retaliation against an individual for the purpose of interfering with the exercise of Title IX rights. Section 106.71(a) requires recipients to keep confidential the identity of any individual who has made a report or complaint of sex

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[307] *See Peterson v. City of Greenville*, 373 U.S. 244 (1963); *Truax v. Raich*, 239 U.S. 33, 38 (1915); § 106.6(d)(1).

discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness (unless permitted by FERPA, or required under law, or as necessary to conduct proceedings under Title IX), and § 106.71(b) states that exercise of rights protected by the First Amendment is not retaliation.

Comments: Some commenters suggested broadening the scope of the proposed rules to address other issues, for example: providing guidance on pregnancy and parenting obligations under Title IX; evaluating coverage of fraternities and sororities under Title IX; funding to protect women and young adults on campus; girls losing access to sports, academic, and vocational programs as schools choose to save money by cutting girls' programs; investigating whether speech and conduct codes impose a disparate impact on men; covering other forms of harassment (e.g., race, age, national origin).

A few commenters expressed concern about the lack of clarity for cases alleging harassment on multiple grounds, such as whether the proposed provisions regarding mandatory dismissal, the clear and convincing evidence standard, interim remedies, and cross-examination would apply to the non-sex allegations. A few commenters requested that the final regulations address student harassment of staff and faculty by changing "employee" or "student" to "member" in the final regulations.

Discussion: The NPRM focused on the problem of recipient responses to sexual harassment, and the scope of matters addressed by the final regulations is defined by the subjects presented in the NPRM. Therefore, the Department declines to address other topics outside of this original scope, such as pregnancy, parenting, or athletics under Title IX, coverage of Title IX to fraternities and sororities, whether speech codes discriminate based on sex, funding intended to protect women

or young adults on campus, funding cuts to girls' programs by recipients, or forms of harassment other than sexual harassment. The Department notes that inquiries about the application of Title IX to particular organizations may be referred to the organization's Title IX Coordinator or to the Assistant Secretary as indicated in § 106.8(b)(1), and that complaints alleging sex discrimination that does not constitute sexual harassment may be referred to the recipient's Title IX Coordinator for handling under the equitable grievance procedures that recipients must adopt under § 106.8(c).

The Department appreciates commenters' questions regarding the handling of allegations that involve sexual harassment as well as harassment based on race (or on a basis other than sex) and appreciates the opportunity to clarify that the response obligations in § 106.44 and the grievance process in § 106.45 apply only to allegations of Title IX sexual harassment; the final regulations impose no new obligations or requirements with respect to non-Title IX sexual harassment and do not alter existing regulations under civil rights laws such as Title VI (discrimination on the basis of race, color, or national origin) or regulations under disability laws such as IDEA, Section 504, or ADA. The Department will continue to enforce regulations under those laws and recipients must comply with all regulations that apply to a particular allegation of discrimination (including allegations of harassment on multiple bases) accordingly.

The Department declines to change the words "students" and "employees" to "members" in the final regulations, because doing so could create inconsistencies with the current regulations, and the meaning of the term "member" is not readily understood by reference to other State and Federal laws, in the way that "employee" is. However, the Department

appreciates the opportunity to reiterate that the definitions of "complainant"[308] and "respondent"[309] do not restrict either party to being a student or employee, and, therefore, the final regulations do apply to allegations that an employee was sexually harassed by a student.

Changes: None.

Comments: Commenters expressed concern that there is no point in revising a rule without enforcement and proposed that the Department should use its enforcement authority to sanction non-compliance of Title IX, since no school has ever had its funding withdrawn. Other commenters asked the Department to disallow private rights of action and the payment of attorney fees, damages, or costs. Other commenters proposed that the Department revise OCR's existing Case Processing Manual to: eliminate biases toward specific groups when handling charges of rape, sexual harassment, and assault; protect undocumented students who file Title IX complaints with OCR so they do not have to fear doing so would lead to their deportation; avoid psychological bias by OCR investigators; and revise the 180-day complaint timeliness requirement to allow for complaints to be filed after the 180-day filing time frame with OCR for allegations involving sexual misconduct, under certain conditions. Other commenters proposed adding a provision that expressly releases institutions that are currently subject to settlement agreements with the Department from provisions that set forth ongoing obligations that are inconsistent with the new regulations.

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[308] Section 106.30 (*Complainant* "means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.").

[309] Section 106.30 (*Respondent* "means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.").

Discussion: The Department agrees with commenters who asserted that administrative enforcement of Title IX obligations is vital to the protection of students' and employees' civil rights, and the Department will vigorously enforce the final regulations. Nothing in these final regulations alters the existing statutory and regulatory framework under which the Department exercises its administrative authority to take enforcement actions against recipients for non-compliance with Title IX including the circumstances under which a recipient's Federal financial assistance may be terminated. The Department does not have authority or ability to affect the existence of judicially-implied private rights of action under Title IX or the remedies available through such private lawsuits.

Changes to OCR's Case Processing Manual are outside the scope of this rulemaking process. The Department will not enforce the final regulations retroactively; whether prospective enforcement of the final regulations will impact any existing resolution agreements between recipients and OCR requires examination of the circumstances of those resolution agreements. The Department will provide technical assistance to recipients with questions about the enforceability of existing resolution agreements.

Changes: None.

Comments: Some commenters expressed general support for Title IX without reference to sexual misconduct or the proposed rules, for example, asserting: that Title IX is important to rebuilding the country's education system; that Title IX has made great strides for equality in girls' sports; and that Title IX has helped equalize the power imbalance between women and men. Other commenters expressed opposition to Title IX generally, for example, arguing: that Title IX has become a war on men, is biased against men, has set up kangaroo courts against males, and has fed into destructive identity politics; that women and men are different and men need to be men;

and that Title IX is no longer needed because women outperform men in several areas (e.g., college admissions).

A number of commenters expressed support for equality and non-discrimination, or support for safe schools, public education, environments conducive to learning, schools operating *in loco parentis*, the well-being of children, protection of sex workers, fighting rape culture, respect for everyone's feelings, or anti-bullying, without expressing a position on the proposed rules. Without expressing a view about the proposed rules, some commenters expressed concern about a young woman murdered at a prominent university, and others expressed concern that it is too easy to get away with rape already due to "date rape" drugs, online dating sites, and powerful networks of people with bad intentions helping cover up incidents. A few commenters asked rhetorical questions such as: Does the government as "Protector of Citizens" devalue sexual assaults in educational institutions? Three million college students will be sexually assaulted this year: What are you going to do about it? What if something happened to your child?

A few commenters suggested changes to other agencies' rules, such as one suggestion that the Department of Labor employment discrimination rules should address the loss of jobs for female coaches due to gender-separate sports teams.

Discussion: The Department appreciates the range of opinions expressed by commenters on the general impact of Title IX. The Department believes that Title IX has improved educational access for millions of students since its enactment decades ago, and believes that these final regulations continue the national effort to make Title IX's non-discrimination mandate a meaningful reality for all students. The Department also appreciates commenters' viewpoints about topics related to gender equality and sexual abuse unrelated to the proposed rules. As an

executive branch agency of the Federal government charged with enforcing Title IX, the Department believes that sexual assaults in education programs or activities warrant the extensive attention and concern demonstrated by the obligations set forth in these final regulations and that these final regulations will provide millions of college (and elementary and secondary school) students with clarity about what to expect from their educational institutions in response to any incident of sexual assault or other sexual harassment that constitutes sex discrimination under Title IX.

Comments regarding other agencies' regulations are outside the scope of this rulemaking process and the Department's jurisdiction.

The Department notes that for comments submitted with no substantive text, names of survivor advocacy organizations, or pictures or graphics depicting, e.g., feminist icons, protest marches featuring cardboard signs with slogans such as "We Stand With Survivors" or "Hands Off IX," and similar depictions, the Department has considered the viewpoints that such pictures, graphics, and slogans appear to convey.

Changes: None.

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In explaining opposition to many provisions of the NPRM (most commonly, use of the Supreme Court's framework to address sexual harassment, i.e., the definition of sexual harassment, the actual knowledge requirement, the deliberate indifference standard, the education program or activity and "against a person in the U.S." jurisdictional limitations, and aspects of the grievance process, e.g., permitting a clear and convincing evidence standard, live hearings with cross-examination in postsecondary institutions, presumption of the respondent's non-responsibility, permitting informal resolution processes such as mediation) commenters

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- Kathryn M. Stanchi, *Who Next, the Janitors? A Socio-Feminist Critique of the Status Hierarchy of Law Professors*, 73 UNIV. OF MISSOURI-KANSAS L. REV. 2 (2004).

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- John F. Tedesco & Steven V. Schnell, *Children's reactions to sex abuse investigation and litigation*, 11 CHILD ABUSE & NEGLECT 2 (1987).

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- Bessel A Van Der Kolk, *The Body Keeps the Score: Brain, Mind, and Body in the Healing of Trauma* (Penguin Books 2014).

- Erica van Roosmalen & Susan A. McDaniel, *Sexual harassment in academia: A hazard to women's health*, 28 WOMEN & HEALTH 2 (1999).

- Grayson S. Walker, *The Evolution and Limits of Title IX Doctrine on Peer Sexual Assault*, 45 HARV. C.R.-C.L. L. REV. 95 (2010).

- Wendy Walsh *et al.*, *Disclosure and Service Use on a College Campus After an Unwanted Sexual Experience*, 11 JOURNAL OF TRAUMA & DISSOCIATION 2 (2010).

- Lavinia M. Weizel, *The Process That is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudications of Student-on-Student Sexual Assault Complaints*, 53 BOSTON COLL. L. REV. 1613 (2012).

- Nicole Westmarland & Sue Alderson, *The Health, Mental Health, and Well-Being Benefits of Rape Crisis Counseling,* 28 JOURNAL OF INTERPERSONAL VIOLENCE 17 (2013).

- Jacqueline M. Wheatcroft *et al.*, *Revictimizing the Victim? How Rape Victims Experience the UK Legal System*, 4 VICTIMS & OFFENDERS 3 (2009).

- Helen Whittle *et al.*, *A Comparison of Victim and Offender Perspectives of Grooming and Sexual Abuse*, 36 DEVIANT BEHAVIOR 7 (2015).

- Jacquelyn D. Wiersma-Mosley & James DiLoreto, *The Role of Title IX Coordinators on College and University Campuses*, 8 BEHAVIORAL SCI. 4 (2018).

- Joyce E. Williams & Karen A. Holmes, *The Second Assault: Rape and Public Attitudes* (Praeger Publishers 1981).

- Laura C. Wilson & Katherine E. Miller, *Meta-Analysis of the Prevalence of Unacknowledged Rape*, 17 TRAUMA, VIOLENCE, & ABUSE 2 (2016).

- Kate B Wolitzky-Taylor *et al.*, *Reporting rape in a national sample of college women*, 59 JOURNAL OF AM. COLL. HEALTH 7 (2011).

- Anne B. Woods *et al.*, *The mediation effect of posttraumatic stress disorder symptoms on the relationship of intimate partner violence and IFN-γ levels*, 36 AM. J. OF COMMUNITY PSYCHOL. 1-2 (2005).

- Corey R. Yung, *Concealing Campus Sexual Assault: An Empirical Examination*, 21 PSYCHOL., PUB. POL'Y, & L. 1 (2015).

- Sarah Zydervelt *et al.*, *Lawyers' Strategies for Cross-examining Rape Complainants: Have we Moved Beyond the 1950s?*, 57 BRITISH J. OF CRIMINOLOGY 3 (2016).

The Department has considered the sources cited to by commenters. For reasons described in this preamble, the Department believes that the final regulations create a predictable framework governing recipients' responses to allegations of sexual harassment in furtherance of Title IX's non-discrimination mandate.

Data – Overview

Many commenters referred the Department to statistics, data, research, and studies about the prevalence of sexual harassment, the impact of sexual harassment, the cost to victims of sexual harassment, underreporting of sexual harassment, problematic patterns of survivors facing negative stereotypes or being accused of "lying" when reporting sexual harassment, and rates of false accusations. Many commenters pointed to such data and information as part of general opposition to the proposed rules, expressing concern that the proposed rules as a whole would exacerbate the prevalence and negative impact of sexual harassment for all victims and with respect to specific demographic groups. Many commenters cited to such data and information in opposition to specific parts of the proposed rules, most commonly: use of the Supreme Court's framework to address sexual harassment (i.e., the definition of sexual harassment, the actual knowledge requirement, the deliberate indifference standard), the education program or activity and "against a person in the U.S." jurisdictional limitations, and aspects of the grievance process (e.g., permitting a clear and convincing evidence standard, live hearings with cross-examination in postsecondary institutions, presumption of the respondent's non-responsibility, permitting informal resolution processes such as mediation). The Department has carefully considered the

data and information presented by commenters with respect to the aforementioned aspects of the final regulations and with respect to the overall approach and framework of the final regulations.

Prevalence Data – Elementary and Secondary Schools

Comments: Many commenters referred the Department to statistics, data, research, and studies showing the prevalence of sexual harassment against children and adolescents, and in elementary and secondary schools, including as follows:

- Data show that sexual assault is most prevalent among adolescents as compared to any other group. School was reported as the most common location for this peer-on-peer victimization to occur. Fifty-one percent of high school girls and 26 percent of high school boys experienced adolescent peer-on-peer sexual assault victimization.[310]
- One in four young women experiences sexual assault before the age of 18.[311]
- One study found that ten percent of children were targets of educator sexual misconduct by the time they graduated from high school.[312]
- Nearly half (48 percent) of U.S. students are subject to sexual harassment or assault at school before they graduate high school (56 percent of girls and 40 percent of boys).[313] There were at least 17,000 official reports of sexual assaults of K-12 students by their

[310] Commenters cited: Amy M. Young *et al.*, *Adolescents' Experiences of Sexual Assault by Peers: Prevalence and Nature of Victimization Occurring Within and Outside of School*, 38 JOURNAL OF YOUTH & ADOLESCENCE 1072 (2009).
[311] Commenters cited: Girls, Inc., *2018 Strong, Smart, and Bold outcomes survey report* (2018) (citing David Finklehor *et al.*, *The lifetime prevalence of child sexual abuse and sexual assault assessed in late adolescence*, 55 JOURNAL OF ADOLESCENT HEALTH 3 (2014)).
[312] Commenters cited: Charol Shakeshaft, *Educator Sexual Misconduct: A Synthesis of Existing Literature* (2004) (prepared for the U.S. Dep't. of Education).
[313] Commenters cited: American Association of University Women, *Crossing the Line: Sexual Harassment at School* (2011).

peers between 2011 and 2015.[314] A longitudinal study found that 68 percent of girls and 55 percent of boys surveyed had at least one sexual harassment victimization experience in high school.[315] A survey of 2,064 students in grades eight through11 indicated: 83 percent of girls have been sexually harassed; 78 percent of boys have been sexually harassed; 38 percent of the students were harassed by teachers or school employees; 36 percent of school employees or teachers were harassed by students; and 42 percent of school employees or teachers had been harassed by each other.[316]

- One sexual assault study surveyed 18,030 high school students and found that 18.5 percent reported victimization and eight percent reported perpetration in the past year; although females were more likely to report unwanted sexual activities due to feeling pressured, there were no significant sex differences among those reporting physical force or unwanted sexual activities due to alcohol or drug use.[317] In another study in which 18,090 high school students completed a survey, 30 percent disclosed sexual harassment victimization (37 percent of females, 21 percent of males) and 8.5 percent reported perpetration (five percent of females, 12 percent of males).[318]

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[314] Commenters cited: Robin McDowell *et al.*, *Hidden Horror of school sex assaults revealed by AP*, ASSOCIATED PRESS (May 1, 2017).
[315] Commenters cited: Dorothy Espelage *et al.*, *Longitudinal Associations Among Bullying, Homophobic Teasing, and Sexual Violence Perpetration Among Middle School Students*, 30 JOURNAL OF INTERPERSONAL VIOLENCE 14 (2014).
[316] Commenters cited: American Association of University Women Educational Foundation, *Hostile Hallways: Bullying Teasing, and Sexual Harassment in School* (2001).
[317] Commenters cited: Corrine M. Williams *et. al.*, *Victimization and Perpetration of Unwanted Sexual Activities Among High School Students: Frequency and Correlates*, 20 VIOLENCE AGAINST WOMEN 10 (2014).
[318] Commenters cited: Emily R. Clear *et al.*, *Sexual Harassment Victimization and Perpetration Among High School Students*, 20 VIOLENCE AGAINST WOMEN 10 (2014).

- In one study designed to examine sexual harassment victimization among American middle school youth (grades five through eight), verbal victimization was more frequent than physical victimization and sexual assault; the types of sexual harassment experienced and the perpetrators varied by sex, race, and grade level; nearly half (43 percent) of middle school students experienced verbal sexual harassment the previous year; 21 percent of middle school students reported having been pinched, touched, or grabbed in a sexual way, 14 percent reported having been the target of sexual rumors, and nine percent had been victimized with sexually explicit graffiti in school locker rooms or bathrooms.[319]
- One study's data reveal that, while boys' violence towards girls comprises a substantial proportion of sexual violence in the middle school population, same-sex violence and girls' violence towards boys are also prevalent.[320]
- In the 2010-2011 school year, 36 percent of girls, 24 percent of boys, and 30 percent of all students in grades seven through 12 experienced sexual harassment online.[321]
- Analysis of the Civil Rights Data Collection for 2015-16, with data from 96,000 public and public charter P-12 educational institutions including magnet schools, special education schools, alternative schools, and juvenile justice facilities showed that: more than three-fourths (79 percent) of the 48,000 public schools with students in grades seven

[319] Commenters cited: Dorothy L. Espelage *et al.*, *Understanding types, locations, & perpetrators of peer-to-peer sexual harassment in U.S. middle schools: A focus on sex, racial, and grade differences*, 71 CHILDREN & YOUTH SERV. REV. 174 (2016).
[320] Commenters cited: Ethan Levin, *Sexual Violence Among Middle School Students: The Effects of Gender and Dating Experience*, 32 JOURNAL OF INTERPERSONAL VIOLENCE 14 (2015).
[321] Commenters cited: American Association of University Women, *Crossing the Line: Sexual Harassment at School* (2011).

through 12 disclosed zero reported allegations of harassment or bullying on the basis of sex, showing that students experience far more sexual harassment than schools report.[322]

Discussion: The data referred to by commenters, among other data, indicates that sexual harassment affects children, adolescents, and students throughout elementary and secondary schools across the country. When sexual harassment constitutes sex discrimination covered by Title IX, the final regulations hold schools accountable for responding in ways that restore or preserve a complainant's equal access to education.

Changes: None.

Prevalence Data – Postsecondary Institutions

Comments: Many commenters referred the Department to statistics, data, research, and studies showing the prevalence of sexual harassment in postsecondary institutions, including as follows:

- One in five college women experience attempted or completed sexual assault in college;[323] some studies state one in four.[324] One in 16 men are sexually assaulted while in college.[325] One poll reported that 20 percent of women, and five percent of men, are sexually assaulted in college.[326]

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[322] Commenters cited: American Association of University Women, *Schools are Still Underreporting Sexual Harassment and Assault* (Nov. 2, 2018), https://www.aauw.org/article/schools-still-underreporting-sexual-harassment-and-assault/.
[323] Commenters cited: Christopher Krebs *et al.*, *Bureau of Justice Statistics Research and Development Series: Campus Climate Survey Validation Study Final Technical Report* (2016); Lisa Wade, *American Hookup: The New Culture of Sex on Campus* (W.W. Norton & Co. 2016).
[324] Commenters cited: The Association of American Universities, *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct* (Westat 2015).
[325] Commenters cited: National Sexual Violence Resource Center: Info and Stats for Journalists, *Statistics About Sexual Violence* (2015) (citing National Institute of Justice, *The Campus Sexual Assault (CSA) Study: Final Report* (2007)).
[326] Commenters cited: Kaiser Family Foundation & The Washington Post, *Survey of Current and Recent College Students on Sexual Assault* (2015).

- 62 percent of women and 61 percent of men experience sexual harassment during college.[327]
- Among undergraduate students, 23.1 percent of females and 5.4 percent of males experience rape or sexual assault; among graduate and undergraduate students 11.2 percent experience rape or sexual assault through physical force, violence, or incapacitation; 4.2 percent have experienced stalking since entering college.[328]
- More than 50 percent of college sexual assaults occur in August, September, October, or November, and students are at an increased risk during the first few months of their first and second semesters in college; 84 percent of the women who reported sexually coercive experiences experienced the incident during their first four semesters on campus.[329]
- Seven out of ten rapes are committed by someone known to the victim;[330] for most women victimized by attempted or completed rape, the perpetrator was a boyfriend, ex-boyfriend, classmate, friend, acquaintance, or coworker. [331]
- A study showed that 63.3 percent of men at one university who self-reported acts qualifying as rape or attempted rape admitted to committing repeat rapes.[332]

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[327] Commenters cited: American Association of University Women Educational Foundation, *Drawing the Line: Sexual Harassment on Campus* (2005).
[328] Commenters cited: Rape, Abuse & Incest National Network (RAINN), *Campus Sexual Violence: Statistics*, https://www.rainn.org/statistics/campus-sexual-violence.
[329] Commenters cited: Matthew Kimble *et al.*, *Risk of Unwanted Sex for College Women: Evidence for a Red Zone*, 57 JOURNAL OF AM. COLL. HEALTH 3 (2010).
[330] Commenters cited: U.S. Dep't. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *National Crime Victimization Survey* (2015).
[331] Commenters cited: U.S. Dep't. of Justice, Office of Justice Programs, National Institute of Justice, *Research Report: The Sexual Victimization of College Women* (2000).
[332] Commenters cited: David Lisak & Paul Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 1 (2002).

- Of college students in fraternity and sorority life, 48.1 percent of females and 23.6 percent of males have experienced nonconsensual sexual contact, compared with 33.1 percent of females and 7.9 percent of males not in fraternity and sorority life.[333]
- Fifty-eight percent of female academic faculty and staff experienced sexual harassment across all U.S. colleges and universities, and one in ten female graduate students at most major research universities reports being sexually harassed by a faculty member.[334]
- Twenty-one to 38 percent of college students experience faculty/staff-perpetrated sexual harassment and 39 to 64.5 percent experience student-perpetrated sexual harassment during their time at their university.[335]

Discussion: The data referred to by commenters, among other data, indicates that sexual harassment affects students and employees in postsecondary institutions across the country. When sexual harassment constitutes sex discrimination covered by Title IX, the final regulations hold colleges and universities accountable for responding in ways that restore or preserve a complainant's equal access to education.

Changes: None.

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[333] Commenters cited: Jennifer J. Freyd, *The UO Sexual Violence and Institutional Betrayal Surveys: 2014, 2015, and 2015-2016*, https://dynamic.uoregon.edu/jjf/campus/.
[334] Commenters cited: National Academies of Science, Engineering, and Medicine, *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine* (Frasier F. Benya *et al.* eds., 2018).
[335] Commenters cited: Marina N. Rosenthal *et al.*, *Still second class: Sexual harassment of graduate students*, 40 PSYCHOL. OF WOMEN QUARTERLY 3 (2016).

Prevalence Data – Women

Comments: Many commenters referred the Department to statistics, data, research, and studies showing the prevalence of sexual harassment against girls and women, including as follows:

- Sexual assault disproportionately harms women; 84 percent of sexual assault and rape victims are female.[336] Among females, the highest rate of domestic abuse victimization occurs between the ages of 16-24, ages when someone is most likely to be a high school or college student.[337] Among college-aged female homicide victims, 42.9 percent were killed by an intimate partner.[338]
- One out of every six American women has been the victim of an attempted or completed rape in her lifetime (14.8 percent completed rape, 2.8 percent attempted rape for a total of 17.6 percent).[339] The national rape-related pregnancy rate is five percent among victims of reproductive age (aged 12 to 45); among adult women an estimated 32,101 pregnancies result from rape each year.[340] Fifty-six percent of girls ages 14-18 who are pregnant or parenting are kissed or touched without their consent.[341]

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[336] Commenters cited: U.S. Dep't. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *National Crime Victimization Survey* (2017).
[337] Commenters cited: U.S. Dep't. of Justice, Office of Justice Programs, *Bureau of Justice Statistics Factbook: Violence by Intimates* (1998).
[338] Commenters cited: U.S. Dep't. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Homicide Trends in the United States: 1980-2008: Annual Rates for 2009 and 2010* (2011).
[339] Commenters cited: Rape, Abuse & Incest National Network (RAINN), *Campus Sexual Violence: Statistics*, https://www.rainn.org/statistics/campus-sexual-violence.
[340] Commenters cited: Melissa M. Holmes, *Rape-related pregnancy: estimates and descriptive characteristics from a national sample of women*, 17 AM. J. OF OBSTETRICS & GYNECOLOGY 2 (1996).
[341] Commenters cited: National Women's Law Center (NWLC), *Let Her Learn: Stopping Push Out for Girls who are Pregnant or Parenting* (2017).

- A few commenters argued that the prevalence rate for sexual assault against college-age women is lower than shown by the above data, with the rate of rape and sexual assault being lower for female college students (6.1 per 1,000) than for female college-age nonstudents (7.6 per 1,000). [342]

Discussion: The data referred to by commenters, among other data, indicates that sexual harassment affects girls and women in significant numbers. When sexual harassment constitutes sex discrimination covered by Title IX, the final regulations hold schools accountable for responding in ways that restore or preserve a complainant's equal access to education.

Changes: None.

Prevalence Data – Men

Comments: Many commenters referred the Department to statistics, data, research, and studies showing the prevalence of sexual harassment against boys and men, including as follows:

- Approximately one in six men have experienced some form of sexual violence in their lifetime.[343] Sixteen percent of men were sexually assaulted by the age of 18.[344] Approximately one in 33 American men has experienced an attempted or completed rape in their lifetime.[345]

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[342] Commenters cited: U.S. Dep't. of Justice, Office of Justice Programs, *Bureau of Justice Statistics Special Report: Rape and Sexual Assault Victimization Among College-Age Females*, *1995-2013* (2014).
[343] Commenters cited: Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Summary Report* (Nov. 2011).
[344] Commenters cited: Shanta R. Dube, *Long-term consequences of childhood sexual abuse by gender of victim*, 28 AM. J. OF PREVENTIVE MED. 5 (2005).
[345] Commenters cited: Rape, Abuse, & Incest National Network (RAINN), *Scope of the Problem: Statistics*, https://www.rainn.org/statistics/scope-problem.

- College-age male victims accounted for 17 percent of rape and sexual assault victimizations against students and four percent against nonstudents.[346] Approximately 15 percent of college men are victims of forced sex during their time in college.[347]
- Approximately 26 percent of gay men, and 37 percent of bisexual men, experience rape, physical violence, or stalking by an intimate partner.[348]
- Men are more likely to be assaulted than falsely accused of assault.[349]

Discussion: The data referred to by commenters, among other data, indicates that sexual harassment affects boys and men in significant numbers. When sexual harassment constitutes sex discrimination covered by Title IX, the final regulations hold schools accountable for responding in ways that restore or preserve a complainant's equal access to education.

Changes: None.

Prevalence Data – LGBTQ Persons

Comments: Many commenters referred the Department to statistics, data, research, and studies showing the prevalence of sexual harassment against LGBTQ individuals, including as follows:

- A 2015 survey found that 47 percent of transgender people are sexually assaulted at some point in their lifetime: transgender women have been sexually assaulted at

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[346] Commenters cited: U.S. Dep't. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Special Report: Rape and Sexual Assault Victimization Among College-Age Females, 1995-2013* (2014).
[347] Commenters cited: U.S. Dep't. of Justice, Office of Justice Programs, National Institute of Justice, *Research Report: The Sexual Victimization of College Women* (2000).
[348] Commenters cited: Human Rights Campaign, *Sexual Assault and the LGBTQ Community*, https://www.hrc.org/resources/sexual-assault-and-the-lgbt-community; Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, *The National Intimate Partner and Sexual Violence Survey (NISVS): An Overview of 2010 Findings on Victimization by Sexual Orientation*.
[349] Commenters cited: Tyler Kingkade, *Males are More Likely to Suffer Sexual Assault Than to be Falsely Accused of it*, THE HUFFINGTON POST (Dec. 8, 2014).

a rate of 37 percent; nonbinary people assigned male at birth have been sexually assaulted at a rate of 41 percent; transgender men have been sexually assaulted at a rate of 51 percent; and nonbinary people assigned female at birth have been sexually assaulted at a rate of 58 percent.[350] Another study, which drew from interviews of over 16,500 adults, indicated that gay and bisexual individuals experienced a higher lifetime prevalence of sexual violence than their heterosexual counterparts.[351]

- A study found that transgender students, who represented 1.8 percent of high school respondents to a survey, faced far higher rates of assault and harassment than their peers: 24 percent of transgender students had been forced to have sexual intercourse, compared to four percent of male cisgender students and 11 percent of female cisgender students; 23 percent of transgender students experienced sexual dating violence, compared to four percent of male cisgender students and 12 percent of female cisgender students; more than one-quarter (26 percent) experienced physical dating violence, compared to six percent of male cisgender students and nine percent of female cisgender students; transgender students were more likely to face bullying and violence in school overall compared to cisgender students.[352]

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[350] Commenters cited: National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey* (Dec. 2016).
[351] Commenters cited: Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, *The National Intimate Partner and Sexual Violence Survey (NISVS): An Overview of 2010 Findings on Victimization by Sexual Orientation*.
[352] Commenters cited: Michelle M. Johns *et al.*, *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students – 19 States and Large Urban School Districts, 2017*, 68 MORBIDITY & MORTALITY WEEKLY REPORT 3 (Jan. 25, 2019).

- Lesbian, gay, and bisexual students are more likely to experience nonconsensual sexual contact by physical force or incapacitation than heterosexual students: 14 percent of gay or lesbian students and 25 percent of bisexual students reported experiencing nonconsensual sexual contact while in college or graduate school compared to 11 percent of heterosexual students.[353]
- A 2018 study found that 57.3 percent of LGBTQ students were sexually harassed at school during the past year.[354] Another survey showed that 38 percent of LGBTQ girls had been kissed or touched without their consent.[355] Eighty-six percent of high school transgender individuals had experienced a form of sexual violence due to their gender identity, often perpetrated by other students.[356] Nearly 25 percent of transgender, genderqueer, and gender nonconforming or questioning students experience sexual violence during their undergraduate education.[357]
- Twenty-two percent of lesbian, gay, and bisexual youth have experienced sexual violence, more than double the rate reported by heterosexual youth.[358] According to another survey: 44 percent of lesbians and 61 percent of bisexual women

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[353] Commenters cited: The Association of American Universities, *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct* (Westat 2015).
[354] Commenters cited: Gay, Lesbian and Straight Education Network (GLSEN), *The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools* (2018).
[355] Commenters cited: National Women's Law Center (NWLC), *Let Her Learn: Stopping Push Out for Girls who are Pregnant or Parenting* (2017).
[356] Commenters cited: Rebecca L. Stotzer, *Violence Against Transgender People: A Review of United States Data*, 14 AGGRESSION & VIOLENT BEHAVIOR 3 (2009).
[357] Commenters cited: The Association of American Universities, *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct* (Westat 2015).
[358] Commenters cited: Centers for Disease Control & Prevention, Division of Adolescent & School Health, *Youth Risk Behavior Survey Data Summary and Trends Report: 2007-2017* (2018).

experience rape, physical violence, or stalking by an intimate partner, compared to 35 percent of heterosexual women; 26 percent of gay men and 37 percent of bisexual men experience rape, physical violence, or stalking by an intimate partner, compared to 29 percent of heterosexual men; 46 percent of bisexual women have been raped, compared to 17 percent of heterosexual women; 13 percent of lesbians and 22 percent of bisexual women have been raped by an intimate partner, compared to nine percent of heterosexual women; 40 percent of gay men and 47 percent of bisexual men have experienced sexual violence other than rape, compared to 21 percent of heterosexual men; and 46.4 percent of lesbians, 74.9 percent of bisexual women, and 43.3 percent of heterosexual women, reported sexual violence other than rape during their lifetimes, while 40.2 percent of gay men, 47.4 percent of bisexual men, and 20.8 percent of heterosexual men reported sexual violence other than rape during their lifetimes.[359]

- More than eight in ten LGBTQ students experienced harassment or assault at school and more than half (57 percent) were sexually harassed at school; 70 percent of LGBTQ students said that they were verbally harassed, 29 percent said that they were physically harassed, and 12 percent said that they were physically assaulted because of their sexual orientation; 60 percent of LGBTQ students said that they were verbally harassed, 24 percent said that they were physically

[359] Commenters cited: Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, *The National Intimate Partner and Sexual Violence Survey (NISVS): An Overview of 2010 Findings on Victimization by Sexual Orientation*.

harassed, and 11 percent said that they were physically assaulted because of their gender expression.[360]

- A survey of students in grades nine through 12 found that lesbian, gay, and bisexual ("LGB") students were more likely to say that they experienced bullying than heterosexual students: one-third of LGB students said that they had been bullied on school property in the past year compared to 17 percent of heterosexual students; 27 percent of LGB students reported that they had been electronically bullied in the past year compared to 13 percent of heterosexual students; nearly half of middle and high school students report being sexually harassed, with harassment especially extensive among LGBTQ students, causing nearly one-third to say that they felt unsafe or uncomfortable enough to miss school.[361]
- Seventy-three percent of LGBTQ college students have been sexually harassed, compared to 61 percent of non-LGBTQ students;[362] 75.2 percent of undergraduate and 69.4 percent of graduate/professional students who identify as transgender, queer, and gender nonconforming reported being sexually harassed, compared with 62 percent of cisgender female undergraduates, 43 percent of cisgender male undergraduates, 44 percent of cisgender female graduate students, and 30 percent of cisgender male graduate students.[363]

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[360] Commenters cited: Gay, Lesbian and Straight Education Network (GLSEN), *The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools* (2018).
[361] Commenters cited: Laura Kann *et al.*, *Youth Risk Behavior Surveillance – United States, 2017*, 67 MORBIDITY & MORTALITY WEEKLY REPORT 8 (Jun. 15, 2018).
[362] Commenters cited: American Association of University Women Educational Foundation, *Drawing the Line: Sexual Harassment on Campus* (2005).
[363] Commenters cited: The Association of American Universities, *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct* (Westat 2015).

Discussion: The data referred to by commenters, among other data, indicates that sexual harassment affects LGBTQ individuals in significant numbers. When sexual harassment constitutes sex discrimination covered by Title IX, the final regulations hold schools accountable for responding in ways that restore or preserve a complainant's equal access to education.

Changes: None.

Prevalence Data – Persons of Color

Comments: Many commenters referred the Department to statistics, data, research, and studies showing the prevalence of sexual harassment against persons of color, including as follows:

- Women who have intersecting identities, for example women who are women of color and LGBTQ, experience certain types of harassment, including gender and sexual harassment, at even greater rates than other women, and often experience sexual harassment as a manifestation of both gender and other kinds of discrimination.[364] A survey of 1,003 girls between the ages of 14 and 18, with a focus on Black, Latina, Asian, Native American, and LGBTQ individuals, found that 31 percent had survived sexual assault.[365] Of women who identify as multiracial, 32.3 percent are sexually assaulted.[366]

[364] Commenters cited: National Academies of Science, Engineering, and Medicine, *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine* (Frasier F. Benya *et al.* eds., 2018).
[365] Commenters cited: National Women's Law Center (NWLC), *Let Her Learn: Stopping Push Out for Girls who are Pregnant or Parenting* (2017).
[366] Commenters cited: Matthew J. Breiding *et al.*, *Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization – National Intimate Partner and Sexual Violence Survey, United States, 2011*, 63 MORBIDITY & MORTALITY WEEKLY REPORT 8 (Sept. 5, 2014).

- Of Black women in school, 16.5 percent reported being raped in high school and 36 percent were raped in college.[367] Among Black women, 21.2 percent are survivors of sexual assault.[368] Sixty percent of Black girls are sexually harassed before the age of 18.[369]
- Among Hispanic women, 13.6 percent are survivors of sexual assault.[370]
- In a 2015 study of 313 participants of Korean, Chinese, Filipino, and other Asian backgrounds: 53.5 percent of female participants reported experiencing sexual violence, including forced sexual relations (12.4 percent), sexual harassment (17.3 percent), unwanted touching (31.7 percent), or pressure to have unwanted sex (25.2 percent); out of all participants, 38.7 percent said they knew someone who had experienced sexual violence, and, of those, 70 percent said they knew two or more survivors. Of male participants, 8.1 percent reported experiencing sexual violence; 56.1 percent of the survivors first experienced sexual violence when they were ten to 19 years old and 26.3 percent when they were in their twenties.[371]
- Of Asian Pacific Islander women, 23 percent experienced sexual violence. Of Asian Pacific Islander men, nine percent experienced sexual violence.[372]

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[367] Commenters cited: Carolyn M. West & Kalimah Johnson, *Sexual Violence in the Lives of African American Women: Risk, Response, and Resilience*, VAWNET.ORG: NATIONAL ONLINE RESOURCE CENTER ON DOMESTIC VIOLENCE (2013).
[368] Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, *STOP SV: A Technical Package to Prevent Sexual Violence* (2016).
[369] Commenters cited: Hannah Giorgis, *Many women of color don't go to the police after sexual assault for a reason*, THE GUARDIAN (Mar. 25, 2015).
[370] Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, *STOP SV: A Technical Package to Prevent Sexual Violence* (2016).
[371] Commenters cited: KAN-WIN, *Community Survey Report on Sexual Violence in the Asian American/Immigrant Community* (2017), http://www kanwin.org/downloads/sareport.pdf.
[372] Commenters cited: Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010-2012 State Report* (2017).

- Of women who identify as American Indian or Alaska Native, over one-quarter have experienced rape and 56 percent have experienced rape, physical violence, or stalking by an intimate partner in their lifetime.[373] Seven out of every 1,000 American Indian (including Alaska Native) women experience rape or sexual assault, compared to two out of every 1,000 women of all races.[374]

Discussion: The data referred to by commenters, among other data, indicates that sexual harassment affects persons of color, particularly girls and women of color and persons with intersecting identities, in significant numbers. When sexual harassment constitutes sex discrimination covered by Title IX, the final regulations hold schools accountable for responding in ways that restore or preserve a complainant's equal access to education.

Changes: None.

Prevalence Data – Individuals with Disabilities

Comments: Many commenters referred the Department to statistics, data, research, and studies showing the prevalence of sexual harassment against individuals with disabilities, including as follows:

- Students with disabilities are 2.9 times more likely than their peers to be sexually assaulted.[375] As many as 40 percent of women with disabilities experience sexual

[373] Commenters cited: Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Summary Report* (Nov. 2011).
[374] Commenters cited: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *American Indians and Crime* (1999).
[375] Commenters cited: National Women's Law Center (NWLC), *Let Her Learn: Stopping Push Out for Girls who are Pregnant or Parenting* (2017).

assault or physical violence in their lifetimes.[376] Almost 20 percent of women with disabilities will have undesired sex with an intimate partner.[377]

- An exploratory study conducted to learn the rates of abuse among university students who have identified as having a disability found: 22 percent of participants reported some form of abuse over the last year and nearly 62 percent had experienced some form of physical or sexual abuse before the age of 17; only 27 percent reported the incident, and 40 percent of students with disabilities who reported abuse in the past year said they had little or no knowledge of abuse-related resources.[378]
- More than 90 percent of all people with developmental disabilities will experience sexual assault.[379] Forty-nine percent of people with developmental disabilities who are victims of sexual violence will experience ten or more abusive incidents.[380] Thirty percent of men and 80 percent of women with intellectual disabilities have been sexually assaulted.[381]
- Individuals with intellectual disabilities are sexually assaulted and raped at more than seven times the rate of individuals without disabilities; women with

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[376] Commenters cited: University of Michigan Sexual Assault Awareness and Prevention Center, *Sexual Assault and Survivors with Disabilities*, https://sapac.umich.edu/article/56.
[377] Commenters cited: Disabled World, *People with Disabilities and Sexual Assault* (2012), https://www.disabled-world.com/disability/sexuality/assaults.php.
[378] Commenters cited: Patricia A. Findley *et al.*, *Exploring the experiences of abuse of college students with disabilities*, 31 JOURNAL OF INTERPERSONAL VIOLENCE 17 (2015).
[379] Commenters cited: University of Michigan Sexual Assault Awareness and Prevention Center, *Sexual Assault and Survivors with Disabilities*, https://sapac.umich.edu/article/56.
[380] Commenters cited: Valenti-Hein & Schwartz, *The Sexual Abuse Interview for Those with Developmental Disabilities* (James Stanfield Co. 1995).
[381] Commenters cited: Disabled World, *People with Disabilities and Sexual Assault* (2012), https://www.disabled-world.com/disability/sexuality/assaults.php.

intellectual disabilities are 12 times more likely to be sexually assaulted or raped than women without disabilities.[382]

- Fifty-four percent of boys who are deaf and 25 percent of girls who are deaf, have been sexually assaulted, compared to ten percent of boys who are hearing and 25 percent of girls who are hearing.[383]

Discussion: The data referred to by commenters, among other data, indicates that sexual harassment affects individuals with disabilities in significant numbers. When sexual harassment constitutes sex discrimination covered by Title IX, the final regulations hold schools accountable for responding in ways that restore or preserve a complainant's equal access to education.

Changes: None.

Prevalence Data – Immigrants

Comments: Commenters referred the Department to data showing that immigrant girls and young women are almost twice as likely as their non-immigrant peers to have experienced incidents of sexual assault.[384]

Discussion: The data referred to by commenters, among other data, indicates that sexual harassment affects immigrant girls and women in significant numbers. When sexual harassment constitutes sex discrimination covered by Title IX, the final regulations hold schools accountable for responding in ways that restore or preserve a complainant's equal access to education.

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[382] Commenters cited: Joseph Shapiro, *The Sexual Assault Epidemic No One Talks About*, NPR (Jan. 8, 2018).
[383] Commenters cited: Disabled World, *People with Disabilities and Sexual Assault* (2012), https://www.disabled-world.com/disability/sexuality/assaults.php.
[384] Commenters cited: National Immigrant Women's Advocacy Project, *Empowering Survivors: Legal Rights of Immigrant Victims of Sexual Assault* (Leslye Orloff *ed*., 2013), https://www.evawintl.org/library/documentlibraryhandler.ashx?id=456 (using the term "immigrant" to include documented persons, refugees and migrants, others present in the United States on temporary visas, such as visitors, students, temporary workers, as well as undocumented individuals.).

Changes: None.

Impact Data

Comments: Many commenters referred the Department to statistics, data, research, and studies showing the impact of sexual harassment on victims, including as follows:

- Among students who are harassed, a vast majority of students (87 percent) report that the harassment had a negative effect on them, causing 37 percent of girls to not want to go to school, versus 25 percent of boys; female students were more likely in every case to say they continued to feel detrimental effects for "quite a while" compared with male students.[385]
- Approximately half of LGBTQ students who said that they experienced frequent or severe verbal harassment because of their sexual orientation or gender identity missed school at least once a month, and about 70 percent who said they experienced frequent or severe physical harassment missed school more than once a month.[386]
- In one study of transgender students, of those who faced harassment, 16 percent left college or vocational school because of the severity of the mistreatment they faced; and 17 percent of people who were out as transgender when they were K-12 students said that they experienced such severe harassment as a student that they had to leave school as a result.[387]

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[385] Commenters cited: American Association of University Women, *Crossing the Line: Sexual Harassment at School* (2011).
[386] Commenters cited: Gay, Lesbian and Straight Education Network (GLSEN), *The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools* (2018).
[387] Commenters cited: National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey* (Dec. 2016).

- The negative emotional effects of sexual harassment take a toll on girls' education, resulting in decreased productivity and increased absenteeism from school; in the 2010-2011 school year, 18 percent of abused children and teens did not want to go to school, 13 percent found it hard to study, 17 percent had trouble sleeping, and eight percent stayed home from school.[388]
- The impact of sexual harassment on students occurs at all grade levels and includes lowered motivation to attend class, paying less attention in class, lower grades, avoiding teachers with a reputation for engaging in harassment, dropping classes, changing majors, changing advisors, avoiding informal activities that enhance the educational experience, feeling less safe on campus, and dropping out of school.[389]
- Twenty percent of children and youth in schools have an identified mental health problem;[390] bullying, sexual harassment, and sexual assault contribute to mental health challenges for individuals when left unreported.
- Adverse childhood experiences can contribute significantly to negative adult physical and mental health outcomes and affect more than 60 percent of adults; every instance of sexual harassment against women undermines their potential for long-term economic

[388] Commenters cited: American Association of University Women, *Crossing the Line: Sexual Harassment at School* (2011).
[389] Commenters cited: National Academies of Science, Engineering, and Medicine, *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine* (Frasier F. Benya *et al.* eds., 2018).
[390] Commenters cited: Amy J. Houtrow & Megumi J. Okumura, *Pediatric Mental Health Problems and Associated Burden on Families*, 6 VULNERABLE CHILDREN & YOUTH STUDIES 3 (2011).

productivity and, by extension, the productivity of their family, their community, and the United States.[391]

- Secondary victimization and institutional betrayal have been shown to exacerbate trauma symptoms following a sexual assault, including increased anxiety, and more than 40 percent of college students who were sexually victimized reported experiences of institutional betrayal.[392]
- Being a victim of sexual assault can cause both immediate and long-term physical and mental health consequences; at least 89 percent of victims face emotional and physical consequences.[393] Approximately 70 percent of rape or sexual assault victims experience moderate to severe distress, a larger percentage than for any other violent crime.[394] The dropout rate of sexual harassment victims is much higher than percentage of college students who drop out of school; 34 percent of victims dropout of college.[395] Many schools have expelled survivors when their grades suffer as a result of trauma.[396]
- Eighty-one percent of women and 35 percent of men report significant short- or long-term impacts of sexual assault, such as post-traumatic stress disorder (PTSD); women

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[391] Commenters cited: American Academy of Pediatrics, *Adverse Childhood Experiences and the Lifelong Consequences of Trauma* (2014), https://www.aap.org/en-us/Documents/ttb_aces_consequences.pdf.
[392] Commenters cited: Carly Parnitzke Smith & Jennifer J. Freyd, *Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma*, 26 JOURNAL OF TRAUMATIC STRESS 1 (2013); John Briere & Carol E. Jordan, *Violence Against Women: Outcome Complexity and Implications for Assessment and Treatment*, 19 JOURNAL OF INTERPERSONAL VIOLENCE 11 (2004).
[393] Commenters cited: Andrew Van Dam, *Less than 1% of rapes lead to felony convictions. At least 89% of victims face emotional and physical consequences*, THE WASHINGTON POST (Oct. 6, 2018).
[394] Commenters cited: U.S. Dep't. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Special Report: Socio-emotional impact of violent crime* (2014).
[395] Commenters cited: Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18 JOURNAL OF COLL. STUDENT RETENTION: RESEARCH, THEORY & PRACTICE 2 (2015).
[396] Commenters cited: Alexandra Brodsky, *How much does sexual assault cost college students every year*, THE WASHINGTON POST (Nov. 18, 2014).

who are sexually assaulted or abused are over twice as likely to have PTSD, depression, and chronic pain following the violence compared to non-abused women.[397] Thirty percent of the college women who said they had been raped contemplated suicide after the incident.[398] Male victims of sexual abuse experience problems such as depression, suicidal ideation, anxiety, sexual dysfunction, loss of self-esteem, and long-term relationship difficulties.[399]

- Rape victims suffer long-term negative outcomes including PTSD, depression, generalized anxiety, eating disorders, sexual dysfunction, alcohol and illicit drug use, nonfatal suicidal behavior and suicidal threats, attempted and completed suicide, physical symptoms in the absence of medical conditions, low self-esteem, self-blame, and severe preoccupations with physical appearances; short-term negative impacts include shock, denial, fear, confusion, anxiety, withdrawal, shame or guilt, nervousness, distrust of others, symptoms of PTSD, emotional detachment, sleep disturbances, flashbacks, and mental replay of the assault.[400]
- If a sexual assault survivor ends up dropping out of high school, the survivor will earn 84 percent less than a typical graduate from a four-year college; student debt is a greater

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[397] Commenters cited: Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Summary Report* (Nov. 2011).
[398] Commenters cited: National Victim Center and Crime Victims Research and Treatment Center, *Rape in America: A Report to the Nation* (1992).
[399] Commenters cited: Lara Stemple, *The Sexual Victimization of Men in America: New Data Challenge Old Assumptions*, 104 AM. J. OF PUB. HEALTH 6 (2014).
[400] Commenters cited: Nicole P. Yuan, *The Psychological Consequences of Sexual Trauma*, VAWNET.ORG: NATIONAL RESOURCE CENTER ON DOMESTIC VIOLENCE (2006); Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, Division of Violence Prevention, *Preventing Sexual Violence* (last reviewed by the CDC on Jan. 17, 2020), https://www.cdc.gov/violenceprevention/sexualviolence/fastfact.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fviolenceprevention%2Fsexualviolence%2Fconsequences html; Rape, Abuse, & Incest National Network (RAINN), *Victims of Sexual Violence: Statistics*, https://www rainn.org/statistics/victims-sexual-violence.

burden for low income students who drop out, as those students will earn significantly less; and dropping out can have dire consequences as the lack of a high school diploma or General Equivalency Diploma (GED) directly correlates with higher risks of experiencing homelessness. [401]

Discussion: The data referred to by commenters, among other data, indicate that many sexual harassment victims suffer serious, negative consequences. Because sexual harassment causes serious detriment to victims, when sex discrimination covered by Title IX takes the form of sexual harassment, the final regulations require recipients to respond to complainants by offering supportive measures (irrespective of whether the complainant files a formal complaint), and when a complainant chooses to file a formal complaint, requiring remedies for a complainant when a respondent is found responsible. Supportive measures, and remedies, are designed to restore or preserve equal access to education.

Recognizing that Title IX governs the conduct of recipients themselves, the Department believes that the final regulations appropriately prescribe the actions recipients must take in response to reports and formal complaints of sexual harassment, so that complainants are not faced with institutional betrayal from a recipient's refusal to respond, or non-supportive response.

Changes: None.

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[401] Commenters cited: Eduardo Porter, *Dropping Out of College, and Paying the Price*, THE NEW YORK TIMES (June 26, 2013).

Cost Data

Comments: Many commenters referred to data showing that rape and sexual assault survivors often incur significant financial costs such as medical and psychological treatment, lost time at work, and leaves of absence from school, including as follows:

- The average lifetime cost of being a rape victim is estimated at $122,461, which calculates to roughly $3.1 trillion of lifetime costs across the 25 million reported victims in the United States.[402] A single rape costs a victim between $87,000 to $240,776.[403]
- More than one-fifth of intimate partner rape survivors lose an average of eight days of paid work per assault, and that does not include the subsequent job loss, psychological trauma, and cost (of treatment and to society at large).[404]

Many commenters asserted that the proposed rules would exacerbate the economic costs suffered by sexual assault survivors.

Discussion: The Department understands that sexual assault survivors often incur significant financial costs, both in the short-term and long-term. The final regulations require recipients to offer supportive measures to complainants and provide remedies to complainants when a fair grievance process has determined that a respondent is responsible for sexual harassment. Supportive measures and remedies are designed to restore or preserve equal access to education. The Department believes these responses by recipients will help complainants avoid costs that flow from loss of educational opportunities.

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[402] Commenters cited: Cora Peterson *et al.*, *Lifetime Economic Burden of Rape Among U.S. Adults*, 52 AM. J. PREVENTIVE MED. 6 (2017).
[403] Commenters cited: Ted R. Miller *et al.*, *Victim Costs of Violent Crime and Resulting Injuries*, 12 HEALTH AFFAIRS 4 (1993).
[404] Commenters cited: Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, *Costs of Intimate Partner Violence Against Women in the United States* (2003).

Changes: None.

Reporting Data

Comments: Many commenters referred the Department to statistics, data, research, and studies regarding rates of reporting of sexual harassment and sexual violence, and reasons why some victims do not report their victimization to authorities, including as follows:

- Only about half of all adolescent victims of peer-on-peer sexual assault will tell anyone about having been sexually harassed or assaulted and only six percent will actually report the incident to an official who might be able help them. Such underreporting may be due to individual student fears of reporting to school authorities or law enforcement; procedural gaps in how institutions record or respond to incidents; a reluctance on the part of institutions to be associated with these problems; or a combination of these factors.[405]
- At least 35 percent of college students who experience sexual harassment do not report it[406] because shame, fear of retaliation, and fear of not being believed prevent victims from coming forward. Only five to 28 percent of sexual harassment incidents are reported to Title IX offices; less than 30 percent of the most serious incidents of nonconsensual sexual contact are reported to an organization or agency like a university's Title IX office or law enforcement; the most common reason for not reporting was the victim did not consider the incident serious enough, while other reasons included embarrassment,

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[405] Commenters cited: Amy M. Young *et al.*, *Adolescents' Experiences of Sexual Assault by Peers: Prevalence and Nature of Victimization Occurring Within and Outside of School*, 38 JOURNAL OF YOUTH & ADOLESCENCE 1072 (2009).
[406] Commenters cited: American Association of University Women Educational Foundation, *Drawing the Line: Sexual Harassment on Campus* (2005).

shame, feeling it would be too emotionally difficult, and lack of confidence that anything would be done about it.[407]

- Survivors often do not report cases of sexual violence to their schools because they do not know how to report on their campus, because of fear of being disbelieved, or because of fear of having their assault not taken seriously.[408] Some survivors choose not to report sexual violence to authorities for a multitude of reasons, one of which is a fear that their perpetrator will retaliate or escalate the violence.[409]
- Research shows that students are deterred from reporting sexual harassment and assault for the following reasons: policies that compromise or restrict the victim's ability to make informed choices about how to proceed; concerns about confidentiality; a desire to avoid public disclosure; uncertainty as to whether they can prove the sexual violence or whether the perpetrator will be punished; campus policies on drug and alcohol use; policies requiring victims to participate in adjudication; trauma response; the desire to avoid the perceived or real stigma of having been victimized.[410]

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[407] Commenters cited: The Association of American Universities, *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct* (Westat 2015).
[408] Commenters cited: Kathryn J. Holland & Lilia M. Cortina, *"It happens to girls all the time": Examining sexual assault survivors' reasons for not using campus supports*, 59 AM. J. OF COMMUNITY PSYCHOL. 1-2 (2017).
[409] Commenters cited: Marjorie R. Sable *et al.*, *Barriers to Reporting Sexual Assault for Women and Men: Perspectives of College Students*, 55 JOURNAL OF AM. COLL. HEALTH 3 (2006); Ruth E. Fleury *et al.*, *When Ending the Relationship Does Not End the Violence*, 6 VIOLENCE AGAINST WOMEN 12 (2000); T.K. Logan & Robert Walker, *Stalking: A Multidimensional Framework for Assessment and Safety Planning*, 18 TRAUMA, VIOLENCE, & ABUSE 2 (2017).
[410] Commenters cited: U.S. Dep't. of Justice, Office of Justice Programs, National Institute of Justice, *Sexual Assault on Campus: What Colleges and Universities Are Doing About It* (2005).

- According to one study, 20 percent of students ages 18-24 did not report assault because they feared reprisal, nine percent believed the police would not or could not do anything to help, and four percent reported, but not to police.[411]
- One national survey found that of 770 rapes on campus during the 2014-2015 academic year, only 40 were reported to authorities under the Clery Act guidelines.[412]
- Campus sexual assault is grossly underreported with only two percent of incapacitated sexual assault survivors and 13 percent of forcible rape survivors reporting to crisis or healthcare centers and even fewer to law enforcement.[413] About 65 percent of surveyed rape victims reported the incident to a friend, a family member, or roommate but only ten percent reported to police or campus officials.[414]
- Male victims often resist reporting due to contemporary social narratives, including jokes about prison rape, the notion that "real men" can protect themselves, the fallacy that gay male victims likely "asked for it," and the belief that reporting itself is "un-masculine."[415]
- Some students – especially students of color, undocumented students, LGBTQ students, and students with disabilities – are less likely than their peers to report sexual assault to

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[411] Commenters cited: U.S. Dep't. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Special Report: Rape and Sexual Assault Victimization Among College-Age Females, 1995-2013* (2014).
[412] Commenters cited: New Jersey Task Force on Campus Sexual Assault, *2017 Report and Recommendations* (June 2017).
[413] Commenters cited: National Sexual Violence Resource Center: Info and Stats for Journalists, *Statistics About Sexual Violence* (2015) (citing National Institute of Justice, *The Campus Sexual Assault (CSA) Study: Final Report* (2007)).
[414] Commenters cited: U.S. Dep't. of Justice, Office of Justice Programs, Office for Victims of Crime, *2017 National Crime Victims' Rights Week Resource Guide: Crime and Victimization Fact Sheets* (2017).
[415] Commenters cited: Lara Stemple, *The Sexual Victimization of Men in America: New Data Challenge Old Assumptions*, 104 AM. J. OF PUB. HEALTH 6 (2014).

the police due to increased risk of being subjected to police violence or deportation.[416] Survivors of color may not want to report to the police and add to the criminalization of men and boys of color; for these students, schools are often the only avenue for relief. Many LGBTQ students and students of color may feel mistrustful, unwelcomed, invisible, or discriminated against, which makes reporting their experience of sexual assault even more difficult.[417]

- LGBTQ students also experience unique barriers that prevent them from reporting these incidents:[418] the most common reason students gave for their failure to report were doubts that the school staff would do anything about the harassment; almost two-thirds (60 percent) of students who did report their harassment said that school staff did nothing in response or just told the students to ignore the harassment; and more than one in five students were told to change their behavior to avoid harassment, such as changing the way they dress or acting less "gay." Another reason LGBTQ students gave for not reporting was fear they would be "outed" to the school staff or their families, or face additional violence from their harasser. Over 40 percent of LGBTQ students stated that they did not report because they were not comfortable with school staff, often because of the belief that staff was discriminatory or complicit in the harassment.

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[416] Commenters cited: Jennifer Medina, *Too Scared to Report Sexual Abuse. The Fear: Deportation*, THE NEW YORK TIMES (April 30, 2017); National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey* (Dec. 2016); Audrey Chu, *I Dropped Out of College Because I Couldn't Bear to See My Rapist on Campus*, VICE (Sept. 26, 2017).
[417] Commenters cited: L. Ebony Boulware, *Race and trust in the health care system*, 118 PUB. HEALTH REPORTS 4 (2003).
[418] Commenters cited: Gay, Lesbian and Straight Education Network (GLSEN), *The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools* (2018).

- Sixty-nine percent of sexual abuse survivors said that police officers discouraged them from filing a report and one-third of survivors had police refuse to take their report; 80 percent of sexual assault survivors are reluctant to seek help and 91 percent report feeling depressed after their interaction with law enforcement.[419]
- Native American women are reluctant to report crimes because of the belief that nothing will be done; according to a 2010 study, the government declined to prosecute 67 percent of sexual abuse, homicide, and other violent crimes against Native American women.[420]
- Students with disabilities are less likely to be believed when they report sexual harassment experiences and often have greater difficulty describing the harassment they experience, because of stereotypes that people with disabilities are less credible or because they may have greater difficulty describing or communicating about the harassment they experienced, particularly if they have a cognitive or developmental disability.[421]

Discussion: The Department appreciates commenters' concerns that sexual harassment is underreported and references to data explaining the variety of factors that contribute to complainants choosing not to report incidents of sexual harassment.

We have revised the final regulations in several ways in order to provide students, employees, and third parties with clear, accessible reporting channels, predictability as to how a

[419] Commenters cited: Rebecca Campbell, *Survivors' Help-Seeking Experiences with the Legal and Medical Systems*, 20 VIOLENCE & VICTIMS 1 (2005).
[420] Commenters cited: *Gender Based Violence and Intersecting Challenges Impacting Native American & Alaskan Village Communities*, VAWNET.ORG: NATIONAL ONLINE RESOURCE CENTER ON DOMESTIC VIOLENCE (2016), https://vawnet.org/sc/gender-based-violence-and-intersecting-challenges-impacting-native-american-alaskan-village.
[421] Commenters cited: U.S. Dep't. of Justice, Office of Justice Programs, National Institute for Justice, *The Many Challenges Facing Sexual Assault Survivors with Disabilities* (2017).

recipient must respond to a report, informed options on how a complainant may choose to proceed, and requirements that Title IX personnel serve impartially, free from bias. Under the final regulations, any person may report sexual harassment to trigger the recipient's response obligations, and the complainant (i.e., the person alleged to be the victim) retains the right to receive available supportive measures irrespective of whether the complainant also decides to file a formal complaint that initiates a grievance process.

To emphasize that any person may report sexual harassment (not just the complainant), we have revised § 106.8 to state that any person may report sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sexual harassment) using the contact information listed for the Title IX Coordinator, which must include an office address, telephone number, and e-mail address, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report. In elementary and secondary schools, § 106.30 defining "actual knowledge" now provides that notice of sexual harassment to any employee triggers the recipient's response obligations, and in postsecondary institutions, students retain more autonomy and control over deciding whether, when, or to whom to disclose a sexual harassment experience without automatically triggering a report to the Title IX office.[422] The Department therefore aims to give every complainant (i.e., person alleged to be the victim) and all third parties clear reporting channels (which differ for postsecondary institution students than for elementary and secondary school students), and predictability as to the recipient's response obligations (i.e., under revised § 106.44(a) the Title IX Coordinator must contact the

[422] *See* discussion in the "Actual Knowledge" subsection of the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble.

complainant to discuss supportive measures, consider the complainant's wishes with respect to supportive measures, and explain the option for filing a formal complaint).

Every Title IX Coordinator must be free from conflicts of interest and bias and, under revised § 106.45(b)(1)(iii), trained in how to serve impartially and avoid prejudgment of the facts at issue. No recipient is permitted to ignore a sexual harassment report, regardless of the identity of the person alleged to have been victimized, and whether or not a school administrator might be inclined to apply harmful stereotypes against believing complainants generally or based on the complainant's personal characteristics or identity. The Department will enforce the final regulations vigorously to ensure that each complainant receives the response owed to them by the recipient.

We have added § 106.71 prohibiting retaliation against any individual exercising Title IX rights (including the right to refuse to participate in a grievance process). When complainants do decide to initiate a grievance process, or participate in a grievance process, recipients also may choose to offer informal resolution processes as alternatives to a full investigation and adjudication of the formal complaint, with the voluntary consent of both the complainant and respondent, which may encourage some complainants to file a formal complaint where they may have been reluctant to do so if a full investigation and adjudication was the only option. Where a respondent is found responsible for sexual harassment as defined in § 106.30, the recipient must provide remedies to the complainant designed to restore or preserve the complainant's equal access to education. In response to comments concerned that such remedies may not be effective, the final regulations expressly require the Title IX Coordinator to be responsible for the effective implementation of remedies.

The final regulations present a consistent, predictable framework for when and how a recipient must respond to Title IX sexual harassment. Although reporting sexual harassment is often inherently difficult, complainants who desire supportive measures, or factual investigation and adjudication, or both, may expect prompt, meaningful responses from their schools, colleges, or universities.

Changes: We have revised § 106.8 to state that any person may report sexual harassment (whether or not the person reporting is the person alleged to be the victim of sexual harassment) by using the contact information listed for the Title IX Coordinator, which must include an office address, telephone number, and e-mail address; reports may be made at any time, including during non-business hours, by using the telephone number or e-mail address or by mailing to the office address. We have revised § 106.30 defining "actual knowledge" to provide that notice of sexual harassment to any elementary and secondary school employee constitutes actual knowledge to the recipient, and to state that "notice" includes but is not limited to reporting to the Title IX Coordinator as described in § 106.8(a).

We have revised § 106.44(a) to specifically require the Title IX Coordinator to contact the complainant to discuss supportive measures, consider the complainant's wishes with respect to supportive measures, and explain the process for filing a formal complaint. We have revised § 106.45(b)(1)(iii) to require that Title IX personnel be trained on how to serve impartially, without prejudgment of the facts. We have added § 106.71 prohibiting retaliation against any person exercising rights under Title IX, and § 106.45(b)(7)(iv) requiring Title IX Coordinators to be responsible for effective implementation of any remedies.

Stereotypes / Punishment for "Lying"

Comments: Some commenters asserted that the proposed rules will be particularly harmful to women and girls of color, who experience explicit and implicit bias in the investigation of claims of sexual harassment and assault. Commenters argued that due to harmful race and sex stereotypes that label women of color as "promiscuous," schools are more likely to ignore, blame, and punish women and girls of color who report sexual harassment.[423] Student concerns about reporting are especially common among members of historically marginalized communities, who are often more likely to be disbelieved or even punished by schools for reporting sexual assault. Commenters stated that Black women and girls are commonly stereotyped as "Jezebels," Latina women and girls as "hot-blooded," Asian American and Asian Pacific Islander women and girls as "submissive, and naturally erotic," Native American women and girls as "sexually violable as a tool of war and colonization," and multiracial women and girls as "tragic and vulnerable, historically, products of sexual and racial domination." Commenters stated that schools are also more likely to punish Black women and girls by labeling them as aggressors based on stereotypes that they are "angry" and "aggressive." Commenters pointed out that the Department's 2013-14 Civil Rights Data Collection shows that Black girls are five times more likely than white girls to be suspended in K-12, and that while Black girls represented 20 percent of all preschool enrolled students, they were 54 percent of

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[423] Commenters cited: Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 HARV. J. OF L. & GENDER 1 (2018); National Women's Law Center & Girls for Gender Equity, *Listening Session on the Needs of Young Women of Color* (2015); Sonja C. Tonnesen, *Commentary: "Hit It and Quit It": Responses to Black Girls' Victimization in School*, 28 BERKELEY J. OF GENDER, L. & JUSTICE 1 (2013); NAACP Legal Defense and Educational Fund, Inc. & National Women's Law Center, *Unlocking Opportunity for African American Girls: A Call to Action for Educational Equity* (2014).

preschool students who were suspended. Commenters argued that schools should require all officials involved in Title IX proceedings to attend implicit bias trainings.

One commenter argued that the negative effects of harmful stereotypes are exacerbated by the fact that the proposed rules would allow schools to punish students whom the school believes are lying, and this could have a significant effect on survivors of color. Commenters asserted that many Black girls who defend themselves against perpetrators are often misidentified as the aggressors. Similarly, commenters asserted that the proposed rules would allow a school to punish any person, including a witness, who "knowingly provides false information" to the school, which makes it even easier for schools to punish girls and women of color who report sexual harassment for "lying" about it, when such a conclusion by the school is often based on negative stereotypes rather than the truth.

Commenters also expressed concern that many students who report sexual assault and other forms of sexual harassment to their school face discipline instead of support: for example, schools punish complainants for engaging in so-called "consensual" sexual activity; for engaging in premarital sex; for defending themselves against their harassers; or for merely talking about their assault with other students in violation of a "gag order" or nondisclosure agreement imposed by their school.

Discussion: The Department shares the concerns of commenters who asserted, and cited to data and articles showing, that some complainants, including or especially girls of color, face school-level responses to their reports of sexual harassment infected by bias, prejudice, or stereotypes. In response to such concerns, the Department adds to § 106.45(b)(1)(iii), prohibiting Title IX Coordinators, investigators, and decision-makers, and persons who facilitate informal resolution processes from having conflicts of interest or bias against complainants or respondents generally,

or against an individual complainant or respondent, training that also includes "how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias." No complainant reporting Title IX sexual harassment or respondent defending against allegations of sexual harassment should be ignored or be met with prejudgment, and the final regulations require recipients to meet response obligations impartially and free from bias. The Department will vigorously enforce the final regulations in a manner that holds recipients responsible for responding to complainants, and treating all parties during any § 106.45 grievance process, impartially without prejudgment of the facts at issue or bias, including bias against an individual's sex, race, ethnicity, sexual orientation, gender identity, disability or immigration status, financial ability, or other characteristic. Any person can be a complainant, and any person can be a respondent, and every individual is entitled to impartial, unbiased treatment regardless of personal characteristics. The Department declines to specify that training of Title IX personnel must include implicit bias training; the nature of the training required under § 106.45(b)(1)(iii) is left to the recipient's discretion so long as it achieves the provision's directive that such training provide instruction on how to serve impartially and avoid prejudgment of the facts at issue, conflicts of interest, and bias, and that materials used in such training avoid sex stereotypes.

In response to commenters' concerns that biases and stereotypes may lead a recipient to punish students reporting sexual harassment allegations, the Department adds § 106.71(a) to expressly prohibit retaliation and specifically state that intimidation, threats, coercion, discrimination, or charging an individual with a code of conduct violation, arising out of the same facts or circumstances as a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX, constitutes retaliation. This

provision draws recipients' attention to the fact that punishing a complainant with non-sexual harassment conduct code violations (e.g., "consensual" sexual activity when the complainant has reported the activity to be nonconsensual, or underage drinking, or fighting back against physical aggression) is retaliation when done for the purpose of deterring the complainant from pursuing rights under Title IX. The Department notes that this section applies to respondents as well.

In further response to commenters' concerns about parties being unfairly punished for lying, § 106.71(b)(2) provides that charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding does not constitute retaliation but a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith. This provision leaves open the possibility that punishment for lying or making false statements might be retaliation, unless the recipient has concluded that the party made a materially false statement in bad faith (and that conclusion cannot be based solely on the outcome of the case).

While commenters are correct that § 106.45(b)(2) requires the written notice of allegations to inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process, this provision appropriately alerts parties where the recipient's own code of conduct has a policy against making false statements during a disciplinary proceeding so that both parties understand that risk. Section 106.71 protects complainants – and respondents and witnesses – from being charged with code of conduct violations arising from the same facts or circumstances as sexual harassment allegations if such a charge is brought for the purpose of curtailing rights or privileges secured by Title IX or these final regulations, and leaves open the

possibility that punishment for lying might be retaliation unless the disciplined party made a materially false statement in bad faith.

The Department notes that commenters' concerns that complainants are sometimes punished unfairly for merely talking about their assault with fellow students in violation of a school-imposed "gag order" is addressed by § 106.45(b)(5)(iii).

Changes: The Department has revised § 106.45(b)(1)(iii) to include in the required training how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. We have added § 106.71(a), which prohibits retaliation and states that charging an individual with a code of conduct violation that does not involve sexual harassment but arises out of the same facts or circumstances as sexual harassment allegations, for the purpose of interfering with rights under Title IX, constitutes retaliation. The Department has also added § 106.71(b)(2) to provide that charging an individual with a code of conduct violation for making a materially false statement in bad faith does not constitute retaliation, provided that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a such a false statement.

False Allegations

Comments: A number of commenters referred the Department to statistics, data, research, and studies relating to the frequency of false accusations of sexual misconduct. Most commenters who raised the issue of false allegations cited data for the proposition that somewhere between

two to ten percent of sexual assault reports are false or unfounded.[424] Commenters asserted that despite the low frequency of false allegations, police officers tend to believe false allegations of rape are much more common than they actually are,[425] reflecting a society-wide misconception about women falsely alleging rape.

Many commenters concluded that such data shows that nationwide, overreporting and false allegations are not nearly as concerning as underreporting and perpetrators "getting away with it," and thus protection of respondents from false allegations should not be the motive or purpose of Title IX rules.

Other commenters argued that whether the rate of false allegations is as low as two to ten percent or somewhat higher, the reality is that some complainants do bring false or unfounded accusations for a variety of reasons.[426] A few commenters referred to the Duke lacrosse rape case and the University of Virginia gang rape situation as specific instances where rape accusations were revealed to be false only after prejudgment of the facts in favor of the complainants had led to unfair penalization of the accused students. One commenter referred to a 2017 National Center

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[424] Commenters cited: National Sexual Violence Resource Center, *False Reporting: Overview* (2012); David Lisak *et al.*, *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 12 (2010); Kimberly A. Lonsway, *et al.*, *False reports: moving beyond the issue*, 3 THE VOICE 1 (2009); U.S. Dep't. of Justice, Federal Bureau of Investigation, *Crime in the United States: 1996 Uniform Crime Reports* (1997); State of Victoria, Office of Women's Policy, *Study of Reported Rapes in Victoria 2000-2003: Summary Research Report* (2006).

[425] Commenters cited: David Lisak *et al.*, *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 12 (2010).

[426] Commenters cited, *e.g.*, Cassia Spohn & Katharine Tellis, *Policing and Prosecuting Sexual Assault in Los Angeles City and County: A Collaborative Study in Partnership with the Los Angeles Police Department, the Los Angeles County Sheriff's Department, and the Los Angeles County District Attorney's Office* (2012) ("Complainants' motivations for filing false reports, which fell into five overlapping categories, included a desire to avoid trouble or a need for an alibi for consensual sex with someone other than a current partner, a desire to retaliate against a current or former partner, a need for attention or sympathy, and guilt or remorse as a result of consensual sexual activity. Many complainants in the unfounded cases also had mental health issues that made it difficult for them to separate fact from fantasy.").

for Higher Education Risk Management (NCHERM) report that noted that the recent trend of increased reports "brings allegations of all kinds out of the woodwork, some based strongly in fact, others that are baseless, and most that are somewhere in between."[427]

One commenter, on behalf of an organization representing student affairs professionals in higher education, described campus sexual assault proceedings as complicated under the best of circumstances because these cases involve navigating allegations that frequently involve different personal recollections of what happened, with few or no witnesses or physical evidence, and possibly colored by alcohol use by one or both parties. Commenters argued that just because a victim does not have corroborating evidence does not mean that a sexual assault claim is false.

Discussion: Under the final regulations, recipients must offer supportive measures to a complainant; the final regulations make this an explicit part of a recipient's prompt, non-deliberately indifferent response.[428] Such a requirement advances the non-discrimination mandate of Title IX by imposing an obligation on recipients to support complainants even without a factual determination regarding the allegations. In order to determine that a complainant has been victimized and is entitled to remedies (which, unlike supportive measures,

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[427] Commenters cited: National Center for Higher Education Risk Management (NCHERM), *The 2017 NCHERM Group Whitepaper: Due Process and the Sex Police* 15 (2017) ("What is needed for all of our students is a balanced process that centers on their respective rights while showing favoritism to neither. Not only is that best, it is required by law. Title IX Coordinators write to us, worried that their annual summaries show that they are finding no violation of policy 60% of the time in their total case decisions. They feel like somehow that is wrong, or not as it should be, as if there is some proper ratio of findings that we are supposed to be reaching. . . . With all the training and education being directed at students, more are coming forward, and that education brings allegations of all kinds out of the woodwork, some based strongly in fact, others that are baseless, and most that are somewhere in between.").

[428] Section 106.44(a).

need not avoid burdening a respondent),[429] allegations of Title IX sexual harassment must be resolved through the § 106.45 grievance process, designed to reach reliable factual determinations. This approach is necessary to promote accurate resolution of allegations in each situation presented in a formal complaint, regardless of how frequently or infrequently false accusations statistically occur.

The Department disputes that a choice must be made between caring about underreporting and caring about overreporting, or prioritizing protection of complainants' right to receive support and remedies, over protection of respondents from unfounded accusations. The Department understands that false allegations may occur infrequently, but believes that in every case in which Title IX sexual harassment is alleged, the facts must be resolved accurately to further the non-discrimination mandate of Title IX, including providing remedies to victims and ensuring that no party is treated differently based on sex. Under the final regulations, complainants are entitled to a prompt response that is not clearly unreasonable under the known circumstances, which response must include offering supportive measures even in the absence of factual investigation into the allegations. Complainants and respondents are owed an impartial grievance process that reaches reliable factual determinations of the allegations before remedies are owed to a victim or disciplinary sanctions are imposed on the respondent. Such an approach protects the interests of complainants and respondents in each unique situation, without assuming

[429] The final regulations revise § 106.45(b)(1)(i) to expressly state that remedies, unlike supportive measures, may be punitive or disciplinary and need not avoid burdening the respondent. This distinction between supportive measures and remedies is because remedies are required after a respondent has been determined responsible under a grievance process that complies with § 106.45.

the truth or falsity of particular allegations based on statistical information about the prevalence or reasons for false accusations.

The Department appreciates the commenters who described campus sexual assault proceedings as difficult to navigate and complex because they nearly always involve different personal recollections about what happened, with few or no witnesses or physical evidence, possibly influenced by alcohol use by one or both parties. Some commenters emphasized, and the Department agrees, that the difficult, complex nature of Title IX sexual harassment situations cautions against concluding that allegations are "false" based solely on the outcome of the case, because lack of evidence sufficient to conclude responsibility does not necessarily imply that the allegations were unfounded or false. In response to commenters addressing this topic, these final regulations contain a provision expressly prohibiting retaliation[430] and specifying that charging an individual with a code of conduct violation for making a materially false statement in bad faith does not constitute retaliation, but a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith. This provision cautions recipients to avoid stating or implying to complainants whose formal complaints end in a determination of non-responsibility that the determination, alone, means that the complainant's allegations were false or show bad faith on the part of the complainant, because such statements or implications may constitute retaliation. The Department further notes that the new provision in § 106.71(b)(2) applies equally to respondents and complainants, such that a determination of responsibility against a respondent, alone, is insufficient to justify punishing the respondent for making a materially false statement in bad faith. The Department

[430] Section 106.71.

agrees with commenters who asserted that a complainant's allegations may be determined to be accurate and valid even if there is no evidence corroborating the complainant's statements. The final regulations are designed to result in accurate outcomes regardless of the type of evidence available in particular cases.

Changes: The Department has added § 106.71(b)(2), which provides that charging an individual with a code of conduct violation for making a materially false statement in bad faith does not constitute retaliation, provided that a determination regarding responsibility, alone, is not sufficient to conclude that such a false statement was made.

General Support and Opposition for Supreme Court Framework Adopted in § 106.44(a)

Comments: A number of commenters expressed general support for § 106.44(a). Several commenters supported the provision because they believed it was fair and thoughtful or made common sense. Commenters stated that this provision brings clarity and accountability. One commenter opined that the proposed rules would restore public confidence in these proceedings.

Other commenters expressed satisfaction that the provisions in § 106.44(a) are consistent with basic constitutional principles and operative practices in our criminal justice system. A number of commenters argued that the proposed rules were necessary because the processes under previous rules have been inadequate. Some commenters argued that this provision is necessary because there needs to be more due process provided after the withdrawn 2011 Dear Colleague Letter. Commenters expressed concern the previous approach in guidance lacked protections for the accused, and the proposed rules balance protection for the accused with justice for victims. Commenters asserted the proposed rules bring back the rule of law to these proceedings. Other commenters expressed concern that past Department guidance has led to violations of students' free speech rights. Another commenter asserted that by nature,

universities are ill-equipped to handle criminal assault charges and asserted that if universities are going to deal with serious charges like sexual assault, it is critical that the sanctions they wield, which often can have significant consequences, are applied only after a fair process to determine facts and guilt; the commenter supported the process that the proposed regulations provide.

Commenters expressed support for the Department's general approach because it is flexible. Commenters supported the "not clearly unreasonable standard" in particular for this reason. Commenters also expressed support for this approach because it brings clarity to a very confusing and complicated issue. Some commenters expressed support for the proposed rules because they are pro-women. Other commenters asserted that the proposed rules add needed clarity to what is required by recipients under Title IX. Some commenters also stated that responding to sexual harassment is a uniquely difficult challenge because, unlike sexual assault, it is intertwined with free speech.

Commenters also expressed support for the Department's choice to respect survivors' autonomy in deciding whether to initiate a grievance process in the higher education setting. Some commenters suggested expanding the deliberately indifferent standard to include the respondent so that recipients must respond in a manner that is not deliberately indifferent toward a complainant or respondent. Other commenters asserted that not all cases of sexual harassment warrant discipline because sometimes a reporting party just wants the respondent to understand why what they did was wrong.

Some commenters suggested adding a statute of limitations requirement in the filing of a complaint that aligns to that jurisdiction so as to preserve evidence and protect both parties.

Other commenters expressed disapproval of the notion of third-party reporting and bystander intervention because posters plastered all over campuses that command students to make reporting a habit have a totalitarian feel. Other commenters asked if the Department would consider encouraging schools to inquire into anonymous and third-party reports as a means of preventing harassment from worsening.

Discussion: The Department appreciates the comments in support of the deliberate indifference standard in § 106.44(a). The deliberate indifference standard provides consistency with the Title IX rubric for judicial and administrative enforcement and gives a recipient sufficient flexibility and discretion to address sexual harassment. At the same time, for reasons explained in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, the Department has tailored a deliberate indifference standard for administrative enforcement purposes by adding specific obligations that every recipient must meet as part of every response to sexual harassment, including offering supportive measures to complainants through the Title IX Coordinator engaging in an interactive discussion with the complainant about the complainant's wishes, and explaining to the complainant the option and process for filing a formal complaint.

The Department acknowledges that some commenters think that these final regulations are pro-women while others think that these final regulations are pro-men. The final regulations are structured to avoid any favoritism on the basis of sex, and the Department will enforce them in a manner that does not discriminate on the basis of sex.

The Department appreciates the commenters who would like the Department to make it clear that the deliberate indifference standard applies to both complainants and respondents. To address this concern, the Department is revising § 106.44(a) to clarify that a recipient must treat

complainants and respondents equitably, which for a respondent means following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30.

We also appreciate commenters who would like us to respect the autonomy of the complainant. A complainant may only want supportive measures, may wish to go through an informal process, or may want to file a formal complaint. The Department revised § 106.44(a) to clarify that an equitable response for a complainant means offering supportive measures irrespective of whether the complainant also chooses to file a formal complaint. Additionally, a recipient may choose to offer an informal resolution process under § 106.45(b)(9) (except as to allegations that an employee sexually harassed a student). These final regulations thus respect a complainant's autonomy in determining how the complainant would like to proceed after a recipient becomes aware (through the complainant's own report, or any third party reporting the complainant's alleged victimization) that a complainant has allegedly suffered from sexual harassment.

The Department does not wish to impose a statute of limitations for filing a formal complaint of sexual harassment under Title IX. Each State may have a different statute of limitations for filing a complaint, which goes against the Department's objective of creating uniformity and consistency. Additionally, a State's statute of limitations for each category of sexual harassment may be different as jurisdictions may have a different statute of limitations for criminal offenses versus civil torts, adding yet another level of complexity to a recipient's response. The Department notes that a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed as provided in the revised definition of "formal complaint" in § 106.30; this provision

tethers a recipient's obligation to investigate a complainant's formal complaint to the complainant's involvement (or desire to be involved) in the recipient's education program or activity so that recipients are not required to investigate and adjudicate allegations where the complainant no longer has any involvement with the recipient while recognizing that complainants may be affiliated with a recipient over the course of many years and sometimes complainants choose not to pursue remedial action in the immediate aftermath of a sexual harassment incident. The Department believes that applying a statute of limitations may result in arbitrarily denying remedies to sexual harassment victims. At the same time, the § 106.45 grievance process contains procedures designed to take into account the effect of passage of time on a recipient's ability to resolve allegations of sexual harassment. For example, if a formal complaint of sexual harassment is made several years after the sexual harassment allegedly occurred, § 106.45(b)(3)(ii) provides that if the respondent is no longer enrolled or employed by the recipient, or if specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein, then the recipient has the discretion to dismiss the formal complaint or any allegations therein.

Similarly, the Department does not take a position in the NPRM or these final regulations on whether recipients should encourage anonymous reports of sexual harassment, but we have revised § 106.8(a) and § 106.30 defining "actual knowledge" to emphasize that third party (including "bystander") reporting, as well as anonymous reporting (by the complainant or by a

third party) is a permissible manner of triggering a recipient's response obligations.[431] Irrespective of whether a report of sexual harassment is anonymous, a recipient with actual knowledge of sexual harassment or allegations of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent generally and must meet the specific obligations set forth in revised § 106.44(a). On the other hand, if a recipient cannot identify any of the parties involved in the alleged sexual harassment based on the anonymous report, then a response that is not clearly unreasonable under light of these known circumstances will differ from a response under circumstances where the recipient knows the identity of the parties involved in the alleged harassment, and the recipient may not be able to meet its obligation to, for instance, offer supportive measures to the unknown complainant.

Changes: The Department revised § 106.44(a) to require recipients to respond *promptly* in a manner that is not deliberately indifferent. We also added to that paragraph: A recipient's response must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30,

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[431] Section 106.8(a) states that any person may report sexual harassment (whether or not the person reporting is the person alleged to be the victim of sexual harassment) by using the contact information listed for the Title IX Coordinator, and that such a report may be made "at any time (including during non-business hours)" by using the listed telephone number or e-mail address, or by mail to the listed office address. Section 106.30 defines "actual knowledge" and includes a statement that "notice" charging a recipient with actual knowledge includes a report to the Title IX Coordinator as described in § 106.8(a). *See also* discussion of anonymous reporting in the "Formal Complaint" subsection of the "Section 106.30 Definitions" section of this preamble.

consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.

The Department also has revised § 106.45(b)(3)(ii) to state that if a respondent is no longer enrolled or employed by a recipient, or if specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein, then the recipient may dismiss the formal complaint or any allegations therein.

We have also revised § 106.8(a) and § 106.30 defining "actual knowledge" to expressly state that any person may report sexual harassment in person, by mail, telephone, or e-mail, by using the contact information required to be listed for the Title IX Coordinator.

Comments: A number of commenters asserted that § 106.44(a) does not adequately protect students in both elementary and secondary and postsecondary education. Some commenters stated that no harassment at all should be tolerated under Title IX. Other commenters asserted that the provision would hinder Title IX enforcement. Still other commenters opined that the provision creates a situation in which systematic sexual harassment and misconduct can continue. Other commenters gave examples of the need to protect students evidenced by high-profile sexual abuse scandals at postsecondary institutions. Some commenters asserted that the proposed rules change schools' current responsibilities to take prompt and effective steps to end harassment, arguing that the current standard is more protective of students than the new deliberate indifference standard. Other commenters stated that the provision allows schools to "check boxes" in investigating complaints of sexual misconduct and will lead to a less prompt, less equitable response. Commenters stated the proposed rules would require schools to ignore

all sexual harassment unless the student has been denied equal access to education, even if the student has to sit next to their harasser or rapist in class every day, which creates a hostile environment for victims and negatively affects victims' ability to proceed with their education. Commenters argued schools will become more dangerous because the proposed rules perpetuate rape culture.

Discussion: The Department agrees with commenters inasmuch as proposed § 106.44(a), in conjunction with the way that actual knowledge was defined in § 106.30, did not adequately protect students in the elementary and secondary context. As discussed in the "Actual Knowledge" subsection of the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, we have revised § 106.30 defining actual knowledge to include notice to any elementary and secondary school employee.

We also agree with commenters to the extent that proposed § 106.44(a) did not impose sufficient specific, mandatory requirements as to what a recipient's non-deliberately indifferent response must consist of in order to protect complainants and be fair to respondents, in the context of elementary and secondary schools as well as the postsecondary institution context. As revised, § 106.44(a) requires all recipients to treat complainants and respondents equitably when responding to a report or formal complaint of sexual harassment (by offering supportive measures to complainants, and by disciplining respondents only after applying a grievance process that complies with § 106.45).

When a recipient has actual knowledge of sexual harassment in its education program or activity, the Department will not tolerate, and the final regulations do not allow recipients to tolerate, sexual harassment, including systematic sexual harassment or the perpetuation of a rape culture. Contrary to commenters' assertions, recipients will not be allowed to ignore sexual

harassment until it leads to the denial of equal access to education and must respond to every report of sexual harassment by offering supportive measures by engaging in an interactive discussion with the complainant to consider the complainant's wishes regarding available supportive measures, with or without the filing of a formal complaint. Supportive measures for complainants may include a different seating assignment or other accommodation so that the complainant does not need to sit next to the respondent in class every day. By requiring a recipient to offer supportive measures, these final regulations do not create or further a hostile environment and expressly require recipients to provide measures designed to restore or preserve a complainant's equal access to education.

In response to comments, the Department also revised § 106.44(a) to clarify that a recipient must respond *promptly* in a manner that is not deliberately indifferent. This clarifies that whether or not a formal complaint triggers a grievance process, the recipient must promptly offer supportive measures to the complainant. Where a formal complaint does trigger a grievance process, § 106.45(b)(1)(v) requires recipients to have a reasonably prompt time frame for the conclusion of the grievance process, including any appeals or informal resolution process.

Changes: As previously noted, the Department revised § 106.44(a) to require that the recipient respond promptly, and by offering supportive measures to complainants while refraining from punishing a respondent without following the § 106.45 grievance process.

Comments: Commenters expressed concern that the trauma suffered by victims is too great to hold schools to the deliberate indifference standard, which commenters characterized as too low a standard. Commenters noted the severe long-term effects of sexual assault and harassment on victims, including depression and suicide. Commenters expressed concern with the "clearly unreasonable" standard because false reporting is much less likely to happen than actual rape.

Commenters stated the proposed rules promote the misconception that survivors are making false accusations of sexual assault.

Commenters expressed concern that the proposed rules allow perpetrators in positions of authority to abuse the system. Commenters stated that by allowing institutions to create complex and opaque systems for reporting sexual harassment or sexual assault, perpetrators in positions of authority can continue to victimize students over long periods.

Discussion: The Department disagrees that the deliberate indifference standard in § 106.44(a) is too low of a standard to protect complainants and hold schools, colleges, and universities responsible for responding to sexual harassment in education programs or activities. As adapted from the *Gebser/Davis* framework and revised in these final regulations, this standard requires recipients to offer supportive measures to a complainant through an interactive process whereby the Title IX Coordinator must contact the complainant to discuss availability of supportive measures (with or without the filing of a formal complaint), consider the complainant's wishes regarding supportive measures, and explain to the complainant the process for filing a formal complaint. The Department has not previously imposed a legally binding requirement on recipients to offer supportive measures to a complainant in response to a report of sexual harassment. The Department acknowledges that sexual assault and sexual harassment may have severe, long-term consequences, which is why the Department requires recipients to respond promptly and to offer a complainant supportive measures. The final regulations' emphasis on supportive measures recognizes that educational institutions are uniquely positioned to take prompt action to protect complainants' equal access to education when the educational institution is made aware of sexual harassment in its education program or activity, often in ways that even a court-issued restraining order or criminal prosecution of the respondent would not accomplish

(e.g., approving a leave of absence for a complainant healing from trauma, or accommodating the re-taking of an examination missed in the aftermath of sexual violence, or arranging for counseling or mental health therapy for a sexual harassment victim experiencing PTSD symptoms). While we recognize that the range of supportive measures (defined in § 106.30 as individualized services, reasonably available, without fee or charge to the party) will vary among recipients, we believe that every recipient has the ability to consider, offer, and provide some kind of individualized services reasonably available, designed to meet the needs of a particular complainant to help the complainant stay in school and on track academically and with respect to the complainant's educational benefits and opportunities, as well as to protect parties' safety or deter sexual harassment. These final regulations impose on recipients a legal obligation to do what recipient educational institutions have the ability and responsibility to do to respond promptly and supportively to help complainants, while treating respondents fairly.

Commenters erroneously asserted that the Department is adopting the standard in § 106.44(a) because of a belief that false reporting occurs more frequently than rape; these final regulations are not premised on, and do not promote, this notion. As explained previously, the Department is adopting this standard to require recipients to respond promptly and in a manner that provides a complainant with supportive measures and presents the complainant with more control over the process by which the recipient will respond to the report of sexual harassment.

This standard will not allow perpetrators in positions of authority to abuse the system or to continue to victimize students over long periods of time. Contrary to the commenters' assertions, these final regulations do not allow institutions to create complex and opaque systems for reporting sexual harassment or sexual assault. These final regulations require recipients to notify all students and employees (and parents and guardians of elementary and secondary

school students) of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator pursuant to § 106.8(a) so that students and employees will know to whom they may report sexual harassment and how to make such a report, including options for reporting during non-business hours. Each recipient also must prominently display the contact information required to be listed for the Title IX Coordinator on its website, if any, and in each handbook or catalog that it makes available to applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, pursuant to § 106.8(c). Additionally, a recipient must respond when the recipient has actual knowledge of sexual harassment, even if the complainant (i.e., the person alleged to be the victim) is not the person who reports the sexual harassment. As explained above, "actual knowledge" is defined in § 106.30 as notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school. Far from being complex or opaque, the final regulations ensure that recipients and their educational communities (including their students, employees, and parents of elementary and secondary school students) understand how to report sexual harassment and what the recipient's response will be. Regardless of whether a recipient desires to absolve itself of actual knowledge of sexual harassment, a recipient cannot avoid actual knowledge triggering prompt response obligations, because any person (not only the complainant – i.e., the alleged victim – but any third party) may report sexual harassment allegations to the Title IX Coordinator, to an official with authority to

take corrective action, or to any elementary or secondary school employee.[432] The final regulations require recipients to post on their websites the contact information for the recipient's Title IX Coordinator and to send notice to every student, employee, and parent of every elementary and secondary school student of the Title IX Coordinator's contact information.[433] The final regulations thus create clear, accessible channels for any person to report sexual harassment in a way that triggers a recipient's response obligations. A recipient must promptly respond if it has actual knowledge that any person, including someone in a position of authority, is sexually harassing or assaulting students; failure to do so violates these final regulations. As previously stated, the deliberate indifference standard is flexible and may require a different response depending on the unique circumstances of each report of sexual harassment. If a recipient has actual knowledge of a pattern of alleged sexual harassment by a perpetrator in a position of authority, then a response that is not deliberately indifferent or clearly unreasonable may require the recipient's Title IX Coordinator to sign a formal complaint obligating the recipient to investigate in accordance with § 106.45, even if the complainant (i.e., the person alleged to be the victim) does not wish to file a formal complaint or participate in a grievance process.

Changes: None.

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[432] *See* § 106.30 defining "actual knowledge" and § 106.44(a) requiring a prompt response to actual knowledge of sexual harassment in a recipient's program or activity against a person in the United States.

[433] Section 106.8 (expressly stating that any person may report sexual harassment by using the contact information required to be listed for the Title IX Coordinator or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report; requiring the contact information to be prominently displayed on recipients' websites; and stating that reports may be made at any time including during non-business hours by using the listed telephone number or e-mail address or by mail to the listed office address).

Comments: A number of commenters expressed concern that the proposed rules create more obstacles for survivors. Commenters stated that the proposed rules are not based in science and that reducing existing standards by not providing support and services to survivors of sexual assault and harassment is harmful and out of step with data and research. Other commenters expressed concern that the proposed rules prevent survivors from coming forward by cutting off their access to resources. Commenters expressed concern that the proposed rules are unfair to, unreasonable, or indifferent toward survivors and allows schools to do very little to help survivors. Commenters stated the proposed rules make it impossible for survivors to seek meaningful redress from their schools after having experienced sexual harassment.

Some commenters expressed concern that the standard for opening an investigation is too high. Other commenters suggested that the standard for opening an investigation into an individual student's complaint of harassment should not be as high as the standard for actually holding a school liable as an institution. Commenters stated that the Title IX Coordinator determining if a complaint meets certain criteria is an unnecessary obstacle.

Commenters argued that requiring a formal complaint places additional burdens on the individual who has experienced trauma. Commenters stated the process could retraumatize the survivor and discourage others from coming forward. Commenters stated a plaintiff would normally be able to access equitable relief to remedy unintentional discrimination through a court order, but the Department would not attempt to secure a remedy on the same facts.

Discussion: Contrary to commenters' assertions, these final regulations remove obstacles for complainants by clearly requiring recipients to offer supportive measures irrespective of whether the complainant files a formal complaint and without any showing of proof of the complainant's allegations. The final regulations provide greater choice and control for complainants.

Complainants may choose whether to receive supportive measures without filing a formal complaint, may choose to receive supportive measures and file a formal complaint, or may choose to receive supportive measures and request any informal resolution process that the recipient may offer. Accordingly, these final regulations respect complainants' autonomy and require recipients to consider the wishes of each complainant with respect to the type of response that best suits a complainant's particular needs.[434]

We disagree that the standard for opening an investigation is the same standard for holding a recipient liable and that this standard is too high. If a recipient has actual knowledge of sexual harassment (or allegations of sexual harassment) in its education program or activity against a person in the United States, then it must begin an investigation as soon as the complainant requests an investigation by filing a formal complaint (or when the Title IX Coordinator determines that circumstances require or justify signing a formal complaint). The actual knowledge standard is discussed in greater depth under the "Actual Knowledge" subsection of the "Section 106.30 Definitions" section of this preamble.

Title IX Coordinators have always had to consider whether a report satisfies the criteria in the recipient's policy, and these final regulations are not creating new obstacles in that regard. The criteria that the Title IX Coordinator must consider are statutory criteria under Title IX or criteria under case law interpreting Title IX's non-discrimination mandate with respect to discrimination on the basis of sex in the recipient's education program or activity against a

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[434] While the final regulations at § 106.30 (defining "formal complaint") give Title IX Coordinators discretion to sign a formal complaint even where the complainant does not wish to participate in a grievance process, the final regulations also protect every complainant's right not to participate. § 106.71 (prohibiting retaliation against any person exercising rights under Title IX, including participation or refusal to participate in any grievance process).

person in the United States, tailored for administrative enforcement.[435] Additionally, these final regulations do not preclude action under another provision of the recipient's code of conduct, as clearly stated in revised § 106.45(b)(3)(i), if the conduct alleged does not meet the definition of Title IX sexual harassment.

The Department understands commenters' concerns that requiring complainants to go through a formal complaint process may cause further trauma, which is why the Department's final regulations provide that a recipient must offer supportive measures even if the complainant does not choose to file a formal complaint. We do not think that giving a complainant the choice to file a formal complaint will further traumatize the complainant. Giving complainants the option to choose a formal complaint process rather than mandating such a process gives complainants more autonomy and control over their circumstances, which survivor advocates have emphasized is crucial to supporting survivors, and may make more complainants feel comfortable enough to report allegations of sexual harassment. Where a complainant does file a formal complaint raising allegations of sexual harassment, both parties must have full and fair opportunity to participate in a fair grievance process designed to reach an accurate outcome. The final regulations endeavor to take into account the fact that navigating a formal process can be difficult for both complainants and respondents.[436]

The Department does not understand the comment that these final regulations do not require recipients to address unintentional discrimination that a court would address. These final regulations require a recipient to respond to allegations of sexual harassment as defined in §

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[435] *See* the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble.
[436] *E.g.*, § 106.45(b)(5)(iv) gives both parties equal opportunity to be assisted by an advisor of choice.

106.30, irrespective of whether the alleged conduct was intentional or unintentional on the part of the respondent[437] and similarly, a recipient's response obligations will be enforced without any regard for whether a recipient "intentionally" violated these final regulations. If a complainant received a court order remedying unintentional discrimination, the recipient would have to follow any court order that by its terms applied to that recipient.

Changes: We have revised § 106.44(a) to require recipients to treat complainants and respondents equitably meaning offering supportive measures to a complainant and refraining from disciplining a respondent with following the § 106.45 grievance process; specifically, a recipient's Title IX Coordinator must contact the complainant to discuss the availability of supportive measures (with or without the filing of a formal complaint), consider the complainant's wishes with respect to supportive measures, and explain to the complainant the process for filing a formal complaint.

Comments: Some commenters argued that the proposed rules would allow a school to treat survivors poorly and impose little or no sanctions for rapists. Other commenters stated the proposed rules would dissolve free speech for survivors.

Some commenters expressed concern that the proposed rules allow schools to evade responsibility and accountability. Other commenters expressed concern that the proposed rules give too much deference to school districts. At least one commenter expressed concern that the

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[437] Section 106.30 defining "sexual harassment" does not impose an independent intent or *mens rea* requirement on conduct that constitutes sexual harassment; however, the Department notes that the sexual offense of "fondling," which is an offense under "sexual assault" as defined under the Clery Act and made part of Title IX sexual harassment under § 106.30, includes as an element of fondling touching "for the purpose of sexual gratification." Courts have interpreted similar "purpose of" elements in sex offense legislation as an intent requirement, and recipients should take care to apply that intent requirement to incidents of alleged fondling so that, for example, unwanted touching committed by young children – with no sexualized intent or purpose – is distinguished from Title IX sexual harassment and can be addressed by a recipient outside these final regulations.

Department's decision to adopt the deliberate indifference standard essentially negates the Department's ability to perform regulatory oversight, one of its primary functions. Commenters argued that deferring to a school district's determination is not always appropriate, and accountability is necessary to ensure schools are free of sexual harassment. Other commenters expressed concern that universities can expediently reduce liability by simply checking boxes and doing nothing. Commenters argued that the responsibilities of university administrators and educators extend beyond the minimal standard set by the rule. Commenters expressed concern that the proposed rules allow the Department to defer to local leaders rather than ensuring universally agreed-upon standards. Other commenters argued that institutions need to be labeled publicly as offenders.

Discussion: As previously noted, the recipient cannot ignore a complainant's report of sexual harassment, and these final regulations do not prevent punishment of perpetrators of sexual assault; the recipient must offer supportive measures to the complainant under § 106.44(a) and Title IX Coordinators must be trained to serve impartially, without prejudgment of the facts and without bias, under § 106.45(b)(1)(iii). A recipient may impose disciplinary sanctions upon a respondent after a grievance process that complies with § 106.45. Requiring recipients to offer supportive measures to the complainant and follow a grievance process under § 106.45 prior to disciplining the respondent helps ensure that a recipient's response treats complainants and respondents fairly. Moreover, the final regulations add § 106.71 to assure complainants and respondents that the recipient cannot retaliate against any party.

Contrary to commenters' assertions, these final regulations do not dissolve free speech for complainants. The Department revised § 106.44(a) to clarify that no recipient is required to restrict a person's rights under the U.S. Constitution, including the First Amendment, to satisfy

its obligation not to be deliberately indifferent in response to sexual harassment. Although this premise is expressed in § 106.6(d), which applies to the entirety of Part 106 of Title 34 of the Code of Federal Regulations, in recognition of commenters' concerns that a recipient subject to constitutional restraints may believe that the recipient must restrict constitutional rights in order to comply with the recipient's obligation to respond to a Title IX sexual harassment incident, the Department reinforces in § 106.44(a) that responding in a non-deliberately indifferent manner to a complainant does not require restricting constitutional rights.[438]

The Department is not negating its duties or unduly deferring to a recipient with respect to compliance with Title IX. The Department is clarifying the recipient's legally enforceable obligations through these final regulations and providing greater consistency. Every complainant who reports sexual harassment, as defined in § 106.30, will know that the recipient must offer supportive measures in response to such a report, and every respondent will know that a recipient must provide a grievance process under § 106.45 prior to imposing disciplinary sanctions. The Department will continue to exercise regulatory oversight in enforcing these final regulations. Recipients, including universities, will not be able to simply check off boxes without doing anything. Recipients will need to engage in the detailed and thoughtful work of informing a complainant of options, offering supportive measures to complainants through an interactive process described in revised § 106.44(a), and providing a formal complaint process with robust due process protections beneficial to both parties as described in § 106.45. Where a formal complaint triggers a grievance process, § 106.45 requires recipients to do much more than simply

[438] Similarly, the Department emphasizes the purpose of § 106.6(d) in new § 106.71(b) (prohibiting retaliation) to remind recipients that in the context of deciding if conduct constitutes retaliation, the Department will interpret the retaliation prohibition in a manner consistent with constitutional rights such as rights under the First Amendment.

have a process "on paper" or "check off boxes." These final regulations require a recipient to investigate and adjudicate a complaint in a way that gives both parties a meaningful opportunity to participate, including by requiring the recipient to objectively evaluate relevant evidence, permitting parties to inspect and review evidence, and providing the parties a copy of an investigative report prior to any hearing or other determination regarding responsibility. These procedures, and all the provisions in § 106.45, must be followed by the recipient using personnel who are free from bias and conflicts of interest and who are trained to serve impartially.

With respect to commenters who asserted that recipients should have greater obligations than those imposed under these final regulations, the Department notes that nothing in these final regulations precludes action under another provision of the recipient's code of conduct that these final regulations do not address. For example, a recipient may choose to address conduct outside of or not in its "education program or activity," even though Title IX does not require a recipient to do so. The Department believes that these final regulations hold recipients to appropriately high, legally enforceable standards of compliance to effectuate Title IX's non-discrimination mandate.

The Department disagrees that all institutions should be labeled publicly as offenders for violating Title IX. The Department will make findings against recipients that violate these final regulations and will continue to make such letters of findings publicly available.

Changes: The Department revised § 106.44(a) to clarify that the Department will not deem a recipient not deliberately indifferent based on the recipient's restriction of rights protected under the U.S. Constitution, including the First Amendment, the Fifth Amendment, and the Fourteenth Amendment.

Comments: A number of commenters argued that the 2011 Dear Colleague Letter was better for protecting survivors and was fair to both sides. One commenter urged the Department to reject the NPRM and to reinstate the 2011 Dear Colleague Letter and 2014 Q&A to keep students safe. This commenter argued that Title IX is a critical safety net because applicable State laws and school policies may vary widely and leave students unprotected. The commenter also cited studies showing a widespread problem of educator sexual misconduct against students.[439] Another commenter suggested that the proposed rules should be replaced with affirmative obligations from the 2011 Dear Colleague Letter requiring the recipient to take immediate action to eliminate the harassment, prevent its reoccurrence, and address its effects.

A number of commenters argued that the 2001 Guidance was adequate and protected survivors. Commenters asserted that the 2001 Guidance standards were superior to the *Gebser/Davis* standards. Other commenters expressed concern that even under the 2001 Guidance standards, schools failed to adopt policies that would develop responses to sexual harassment designed to reduce occurrence and remedy effects. Similarly, commenters expressed concern that many cases demonstrate that even when students and parents were well informed on the 2001 Guidance standards, and brought legitimate concerns directly to institutions, institutions continued to fail students. Commenters argued that schools conducted an in-name-only investigation and refused to discipline respondents, resulting in escalating sexual harassment, in some cases leading to rape.

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[439] Commenters cited, *e.g.*: Magnolia Consulting, *Characteristics of School Employee Sexual Misconduct: What We Know from a 2014 Sample* (Feb. 1, 2018), https://magnoliaconsulting.org/news/2018/02/characteristics-school-employee-sexual-misconduct (noting one in three employee-respondents in elementary and secondary schools sexually abuse multiple student victims).

A number of commenters opposed the use of the *Gebser/Davis* standards. Commenters disapproved of the use of the higher bar erected by the U.S. Supreme Court in the very specific and narrow context of a civil Title IX lawsuit seeking monetary damages against a school due to its response (or lack thereof) to actual notice of sexual harassment. Commenters argued these standards have no place in the far different context of administrative enforcement with its iterative process and focus on voluntary corrective action by schools. Other commenters argued that the 2001 Guidance directly addressed this precedent, concluding that it was inappropriate for the Department to limit its enforcement activities by applying the more stringent standard, stating that the Department would continue to enforce the broader protections provided under Title IX, and noting that the Department acknowledges that it is "not required to adopt the liability standards applied by the Supreme Court in private suits for money damages." Other commenters expressed concern about the *Davis* progeny, where Federal courts have determined that only the most severe cases can meet the deliberate indifference standard. Other commenters suggested that the liability standard should be higher than what was set by the Supreme Court, and that recipients must be on clear notice of what conduct is prohibited and that recipients must be held liable only for conduct over which they have control.

Discussion: Although the Department is not required to adopt the deliberate indifference standard articulated by the Supreme Court, we are persuaded by the rationales relied on by the Supreme Court and believe that the deliberate indifference standard represents the best policy approach. As the Supreme Court reasoned in *Davis*, a recipient acts with deliberate indifference only when it responds to sexual harassment in a manner that is "clearly unreasonable in light of

the known circumstances."[440] The Department believes this standard holds recipients accountable for providing a meaningful response to every report, without depriving recipients of legitimate and necessary flexibility to make disciplinary decisions and provide supportive measures that best respond to particular incidents of sexual harassment. Sexual harassment incidents present context-driven, fact-specific needs and concerns for each complainant, and the Department believes that teachers and local school leaders with unique knowledge of the school climate and student body are best positioned to make decisions about supportive measures and potential disciplinary measures; thus, unless the recipient's response to sexual harassment is clearly unreasonable in light of the known circumstances, the Department will not second guess such decisions.[441] In response to commenters' concerns that the liability standard of deliberate indifference gives recipients too much leeway to respond to the sexual harassment ineffectively, the Department has specified certain steps a recipient must take in all circumstances. For example, a response that is not deliberately indifferent must include promptly informing each complainant of the method for filing a formal complaint, offering supportive measures for that complainant, and imposing discipline on a respondent only after complying with the grievance process set forth in § 106.45. Where a respondent has been found responsible for sexual harassment, any disciplinary sanction decision rests within the discretion of the recipient, and the Department's concern under Title IX is to mandate that the recipient provide remedies, as

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[440] *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 648-49 (1999).

[441] *Id.* Indeed, the Supreme Court observed in *Davis* that courts must not second guess recipients' disciplinary decisions. As a matter of policy, the Department believes that the Department should not second guess recipients' disciplinary decisions through the administrative enforcement process. When a recipient finds a respondent responsible for Title IX sexual harassment, the Department requires the recipient to effectively implement remedies for the complainant, and will not second guess the recipient's determination of responsibility solely based on the fact that the Department would have weighed the evidence in the case differently than the recipient's decision-maker did. §§ 106.45(b)(1)(i), 106.45(b)(7)(iv), 106.44(b)(2).

appropriate, to the victim, designed to restore or preserve the victim's equal educational access.[442]

The Department acknowledges that the deliberate indifference standard in § 106.44(a) departs from standards set forth in prior guidance and applied in OCR enforcement of Title IX. In its previous guidance and enforcement practices, the Department took the position that constructive notice – as opposed to actual knowledge – triggered a recipient's duty to respond to sexual harassment; that recipients had a duty to respond to a broader range of sex-based misconduct than the sexual harassment defined in the proposed rules; and that recipients' response to sexual harassment should be effective and should be judged under a reasonableness or even strict liability standard, rather than under the deliberate indifference standard.[443]

Based on its consideration of the text and purpose of Title IX, of the reasoning underlying the Court's decisions in *Gebser* and *Davis*, and over 124,000 comments, the Department departs from its prior guidance that set forth a standard different from the deliberate indifference standard. We discuss the reasons for the ways in which we have adopted, but tailored, the three-part *Gebser/Davis* framework in these final regulations, in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, including the ways in which these final regulations are similar to, and different from, Department guidance.

In response to commenters who asserted that recipients should only be liable for conduct over which they have control, the Department agrees with that statement and, in response, adds

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[442] Section 106.45(b)(1)(i).
[443] 2001 Guidance at iv, vi.

to § 106.44(a) the statement that "education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs. The Department derives this language from the holding in *Davis* that a recipient should be held liable for "circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs."[444] Accordingly, the Department does not need to adopt a higher standard than what the *Gebser/Davis* framework set forth in order to hold a recipient responsible for circumstances under the recipient's control. These final regulations apply to employees who sexually harass a student and will provide uniformity and consistency with respect to how a recipient responds to employee-on-student sexual harassment.

The Department acknowledges that some recipients failed to satisfy the requirements in the Department's past guidance and does not believe that the past failures of these recipients require the Department to adopt a different standard. The standards we adopt cannot ensure recipients' compliance in every instance. Any failure to comply would be handled as an enforcement matter, but such failure to comply, alone, does not warrant changing the standard.

Changes: In addition to the changes previously noted, § 106.44(a) now includes a statement that "education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs.

Comments: Commenters expressed concern that the proposed rules would result in less predictable outcomes for schools. Commenters reasoned that if the Department applies a

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[444] *Davis*, 526 U.S. at 645.

standard for monetary damages to its administrative enforcement scheme, plaintiffs will ask the courts to play the role that the Department abdicated. Commenters expressed concern that the proposed rules will cause a massive increase in lawsuits against colleges because individuals who would have filed administrative complaints with the Department will instead file court actions for equitable relief against recipients of Federal funds thus depriving schools of an opportunity to comply voluntarily. Commenters asserted that such a system would be both less efficient and far slower than the status quo, because the costs of litigation would dwarf the costs of negotiating a voluntary resolution agreement and recipients of Federal funds would be unable to engage in informal negotiations with the court over the extent of the remedy. Commenters argued that if the Department adopts the same standards as the Court adopted for monetary damages, students with viable claims will likely bypass the Department altogether, undercutting the Department's efforts to promote systemic reforms that would benefit individuals without the means to engage in litigation.

Commenters expressed concern that the Department is the wrong entity to enact Title IX reforms and that survivors should be the ones who create or enact these regulations. Commenters likened the proposed rules to laws restricting abortions inasmuch as people who are not women should not dictate how a woman's body is treated, with respect to having an abortion or how a school responds to the sexual assault of a woman's body.

Discussion: The Department respectfully disagrees that the proposed rules or these final regulations would result in less predictable outcomes for schools. As previously explained, the Department revised § 106.44(a) to specify that a recipient must offer supportive measures to a complainant, and must include a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as

defined in § 106.30. Additionally, as explained in more detail below, the Department has revised § 106.44(b) to remove the safe harbors that were proposed in the NPRM, replacing the concept of safe harbors with more specific obligations: mandatory steps that a recipient must take as part of every response to sexual harassment, in § 106.44(a); and a requirement to investigate and adjudicate in accordance with § 106.45 in response to a formal complaint, in § 106.44(b).

The Department disagrees that it is abdicating its role to courts and that litigation will significantly increase as a result of these final regulations. The Department recognizes that its approach to Title IX enforcement may have caused much litigation in the past, as recipients that complied with the Department's recommendations in past guidance may have risked not providing adequate due process protections, resulting in litigation. Going forward, the Department believes that the balanced approach in these final regulations will provide complainants with supportive, meaningful responses to all reports, and provide both parties with due process protections during investigations and adjudications, which may result in decreased litigation against recipients by complainants and respondents. The Department will be the arbiter of whether a recipient complies with the requirements of these final regulations. Additionally, failure to comply with the Department's regulations may not always result in legal liability before a court. For example, although the final regulations require that a recipient must offer supportive measures to a complainant, a court may determine that a recipient was not deliberately indifferent even though that recipient did not offer supportive measures. If a recipient complies with the Department's regulations and offers supportive measures in response to a complaint of sexual harassment, then such action may persuade a court that the recipient was not deliberately indifferent. Accordingly, the Department retains its proper role as the enforcer of its regulations, and these final regulations may help decrease litigation.

Congress charged the Department with the responsibility to administer Title IX, and the Department has carefully considered the input of survivors as well as other communities through the notice-and-comment rulemaking process before issuing these final regulations. The Department is sensitive to the unique trauma that sexual violence often inflicts on women (as well as men, and LGBTQ individuals); while the Department disagrees with a commenter's assertion that these regulations are similar to laws restricting abortions, we endeavor in these final regulations to give each complainant (regardless of sex) more control over the response of the complainant's school, college, or university in the wake of sexual harassment that violates a woman or other complainant's physical and emotional dignity and autonomy.

Changes: We have removed the "safe harbor" provisions in proposed § 106.44(b).

Comments: Commenters expressed concern that new sets of formal relationships between faculty members and students are established every four months, when students enroll in new courses each academic term and that any given student may not currently be under the supervision of a particular faculty member, but that situation could change in a matter of a few weeks. Such reconfigurations every semester add to the difficulty of determining whether a particular circumstance is or is not within the scope of Title IX pursuant to § 106.44(a).

Discussion: The Department is aware that students will change classes and also have different instructors throughout their education, and these final regulations provide the same clarity and consistency in case law under the Supreme Court's rubric in *Gebser/Davis*. The Department notes that "program or activity" has been defined in detail by Congress[445] and is reflected in

[445] 20 U.S.C. 1687.

existing Department regulations.[446] The Department will interpret a recipient's education "program or activity" in accordance with the Title IX statute and its implementing regulations, which generally provide that an educational institution's program or activity includes "all of the operations of" a postsecondary institution or elementary and secondary school. For instance, incidents that occur in housing that is part of a recipient's operations such as dormitories that a recipient provides for students or employees whether on or off campus are part of the recipient's education program or activity. For example, a recipient must respond to an alleged of sexual harassment between two students in one student's dormitory room provided by the recipient. In order to clarify that a recipient's "education program or activity" may also include situations that occur off campus, the Department adds to § 106.44(a) the statement that "education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs. This helps clarify that even if a situation arises off campus, it may still be part of the recipient's education program or activity if the recipient exercised substantial control over the context and the alleged harasser. While such situations may be fact specific, recipients must consider whether, for example, a sexual harassment incident between two students that occurs in an off-campus apartment (i.e., not a dorm room provided by the recipient) is a situation over which the recipient exercised substantial control; if so, the recipient must respond to notice of sexual harassment that occurred there. The Department has also revised § 106.45(b)(1)(iii) to specifically require recipients to provide Title IX personnel with training about the scope of the recipient's education program or activity, so that recipients accurately identify situations that

[446] 34 CFR 106.2(h).

require a response under Title IX. We further note that we have revised § 106.45(b)(3) to clarify that even if alleged sexual harassment did not occur in the recipient's education program or activity, dismissal of a formal complaint for Title IX purposes does not preclude the recipient from addressing that alleged sexual harassment under the recipient's own code of conduct. Recipients may also choose to provide supportive measures to any complainant, regardless of whether the alleged sexual harassment is covered under Title IX.

The Department is revising the definition of "formal complaint" in § 106.30 to make it clear that the student must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed; no similar condition exists with respect to *reporting* sexual harassment.[447] Changing classes or changing instructors does not necessarily mean that a student is not participating or attempting to participate in a recipient's education program or activity. To the extent that a recipient needs further clarity in this regard, the Department will be relying on statutory and regulatory definitions of a recipient's education "program or activity."[448]

Changes: The Department has revised § 106.44(a) to state that "education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs.

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[447] We have revised § 106.8(a) to clarify that any person may report sexual harassment (whether or not the person reporting is also the person who is alleged to be the victim of sexual harassment) by using any of the listed contact information for the Title IX Coordinator, and a report can be made at any time (including during non-business hours) by using the telephone number or e-mail address, or by mail to the office address, listed for the Title IX Coordinator.

[448] For further discussion, see the "Section 106.44(a) 'education program or activity'" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this preamble.

Comments: Commenters stated the proposed rules constitute clear violations of the purpose of Title IX. Commenters expressed concern that the proposed regulations will eliminate the Department's enforcement of Title IX or hurt Title IX, or are contrary to the congressional purpose of Title IX. Commenters expressed concern that OCR would not be able to investigate a school or begin the processes required for enforcement unless a school's actions already reached the levels necessary for enforcement, effectively eliminating OCR's ability to seek the informal means of enforcement built into the statute, such as resolution agreements with schools.

Discussion: These final regulations adhere closely to both the plain meaning of Title IX and to Federal case law interpreting Title IX; therefore, they are not a violation of the text or purpose of Title IX. These final regulations provide greater clarity for recipients, as recipients will know how the Department requires recipients to respond to reports of sexual harassment.

OCR will continue to vigorously enforce Title IX to achieve recipients' compliance, including by reaching voluntary resolution agreements. Nothing in these final regulations prevents the Department from carrying out its enforcement obligations under Title IX. For example, if the Department receives a complaint that a recipient did not offer supportive measures in response to a report of sexual harassment, the Department may enter into a resolution agreement with the recipient in which the recipient agrees to offer supportive measures for that complainant and for other complainants prospectively.

Changes: None.

Comments: Commenters suggested the final regulations should abolish or limit peer harassment liability for schools. Commenters argued that the *Davis* decision applying peer harassment liability does not prevent the Department from abolishing such liability as long as there are informed reasons for doing so. Commenters asserted that courts will defer to agency

reinterpretations of statutes when the agency supplies a reasoned explanation for its decision, under *Chevron* deference.[449]

Discussion: The Department acknowledged in the NPRM that it is not required to adopt the deliberate indifference standard articulated by the Supreme Court.[450] As explained in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, the Department is persuaded by the policy rationales relied on by the Court and continues to believe that the Supreme Court's rubric for addressing sexual harassment – including peer sexual harassment – is the best policy approach, with the adaptions made in these final regulations for administrative enforcement.

Changes: None.

General Support and Opposition for the Grievance Process in § 106.45

Comments: Many commenters favored the § 106.45 grievance process on grounds that it would provide greater clarity, bring fairness to all parties, increase public confidence in school-level Title IX proceedings, and decrease the likelihood that recipients will be sued in court for mishandling Title IX sexual harassment cases. Several commenters expressed support for § 106.45 on the ground that whether false accusations occur at a low rate or a higher rate, false accusations against accused students and employees, and their support networks of family and friends, have devastating consequences. Several commenters included personal stories of being

[449] Commenters cited: *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984) (holding that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer").

[450] 83 FR 61468. For discussion of the way these final regulations adopt the Supreme Court's deliberate indifference liability standard, but tailor that standard to achieve policy aims of administrative enforcement of Title IX's non-discrimination mandate, see the "Deliberate Indifference" subsection of the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble.

falsely accused, or having family members falsely accused, including where the complainant recanted the allegations after the commenter's loved one had committed suicide. One commenter asserted that the "fraud triangle" theory that explains the dynamics around fraud-related offenses can also illustrate the importance of due process protections in the sexual misconduct context, because rationalization is one of the three legs of the triangle (the other two being pressure and opportunity), and due process protections serve to discourage people from rationalizing dishonesty by ensuring that allegations are investigated before being acted upon.

Some commenters believed that § 106.45 will rectify sex discrimination against men, and some believed that it will correct sex discrimination against women. A few commenters supported the due process protections in § 106.45 on the ground that lack of due process in any system, whether courts of law or educational institution tribunals, often results in persons of color and persons of low socioeconomic status being wrongly or falsely convicted or punished. Several commenters asserted that men of color are more likely than white men to be accused of sexual misconduct and a system that lacks due process thus results in men of color being unfairly denied educational opportunities. One commenter asserted that due process exists not only to protect all individuals irrespective of sex, race, or ethnicity from persecution by those in power but also exists to ensure those in authority are enacting real justice, and that when due process is abandoned it is always the most marginalized and vulnerable who suffer; other commenters echoed that theme. A few commenters claimed that innocent people do not need due process, or that due process only helps those who are guilty.

Several commenters noted that principles of due process developed over centuries of Western legal history, while imperfect, are most apt to find truth in matters involving high-stakes factual disputes, and that no cause or movement justifies abandoning such principles to equate an

accusation with a determination of responsibility. A few commenters expressed support for the due process protections in § 106.45 by noting that Supreme Court Justice Ruth Bader Ginsburg has expressed public support for enhancing campus due process, and that public opinion polls have shown public support for due process on college campuses.

Some commenters supported § 106.45 because Title IX sexual harassment proceedings often involve contested proceedings with plausible competing narratives and a lack of disinterested witnesses, and the proposed rules do not give an advantage to either complainants or respondents, but rather provide a web of protections for both sides formulated to ensure as fair and unbiased a result as possible. One commenter recounted a personal experience managing a university's sexual assault response program and opined that because that university's process was widely viewed as fair and impartial to both sides, the program held students responsible where the evidence showed responsibility, including against star athletes; the commenter believed that due process was essential to the program's credibility.[451]

At least one commenter supported the § 106.45 grievance process as a lawful method of implementing Title IX's directive that the Department "effectuate the provisions of" Title IX, citing 20 U.S.C. 1681 and 1682, arguing that the Department's proposed grievance process: adopts procedures designed to reduce or eliminate sex discrimination; prevents violations of substantive non-discrimination mandates; and constitutes a reasonable means of guarding against sex discrimination and unlawful retaliation, particularly because the § 106.45 requirements are

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[451] Commenters cited: Gary Pavela & Gregory Pavela, *The Ethical and Educational Imperative of Due Process*, 38 JOURNAL OF COLL. & UNIV. L. 567 (2012) (arguing that "due process – broadly defined as an inclusive mechanism for disciplined and impartial decision making – is essential to the educational aims of contemporary higher education and to fostering a sense of legitimacy in college and university policies.").

sex neutral and narrowly tailored to prevent sex discrimination. One commenter asserted with approval that the § 106.45 grievance process not only expressly prohibits bias and conflicts of interest, but also promotes full and fair adversarial procedures and requires decision-makers to give reasons that explain their decisions – all of which have been shown to prevent biased outcomes.

One commenter suggested improving § 106.45 by clarifying whether the procedures in the "investigations" section apply throughout the entire grievance process or only to the investigation portion of a grievance process. Another commenter expressed concern that recipients wishing to avoid applying the § 106.45 grievance process will process complaints about sexual misconduct outside their Title IX offices under non-Title IX code of conduct provisions and suggested the Department take action to ensure that recipients cannot circumvent § 106.45 by charging students with non-Title IX student conduct code violations. One commenter asked the Department to clarify whether § 106.45 applies to non-sexual harassment sex discrimination complaints.

Discussion: The Department appreciates the variety of reasons for which commenters expressed support for the § 106.45 grievance process. The provisions in § 106.45 are grounded in principles of due process to promote equitable treatment of complainants and respondents and protect each individual involved in a grievance process without bias against an individual's sex, race, ethnicity, socioeconomic status, or other characteristics, by focusing the proceeding on unbiased, impartial determinations of fact based on relevant evidence. The Department understands that some commenters believe § 106.45 primarily benefits women and others believe such provisions primarily benefit men; however, the Department agrees with still other commenters who support § 106.45 because its procedural protections provide all complainants and respondents with a

consistent, reliable process without regard to sex. The Department will enforce § 106.45 in a manner that does not discriminate based on sex. The Department agrees that due process of law exists to protect all individuals, and disagrees with commenters who claim that only guilty people need due process protections; the evolution of the American concept of due process of law has revolved around recognition that for justice to be done, procedural protections must be offered to those accused of even the most heinous offenses – precisely because only through a fair process can a just conclusion of responsibility be made. Further, the § 106.45 grievance process grants procedural rights to complainants and respondents so that both parties benefit from strong, clear due process protections.

In response to a commenter's request, the final regulations include two changes to clarify that procedures and requirements listed in §106.45 apply throughout the entirety of a grievance process. First, the Department uses the phrase "grievance process" and "a grievance process that complies with § 106.45" throughout the final regulations rather than "grievance procedures" or "due process protections" to reinforce that the entirety of § 106.45 applies when a formal complaint necessitates a grievance process. Second, and in particular response to the commenter's concern, the final regulations revise the investigation portion of § 106.45 to begin with the phrase "When investigating a formal complaint, *and throughout the grievance process*, a recipient must…" (emphasis added) to clarify that the procedures and protections in § 106.45(b)(5) apply to investigations but also throughout the grievance process.

The Department appreciates the commenter's concern that § 106.45 not be circumvented by processing sexual harassment complaints under non-Title IX provisions of a recipient's code of conduct. The definition of "sexual harassment" in § 106.30 constitutes the conduct that these final regulations, implementing Title IX, address. Allegations of conduct that do not meet the

definition of "sexual harassment" in § 106.30 may be addressed by the recipient under other provisions of the recipient's code of conduct, and we have revised § 106.45(b)(3) to clarify that intent; however, where a formal complaint alleges conduct that meets the Title IX definition of "sexual harassment," a recipient must comply with § 106.45.[452]

In response to a commenter's request for clarification, § 106.45 applies to formal complaints alleging sexual harassment under Title IX, but not to complaints alleging sex discrimination that does not constitute sexual harassment ("non-sexual harassment sex discrimination"). Complaints of non-sexual harassment sex discrimination may be filed with a recipient's Title IX Coordinator for handling under the "prompt and equitable" grievance procedures that recipients must adopt and publish pursuant to § 106.8(c).

Changes: To clarify that the ten groups of provisions that comprise § 106.45[453] apply as a cohesive whole to the handling of a formal complaint of sexual harassment, the Department has changed terminology throughout the final regulations to refer to "a grievance process complying with § 106.45" (for example, in § 106.44(a)), and uses the phrase "grievance process" rather than "grievance procedures" within § 106.45. Additionally, § 106.45(b)(5) now clarifies that the procedures a recipient must follow during investigation of a formal complaint also must apply throughout the entire grievance process.

Comments: Two commenters representing trade associations of men's fraternities and women's sororities requested that the Department specify that an individual's Title IX sexual harassment

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[452] Section 106.45(b) ("For the purpose of addressing formal complaints of sexual harassment, a recipient's grievance process must comply with the requirements of this section.").

[453] *See* the "Summary of § 106.45" subsection of the "Role of Due Process in the Grievance Process" section of this preamble.

violation must be adjudicated as an individual case unless specific evidence clearly implicates group responsibility, in which case the recipient must apply a separate grievance process (with the same due process protections contained in § 106.45) to adjudicate group or organizational responsibility. These commenters asserted that in the past few years more than 20 postsecondary institutions have suspended entire systems of fraternities and sororities upon reports of a group member sexually harassing a complainant, and that such action chills and deters victims from reporting sexual harassment because some victims do not wish to see broad groups of people punished for the wrongdoing of an individual perpetrator.

One commenter supported § 106.45 but asked the Department to require recipients to punish individuals who make false accusations.

Discussion: The final regulations address recipients' obligations to respond to sexual harassment, and § 106.45 obligates a recipient to follow a consistent grievance process to investigate and adjudicate allegations of sexual harassment. In § 106.30, "respondent" is defined as "an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment." The § 106.45 grievance process, therefore, contemplates a proceeding against an individual respondent to determine responsibility for sexual harassment.[454] The Department declines to require recipients to apply § 106.45 to groups or organizations against whom a recipient wishes to impose sanctions arising from a group member being accused of sexual harassment because such potential sanctions by the recipient against the group do not involve

[454] As discussed in the "Dismissal and Consolidation of Formal Complaints" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble, § 106.45(b)(4) gives recipients the discretion to consolidate formal complaints involving multiple parties where the allegations of sexual harassment arise from the same facts or circumstances; in such consolidated matters, the grievance process applies to more than one complainant and/or more than one respondent, but each party is still an "individual" and not a group or organization.

determining responsibility for perpetrating Title IX sexual harassment but rather involve determination of whether the group violated the recipient's code of conduct. Application of non-Title IX provisions of a recipient's code of conduct lies outside the Department's authority under Title IX. For the same reason, the Department declines to require a recipient to punish individuals who make false accusations, even if the accusations involve sexual harassment. An individual, or group of individuals, who believe a recipient has treated them differently on the basis of sex in a manner prohibited under Title IX may file a complaint of sex discrimination with the recipient's Title IX Coordinator for handling under the "prompt and equitable" grievance procedures recipients must adopt and publish pursuant to § 106.8(c).

Changes: None.

Comments: Many commenters expressed concern that the § 106.45 grievance process unduly restricts recipients' flexibility and discretion in structuring and applying recipients' codes of conduct and that it ignores unique needs of the wide array of schools, colleges, and universities that differ in size, location, mission, public or private status, and resources, and imposes a Federal one-size-fits-all mandate on recipients. In support of granting flexibility and discretion to recipients, several commenters pointed the Department to Federal and State court opinions for the proposition that the internal decisions of colleges and universities, including academic and disciplinary matters, are given considerable deference by courts.[455]

Many commenters expressed concerns that the § 106.45 grievance process is too quasi-judicial to be applied in a setting where schools and colleges are not courts of law and that it

[455] Commenters cited, *e.g.*: *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *Doe v. Hamilton Cnty. Bd. of Educ.*, 329 F. Supp. 3d 543, 470 (E.D. Tenn. 2018).

ignores the educational purpose of school discipline. A few commenters requested that the Department incorporate more features of legal and court systems into § 106.45, including importing the Federal Rules of Evidence, the Federal Rules of Civil Procedure, and the Federal Rules of Criminal Procedure, and some of the rights afforded to criminal defendants under the U.S. Constitution such as protection against double jeopardy, protection against self-incrimination, and provision of public defenders (or provision of attorneys for both parties in a school-level Title IX proceeding).

Many commenters objected to § 106.45 on the ground that it will be burdensome and costly for many recipients to adopt and implement.

Some commenters believed that § 106.45 heightens the adversarial aspects of a grievance process, and others asserted that increasing the adversarial nature of the process undermines Title IX as a civil rights mechanism. Some commenters asserted that adversarial proceedings advantage students with greater financial resources who can afford to hire an attorney over socioeconomically disadvantaged students.

Discussion: The Department acknowledges the vast diversity among schools, colleges, and universities, the variety of systems historically used to enforce codes of conduct, and the desirability of each recipient retaining flexibility and discretion to manage its own affairs. With respect to Title IX sexual harassment, however, recipients are not simply enforcing their own codes of conduct; rather, they are complying with a Federal civil rights law, the protections and benefits of which extend uniformly to every person in the education program or activity of a recipient of Federal financial assistance. The need for Title IX to be consistently, predictably enforced weighs in favor of Federal rules standardizing the investigation and adjudication of sexual harassment allegations under these final regulations, implementing Title IX.

The Department agrees with commenters that numerous Federal and State court opinions confirm the proposition that schools, colleges, and universities deserve considerable deference as to their internal affairs including academic and disciplinary decisions. The final regulations respect the right of recipients to make such decisions without being second guessed by the Department. The final regulations do not address recipients' academic decisions (including curricula, or dismissals for failure to meet academic standards), and do not second guess disciplinary decisions. The Department does not require disciplinary sanctions after a determination of responsibility, and does not prescribe any particular form of sanctions.[456] Rather, § 106.45 prescribes a grievance process focused on reaching an accurate determination regarding responsibility so that recipients and the Department can ensure that victims of sexual harassment receive remedies designed to restore or preserve a victim's equal access to the recipient's education program or activity. Because § 106.45 provides a grievance process designed to effectuate the purpose of Title IX, a Federal civil rights statute, the Title IX grievance process is not purely an internal decision of the recipient. The Department believes that the § 106.45 grievance process will promote consistency, transparency, and predictability for students, employees, and recipients, ensuring that enforcement of Title IX sexual harassment rules does not vary needlessly from school to school or college to college. The Department notes

[456] The Department acknowledges that this approach departs from the 2001 Guidance, which stated that where a school has determined that sexual harassment occurred, effective corrective action "tailored to the specific situation" may include particular sanctions against the respondent, such as counseling, warning, disciplinary action, or escalating consequences. 2001 Guidance at 16. For reasons described throughout this preamble, the final regulations modify this approach to focus on *remedies* for the complainant who was victimized rather than on second guessing the recipient's disciplinary sanction decisions with respect to the respondent. However, the final regulations are consistent with the 2001 Guidance's approach inasmuch as § 106.45(b)(1)(i) clarifies that "remedies" may consist of individualized services similar to those described in § 106.30 as "supportive measures" except that remedies need not avoid disciplining or burdening the respondent.

that courts have traditionally distinguished between student dismissal for misconduct, where more due process is required, and dismissal for academic failure, where less due process is owed, because of the subjectivity of a school's conclusion that a student has failed to meet academic standards. Where misconduct is at issue, however, conclusions about whether the misconduct took place involve objective factual determinations rather than subjective academic judgments, and procedures rooted in fundamental due process principles can "safeguard" the accuracy of determinations about misconduct.[457]

Within the standardized § 106.45 grievance process, recipients retain significant flexibility and discretion, including decisions to: designate the reasonable time frames that will apply to the grievance process; use a recipient's own employees as investigators and decision-makers or outsource those functions to contractors; determine whether a party's advisor of choice may actively participate in the grievance process; select the standard of evidence to apply in reaching determinations regarding responsibility; use an individual decision-maker or a panel of decision-makers; offer informal resolution options; impose disciplinary sanctions against a respondent following a determination of responsibility; and select procedures to use for appeals.

The Department agrees with commenters that schools, colleges, and universities are educational institutions and not courts of law. The § 106.45 grievance process does not attempt

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[457] Lisa L. Swem, *Due Process Rights in Student Disciplinary Matters*, 14 JOURNAL OF COLL. & UNIV. L. 359, 361-62 (1987) (citing *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1978) where the Supreme Court held that procedures leading to medical student's dismissal for failing to meet academic standards did not violate due process of law under the Fourteenth Amendment) (noting that courts often distinguish between student dismissal for misconduct, where more due process is required, and dismissal for academic failure, where less due process is owed, because of the subjectivity of a school's conclusion that a student has failed to meet academic standards); *Horowitz*, 435 U.S. at 95 fn. 5 (Powell, J., concurring) ("A decision relating to the misconduct of a student requires a factual determination as to whether the conduct took place or not. The accuracy of that determination can be safeguarded by the sorts of procedural protections traditionally imposed under the Due Process Clause.").

to transform schools into courts; rather, the prescribed framework provides a structure by which schools reach the factual determinations needed to discern when victims of sexual harassment are entitled to remedies. The Department declines to import into § 106.45 comprehensive rules of evidence, rules of civil or criminal procedure, or constitutional protections available to criminal defendants. The Department recognizes that schools are neither civil nor criminal courts, and acknowledges that the purpose of the § 106.45 grievance process is to resolve formal complaints of sexual harassment in an education program or activity, which is a different purpose carried out in a different forum from private lawsuits in civil courts or criminal charges prosecuted by the government in criminal courts. The Department believes that the final regulations prescribe a grievance process with procedures fundamental to a truth-seeking process reasonably adapted for implementation in an education program or activity.

The Department understands commenters' objections that § 106.45 will be burdensome and costly for many recipients to adopt and implement. The Department also appreciates that many of these commenters, and additional commenters, recognized that receipt of Federal financial assistance requires recipients to comply with regulations effectuating Title IX's non-discrimination mandate and that the benefits of protecting civil rights outweigh the monetary costs of compliance. While the Department is required to estimate the benefits and costs of every regulation, and has considered those benefits and costs for these final regulations, our decisions regarding the final regulations rely on legal and policy considerations designed to effectuate Title IX's civil rights objectives, and not on the estimated cost likely to result from these final regulations.

The Department further acknowledges commenters' concerns that schools, colleges, and universities exist primarily to educate, and are not courts with a primary purpose, focus, or

expertise in administering proceedings to resolve factual disputes. Many commenters expressed a similar concern, that recipients may view a recipient's code of conduct as an educational process rather than a punitive process, and these recipients are thus uncomfortable with a grievance process premised on adversarial aspects of resolving the truth of factual allegations. With respect to Title IX sexual harassment, however, in order to carry out a recipient's responsibility to provide appropriate remedies to victims suffering from that form of sex discrimination, the recipient must administer a grievance process designed to reach reliable factual determinations and do so in a manner free from sex-based bias. In the context of sexual harassment that process is often inescapably adversarial in nature where contested allegations of serious misconduct carry high stakes for all participants. The standardized framework of the § 106.45 grievance process will thus assist recipients in complying with the recipients' Title IX obligation to provide remedies for sexual harassment victims when a respondent is found responsible for sexual harassment, by providing recipients with a prescribed structure for resolving highly contested factual disputes between members of the recipient's own community consistent with due process principles, in recognition that recipients may not already have such a structure in place.

Recipients retain the right and ability to use the disciplinary process as an educational tool rather than a punitive tool because the § 106.45 grievance process leaves recipients with wide discretion to utilize informal resolution processes[458] and does not mandate or second guess disciplinary sanctions.[459] Rather, the § 106.45 grievance process focuses on the purpose of Title IX: to give individuals protections against discriminatory practices and ensure that recipients

[458] Section 106.45(b)(9).
[459] Section 106.44(b)(2).

provide victims of sexual harassment with remedies to help overcome the denial of equal access to education caused by sex discrimination in the form of sexual harassment.[460]

The Department disagrees with commenters who believe that § 106.45 heightens the adversarial nature of the grievance process. The Department believes that sexual harassment allegations inherently present an adversarial situation; as some commenters pointed out, campus sexual misconduct situations often present plausible competing narratives under circumstances that pose challenges to reaching accurate factual determinations.[461] A grievance process that standardizes procedures by which parties participate equally serves the purpose of reaching reliable determinations resolving factual disputes presented in formal complaints alleging sexual harassment, in a manner free from sex-based bias, and increasing confidence in the outcomes of such cases. Acknowledging that sexual harassment allegations present adversarial circumstances and that parties may benefit from guidance, advice, and assistance in such a setting, the Department requires recipients to allow the parties to select advisors of choice to assist each party throughout the grievance process.[462] In recognition that Title IX governs recipients, not parties, the Department obligates the recipient to carry both the burden of proof and the burden of collecting evidence sufficient to reach a determination regarding responsibility, while also

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[460] As discussed throughout this preamble, including in the "Section 106.44(a) Deliberate Indifference Standard" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this preamble, the final regulations also mandate that recipients offer supportive measures to complainants with or without a formal complaint so that complainants receive meaningful assistance from their school in restoring or preserving equal access to education even in situations that do not result in an investigation and adjudication under § 106.45.

[461] *See, e.g.*, EduRisk by United Educators, *Confronting Campus Sexual Assault: An Examination of Higher Education Claims* 1 (2015) ("Recent legal and regulatory mandates require virtually all colleges and universities to investigate and adjudicate reports of sexual assault. An analysis of claims reported to United Educators (UE) reveals that institutions respond to cases of sexual assault that the criminal justice system often considers too difficult to succeed at trial and obtain a conviction. Our data indicates these challenging cases involve little or no forensic evidence, delays in reporting, use of alcohol, and differing accounts of consent.").

[462] Section 106.45(b)(5)(iv).

providing parties equal opportunity (but not the burden or obligation) to gather and present witnesses and other evidence, review and challenge the evidence collected, and question other parties and witnesses.[463]

The Department does not agree that an adversarial process runs contrary to Title IX as a civil rights mechanism. To the extent that commenters raising this concern believe that adversarial systems, historically or generally, disadvantage people already marginalized due to sex, race, ethnicity, and other characteristics, the Department will enforce all provisions of § 106.45 without regard to any party's sex, race, ethnicity, or other characteristic, and expects recipients to implement § 106.45 without bias of any kind. The Department further notes that the § 106.45 grievance process is one particular part of a recipient's response to a formal complaint; § 106.44(a) obligates a recipient to provide a prompt, non-deliberately indifferent response to each complainant including offering supportive measures, whether or not the complainant files a formal complaint or participates in a § 106.45 grievance process. The Department believes that § 106.45 serves the important purpose of effectuating Title IX as a civil rights non-discrimination mandate, and the final regulations provide for complainants to receive supportive measures to preserve or restore equal access to education even where a complainant does not wish to participate in the adversarial aspects of a § 106.45 grievance process.

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[463] Section 106.45(b)(5)(i) through (vii); § 106.45(b)(6). We also note that § 106.45(b)(9) gives recipients the discretion to offer and facilitate informal resolution processes, such as mediation or restorative justice, subject to each party voluntarily agreeing after giving informed, written consent. Informal resolution may present a way to resolve sexual harassment allegations in a less adversarial manner than the investigation and adjudication procedures that comprise the § 106.45 grievance process. Informal resolution may only be offered after a formal complaint has been filed, so that the parties understand what the grievance process entails and can decide whether to voluntarily attempt informal resolution as an alternative. Recipients may never require any person to participate in information resolution, and may never condition enrollment, employment, or enjoyment of any other right or privilege upon agreeing to informal resolution. Informal resolution is not an option to resolve allegations that an employee sexually harassed a student.

The Department acknowledges that a party's choice of advisor may be limited by whether the party can afford to hire an advisor or must rely on an advisor to assist the party without fee or charge. The Department wishes to emphasize that the status of any party's advisor (i.e., whether a party's advisor is an attorney or not), the financial resources of any party, and the potential of any party to yield financial benefits to a recipient, must not affect the recipient's compliance with § 106.45, including the obligation to objectively evaluate relevant evidence and use investigators and decision-makers free from bias or conflicts of interest.

Changes: In response to comments concerning specific topics addressed in § 106.45, the Department has made changes in the final regulations that increase recipients' flexibility and discretion while preserving the benefits of a standardized grievance process that promotes reliable fact-finding.[464]

Comments: Some commenters argued that educational institutions should not have the authority to adjudicate criminal accusations, that sexual assault and harassment should be treated like a crime, and that investigations into sex crimes should be solely in the hands of law enforcement (such as the police, district attorneys, State attorney's offices, or U.S. Department of Justice). Some commenters believed the alleged victim should be required to report directly to law enforcement and schools should facilitate survivors' access to the appropriate authorities. Some commenters expressed concern that the proposed rules exclude law enforcement from the

[464] *See, e.g.*, the discussion in the "Other Language/Terminology Comments" subsection of the "Section 106.30 Definitions" section of this preamble (noting that recipients may decide whether to calculate time frames using calendar days, school days, or other method); § 106.45(b)(6)(i) (allowing, but not requiring, live hearings to be held virtually through use of technology); § 106.45(b)(5)(vi) (removing the requirement that evidence in the investigation be provided to the parties using a file-sharing platform); § 106.45(b)(7)(i) (removing the requirement that the preponderance of the evidence standard may be used only if that standard is also used for recipients' non-sexual harassment code of conduct violations).

investigation process. Several commenters concluded that student conduct hearings are too different from criminal trials to be capable of addressing criminal allegations. One commenter believed that universities are incapable of fair assessment in criminal sex offense matters because universities have a strong desire to be seen as advocates for social change; another commenter believed schools have already made a mockery out of campus sexual assault proceedings shown by a practice the commenter characterized as "the first to accuse wins" that has led to an epidemic of false allegations. One commenter argued that the Department must decide if recipients can defer completely to the criminal justice system regarding sexual assault, or else require recipients to implement procedures that are fair, transparent, and adhere to constitutional protections. One commenter believed that alleged assailants should be held responsible in a court of law and that victims should have the right to pursue court action at any point in time.

Some commenters argued that the proposed rules are too similar to criminal court procedures that should not apply to Title IX proceedings because a university disciplinary proceeding does not result in loss of life or liberty for the respondent. Other commenters expressed support for the proposed rules on the belief that the proposed rules require many due process protections existing in criminal proceedings, which these commenters supported because the high consequences in Title IX cases justify procedural safeguards similar to those in court systems. One commenter suggested that before resorting to the formal "court-like" proceedings in the proposed rules, parties to a sexual assault allegation should always first attempt mediation.

Several commenters suggested that the Department establish "regional centers" for investigation and adjudication of Title IX sexual harassment (or at least as to sexual assault), or at least advise colleges and universities that such recipients can join with other similar institutions in their geographic area to form regional centers charged with conducting the

investigations and adjudications required under the proposed rules. These commenters asserted using such a regional center model may benefit recipients because instead of performing investigations and conducting hearings with recipients' own personnel (who may not have sufficient training and experience, and who have inherent potential conflicts of interest), recipients could outsource these functions to centers employing personnel with sufficient expertise and experience to perform investigations and adjudications without conflicts of interest, impartially, and in compliance with the final regulations. One commenter examined variations on potential models for such regional centers, noting that one model might involve a consortium of institutions forming independent 501(c)(3) organizations to cooperatively handle member institutions' needs for investigation and adjudication of Title IX sexual harassment, and a variation of that model would involve those functions handled under the auspices of State government (such as a State attorney general's office); this commenter urged the Department to remind recipients that such models exist as possible methods for better handling obligations under these final regulations, contended that suggesting such models without mandating them is consistent with the Department's overall approach of not dictating specific details more than might be reasonably necessary, and expressed the belief that different types of regional centers with different structures can be tried out and continually improved and refined for what works best in practice for different types of institutions, thus innovating better ways for recipients to competently handle Title IX sexual harassment allegations.

Discussion: The Department understands the concerns of some commenters who believe that educational institutions should not have authority to adjudicate criminal accusations and that law enforcement and criminal justice systems are the appropriate bodies to investigate, prosecute, and penalize criminal charges. However, the Supreme Court has held that sexual misconduct that

constitutes a crime under State law may also constitute sex discrimination under Title IX, and the Department has the responsibility of enforcing Title IX.[465] The Department is not regulating sex crimes, *per se*, but rather is addressing a type of discrimination based on sex. That some Title IX sexual harassment might constitute criminal conduct does not alter the importance of identifying and responding to sex discrimination that is prohibited by Title IX. By requiring recipients to address sex discrimination that takes the form of sexual harassment in a recipient's education program or activity, the Department is not requiring recipients to adjudicate criminal charges or replace the criminal justice system. Rather, the Department is requiring recipients to adjudicate allegations that sex-based conduct has deprived a complainant of equal access to education and remedy such situations to further Title IX's non-discrimination mandate.

The Department recognizes that some Title IX sexual harassment also constitutes criminal conduct under a variety of State laws and that the potential exists for the same set of allegations to result in proceedings under both § 106.45 and criminal laws. Where appropriate, the final regulations acknowledge this intersection;[466] however, a recipient cannot discharge its

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[465] *See, e.g.*, *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 278, 292 (1998) (holding that a sex offense by a teacher against a student – and noting that the offense was one for which the teacher had been arrested – constituted sex discrimination prohibited under Title IX).

[466] Section 106.45(b)(1)(v) provides that the recipient's designated reasonably prompt time frame for completion of a grievance process is subject to temporary delay or limited extension for good cause, which may include concurrent law enforcement activity. Section 106.45(b)(6)(i) provides that the decision-maker cannot draw any inference about the responsibility or non-responsibility of the respondent solely based on a party's failure to appear or answer cross-examination questions at a hearing; this provision applies to situations where, for example, a respondent is concurrently facing criminal charges and chooses not to appear or answer questions to avoid self-incrimination that could be used against the respondent in the criminal proceeding. Further, subject to the requirements in § 106.45 such as that evidence sent to the parties for inspection and review must be directly related to the allegations under investigation, and that a grievance process must provide for objective evaluation of all relevant evidence, inculpatory and exculpatory, nothing in the final regulations precludes a recipient from using evidence obtained from law enforcement in a § 106.45 grievance process. § 106.45(b)(5)(vi) (specifying that the evidence directly related to the allegations may have been gathered by the recipient "from a party *or other source*" which could include evidence obtained by the recipient from law enforcement) (emphasis added); § 106.45(b)(1)(ii).

legal obligation to provide education programs or activities free from sex discrimination by referring Title IX sexual harassment allegations to law enforcement (or requiring or advising complainants to do so),[467] because the purpose of law enforcement differs from the purpose of a recipient offering education programs or activities free from sex discrimination. Whether or not particular allegations of Title IX sexual harassment also meet definitions of criminal offenses, the recipient's obligation is to respond supportively to the complainant and provide remedies where appropriate, to ensure that sex discrimination does not deny any person equal access to educational opportunities. Nothing in the final regulations prohibits or discourages a complainant from pursuing criminal charges in addition to a § 106.45 grievance process.

The Department disagrees with commenters who argued that recipients are not capable of addressing Title IX sexual harassment allegations when such allegations also constitute allegations of criminal activity. The Department has carefully constructed the § 106.45 grievance process for application by a recipient in an education program or activity keeping in mind that schools, colleges, and universities exist first and foremost to educate and do not function as courts of law. The Department understands commenters' assertions that some recipients desire to advocate social change and that some have conducted unfair, biased sexual misconduct proceedings; however, the Department believes that the § 106.45 grievance process reflects a standardized framework that recipients are capable of applying to reach fair, unbiased determinations about sex discrimination in the form of sexual harassment in recipients' education

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[467] The 2001 Guidance takes a similar position: "In some instances, a complainant may allege harassing conduct that constitutes both sex discrimination and possible criminal conduct. Police investigations or reports may be useful in terms of fact gathering. However, because legal standards for criminal investigations are different, police investigations or reports may not be determinative of whether harassment occurred under Title IX and do not relieve the school of its duty to respond promptly and effectively." 2001 Guidance at 22.

programs or activities. The procedures required under § 106.45 are those the Department has determined are most likely to lead to reliable outcomes in the context of Title IX sexual harassment. The § 106.45 grievance process is inspired by principles of due process; however, the final regulations do not incorporate by reference constitutional due process required for criminal defendants, precisely because recipients are reaching conclusions about sex discrimination in a very different context than criminal courts reaching conclusions about defendants' guilt or innocence of criminal charges. While the final regulations permit recipients wide discretion to facilitate informal resolution of formal complaints of sexual harassment,[468] the Department declines to require parties to attempt mediation before initiating the formal grievance process. Every party should know that a formal, impartial, fair process is available to resolve Title IX sexual harassment allegations; where a recipient believes that parties may benefit from mediation or other informal resolution process as an alternative to the formal grievance process, the decision to attempt mediation or other form of informal resolution should remain with each party.

The Department appreciates commenters' recommendations for using regional center models and similar models involving voluntary, cooperative efforts among recipients to outsource the investigation and adjudication functions required under the final regulations. The Department believes these models represent the potential for innovation with respect to how recipients might best fulfill the obligation to impartially reach accurate factual determinations while treating both parties fairly. The Department encourages recipients to consider innovative

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[468] Section 106.45(b)(9) allows informal resolution processes, but only with the written, voluntary consent of both parties, notice to the parties about ramifications of such processes, and with the exception that no such informal resolution may be offered with respect to allegations that an employee sexually harassed a student.

solutions to the challenges presented by the legal obligation for recipients to fairly and impartially investigate and adjudicate these difficult cases, and the Department will provide technical assistance for recipients with questions about pursuing regional center models.

Changes: None.

Comments: Several commenters challenged the Department's legal authority to prescribe a standardized grievance process on the ground that the Department's charge under Title IX is to prevent sex discrimination, not to enforce constitutional due process or ensure that respondents are disciplined fairly. These commenters pointed to Federal court opinions holding that unfair discipline in a sexual harassment proceeding does not, by itself, demonstrate that a respondent was subjected to discrimination on the basis of sex, and Federal court opinions holding that a university using a "victim-centered approach," or otherwise allegedly favoring sexual assault complainants over respondents, is not necessarily discriminating against respondents based on sex.[469] These commenters argued that the Department cannot therefore prescribe a grievance process premised on the fairness of discipline as a way of furthering Title IX's prohibition against sex discrimination.

At least one commenter argued that the Supreme Court held in *Gebser* that a school's failure to adopt grievance procedures for resolving sexual harassment does not itself constitute discrimination under Title IX, and the commenter argued that this shows that failure to have any grievance procedures at all, much less a grievance process with specific procedural protections, does not violate Title IX absent a showing that such a failure was motivated by a student's sex.

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[469] *See, e.g.*, cases cited by commenters referenced in the "Section 106.45(a) Treatment of Complainants or Respondents Can Violate Title IX" subsection of the "General Requirements for § 106.45 Grievance Process" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble.

Several commenters opposed § 106.45 by noting that Federal courts have not required the particular procedures required under § 106.45, and challenging the Department's rationale for prescribing a grievance process that provides more procedural protections than the Supreme Court has required under constitutional due process. Some commenters argued that the Department's authority under Title IX permits the Department to regulate recipients' grievance procedures only to ensure that the formal complaint process does not discriminate against any party based on sex.

Several commenters requested that the Department reserve the "stringent" grievance process required under § 106.45 only for complaints that allege sexual assault, involve allegations of violence, or otherwise subject a respondent to a potential sanction of expulsion.

A few commenters asserted that to the extent that bias and lack of impartiality in school-level Title IX proceedings have resulted in sex discrimination sometimes against women and other times against men, the provisions in § 106.45 prohibiting bias, conflicts of interest, and sex stereotypes used in training materials, and requiring objective evaluation of all relevant evidence and equal opportunity for the parties to present, review, and challenge testimony and other evidence, will reduce the likelihood that sex discrimination will occur in Title IX proceedings because even if school officials harbor intentional or unintentional sex-based biases or prejudices, such improper biases and prejudices are less likely to affect the handling of the matter when the process requires application of procedures grounded in principles of due process.

Some commenters objected to the use of the words "due process" and "due process protections" in § 106.45, believing that using the term "due process" blurs the line between constitutional due process owed by recipients that are State actors, and a "fair process" that all recipients, including private institutions, generally owe by contract with students and employees.

These commenters believe that using the term "due process" in § 106.45 will lead to confusion and misplaced expectations for students, and possibly lead to increased litigation as students try to enforce constitutional due process against private institutions that do not owe constitutional protections. These commenters suggested that the phrase "fair process" replace "due process" in § 106.45.

Discussion: The § 106.45 grievance process prescribed by the final regulations directly serves the purposes of Title IX by providing a framework under which recipients reliably determine the facts of sexual harassment allegations in order to provide appropriate remedies for victims of sexual harassment when the recipient has determined the respondent is responsible. The Department recognizes that some recipients are State actors with responsibilities to provide due process of law to students and employees under the U.S. Constitution, while other recipients are private institutions that do not have constitutional obligations to their students and employees. The Department believes that conforming to the § 106.45 grievance process likely will meet constitutional due process obligations in Title IX sexual harassment proceedings, and as the Department has recognized in guidance for nearly 20 years, Title IX rights must be interpreted consistent with due process guarantees.[470] However, independent of constitutional due process, the purpose of the § 106.45 grievance process is to provide individuals with effective protection from discriminatory practices, including remedies for sexual harassment victims, by consistent application of procedures that improve perceptions that Title IX sexual harassment allegations are resolved fairly, avoid injection of sex-based biases and stereotypes into Title IX proceedings, and promote reliable outcomes.

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[470] 2001 Guidance at 22.

The Department agrees with commenters who asserted that unfair imposition of discipline, even in a way that violates constitutional due process rights, does not necessarily equate to sex discrimination prohibited by Title IX, and this is reflected in the final regulations. Section 106.45(a), for example, states that a recipient's treatment of a respondent "*may* also constitute discrimination on the basis of sex under title IX" (emphasis added). The § 106.45 grievance process aims to provide both parties with equal rights and opportunities to participate in the process, and to promote impartiality without favor to complainants or respondents, both because treating a complainant or respondent differently based on sex would violate Title IX, and because a process lacking principles of due process risks bias that in the context of sexual harassment allegations is likely to involve bias based on stereotypes and generalizations on the basis of sex.

To the extent that the Supreme Court has not held that the specific procedures required under § 106.45 are required under constitutional due process, § 106.45 is both consistent with constitutional due process, and an appropriate exercise of the Department's authority to prescribe a consistent framework for handling the unique circumstances presented by sexual harassment allegations.[471] For reasons discussed in this preamble with respect to each provision in § 106.45, the Department believes that each provision appropriately incorporates principles of due process that provide individuals with effective protection from discriminatory practices, including remedies for sexual harassment victims, by improving perceptions that Title IX sexual harassment allegations are resolved fairly, avoiding injection of sex-based biases and stereotypes into Title IX proceedings, and promoting reliable outcomes.

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

While commenters correctly observe that the Supreme Court's Title IX opinions do not equate failure to adopt a grievance procedure with sex discrimination under Title IX,[472] the Supreme Court has also acknowledged that the Department, under its administrative authority to enforce Title IX, may impose regulatory requirements (such as adoption and publication of grievance procedures) that further the purpose of Title IX to prevent recipients of Federal financial assistance from engaging in sex discriminatory practices and provide individuals with effective protection against sex discriminatory practices.[473] The Department believes that § 106.45 not only incorporates basic principles of due process appropriately translated into the particular context of sexual harassment in education programs and activities but also serves to prevent, reduce, and root out sex-based bias that might otherwise cause recipients to favor one party over the other.

The Department appreciates commenters' recognition that many provisions of § 106.45, which serve the purpose of increasing the reliability of fact-finding, also decrease the likelihood that sex-based biases, prejudices, or stereotypes will affect the investigation and adjudication process in violation of Title IX's prohibition against sex discrimination. The § 106.45 grievance process effectuates Title IX's non-discrimination mandate both by reducing the opportunity for sex discrimination to impact investigation and adjudication procedures through the recipient's own actions during the handling of a complaint, and by promoting a reliable fact-finding process so that recipients are held liable for providing remedies to victims of sex discrimination in the

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[472] *See, e.g.*, *Gebser*, 524 U.S. at 291-92.
[473] *Id.* at 292 ("Agencies generally have authority to promulgate and enforce requirements that effectuate the statute's non-discrimination mandate, 20 U.S.C. 1682, even if those requirements do not purport to represent a definition of discrimination under the statute.").

form of sexual harassment perpetrated in the recipient's education program or activity. While the Department believes that the § 106.45 grievance process provides an appropriately fair framework for many types of school disciplinary matters, the Department is authorized to prescribe § 106.45 for resolution of formal complaints of Title IX sexual harassment because consistent processes reaching reliable factual determinations are needed in order to provide remedies to sexual harassment victims (to further Title IX's purpose) and because Title IX sexual harassment allegations inherently invite intentional or unintentional application of sex-based assumptions, generalizations, and stereotypes (which violate Title IX's non-discrimination mandate).

The Department declines to apply the § 106.45 grievance process only to formal complaints alleging sexual assault, involving allegations of violence, or otherwise subjecting a respondent to expulsion. As discussed under § 106.44(a) and § 106.30, the Department has defined sexual harassment to include three categories of misconduct on the basis of sex (*quid pro quo* harassment by an employee; severe, pervasive, and objectively offensive unwelcome conduct; and sexual assault, dating violence, domestic violence, or stalking as defined under the Clery Act and VAWA). Each of these categories of misconduct is a serious violation that jeopardizes a victim's equal access to education. Formal complaints alleging any type of sexual harassment, as defined in § 106.30, must be handled under a process designed to reliably determine the facts surrounding each allegation so that recipients provide remedies to victims subjected to that serious misconduct. The final regulations do not prescribe any particular form of disciplinary sanction for sexual harassment. Therefore, the Department declines to apply § 106.45 only when a respondent faces expulsion; rather, § 106.45 applies to formal complaints

alleging Title IX sexual harassment regardless of what potential discipline a recipient may impose on a respondent who is found responsible.

In response to commenters concerned that the term "due process" or "due process protections" needlessly confuses whether the Department is referring to a fair process that applies equally to both public and private institutions, or constitutional due process that only public institutions are required to provide, the final regulations use the phrase "grievance process that complies with § 106.45" instead of "due process" or "due process protections."[474] In this way, the Department clarifies that all recipients must, where indicated, apply the § 106.45 grievance process, which requires procedures the Department believes draw from principles of due process but remain distinct from constitutional due process owed by public institutions.

Changes: The final regulations use the phrase "grievance process that complies with § 106.45" instead of "due process" or "due process protections."

Comments: A few commenters noted that existing Title IX regulations provide for prompt and equitable grievance procedures to resolve complaints of sex discrimination, and argued that existing regulations and the 2001 Guidance advising that an equitable grievance procedure means ensuring adequate, reliable, and impartial investigations of complaints, have long provided adequate due process protections for all parties, and thus the more detailed procedural requirements in § 106.45 are unnecessary and only serve to protect respondents at the expense of complainants. A few commenters pointed out that at least two of the Department's Title IX enforcement actions in 2015 and 2016 concluded under then-applicable guidance that university complaint resolution processes were inequitable for complainants, respondents, or both. These

[474] *E.g.*, § 106.8(c); § 106.44(a); § 106.45(b)(1)(i).

commenters argued that this shows that the Department's guidance has sufficiently protected each party's right to a fair process.

Discussion: As discussed in the "Role of Due Process in the Grievance Process" section of this preamble, the Department in its guidance has interpreted the regulatory requirement for recipients to adopt equitable grievance procedures to mean such procedures must ensure adequate, reliable, and impartial investigations of complaints. While the Department still believes that adequate, reliable, and impartial investigation of complaints is necessary for the handling of sexual harassment complaints under Title IX, setting forth that interpretation of equitable grievance procedures in guidance lacks the force and effect of law. Furthermore, the Department does not believe that codifying the "adequate, reliable, and impartial investigation of complaints" standard into the final regulations would sufficiently promote consistency and reliability because such a conclusory standard does not helpfully interpret for recipients what procedures rooted in principles of due process are needed to achieve fairness and factual reliability in the context of Title IX sexual harassment allegations.

To the extent that the Department has in the past used enforcement actions to identify particular ways in which a recipient's grievance process failed to ensure "adequate, reliable, and impartial investigations," the enforcement actions and resulting letters of finding and resolution agreements apply only to the particular recipient under investigation and do not substitute for the transparency of regulations that specify the actions required of all recipients. Through these final regulations, we seek to provide with more certainty that recipients' investigations will be held to consistent standards of adequacy, reliability, and impartiality.

Changes: None.

Comments: One commenter characterized the requirements of § 106.45 as elaborate and multitudinous, predicted that many recipients will fail to comply with every requirement, and asked the Department to answer (i) whether the Department will find a recipient in violation of § 106.45 only if the recipient violated a provision with deliberate indifference? (ii) Will the Department require parties to preserve objections based on a recipient's failure to follow § 106.45 by raising the objection before the decision-maker and on appeal? (iii) Will any violation of § 106.45 result in the Department requiring the recipient to set aside its determination regarding responsibility and hold a new hearing, or only if the violation of § 106.45 affected the outcome?

Discussion: In response to the commenter's questions, the Department will enforce § 106.45 by holding recipients responsible for compliance regardless of any intent on the part of the recipient to violate § 106.45. The Department notes that under existing regulations and OCR enforcement practice, the Department does not pursue termination of Federal financial assistance unless a recipient refuses to correct a violation after the Department has notified the recipient of the violation. The Department will not impose on parties a requirement to preserve objections based on a recipient's failure to comply with § 106.45, because the recipient's obligation to comply exists whether or not the recipient is informed of the violation by a party. The corrective action a recipient must take after the Department identifies violations of statutory or regulatory requirements depends on the facts of each particular enforcement action, and the Department cannot predict every circumstance that may present itself in the future and, thus, declines to state under which circumstances a § 106.45 violation may require a recipient to set aside a determination regarding responsibility.

Changes: None.

Comments: Many commenters believe that due process protections unfairly favor respondents over complainants, and expressed concern that the proposed rules will cause sexual harassment victims to suffer additional trauma because investigations will be biased against complainants, will favor harassers over victims, and retraumatize survivors of sexual violence. A few commenters shared personal stories of feeling deterred from filing a sexual assault complaint because the legal process, including the Title IX campus process, would be harrowing or intimidating. Some commenters asserted that because complainants are disproportionately female, due process that benefits respondents constitutes sex discrimination against women.

Some commenters asserted that treating complainants and respondents equally is insufficient to address the reality that sexual violence is prevalent throughout American society and because women historically have faced biased responses when women report being victims of sexual violence, equity under Title IX requires procedures that favor complainants. At least one commenter asserted that Title IX exists to address systemic gender inequality in education and was not enacted from a place of neutrality. A few commenters asserted that because rape victims often face blame and disbelief when they try to report being raped, and only approximately five in every 1,000 perpetrators of rape will face criminal conviction,[475] the system is already tilted in favor of perpetrators and Title IX needs to provide complainants with more protections than respondents.

Several commenters asserted that because studies have shown the rate of false reports of sexual assault to be low and because rates of sexual assault are high, Title IX must offer

[475] Commenters cited: Rape, Abuse & Incest National Network (RAINN), *Campus Sexual Violence: Statistics*, https://www.rainn.org/statistics/campus-sexual-violence.

protections to complainants rather than seek to protect rights of respondents. Other commenters asserted that the rate of false or unfounded accusations of sexual misconduct may be higher than ten percent, and others disputed that the prevalence of campus sexual assault is as high as 20 percent.

Other commenters argued that relatively few respondents found responsible for sexual misconduct are actually expelled,[476] showing that the scales are not tipped in favor of complainants because even when found responsible, perpetrators are not receiving harsh sanctions.

Commenters asserted that a regulation concerned with avoiding violations of respondents' due process rights ignores the way complainants are still being pushed out of school due to inadequate, unfair responses to their reports of sexual harassment. Several commenters described retaliatory, punitive school and college responses to girls and women who reported suffering sexual harassment. At least one commenter asserted that while data show that boys of color are not disciplined in elementary and secondary schools for sexual harassment at rates much higher than white boys, data show that girls of color not only suffer sexual harassment at higher rates than white girls, but also are more likely to have their reports of sexual harassment ignored or be blamed or punished for reporting.

Discussion: The Department disagrees that due process protections generally, and the procedures drawn from due process principles in § 106.45 particularly, unfairly favor respondents over

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[476] Commenters cited: Kristen Lombardi, *A Lack of Consequences for Sexual Assault*, THE CENTER FOR PUBLIC INTEGRITY (Feb. 24, 2010) (noting that up to 25 percent of respondents are expelled); Nick Anderson, *Colleges often reluctant to expel for sexual violence*, THE WASHINGTON POST (Dec. 15, 2014) (noting that only 12 percent of sanctions against respondents were expulsions).

complainants or sexual harassment perpetrators over victims, or that § 106.45 is biased against complainants, victims, or women. Section 106.45(a) states that a recipient's treatment of a complainant, or a respondent, may constitute sex discrimination prohibited by Title IX. Section 106.45(b)(1)(iii) requires Title IX Coordinators, investigators, decision-makers, and individuals who facilitate any informal resolution process to be free of bias or conflicts of interest for or against complainants or respondents and to be trained on how to serve impartially. Section 106.45(b)(1)(ii) precludes credibility determinations based on a person's status as a complainant, respondent, or witness. With the exceptions noted below, the other provisions of § 106.45 also apply equally to both parties. The exceptions are three provisions that distinguish between complainants and respondents; each exception results from the need to take into account the party's position as a complainant or respondent specifically in the context of Title IX sexual harassment, to reasonably promote truth-seeking in a grievance process particular to sexual harassment allegations. Thus, § 106.45(b)(1)(i) requires recipients to treat complainants and respondents equitably by providing remedies for a complainant where a respondent has been found responsible, and by imposing disciplinary sanctions on a respondent only after following a § 106.45 grievance process; because remedies concern a complainant and disciplinary sanctions concern a respondent, this provision requires equitable treatment rather than strictly equal treatment. Section 106.45(b)(1)(iv) requires recipients to presume the respondent is not responsible until conclusion of the grievance process, because such a presumption reinforces that the burden of proof remains on recipients (not on the respondent, or the complainant) and reinforces correct application of the standard of evidence. Section 106.45(b)(6)(i)-(ii) protects complainants (but not respondents) from questions or evidence about the complainant's prior sexual behavior or sexual predisposition, mirroring rape shield protections applied in Federal

courts. The § 106.45 grievance process, therefore, treats complainants and respondents equally in nearly every regard, with three exceptions (one imposing equitable treatment for both parties, one applicable only to respondents, and one applicable only to complainants). The Department disagrees with commenters who argued that any provision conferring a right or protection only to respondents treats complainants inequitably or constitutes sex discrimination against women. The sole provision that applies only to respondents (§ 106.45(b)(1)(iv)) does not treat complainants inequitably because the provision helps ensure that the burden of proof remains on the recipient, not on the complainant (or respondent), and the presumption serves to reinforce correct application of whichever standard of evidence the recipient has selected. The Department also notes that any person regardless of sex may be a complainant or a respondent, and, thus, provisions that treat complainants and respondents equitably based on party status or apply only to complainants or only to respondents for the purpose of fostering truth-seeking, do not discriminate based on sex but rather distinguish interests unique to a person's party status.

The Department is sensitive to the concerns from commenters that the experience of a grievance process may indeed feel traumatizing or intimidating to complainants,[477] yet the facts surrounding sexual harassment incidents must be reliably determined in order to provide remedies to a victim. In deference to the autonomy of each complainant to decide whether to participate in a grievance process, the final regulations require recipients to offer supportive

[477] The Department does not equate the trauma experienced by a sexual harassment victim with the experience of a perpetrator of sexual harassment or the experience of a person accused of sexual harassment. Nonetheless, the Department acknowledges that a grievance process may be difficult and stressful for both parties. Further, supportive measures may be offered to complainants and respondents (*see* § 106.30 defining "supportive measures"), and § 106.45(b)(5)(iv) requires recipients to provide both parties the same opportunity to select an advisor of the party's choice. These provisions recognize that the stress of participating in a grievance process affects both complainants and respondents and may necessitate support and assistance for both parties.

measures to each complainant whether or not the complainant files a formal complaint or otherwise participates in a grievance process.[478]

The Department disagrees that the historical or general societal bias against women or against victims of sexual harassment requires or justifies a grievance process designed to favor women or complainants. Title IX protects every "person" (20 U.S.C. 1681) without regard for the person's sex or status as a complainant or respondent; the statute's use of the word "person" and not "female" or "woman" indicates that contrary to a commenter's assertion otherwise, Title IX was designed to operate neutrally with respect to the sex of persons protected by the non-discrimination mandate.

Whether or not commenters correctly describe the criminal justice system as "tilted in favor of perpetrators" demonstrated by data showing that only five in every 1,000 perpetrators of rape face criminal conviction, the grievance process under Title IX protects against, and through enforcement the Department will not tolerate, blaming or shaming women or any person pursuing a formal complaint of sexual harassment. Section 106.45 is premised on the principle that an accurate resolution of each allegation of sexual harassment requires objective evaluation of all relevant evidence without bias and without prejudgment of the facts. Under § 106.45, neither complainants nor respondents are automatically or prematurely believed or disbelieved, until and unless credibility determinations are made as part of the grievance process.[479] Implementation of the § 106.45 grievance process will increase the likelihood that whatever

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[478] Section 106.44(a); § 106.30 (defining "supportive measures").

[479] Contrary to many commenters' assertions, the presumption of non-responsibility does not permit (much less require) recipients automatically or prematurely to "believe respondents" or "disbelieve complainants." *See* discussion in the "Section 106.45(b)(1)(iv) Presumption of Non-Responsibility" subsection of the "General Requirements for § 106.45 Grievance Process" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble.

biases and prejudices exist in criminal justice systems will not affect Title IX grievance processes because Title IX Coordinators, investigators, decision-makers and any person who facilitates an informal resolution process must receive training on how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias under § 106.45(b)(1)(iii). Additionally, either party may file an appeal on the ground that the Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias for or against complainants or respondents generally, or the individual complainant or respondent, that affected the outcome of the matter, under § 106.45(b)(8). Accordingly, proceedings to investigate and adjudicate a formal complaint of sexual harassment under these final regulations are designed to reach accurate determinations regarding responsibility so that students and employees are protected from sex discrimination in the form of sexual harassment.

The Department believes that § 106.45 serves the purposes of Title IX by focusing on accurate factual determinations regardless of whether the rate of campus sexual assault, and the rate of false or unfounded accusations, is as high as some commenters stated or as low as other commenters stated. Every complainant and every respondent deserve an impartial, truth-seeking process to resolve the allegations in each particular situation, regardless of the frequency or infrequency of victimization and false accusations. Similarly, every allegation warrants an accurate factual resolution regardless of how many recipients decide that expulsion is the appropriate sanction against respondents found responsible for sexual harassment. No matter what decision a recipient makes with respect to disciplinary sanctions, Title IX requires recipients to provide victims with remedies designed to restore or preserve the victim's access to education, and that obligation can be met only after a reliable determination regarding responsibility.

In response to commenters' concerns that girls and women who report sexual harassment are sometimes ignored or retaliated against by their school, the Department does not believe that such wrongful acts and omissions by recipients justify a grievance process that favors complainants over respondents. The final regulations require recipients to respond promptly to every report of sexual harassment (of which the recipient has actual knowledge, and that occurs in the recipient's education program or activity, against a person in the United States) in a non-deliberately indifferent manner, and, thus, any recipient ignoring a complainant's report of sexual harassment would violate the final regulations, and the Department will vigorously enforce recipients' obligations.

In response to many commenters concerned about retaliation, the final regulations include § 106.71 stating retaliation against any individual making a report, filing a complaint, or participating in a Title IX investigation or proceeding is prohibited. Whether or not the commenter correctly asserted that boys of color are not punished for sexual harassment at much higher rates than white boys but that girls of color are ignored and retaliated against at rates higher than white girls, the protections extended to complainants and respondents under the final regulations apply without bias against an individual's sex, race, ethnicity, or other characteristic of the complainant or respondent.

Changes: Section 106.71 prohibits retaliation against any individual making a report, filing a complaint, or participating in a Title IX investigation or proceeding.

Comments: Some commenters suggested that the Department should proactively intervene and monitor the recipient's disciplinary practices to ensure they are fair, proportionate, and not discriminatory. Some commenters wanted § 106.45 to specifically address topics such as the quality of the information gathered during the investigation, the candid participation of parties

and witnesses, and the skills and experience (as well as the content of training) of Title IX Coordinators, investigators, and decision-makers, arguing that § 106.45 leaves too much discretion to recipients to devise their own strategies and approaches for the grievance process that may run contrary to improving the reliability of outcomes for the parties.

Some commenters proposed adding a provision clarifying that nothing in these regulations shall be interpreted to prevent the accused student from choosing to have their case adjudicated in an administrative law setting, provided that the institution advises the accused student in writing that it is the accused student's sole choice as to whether to have their case decided under those procedures or those offered on campus.

Some commenters proposed that a case should not be adjudicated unless there is quantifiable evidence to determine reasonable cause and suggested forming a compliance team to review the complaint and response from the accused to assess the validity of the accusation. Other commenters asserted that recipients have limited resources and should triage cases with priority based on severity of the conduct alleged. One commenter requested a requirement that attorneys working on these tribunals must have passed the State bar exam of the university's host State(s) and be a current member of the bar. Some commenters expressed concern about the power imbalance between students and professors, asserting that this power imbalance is already a deterrent to reporting an incident. Some postsecondary institutions commented that their institution already follows most of the procedures in § 106.45. Several commenters supported adopting the grievance procedures already in use by specific institutions, published by advocacy organizations, or under Federal laws applicable to Native American Institutions.

Discussion: The Department understands commenters' requests for intervention in and monitoring of the fairness, proportionality, and prevention of any discrimination in disciplinary

sanctions that recipients impose at the conclusion of a § 106.45 grievance process. The grievance process for Title IX sexual harassment is intended and designed to ensure that recipients reach reliable outcomes and provide remedies to victims of sexual harassment. The Department does not prescribe whether disciplinary sanctions must be imposed, nor restrict recipient's discretion in that regard. As the Supreme Court noted, Federal courts should not second guess schools' disciplinary decisions,[480] and the Department likewise believes that disciplinary decisions are best left to the sound discretion of recipients. The Department believes that a standardized framework for resolution of Title IX sexual harassment allegations provides needed consistency in how recipients reach reliable outcomes. The Department's authority to effectuate the purposes of Title IX justifies the Department's concern for reaching reliable outcomes, so that sexual harassment victims receive appropriate remedies, but the Department does not believe that prescribing Federal rules about disciplinary decisions is necessary in order to further Title IX's non-discrimination mandate. The Department notes that while Title IX does not give the Department a basis to impose a Federal standard of fairness or proportionality onto disciplinary decisions, Title IX does, of course, require that actions taken by a recipient must not constitute sex discrimination; Title IX's non-discrimination mandate applies as much to a recipient's disciplinary actions as to any other action taken by a recipient with respect to its education programs or activities.

The Department understands that some commenters would like the Department to issue more specific requirements to address topics such as the quality of information or evidence gathered during investigation, the candid participation of parties and witnesses, and the skills,

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[480] *Davis*, 526 U.S. at 648-49.

experience, and type of training, of Title IX Coordinators, investigators, and decision-makers. We believe, however, that § 106.45 strikes an appropriate balance between prescribing procedures specific enough to result in a standardized Title IX sexual harassment grievance process that promotes impartiality and avoidance of bias, while leaving flexibility for recipients to make reasonable decisions about how to implement a § 106.45-compliant grievance process. For example, while § 106.45 does not set parameters around the "quality" of evidence that can be relied on, § 106.45 does prescribe that all relevant evidence, inculpatory and exculpatory, whether obtained by the recipient from a party or from another source, must be objectively evaluated by investigators and decision-makers free from conflicts of interest or bias and who have been trained in (among other matters) how to serve impartially.

The Department appreciates the commenters' request that the Department provide for alternatives to a § 106.45 grievance process including, for example, adjudication in a State administrative law setting. The Department has tailored the § 106.45 grievance process to provide the procedures and protections we have determined are most needed to promote reliable outcomes resolving Title IX sexual harassment allegations in the context of education programs or activities that receive Federal financial assistance. While the Department does not dispute that other administrative proceedings could provide similarly reliable outcomes, for purposes of enforcing Title IX, a Federal civil rights statute, § 106.45 provides a standardized framework. The Department notes that nothing in the final regulations precludes a recipient from carrying out its responsibilities under § 106.45 by outsourcing such responsibilities to professionally trained investigators and adjudicators outside the recipient's own operations. The Department declines to impose a requirement that Title IX Coordinators, investigators, or decision-makers be licensed attorneys (or otherwise to specify the qualifications or experience needed for a recipient

to fill such positions), because leaving recipients as much flexibility as possible to fulfill the obligations that must be performed by such individuals will make it more likely that all recipients reasonably can meet their Title IX responsibilities.

The Department declines to add a reasonable cause threshold into § 106.45. The very purpose of the § 106.45 grievance process is to ensure that accurate determinations regarding responsibility are reached, impartially and based on objective evaluation of relevant evidence; the Department believes that goal could be impeded if a recipient's administrators were to pass judgment on the sufficiency of evidence to decide if reasonable or probable cause justifies completing an investigation. In response to commenters' concerns that the proposed rules did not permit reasonable discretion to dismiss allegations where an adjudication seemed futile, the final regulations add § 106.45(b)(3)(ii), allowing the recipient, in its discretion, to dismiss a formal complaint, if the complainant notifies the Title IX Coordinator in writing that the complainant wishes to withdraw it, if the respondent is no longer enrolled or employed by the recipient, or if specific circumstances prevent the recipient from collecting evidence sufficient to reach a determination (for example, where the complainant has ceased participating in the process). The Department rejects the notion that Title IX sexual harassment cases can or should be "triaged" or treated differently based on a purported effort to distinguish them based on severity. The Department has defined Title IX sexual harassment as any of three categories of sex-based conduct each of which constitutes serious behavior likely to effectively deny a victim equal access to education, and thus any type of sexual harassment as defined in § 106.30 warrants the § 106.45 grievance process.

The Department appreciates that some commenters on behalf of certain postsecondary institutions believed that their institution's policies already embody most or many of the

requirements of § 106.45. The Department has reviewed and considered the grievance procedures utilized in the codes of conduct in use by many different recipients, as well as the recommended fair procedures set forth by advocacy organizations, and the Federal laws applicable to Native American Institutions with respect to student misconduct proceedings, as referenced by commenters. While the Department declines to adopt wholesale the procedures used or recommended by any particular institution or organization, the Department notes that § 106.45 contains provisions that some commenters, including submissions on behalf of institutions and organizations, described or recommended in their comments.

Changes: Section 106.45(b)(3)(ii) allows the recipient, in its discretion, to dismiss a formal complaint if the complainant notifies the Title IX Coordinator in writing that the complainant wishes to withdraw it, if the respondent is no longer enrolled or employed by the recipient, or if specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination.

Section 106.30 Definitions[481]

Actual Knowledge

Support for Actual Knowledge Requirement and General Safety Concerns

Comments: Several commenters who supported the definition of actual knowledge in § 106.30 and the actual knowledge requirement in § 106.44(a) stated that using an actual knowledge

[481] The NPRM proposed that the definitions in § 106.30 apply only to Subpart D, Part 106 of Title 34 of the Code of Federal Regulations. 83 FR 61496. Aside from the words "elementary and secondary school" and "postsecondary institution," the words that are defined in § 106.30 do not appear elsewhere in Part 106 of Title 34 of the Code of Federal Regulations. Upon further consideration and for the reasons articulated in this preamble, including in the "Section 106.6(f) Title VII and Directed Question 3 (Application to Employees)" subsection of the "Clarifying

requirement empowers victims of sexual harassment to choose when and to whom to report sexual misconduct, which commenters believed would help facilitate building more trusting relationships between students and school administrators. Multiple commenters also supported the way that the proposed regulations allow recipients to design internal reporting processes as recipients see fit, including mandatory reporting by all employees to the Title IX Coordinator or others with the authority to institute corrective measures on the recipient's behalf. One commenter cited the Supreme Court's *Davis* decision and stated that, while the commenter supported the Department's actual knowledge requirement, institutions should publicize a list of the officials who have authority to institute corrective measures, in a location easily accessible and known to the student body, so that those who wish to file complaints know how to do so.

Some commenters referred to the constructive notice standard set forth in Department guidance as a "mandatory reporting" system. Some commenters supported replacing constructive notice with actual knowledge, arguing that the mandatory reporting system recommended by Department guidance has resulted in requiring college and university employees to report allegations of sexual harassment and sexual violence even when a victim reported to an employee in confidence and even when the victim expressed no interest in an investigation.

Amendments to Existing Regulations" section of this preamble, the Department believes that the definitions in § 106.30 should apply to Part 106 of Title 34 of the Code of Federal Regulations, except for the definitions of the words "elementary and secondary school" and "postsecondary institution." The definitions of "elementary and secondary school" and "postsecondary institution" in § 106.30 will apply only to §§ 106.44 and 106.45. This revision is not a substantive revision because this revision does not change the definitions or meaning of existing words in Part 106 of Title 34 of the Code of Federal Regulations. Ensuring that the definitions in § 106.30 apply throughout Part 106 of Title 34 of the Code of Federal Regulations will provide clarity and consistency for future application. We also have clarified in § 106.81 that the definitions in § 106.30 do not apply to 34 CFR 100.6-100.11 and 34 CFR part 101, which are procedural provisions applicable to Title VI. Section 106.81 incorporates these procedural provisions by reference into Part 106 of Title 34 of the Code of Federal Regulations.

Other commenters objected to the Department removing "mandatory reporter" requirements and replacing constructive notice with actual knowledge. Several commenters asserted that the actual knowledge definition in § 106.30 and actual knowledge requirement in § 106.44(a) will harm survivors, especially women, by allowing "lower level employees" to intentionally bury reports of sexual harassment against serial perpetrators. Those commenters expressed concern that Title IX Coordinators will be less informed, which will make campuses more dangerous for students.

Several commenters asserted that survivors of campus assault have frequently experienced Title IX personnel being more concerned with protecting the recipient's institutional interests than with the welfare of victims. Commenters who work in postsecondary institutions, or for corporations, asserted that they are familiar with this dynamic in the context of human resources departments. Many commenters stated that the longstanding constructive notice standard (requiring a school to respond if a responsible employee knew or should have known of sexual harassment) was sufficient to ensure that employees would be held accountable for purposefully turning their backs on students who seek to report sexual harassment. Commenters asserted that employees at a particular university failed to take any action after students disclosed another employee's abuse to them, which resulted in a serial sexual perpetrator victimizing many people. Commenters expressed concern that the actual knowledge requirement requires the Department to be too trusting of recipients, and cited incidents of coaches and employees mishandling reports of sexual harassment at a number of institutions of higher education.

Discussion: The Department appreciates commenters' support for the § 106.30 definition of "actual knowledge" and the requirement in § 106.44(a) that recipients respond to sexual harassment when the recipient has actual knowledge. As explained in the "Actual Knowledge"

subsection of the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" we have revised the § 106.30 definition of "actual knowledge" to differentiate between elementary and secondary schools, and postsecondary institutions, with respect to which school or college employees who have "notice" of sexual harassment require the school or college to respond. Under revised § 106.30, notice to "any employee" of an elementary or secondary school charges the recipient with actual knowledge.

The Department disagrees with commenters that the actual knowledge requirement, as adopted from the *Gebser/Davis* framework and adapted in these final regulations for administrative enforcement, will result in recipients being less informed about, or less responsive to, patterns of sexual harassment and threats to students. With respect to postsecondary institutions, notice of sexual harassment or allegations of sexual harassment to the recipient's Title IX Coordinator or to an official with authority to institute corrective measures on behalf of the recipient (herein, "officials with authority") will trigger the recipient's obligation to respond. Postsecondary institution students have a clear channel through the Title IX Coordinator to report sexual harassment, and § 106.8(a) requires recipients to notify all students and employees (and others) of the Title IX Coordinator's contact information, so that "any person" may report sexual harassment in person, by mail, telephone, or e-mail (or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report), and specifies that a report may be made at any time (including during non-business hours) by mail to the Title IX Coordinator's office address or by using the listed telephone number or e-mail address. In the postsecondary institution context, the Department believes that making sure that complainants and third parties have clear, accessible ways to report to the Title IX Coordinator rather than requiring the recipient to respond each time any postsecondary institution employee has notice,

better respects the autonomy of postsecondary school students (and employees) to choose whether and when to report sexual harassment.[482]

With respect to elementary and secondary schools, the Department is persuaded by commenters' concerns that it is not reasonable to expect young students to report to specific school employees or to distinguish between a desire to disclose sexual harassment confidentially to a school employee, versus a desire to report sexual harassment for the purpose of triggering the school's response obligations. We have revised the § 106.30 definition of actual knowledge

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[482] The Department recognizes the many examples pointed to by commenters, of postsecondary institutions failing to respond appropriately to notice of sexual harassment allegations when at least some university employees knew of the alleged sexual harassment, resulting in some situations where serial predators victimized many people. We note that such failures by institutions occurred under the status quo; that is, under the Department's approach to notice in the Department's guidance. In these final regulations, the Department aims to respect the autonomy of students at postsecondary institutions, while ensuring that such students (and employees) clearly understand how to report sexual harassment. We believe that the best way to avoid reports "falling through the cracks" or successfully being "swept under the rug" by postsecondary institutions, is not to continue (as Department guidance did) to insist that all postsecondary institutions must have universal or near-universal mandatory reporting. As discussed in the "Actual Knowledge" subsection of the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, whether universal mandatory reporting for postsecondary institutions benefits victims or harms victims is a complicated issue as to which research is conflicting. We believe that allowing each postsecondary institution to implement its own policy regarding which employees must report sexual harassment to the Title IX Coordinator (and which may remain confidential resources for students at postsecondary institutions) is a better approach than requiring universal mandatory reporting. The benefits of universal mandatory reporting policies may not outweigh the negative impact of such policies, in terms of helping victims. Allowing postsecondary institutions to choose for themselves what kind of mandatory reporting policies to have is only beneficial if combined (as in these final regulations) with strong requirements that every postsecondary institution inform students and employees about how to report to the Title IX Coordinator and that every institution has in place accessible options for *any person* to report to the Title IX Coordinator. This is the approach taken in these final regulations, so that, for example, if an alleged victim discloses sexual harassment to a university "low-level" employee and the school does not respond by reaching out to the alleged victim (called "the complainant" in these final regulations) then the alleged victim also knows how to contact the Title IX Coordinator, a specially trained employee who must respond promptly to the alleged victim by offering supportive measures and confidentially discussing with the alleged victim the option of filing a formal complaint. A report to the Title IX Coordinator may also be made by any third party, such as the alleged victim's parent or friend. Thus, whether or not the "low level" employee to whom an alleged victim disclosed sexual harassment appropriately kept that disclosure confidential, or wrongfully violated the institution's mandatory reporting policy, the alleged victim is *not* left without recourse or options and the institution is *not* able to avoid responding to the alleged victim, because the alleged victim knows that *any report* made to the Title IX Coordinator, via any of several accessible options (e.g., e-mail or phone, which information must be prominently displayed on recipients' websites) that can be used day or night, will trigger the institution's prompt response obligations. § 106.8; § 106.30 (defining "actual knowledge" to include, but not be limited to, a report to the Title IX Coordinator).

to specifically state that notice to any employee of an elementary or secondary school charges the recipient with actual knowledge, triggering the recipient's obligation to respond to sexual harassment (including promptly offering supportive measures to the complainant). Accordingly, students in elementary and secondary schools do not need to report allegations of sexual harassment to a specific employee such as a Title IX Coordinator to trigger a recipient's obligation to respond to such allegations. A student in an elementary or secondary school may report sexual harassment to any employee. Similarly, if an employee of an elementary or secondary school personally observes sexual harassment,[483] then the elementary or secondary school recipient must respond to and address the sexual harassment in accordance with these final regulations. As previously noted in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment," elementary and secondary schools operate under the doctrine of *in loco parentis*, and employees at elementary and secondary schools typically are mandatory reporters of child abuse under State laws for purposes of child protective services.[484]

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[483] Section 106.30 defines "complainant" to mean "an individual who is alleged to be the victim of *conduct that could constitute sexual harassment*" and therefore, an employee witnessing or hearing about conduct that "could constitute" sexual harassment defined in § 106.30 triggers the elementary and secondary school recipient's response obligations, including having the Title IX Coordinator contact the complainant (and, where appropriate, the complainant's parent or legal guardian) to confidentially discuss the availability of supportive measures. Section 106.44(a). In other words, if an elementary or secondary school employee witnesses conduct but does not know "on the spot" whether the conduct meets the § 106.30 definition of sexual harassment (for example, because the employee cannot discern whether the conduct amounted to a sexual assault, or whether the conduct was "unwelcome" subjectively to the complainant, or whether non-*quid pro quo*, non-sexual assault conduct was "severe"), the person victimized by the conduct is a "complainant" entitled to the school's prompt response if the conduct "could" constitute sexual harassment.

[484] *See* Ala. Code § 26-14-3; Alaska Stat. § 47.17.020; Ariz. Rev. Stat. § 13-3620; Ark. Code Ann. § 12-18-402; Cal. Penal Code § 11165.7; Colo. Rev. Stat. § 19-3-304; Conn. Gen. Stat. § 17a-101; Del. Code Ann. tit. 16, § 903; D.C. Code § 4-1321.02; Fla. Stat. § 39.201; Ga. Code Ann. § 19-7-5; Haw. Rev. Stat. § 350-1.1; Idaho Code Ann. § 16-1605; 325 Ill. Comp. Stat. § 5/4; Ind. Code § 31-33-5-1; Iowa Code § 232.69; Kan. Stat. Ann. § 38-2223; Ky. Rev. Stat. Ann. § 620.030; La. Child Code Ann. art. 603(17); Me. Rev. Stat. tit. 22, § 4011-A; Md. Code Ann., Fam. Law § 5-704; Mass. Gen. Laws ch. 119, § 21; Mich. Comp. Laws § 722.623; Minn. Stat. § 626.556; Miss. Code. Ann. §

In addition to any obligations imposed on school employees under State child abuse laws, these final regulations require the recipient to respond to allegations of sexual harassment by offering supporting measures to any person alleged to be the victim of sexual harassment and taking the other actions required under § 106.44(a).

The Department agrees with commenters who noted that nothing in the proposed or final regulations prevents recipients (including postsecondary institutions) from instituting their own policies to require professors, instructors, or all employees to report to the Title IX Coordinator every incident and report of sexual harassment. A recipient also may empower as many officials as it wishes with the requisite authority to institute corrective measures on the recipient's behalf, and notice to these officials with authority constitutes the recipient's actual knowledge and triggers the recipient's response obligations. Recipients may also publicize lists of officials with authority. We have revised § 106.8 to require recipients to notify students, employees, and parents of elementary and secondary school students (among others) of the contact information for the recipient's Title IX Coordinator, to specify that any person may report sexual harassment in person, by mail, telephone, or e-mail using the Title IX Coordinator's contact information (or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report), to state that reports may be made at any time (including during non-business

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43-21-353; Mo. Ann Stat. § 210.115; Mont. Code Ann. § 41-3-201; Neb. Rev. Stat. § 28-711; Nev. Rev. Stat. § 432B.220; N.H. Rev. Stat. Ann. § 169-C:29; N.J. Stat. Ann. § 9:6-8.10; N.M. Stat. Ann. § 32A-4-3; N.Y. Soc. Serv. Law § 413; N.C. Gen. Stat. Ann. § 7B-301; N.D. Cent. Code Ann. § 50-25.1-03; Ohio Rev. Code Ann. § 2151.421; Okla. Stat. tit. 10A, § 1-2-101; Or. Rev. Stat. § 419B.010; 23 Pa. Cons. Stat. Ann § 6311; R.I. Gen. Laws § 40-11-3(a); S.C. Code Ann. § 63-7-310; S.D. Codified Laws § 26-8A-3; Tenn. Code Ann. § 37-1-403; Tex. Fam. Code § 261.101; Utah Code Ann. § 62A-4a-403; Vt. Stat. Ann. tit. 33, § 4913; Va. Code Ann. § 63.2-1509; Wash. Rev. Code § 26.44.030; W. Va. Code § 49-2-803; Wis. Stat. § 48.981; Wyo. Stat. Ann. § 14-3-205.

hours) by using the listed telephone number or e-mail address, and to require a recipient to post the Title IX Coordinator's contact information on the recipient's website.

The Department appreciates commenters' concerns about recipients purposely ignoring reports of sexual harassment. As the Department has acknowledged through guidance documents since 1997, schools, colleges, and universities have too often ignored sexual harassment affecting students' and employees' equal access to education. These final regulations ensure that every recipient is legally obligated to respond to sexual harassment (or allegations of sexual harassment) of which the recipient has notice. The final regulations use a definition of actual knowledge to address the unintended consequences that the constructive notice standard created for both recipients and students. As explained more fully in the "Actual Knowledge" subsection in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, the Department believes that the approach in these final regulations regarding notice of sexual harassment that triggers a recipient's response obligations is preferable to the constructive notice standard set forth in Department guidance. Additionally, as some commenters noted, the constructive notice standard coupled with the Department's mandate to investigate all allegations of sexual harassment[485] may have actually chilled reporting. Investigations almost always require some intrusion into the complainant's privacy, and some complainants simply wanted supportive measures but were not ready or did not desire to participate in a grievance process. These final regulations provide complainants with more

[485] 2011 Dear Colleague Letter at 4-5; 2001 Guidance at 15.

control over whether or when to report sexual harassment,[486] and clearly obligate a recipient to offer supportive measures to a complainant with or without a formal complaint ever being filed.

With respect to commenters' concerns that recipients have knowingly ignored reports of sexual harassment in the past, and may continue to do so in the future, such action constitutes deliberate indifference, if the other requirements of § 106.44(a) are met. When a recipient with actual knowledge of sexual harassment in its education program or activity refuses to respond to sexual harassment or a report of sexual harassment, such a refusal is clearly unreasonable under § 106.44(a) and constitutes a violation of these final regulations.

Changes: The Department expands the definition of actual knowledge in § 106.30 to include notice to "any employee of an elementary and secondary school" with respect to recipients that are elementary and secondary schools. We have also revised § 106.8 to require that recipients must prominently display the Title IX Coordinator's contact information on the recipient's

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[486] As noted previously, these final regulations ensure that reporting or disclosing sexual harassment to *any* elementary or secondary school employee triggers the recipient's response obligations, while postsecondary institutions are permitted to choose which of their employees must be mandatory reporters. This broader definition of "actual knowledge" for elementary and secondary schools does not reflect that the Department values the autonomy of elementary and secondary school students less than the autonomy of students at postsecondary institutions. The final regulations respect the autonomy of all complainants. However, recognizing the general differences between adults in postsecondary institutions, versus young students in elementary and secondary schools, we believe the better policy is to ensure that an elementary or secondary school responds promptly whenever any employee has notice of sexual harassment, while a postsecondary institution must respond promptly whenever a Title IX Coordinator or official with authority has notice of sexual harassment. This approach does not give as much control to a younger student over whether disclosure of sexual harassment results in a response from the Title IX Coordinator, compared to the control retained by a student at a postsecondary institution to disclose sexual harassment without automatically triggering a report to the Title IX Coordinator. However, the final regulations respect the autonomy of, and give options and control to, *all* complainants, by protecting each complainant's right to choose, for example, how to respond to the Title IX Coordinator's discussion of available supportive measures and whether to file a formal complaint asking the school to investigate the sexual harassment allegations. This approach ensures that an elementary or secondary school student is, for example, considering supportive measures and the option of filing a formal complaint with the Title IX Coordinator, who can involve the student's parent or legal guardian as appropriate. Thus, the final regulations respect the autonomy of all complainants and aim to give all complainants options and control over how a school responds to their sexual harassment experience, yet achieves these aims differently for elementary and secondary school students, than for students at postsecondary institutions.

website, and to state that any person may report sexual harassment in person, by mail, by telephone, or by e-mail using that contact information (or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report), and that a report may be made at any time (including during non-business hours) by using the telephone number or e-mail address, or by mail to the office address, listed for the Title IX Coordinator.

Student Populations Facing Additional Barriers to Reporting

Comments: Several commenters asserted that designating a single individual as the person to whom notice triggers a recipient's obligation to respond creates significant hurdles to reporting for certain populations of students, including students with disabilities, immigrant students, international students, transgender students, and homeless students.

Numerous commenters noted that students with disabilities are more vulnerable to sexual abuse than their peers without disabilities, are less likely to report experiences of abuse, and are less likely to have access to school officials who have the requisite authority to implement corrective measures under § 106.30. One commenter asserted that, while the actual knowledge requirement favors the rights and needs of students with disabilities who are accused of sexual harassment, this requirement disfavors students with disabilities who are victims of sexual harassment. The commenter expressed concern that students with disabilities may only be comfortable communicating sensitive issues to their own teachers, and in some cases may only be able to communicate with appropriately trained special education staff.

One commenter stated that, because immigrant students are even less likely to know to whom they should report, members of immigrant communities are disadvantaged by the actual knowledge requirement. Another commenter asserted that international students are more likely to confide in a teacher or advisor with whom they have close contact, because cultural and

linguistic barriers may make it difficult for international students to navigate official administrative channels.

Several commenters noted that transgender students, as well as non-binary students and students who identify with other gender identity communities, are less likely to report or seek services than students from other demographics. Commenters argued that replacing the constructive notice standard with the actual knowledge standard will reduce the services and support received by transgender students and students who identify with other gender identity communities.

One commenter asserted that the actual knowledge requirement disadvantages students who are homeless, students from economically disadvantaged backgrounds, or students from dysfunctional families; the commenter described having seen bruises, cuts, and left-over tape residue from when a student was hospitalized after getting into the student's parents' crystal methamphetamine. The commenter asserted that, under the proposed rules, students will lose support from teachers, placing students in greater danger. The commenter argued that it is imperative that all elementary and secondary school teachers be mandatory reporters.

Discussion: The Department requires all recipients to address sex discrimination against all students, including students in vulnerable populations. The revised definition of "actual knowledge" in § 106.30 includes notice to any elementary and secondary school employee, addressing the concerns raised by commenters that in the elementary and secondary school context, students with disabilities, LGBTQ students, students who are immigrants, and others, face barriers to reporting sexual harassment only to certain employees or officials. We have also revised § 106.8 to ensure that *all students and employees* are notified of the Title IX Coordinator's contact information, to require that contact information to be prominently

displayed on the recipient's website, and to clearly state that *any person* may report sexual harassment to the Title IX Coordinator using any of several accessible options, including by phone or e-mail at any time of day or night. Thus, as to students at postsecondary institutions, clear, accessible reporting options are available for any student (or third party, such as an alleged victim's friend or a bystander witness to sexual harassment) to contact the Title IX Coordinator and trigger the postsecondary institution's mandatory response obligations. We believe that the final regulations thus provide all students, including students with disabilities, LGBTQ students, students who are immigrants, and others, with accessible ways of reporting, and do not leave any student facing barriers or challenges with respect to how to report to the Title IX Coordinator.[487]

With respect to commenters who assert that the Department is removing a "mandatory reporting" requirement or eliminating "mandatory reporters," as discussed in the "Actual Knowledge" subsection of the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, the adapted actual knowledge requirement in these final regulations distinguishes between elementary and secondary schools (where notice to any employee now triggers the recipient's response obligations) and postsecondary institutions (where notice to the Title IX Coordinator and officials with authority triggers the recipient's response obligations, but postsecondary institution recipients have discretion to determine which

[487] Section 106.8(a) ("*Any person may report* sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), *in person, by mail, by telephone, or by electronic mail*, using the contact information listed for the Title IX Coordinator [which, under § 106.8(b) must be posted on the recipient's website], *or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report. Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail* to the office address, listed for the Title IX Coordinator.") (emphasis added).

of their employees should be mandatory reporters, and which employees may keep a postsecondary student's disclosure about sexual harassment confidential).

In response to commenters' concerns, in elementary and secondary schools, all students (including those in vulnerable populations) can report sexual harassment to any school employee to trigger the recipient's obligation to respond. While the imputation of knowledge based solely on the theories of vicarious liability[488] or constructive notice is insufficient, notice to any elementary and secondary school employee – including a teacher, teacher's aide, bus driver, cafeteria worker, counselor, school resource officer, maintenance staff worker, or other school employee – charges the recipient with actual knowledge, triggering the recipient's response obligations. This expanded definition of actual knowledge in elementary and secondary schools gives all students, including those with disabilities who may face challenges communicating, a wide pool of trusted employees of elementary and secondary schools (i.e., *any* employee) to whom the student can report. As to all recipients, § 106.30 defining "actual knowledge" is also revised to expressly state that "notice" includes a report to the Title IX Coordinator as described in § 106.8(a).[489] These final regulations thus ensure that all students and employees have clear, accessible reporting channels, and ensure that elementary and secondary school students can

[488] The Department has revised the § 106.30 definition of actual knowledge by replacing "respondeat superior" with "vicarious liability." "Vicarious liability" conveys the same meaning as "respondeat superior," but "vicarious liability" is more colloquial and is less likely to be confused with the word "respondent" used throughout these final regulations.

[489] We have revised § 106.8(a) to expressly state that any person may report sexual harassment using the contact information required to be listed for the Title IX Coordinator (which must include an office address, telephone number, and e-mail address), or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report, and that a report may be made at any time (including during non-business hours) by using the listed telephone number or e-mail address, or by mail to the listed office address.

disclose sexual harassment to *any* school employee and the recipient will be obligated to respond promptly and supportively in accordance with § 106.44(a).

While the Department acknowledges commenters' concerns about actual knowledge introducing an additional hurdle to the reporting process for certain students at postsecondary institutions, the Department believes the actual knowledge requirement will bring benefits to students that outweigh potential concerns. Under these final regulations, the recipient must notify and inform students of the right to report sexual harassment to the Title IX Coordinator, a trained professional who is well positioned to contact the complainant to confidentially discuss the complainant's wishes regarding supportive measures (which must be offered regardless of whether the complainant also chooses to file a formal complaint), and explain the process of filing a formal complaint. Students may choose to confide in postsecondary institution employees to whom notice does not trigger the recipient's response obligations, without such confidential conversations necessarily resulting in the student being contacted by the Title IX Coordinator. This results in greater respect for the autonomy of a college student over what kind of institutional response will best serve the student's needs and wishes. This gives students at postsecondary institutions greater control over whether or when to report than does a requirement of universal mandatory reporting.

The Department understands commenters' concerns that some students may not feel comfortable discussing a sexual harassment experience with a stranger. Partly in response to such concerns, the final regulations designate any school employee as someone with whom an elementary or secondary school student can share a report and know that the recipient is then responsible for responding promptly. The Department believes it is reasonable to expect students at a university or college to communicate with the Title IX Coordinator or other official with

authority, as students would with other professionals, including doctors, therapists, and attorneys, many of whom college students do not know personally when they first seek assistance with sensitive, personal issues. At the same time, these final regulations permit each postsecondary institution to decide whether or not to implement a universal mandatory reporting policy. As discussed in the "Actual Knowledge" subsection of the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, there is conflicting research about whether universal mandatory reporting policies for postsecondary institutions benefit victims, or harm victims.

Although these final regulations do not expressly require recipients to allow complainants to bring a supportive friend to an initial meeting with the Title IX Coordinator, nothing in these final regulations prohibits complainants from doing so. Indeed, many people bring a friend or family member to doctors' visits for extra support, whether to assist a person with a disability or for emotional support, and the same would be true for a complainant reporting to a Title IX Coordinator. Once a grievance process has been initiated, these final regulations require recipients to provide the parties with written notice of each party's right to select an advisor of choice, and nothing precludes a party from choosing a friend to serve as that advisor of choice.[490]

The Department agrees with the commenter who asserted that recipients should publish information to help students locate the Title IX Coordinator and other staff to whom notice conveys actual knowledge on the recipient. These final regulations in § 106.8 require recipients to designate and authorize a Title IX Coordinator, notify all students and employees of the name or title, office address, electronic mail address, and telephone number of the Title IX

[490] Section 106.45(b)(2); § 106.45(b)(5)(iv).

Coordinator, and prominently display the contact information for the Title IX Coordinator on recipients' websites.

The Department disagrees that the actual knowledge requirement favors respondents over complainants. The final regulations' approach to designating Title IX Coordinators, officials with authority, and elementary and secondary school employees as persons to whom notice triggers the recipients' response obligations, is designed to ensure that recipients are held responsible for meaningful responses to known incidents of sexual harassment, including by providing equitable responses to the complainant and respondent,[491] while taking into account the different needs and expectations of elementary and secondary school students, and postsecondary institution students. In elementary and secondary schools the recipient must respond to sexual harassment when notice is given to any school employee; in postsecondary institutions where complainants are more capable of exercising autonomy over when to report and seek institutional assistance, the complainant (or any third party) may report to a Title IX Coordinator or official with authority. We reiterate that "notice" may come to a Title IX Coordinator, an official with authority, or an elementary and secondary school employee, from any source (i.e., from the person alleged to be the victim of sexual harassment, from any third party such as a friend, parent, or witness to sexual harassment, or from the employee's or official's first-hand observation of conduct that could constitute sexual harassment).

Changes: The Department has revised the § 106.30 definition of "actual knowledge" to specify that actual knowledge includes notice of sexual harassment to "any employee" in an elementary

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[491] Section 106.44(a) (requiring the recipient to respond equitably by offering supportive measures to a complainant and by refraining from taking disciplinary action against a respondent without first following a grievance process that complies with § 106.45).

and secondary school. The Department revised the § 106.30 definition of "actual knowledge" by replacing "respondeat superior" with "vicarious liability."

Chilling Reporting

Comments: Many commenters asserted that sexual assault is chronically underreported, and that an actual knowledge requirement would create an additional barrier to reporting and chill victims' willingness to try to report sexual harassment. Several commenters noted that studies show that, although only five percent of rapes are reported to officials, nearly two-thirds of victims tell someone about their experience (e.g., friends or family),[492] and commenters argued that limiting the employees who are mandatory reporters will result in the Title IX Coordinator knowing about even fewer incidents and helping even fewer victims, whereas the current system centralizes reporting so that fewer victims fall through the cracks. Numerous commenters asserted that sexual harassment and assault is a sensitive issue that many individuals only feel comfortable discussing within a trusted relationship, if they feel bold enough to discuss it at all.

Another commenter characterized the proposed rules' definition of actual knowledge in § 106.30 as "loose." According to this commenter, the proposed rules' definition of actual knowledge would allow for a situation where a student reports to an agent whom the student trusts and thinks that the report has been conveyed to the recipient, but for some reason, that agent does not properly report the incident. The commenter contended that in this situation the school can claim that it did not have actual knowledge of the incident and therefore the school cannot be held accountable for inaction. Multiple commenters stated that complainants should be

[492] Commenters cited: Massachusetts Institute of Technology, *Survey Results: 2014 Community Attitudes on Sexual Assault* (2014).

able to go to any school official with whom the student feels comfortable, to report sexual harassment, and that complainants should not be forced to go to a few specific people within the school.

Several commenters opposed the actual knowledge definition in § 106.30, asserting that most students do not know which employees have the authority to redress sexual harassment and would not even know who to contact. Also, multiple commenters cited a study that found that survivors often do not report their sexual assaults because of fear of being disbelieved or fear that their assault will not taken seriously,[493] and many commenters argued that the actual knowledge requirement will exacerbate these fears, thereby resulting in even less reporting of sexual harassment. Commenters argued that narrowing the scope of trusted adults to whom survivors of sexual assault can speak to receive support is an unjust violation of their right to safety.

Numerous commenters asserted that giving complainants greater control over whether and when to report will encourage more people to come forward to report sexual misconduct. A few commenters stated that the actual knowledge requirement pushes back against mandatory reporting policies that undermine a student's trust in professors and university employees. Commenters argued that because recipients often require employees to report allegations of sexual harassment to the Title IX office even when disclosures are made to employees in confidence, including in instances in which the complainant expresses no interest in an investigation, and the proposed rules would not require recipients to have these mandatory

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[493] Commenters cited: Kathryn J. Holland & Lilia M. Cortina, *"It happens to girls all the time": Examining sexual assault survivors' reasons for not using campus supports*, 59 AM. J. OF COMMUNITY PSYCHOL. 1-2 (2017).

reporting policies, the actual knowledge requirement would encourage more complainants to report sexual harassment because the complainants have greater control over what action a school takes in response to each situation, including whether the report will proceed to an investigation without the complainant's permission. One commenter asserted that mandatory reporter policies frequently serves as a deterrent to complainants who are seeking resources rather than adjudication. The commenter stated that mandatory reporting enhances the risks of revictimization and penalizes students who wish to come forward and seek services rather than a grievance process.

Another commenter asserted that postsecondary institution recipients should have to require that any employee to whom a student discloses sexual harassment provide the student with information about how to report to the Title IX office, the option of reporting, and the availability of supportive services. The commenter argued that a student should be told (by any employee in whom a student confides a sexual harassment experience) that unless the student makes a report, the institution will not know of the incident and will therefore do nothing about it. Several commenters supporting § 106.30 asserted that the final regulations should allow complainants to meet directly with the Title IX Coordinator who can provide the array of options available to them before deciding to file a formal complaint. One commenter expressed support of the proposed rules' allowance of greater informality in adjudications, because research shows that victims want more informal options, with less mandatory reporting.[494]

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[494] Commenters cited: National Academies of Science, Engineering, and Medicine, *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine* (Frasier F. Benya *et al.* eds., 2018).

Discussion: As discussed above, the final regulations revise the definition of actual knowledge to include notice to any elementary and secondary school employee, thus alleviating many commenters' concerns about requiring young students to both know how, and be willing to, report sexual harassment incidents to a particular school official or to the Title IX Coordinator. As discussed above, the actual knowledge requirement in the postsecondary institution context means notice to the Title IX Coordinator or an official with authority, and the Department believes this approach respects a postsecondary institution complainant's autonomy and choice over whether or when to report sexual harassment, while still ensuring that complainants and third parties have clear, accessible ways of reporting sexual harassment.

The Department agrees with commenters who pointed out that the actual knowledge requirement in the postsecondary institution context appropriately gives more control and autonomy to each complainant to choose to discuss a private incident confidentially (for example, with a trusted professor or resident advisor), or to report the incident in order to seek supportive measures or a grievance process against the respondent. Numerous commenters asserted that preserving a survivor's autonomy and control in the aftermath of a traumatic experience of sexual violence can be crucial to the survivor's ability to heal and recover.[495] The Department agrees with commenters who asserted that victims want more informal options with less mandatory reporting because mandatory reporting policies may have the unintended consequence of penalizing complainants who wish to come forward and seek supportive

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[495] *E.g.*, Carly Parnitzke Smith & Jennifer J. Freyd, *Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma*, 26 JOURNAL OF TRAUMATIC STRESS 1, 120 (2013) (describing "institutional betrayal" as when an important institution, or a segment of it, acts in a way that betrays its member's trust); Merle H. Weiner, *Legal Counsel for Survivors of Campus Sexual Violence*, 29 YALE J. OF L. & FEMINISM 123, 140-141 (2017) (identifying one type of institutional betrayal as the harm that occurs when "the survivor thinks she is speaking to a confidential resource, but then finds out the advocate cannot keep their conversations private").

measures, by subjecting complainants to contact with the Title IX office, (which can lead to a formal grievance process even without the complainant choosing to file a formal complaint),[496] when that was not what some complainants desired.[497] Therefore, the Department believes the actual knowledge requirement may benefit complainants at postsecondary institutions whose reports were chilled under a system of constructive notice. In the postsecondary institution context, the final regulations respect a complainant's decision about whether or when to report, and ensure that a complainant may receive supportive measures irrespective of whether they file a formal complaint of sexual harassment.[498]

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[496] Under the final regulations, a complainant always retains the *option* of initiating a grievance process (by filing a formal complaint) and is never required to file a formal complaint in order to receive supportive measures. § 106.44(a); § 106.44(b)(1); § 106.30 (defining "formal complaint"). However, a Title IX Coordinator may, when it is not clearly unreasonable in light of the known circumstances, sign a formal complaint that initiates a grievance process against a respondent even when that is not what the complainant wished to have happen. § 106.30 (defining "formal complaint"); § 106.44(a). Thus, universal mandatory reporting policies may sometimes result in involving a complainant in a grievance process when that is not what the complainant wanted, and the final regulations aim to make that less likely in the postsecondary institution context by allowing each postsecondary institution to decide for itself whether to have a universal mandatory reporting policy.

[497] *E.g.*, Carmel Deamicis, *Which Matters More: Reporting Assault or Respecting a Victim's Wishes?*, THE ATLANTIC (May 20, 2013) (describing a campus "speak-out" event at which sexual violence survivors were supposed to be able to safely share their stories with other but the university's mandatory reporting policy required any residential advisor who "recognizes the voice of a speaker" to report "that person's name and story" to the university's Title IX Coordinator, resulting in many resident advisors choosing to respect victims' anonymity even knowing that to do so violated campus policy because "[w]hen a policy doesn't embody the values it's supposed to protect, sometimes it's worth breaking"); *id.* (noting that the university's mandatory reporting policy was a direct result of the Department's withdrawn 2011 Dear Colleague Letter, describing professors and staff members "angrily arguing against the new policy" because they "can't believe the school is asking them to violate their students' trust," quoting a victim advocate as wondering "if you want to help victims in their time of need, why not leave it up to the victim?" and quoting a student volunteer at the speak-out as stating: "Sexual harassment or assault is a crime of power . . . . The survivor is stripped of their power and control, and one of the only aspects that remains in their control is if, how, when, and to whom to share their story" and mandatory reporting "removes that last aspect of control that a survivor has."); Allie Grasgreen, *Mandatory Reporting Perils*, INSIDE HIGHER ED (Aug. 30, 2013) (quoting Title IX activist Andrea Pino as stating: "Mandatory reporting is supposed to alleviate that lack of transparency but putting students in this predicament in which they do not feel like they can trust people for confidentiality is doing the opposite. . . . It's literally putting students in situations in which they can't be honest.").

[498] Section 106.44(a) (requiring a recipient's response to include informing the complainant of the availability of supportive measures with or without the filing of a formal complaint and explaining to the complainant the option for filing a formal complaint). While elementary and secondary school students retain less control over when disclosure of sexual harassment triggers the school's mandatory response obligations, these students (with involvement of their parents as appropriate) do retain control over whether to accept supportive measures, and whether to also file a formal complaint. § 106.44(a); § 106.6(g).

In response to commenters' concerns that under the proposed rules complainants would have difficulty finding the Title IX Coordinator or that there would be an increased potential for misunderstandings about whether a complainant wanted the school to investigate, the final regulations strengthen existing regulatory requirements that recipients notify students and employees (and parents of elementary and secondary school students) of the contact information for the Title IX Coordinator, post the Title IX Coordinator's contact information on the recipient's website, and disseminate information about how to report sexual harassment and file a formal complaint.[499] Additionally, revised § 106.44(a) requires the Title IX Coordinator to contact each complainant (which includes a parent or legal guardian, as appropriate) to inform the complainant of the *option* of filing a formal complaint while assuring the complainant that supportive measures are available irrespective of whether the complainant chooses to file a formal complaint.

Under the rubric of actual knowledge, as applied by Federal courts interpreting Supreme Court precedent, whether certain recipient employees are officials with authority is a fact specific inquiry. Accordingly, the final regulations: (1) continue, as proposed in the NPRM, to ensure that notice to a recipient's Title IX Coordinator conveys actual knowledge, and (2) broaden the definition of actual knowledge for elementary and secondary schools to include notice to any school employee.[500] In this manner, the final regulations ensure that students in elementary and secondary schools can discuss, disclose, or report a sexual harassment incident to any school employee, conveying actual knowledge to the school and requiring the school to respond

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[499] Section 106.8.
[500] Section 106.30 (defining "actual knowledge").

appropriately, while postsecondary institutions have discretion to offer college and university students options to discuss or disclose sexual harassment experiences with institutional employees for the purpose of emotional support, or for the purpose of receiving supportive measures and/or initiating a grievance process against the respondent.

The Department acknowledges that the actual knowledge standard relies on the Title IX Coordinator as an essential component of the process to address sexual harassment, especially in the postsecondary institution context. Recipients have been required to designate a Title IX Coordinator for decades, and the Department believes that these final regulations ensure that all students have clear, accessible options for making reports that convey actual knowledge to the recipient.[501] Nothing in these final regulations prevents a postsecondary institution or any other recipient from requiring employees who are not Title IX Coordinators or officials with authority, to report allegations of sexual harassment to the Title IX Coordinator when such employees become aware of such allegations.[502]

The Department disagrees that the actual knowledge requirement will chill reports because complainants might worry that the Title IX Coordinator will not believe or take their reports seriously, or that the actual knowledge requirement violates complainants' "right to

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[501] Section 106.30 defines "actual knowledge" to include notice to any elementary and secondary school employee, or to any Title IX Coordinator, and expressly states that "notice" includes but is not limited to a report to the Title IX Coordinator as described in § 106.8(a) (which, in turn, states that any person may report to the Title IX Coordinator in person or by mail to the office address, by telephone, or by e-mail, using the contact information for the Title IX Coordinator that the recipient must send to students, employees, and parents and guardians of elementary and secondary school students). § 106.8(b) (requiring recipients to prominently display the Title IX Coordinator's contact information on recipients' websites).

[502] We have also revised § 106.30 defining "actual knowledge" to state that the mere fact that an individual is required to, or has been trained to, report sexual harassment, does not mean that individual is an "official with authority." We made this revision so that a recipient may require and/or train contractors, volunteers, or others to report to a Title IX Coordinator (or other appropriate school personnel) without automatically converting any such individual into a person to whom notice charges the recipient with actual knowledge.

safety." These final regulations require that a recipient's Title IX Coordinator receives training on how to serve impartially and without bias pursuant to § 106.45(b)(1)(iii), and must offer each complainant information about supportive measures (designed in part to protect the complainant's safety) and how to file a formal complaint, under § 106.44(a). If a Title IX Coordinator responds to a complainant by not taking a report seriously, or with bias against the complainant, the recipient has violated these final regulations.

Changes: Section 106.30 defining "actual knowledge" is revised to include notice to any elementary and secondary school employee. Section 106.44(a) adds specific requirements that the recipient must offer supportive measures to a complainant, and the Title IX Coordinator must contact each complainant to discuss availability of supportive measures with or without the filing of a formal complaint, consider the wishes of the complainant with respect to supportive measures, and explain the process for filing a formal complaint.

Generally Burdening Complainants

Comments: Many commenters asserted that the actual knowledge definition and requirement places the burden squarely on victims to report harm. One commenter asserted that under the proposed rules, complainants – rather than recipients – would bear the responsibility to report sexual harassment and assault. Numerous commenters stated that postsecondary students are not yet full adults, and that the proposed regulations unrealistically assume that an 18 year old freshman in college is ready to face the process required by the proposed regulations.

Many commenters asserted that eliminating the "responsible employees" rubric used in Department guidance will delay, if not totally hinder, the ability of complainants to get prompt assistance in the aftermath of trauma. Commenters stated that complainants will need to navigate the school's bureaucracy to locate and contact the Title IX Coordinator, which will take time,

and in the meantime this will force complainants to continue to see their perpetrators in classes or dormitories while the complainant navigates the school's bureaucracy. Another commenter asked why the proposed regulations removed the term "responsible employees" that was used in Department guidance.

Discussion: The Department acknowledges that the actual knowledge requirement in the final regulations departs from the constructive notice approach relied on in previous Department guidance, wherein the Department took the position that any "responsible employee" (in both elementary and secondary schools, and postsecondary institutions) who knew or should have known about sexual harassment triggered the recipient's obligation to address sexual harassment.[503] However, we disagree that the actual knowledge definition in § 106.30 (as revised) and the actual knowledge requirement in § 106.44(a), burden complainants or will result in delayed responses to reported sexual harassment. In response to commenters' concerns that students and employees may not know how to report to the Title IX Coordinator, we have revised § 106.8 to better ensure that students, employees, and others have clear, accessible options for reporting to the Title IX Coordinator (including options that can be utilized during non-business hours), and to emphasize that reports may be made by complainants (i.e., the person alleged to be the victim of sexual harassment) or by any other person. Revised § 106.8 now requires recipients to notify all students, employees, and parents of elementary and secondary school students (and others) of the Title IX Coordinator's contact information, to post that contact information prominently on the recipient's website, and specifies that "any person" may report using the listed contact information for the Title IX Coordinator.

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

We appreciate a commenter's inquiry about the omission of "responsible employees" in these final regulations. There are two ways in which the final regulations alter references to "responsible employees." First, existing Title IX regulations have long used a heading, "Designation of responsible employee," preceding 34 CFR 106.8(a); this reference to "responsible employee" has always, in reality, been a reference to the recipient's Title IX Coordinator, and the Department is revising § 106.8(a) to reflect this reality by using the phrase "Designation of Title IX Coordinator" in the header for § 106.8(a) and specifying in that section that the employee designated and authorized by the recipient to coordinate the recipient's Title IX responsibilities is known as, and must be referred to as, the "Title IX Coordinator." Second, the term "responsible employee" appears throughout the Department's past guidance documents. In the 2001 Guidance, the Department defined a responsible employee as "any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility."[504] As explained in the "Actual Knowledge" subsection of the "Adoption and Adaption of the Supreme Court Framework to Address Sexual Harassment" section of this preamble, these final regulations do not use the "responsible employees" rubric that was set forth in Department guidance. In the elementary and secondary school context, there is no need to decide which employees are "responsible employees" because under revised § 106.30 defining "actual knowledge," notice to *any* elementary and secondary school employee triggers the recipient's response obligations. In the postsecondary institution context, these final regulations

[504] 2001 Guidance at 13.

do not use the responsible employees rubric in its entirety, although the first of the three categories described in guidance as "responsible employees" are still used in these final regulations, because notice to an official with authority is the equivalent of the category referred to in guidance as an employee who has the authority to redress the harassment. In the postsecondary institution context, the Department believes that complainants will benefit from allowing postsecondary institutions to decide which of their employees (aside from the Title IX Coordinator, and officials with authority) may listen to a student's disclosure of sexual harassment without being mandated to report the sexual harassment incident to the Title IX Coordinator.

A recipient (including a postsecondary institution recipient) may give authority to as many officials as it wishes to institute corrective measures on behalf of the recipient, and notice to such officials with authority will trigger the recipient's response obligations. A recipient also may choose to train employees and other individuals, such as parent or alumni volunteers, on how to report or respond to sexual harassment, even if these employees and individuals do not have the authority to take corrective measures on the recipient's behalf. The Department will not penalize recipients for such training by declaring that having trained people results in notice to those people charging the recipient with actual knowledge. The Department recognizes that recipients may not engage in such training efforts if such efforts may increase the recipient's liability.[505] Accordingly, these final regulations specify in the definition of actual knowledge in §

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[505] *Id*. Under the 2001 Guidance and subsequent guidance documents, a recipient was required to "ensure that employees are trained so that . . . responsible employees know that they are obligated to report harassment to appropriate school officials." 2001 Guidance at 13. Accordingly, training an employee may have increased the

106.30 that: the "mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient."

The Department disagrees that the actual knowledge requirement will delay implementation of emergency or urgently needed supportive measures compared to policies developed under a constructive notice requirement. In elementary and secondary schools the final regulations provide that reporting to any school employee triggers the school's prompt response. Once the elementary or secondary school has actual knowledge of sexual harassment, under revised § 106.44(a), the recipient must promptly offer the complainant supportive measures, and the Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. The same obligations to respond promptly are triggered in postsecondary institutions whenever the Title IX Coordinator or an official with authority has notice of sexual harassment.

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recipient's liability, as such training indicated the recipient's intention to treat the trained employees as responsible employees. (For reasons explained in this subsection "Actual Knowledge" under the section "Section 106.30 Definitions" as well as the "Actual Knowledge" subsection of the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, the Department no longer adheres to the rubric of "responsible employees" for reasons that differ for elementary and secondary schools, than for postsecondary institutions.) These final regulations require training for Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. § 106.45(b)(1)(iii). A recipient may train more employees or other persons without fear of creating liability because the "mere ability or obligation to report sexual harassment or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient," as described in the definition of "actual knowledge" in § 106.30.

Although commenters asserted that some complainants, even at postsecondary institutions, are too young, immature, or traumatized to contact a Title IX Coordinator, the Department notes that nothing in the final regulations prevents a complainant from first discussing the harassment situation with a trusted mentor or having a supportive friend with them to meet with or otherwise report to the Title IX Coordinator. The Department reiterates that under the final regulations, a complainant may report to the Title IX Coordinator and receive supportive measures without filing a formal complaint or otherwise participating in a grievance process, that reports can be made using any of the contact information for the Title IX Coordinator including office address, telephone number, or e-mail address, and that reports by phone or e-mail may be made at any time, including during non-business hours. Thus, we believe that the final regulations provide clear, accessible reporting options and will not cause delays in the responsibility or ability of a Title IX Coordinator to receive a report and then respond promptly, including by discussing with the complainant services that may be urgently needed to preserve a complainant's equal educational access, protect the complainant's safety, and/or deter sexual harassment, offering supportive measures to the complainant, and remaining responsible for effective implementation of the supportive measures.[506]

Changes: The Department revised the definition of actual knowledge in § 106.30 to add that the mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual, as one who

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[506] Section 106.30 (defining "supportive measures" in pertinent part to mean individualized services, reasonably available, offered without fee or charge, designed to restore or preserve a complainant's equal access to the recipient's education program or activity without unreasonably burdening the other party, and/or designed to protect the complainant's safety or deter sexual harassment, and stating that the Title IX Coordinator is responsible for effective implementation of supportive measures).

has the authority to institute corrective measures on behalf of the recipient. We have also revised § 106.44(a) to require the recipient promptly to offer the complainant supportive measures and to require the Title IX Coordinator promptly to contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.

Employees' Obligations

Comments: Several commenters expressed concern that the definition of actual knowledge means that some employees previously designated as "responsible employees" or mandatory reporters under Department guidance would no longer undergo training about sexual violence on campus. Many commenters believed that under the proposed rules, fewer employees would be mandatory reporters and thus would be untrained when students disclose an incident of sexual harassment. Many commenters asserted that, without mandatory reporting, professors, coaches, resident advisors, or teaching assistants may respond to victims based on personal preferences or biases (perhaps because the employee knows the accused student, or is biased against believing complainants), and argued that this will impact victims' ability to obtain assistance from unbiased, trained personnel. Several commenters argued that this, in turn, will expose recipients to increased litigation for failure to respond to sexual misconduct known by their faculty and staff but not reported to their Title IX offices.

Another commenter asked the Department to reexamine existing regulations under the Clery Act to determine whether student employees who are campus security authorities (CSAs)

under the Clery Act have conflicting duties under the proposed regulations and the Clery Act regulations.

Another commenter asked the Department to clarify why coaches and athletic trainers were not designated in the proposed rules as responsible employees, when this poses a conflict with NCAA (National Collegiate Athletic Association) guidelines.

One commenter asked what officials the Department considers to have the "authority to initiate corrective measures," believing that the language in the proposed rules could be interpreted to limit that role to only the Title IX Coordinator. Relatedly, several commenters requested that the Department provide clarity on what constitutes "authority to initiate corrective measures" and what types of corrective measures would be included; commenters argued that all staff and faculty have at least some ability to initiate some types of corrective measures.

At least one commenter asserted that requiring institutions, such as the commenter's community college, to respond only when the institution has actual notice, is a positive development. The commenter asserted that the commenter's institution employs part-time and contract employees, and vendors, outside the institution's direct control with no authority to institute corrective measures. This commenter therefore appreciated the flexibility offered under the proposed rules, for postsecondary institutions to design their own mandatory reporting policies. One commenter, a graduate student instructor, asserted that the actual knowledge definition was helpful to clarify the commenter's role and asserted that current guidance is unclear.

One commenter, a Title IX Coordinator at a university, asserted that the constructive notice standard is difficult to implement. The commenter stated that those not directly involved

in Title IX compliance or student conduct, such as full-time faculty, seem to have trouble understanding the complexity of the law in that area, even with training.

Discussion: The 2001 Guidance indicated that responsible employees should be trained to report sexual harassment to appropriate school officials.[507] Not all employees, however, were responsible employees and, thus, not all employees had an obligation to report sexual harassment to the Title IX Coordinator or other school officials. With respect to training, the Department in its 2001 Guidance stated: "schools need to ensure that employees are trained so that those with authority to address [sexual] harassment know how to respond appropriately, and other responsible employees know that they are obligated to report [sexual] harassment to appropriate officials."[508] Under the 2001 Guidance, such "[t]raining for employees . . . include[s] practical information about how to identify [sexual] harassment and, as applicable, the person to whom it should be reported."[509] As discussed previously, these final regulations no longer use a responsible employees rubric, and instead define the pool of employees to whom notice triggers a recipient's response obligations differently for elementary and secondary schools, and for postsecondary institutions. Like the 2001 Guidance, these final regulations incentivize recipients to train their employees; however, rather than mandate training of all employees, these final regulations require robust, specific training of every recipient's Title IX Coordinator[510] and place

[507] 2001 Guidance at 13.
[508] 2001 Guidance at 13.
[509] *Id*.
[510] Section 106.45(b)(1)(iii).

specific response obligations on Title IX Coordinators.[511] The Department believes that this approach most effectively ensures that recipients meet their Title IX obligations: the Department will hold recipients accountable for meeting Title IX obligations, the Department requires Title IX Coordinators to be well trained, and the Department leaves recipients discretion to determine the kind of training to other employees that will best enable the recipient, and its Title IX Coordinator, to meet Title IX obligations. Accordingly, the Department disagrees with commenters that removing any "mandatory reporting" requirement or the "responsible employee" rubric allows employees to freely respond to victims out of personal preferences or biases. For example, an elementary or secondary school recipient must promptly offer supportive measures to a complainant under § 106.44(a) whenever one of its employees has notice of sexual harassment, and the Title IX Coordinator specifically must contact the complainant. This ensures that the recipient is responsible for having an employee specially trained in Title IX matters (including the obligation to be free from bias, impartial, and having been trained with materials that do not rely on sex stereotypes)[512] communicates with the complainant. Regardless of the training a recipient gives to employees, the Department will hold the recipient accountable for meeting the recipient's response obligations under § 106.44(a) and for designating and authorizing a Title IX Coordinator[513] who has been trained to serve free from bias. For reasons discussed previously, including in the "Actual Knowledge" subsection of the "Adoption and

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[511] *E.g.*, § 106.44(a) (the Title IX Coordinator must promptly contact each person alleged to be the victim of sexual harassment – i.e., each complainant – regardless of who reported the complainant's sexual harassment victimization, and must discuss with the complainant the availability of supportive measures with or without the filing of a formal complaint, the complainant's wishes with respect to supportive measures, and the option of filing a formal complaint that initiates a grievance process against a respondent).
[512] Section 106.45(b)(1)(iii) (describing mandatory training, and requirements to be free from bias, for the Title IX Coordinator).
[513] Section 106.8(a).

Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, the Department believes that allowing postsecondary institution recipients to decide how its employees (other than the Title IX Coordinator, and officials with authority) respond to notice of sexual harassment appropriately respects the autonomy of postsecondary students to choose to disclose sexual harassment to employees for the purpose of triggering the postsecondary institution's Title IX response obligations, or for another purpose (for example, receiving emotional support without desiring to "officially" report). In order to ensure that all students and employees have clear, accessible reporting channels, we have revised § 106.8 to require a recipient to notify its educational community of the contact information for the Title IX Coordinator[514] and post that contact information prominently on the recipient's website, and to expressly state that "any person" may report sexual harassment at any time, including during non-business hours, by using the telephone number or e-mail address (or by mail to the office address) listed for the Title IX Coordinator, to emphasize that giving the Title IX Coordinator notice of sexual harassment that triggers the recipient's response obligations does not require scheduling an in-person appointment with the Title IX Coordinator.

Additionally, if a postsecondary institution would like to train all employees or require all employees to report sexual harassment to the Title IX Coordinator through policies that these final regulations do not require, then the postsecondary institution may do so without fearing that the Department will hold the postsecondary institution responsible for responding to sexual

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[514] Section 106.8(a) is also revised to require recipients to refer to the employee designated and authorized to coordinate the recipient's Title IX obligations as "the Title IX Coordinator," in order to further clarify for students and employees the Title IX Coordinator's role and function. Thus, for example, a recipient may designate one employee to coordinate multiple types of anti-discrimination and diversity efforts, yet the recipient must use the title "Title IX Coordinator" in its notices to students and employees, on its website, and so forth so that the recipient's educational community knows who to contact to report sex discrimination, including sexual harassment.

harassment allegations unless the recipient's employee actually did give notice to the recipient's Title IX Coordinator (or to an official with authority).[515] The Department revised § 106.30 defining "actual knowledge" to expressly state that the mere ability or obligation to inform a student about how to report sexual harassment or having been trained to do so will not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient. Postsecondary institutions, thus, may train as many employees as they would like or impose mandatory reporting requirements on their employees without violating these final regulations, and may make those training decisions based on what the recipient believes is in the best interest of the recipient's educational community. A postsecondary institution's decisions regarding employee training and mandatory reporting for employees may, for example, take into account that students at postsecondary institutions may benefit from knowing they can discuss sexual harassment experiences with a trusted professor, resident advisor, or other recipient employee without such a discussion automatically triggering a report to the Title IX office, or may take into account whether the postsecondary institution has Clery Act obligations that require training on reporting obligations for CSAs, or whether the institution is expected to adhere to NCAA guidelines.

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[515] As noted by a commenter on behalf of a community college, this flexibility applies in the postsecondary institution context regarding how the institution decides to train, or have a mandatory reporting policy for, all employees who are not the Title IX Coordinator or an official with authority, such as the institution's part-time employees or vendors who are independent contractors to whom the institution has not given authority to institute corrective measures on behalf of the institution. In the elementary and secondary school context, this flexibility is more limited, because the final regulations hold the school responsible for responding whenever *any employee* has notice of sexual harassment. However, this flexibility (to train individuals, or to require individuals to report sexual harassment to the Title IX Coordinator) still applies to elementary and secondary school recipients, for example with respect to independent contractor vendors, or non-employee volunteers who interact with students.

With respect to both elementary and secondary schools as well as postsecondary institutions, the Department does not limit the manner in which the recipient may receive notice of sexual harassment. Although imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge, a Title IX Coordinator, an official with authority to institute corrective measures on behalf of the recipient, and any employee of an elementary and secondary school may receive notice through an oral report of sexual harassment by a complainant or anyone else, a written report, through personal observation, through a newspaper article, through an anonymous report, or through various other means. The Department will not permit a recipient to ignore sexual harassment if the recipient has actual knowledge of such sexual harassment in its education program or activity against a person in the U.S., and such a recipient is required to respond to sexual harassment as described in § 106.44(a).

The Department disagrees with commenters who are concerned that the actual knowledge requirement would expose recipients to increased litigation. Because the Department developed the actual knowledge requirement on the foundation of the Supreme Court's Title IX cases, the Department disagrees that recipients will be subject to increased litigation risk by adhering to these final regulations.[516] Indeed, if recipients comply with these final regulations, these final regulations may have the effect of decreasing litigation because recipients with actual knowledge would be able to demonstrate that they were not deliberately indifferent in responding to a report of sexual harassment. Recipients would be able to demonstrate that they offered supportive

[516] *See* the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section, and the "Litigation Risk" subsection of the "Miscellaneous" section, of this preamble.

measures in response to a report of sexual harassment, irrespective of whether the complainant chose to file a formal complaint, and informed the complainant about how to file such a formal complaint.

The Department has examined these final regulations in light of its regulations implementing the Clery Act, and has determined that these final regulations do not create any conflicts with respect to CSAs and their obligations under the regulations implementing the Clery Act. For discussion about these final regulations and the regulations implementing the Clery Act, see the discussion in the "Clery Act" subsection of the "Miscellaneous" section of this preamble. The Department is not under an obligation to conform these final regulations with NCAA compliance guidelines and declines to do so. Any recipient may give coaches and trainers authority to institute corrective measures on behalf of the recipient such that notice to coaches and trainers conveys actual knowledge to the recipient as defined in § 106.30. Additionally, or alternatively, any recipient may train coaches and athletic trainers to report notice of sexual harassment to the recipient's Title IX Coordinator. We reiterate that as to elementary and secondary schools, notice to a coach or trainer charges the recipient with actual knowledge, if the coach or trainer is an employee.

As discussed in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, the Supreme Court developed the concept of officials with authority to institute corrective measures on behalf of the recipient based on the administrative enforcement requirement in 20 U.S.C. 1682 that an agency must give notice of a Title IX violation to "an appropriate person" affiliated with the recipient before an agency seeks to terminate the recipient's Federal funding, and that an appropriate official is one who can make a decision to correct the violation. Whether a person constitutes an official of the recipient who

has authority to institute corrective measures on behalf of the recipient is a fact-specific determination[517] and the Department will look to Federal case law applying the *Gebser/Davis* framework. Because determining which employees may be officials with authority" is fact-specific, the Department focuses administrative enforcement on (1) requiring every recipient to designate a Title IX Coordinator, notice to whom the Department deems as conveying actual knowledge to the recipient, and (2) applying an expanded definition of actual knowledge in the elementary and secondary school context to include notice to any school employee. The Department notes that recipients may, at their discretion, expressly designate specific employees as officials with authority for purposes of Title IX sexual harassment, and may inform students of such designations.

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[517] *E.g.*, Julie Davies, *Assessing Institutional Responsibility for Sexual Harassment in Education*, 77 TULANE L. REV. 387, 398, 425-26 (2002) ("The requirement of actual notice to a person with corrective authority is more complex than it appears on its face. A person who has corrective authority in one sphere, such as a teacher with regard to students in his class, may lack such authority in other contexts. While one can understand the potential unfairness to educational institutions if liability were imposed for failure to take action when harassing conduct is described in some general manner to someone who is not in a capacity to evaluate, investigate, or intercede in any way, courts cannot rely exclusively on a job description. The legal authority of individuals to receive notice is clearly relevant and a basis for their inclusion as parties to whom notice may be given, but courts must also evaluate the factual reality. Reference to legal power to take the ultimate corrective action gives an incomplete picture of how power is wielded. The Court's policy goals permit a construction that is broad and flexible, both as to what constitutes notice and who is in a position to take action.") (internal citations omitted); Brian Bardwell, *No One is an Inappropriate Person: The Mistaken Application of Gebser's "Appropriate Person" Test to Title IX Peer-Harassment Cases*, 68 CASE W. RES. L. REV. 1343, 1356-64 (2018) (analyzing case law applying the "official with authority" standard and noting that some courts focus on whether the "appropriate person" to whom sexual harassment was reported had authority to discipline the harasser, or the authority to remediate the situation for the victim, or both types of authority, and arguing that only a broader interpretation of an "appropriate person" serves the goals of Title IX, such that any school employee authorized to "take action to ensure that a victim continues to enjoy the full benefits of her [or his] education, despite having been harassed or assaulted" should be deemed authority to institute "corrective action" and satisfy the *Gebser* actual knowledge condition). The final regulations essentially take this broader approach in the elementary and secondary school context, where notice to any employee charges the school with actual knowledge, but in the postsecondary institution context leaves institutions flexibility to choose the officials to whom the institution grants authority to institute corrective measures on the recipient's behalf. Recognizing that case law under the *Gebser/Davis* framework has taken different approaches to what constitutes "corrective action" the final regulations emphasize a recipient's obligation to ensure that its entire educational community knows how to readily, accessibly report sexual harassment to the Title IX Coordinator.

Changes: The Department revised § 106.30 to expressly state that the mere ability or obligation to inform a student about how to report sexual harassment or having been trained to do so will not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient.

Elementary and Secondary Schools

Comments: Many commenters expressed concerns about how the § 106.30 definition of "actual knowledge" will apply to students at elementary and secondary schools. Commenters asserted that elementary and secondary school students suffer a particular harm when adult employees prey upon them, and those same adults can pressure those students to stay silent. Some commenters asserted that the proposed rules conflict with robust State laws and regulations that require mandatory reporting of suspected child abuse or domestic violence. Several commenters characterized the actual knowledge requirement as dramatically narrowing the scope of elementary and secondary school employees' obligation to respond to sexual harassment by using an actual knowledge requirement instead of a constructive notice requirement. These commenters contended that the proposed rules' actual knowledge requirement would harm children because it would exclude school district personnel who regularly interact with students, including school principals, paraeducators, school counselors, coaches, school bus drivers, and others, from the group of officials to whom notice charges the school with actual knowledge.

Discussion: The Department is persuaded that students in elementary and secondary schools who are typically younger than students in postsecondary institutions must be able to report sexual harassment to an employee other than a teacher, Title IX Coordinator, or official with authority, to trigger the school's mandatory response obligations. We agree that it is unreasonable to expect young children to seek out specific employees for the purpose of disclosing Title IX sexual

harassment. Elementary and secondary school employees other than the Title IX Coordinator, teachers, or officials with authority may observe or witness sexual harassment or have notice of sexual harassment through other means such as a third-party report, and we agree that in the elementary and secondary school context such notice must trigger the school's mandatory response obligations because otherwise, a young complainant may not be offered supportive measures or know of the option to file a formal complaint that initiates a grievance process against the respondent. Further, we recognize that in the elementary and secondary school context, a young student's ability to make decisions regarding appropriate supportive measures, or about whether to file a formal complaint, would be impeded without the involvement of a parent or guardian who has the legal authority to act on the student's behalf. Accordingly, the Department expands the definition of actual knowledge in § 106.30 to include "any employee of an elementary and secondary school" and adds § 106.6(g) expressly recognizing the legal rights of parents and guardians to act on behalf of a complainant (or respondent) in any Title IX matter. While the imputation of knowledge based solely on the theories of vicarious liability or constructive notice is insufficient, notice of sexual harassment to elementary and secondary school employees, who may include school principals, teachers, school counselors, coaches, school bus drivers, and all other employees, will obligate the recipient to respond to Title IX sexual harassment.

The actual knowledge requirement is not satisfied when the only official or employee of the recipient with actual knowledge of the harassment is the respondent, because the recipient will not have opportunity to appropriately respond if the only official or employee who knows is the respondent. We understand that in some situations, a school employee may perpetrate sexual harassment against a student and then pressure the complainant to stay silent, and that if the

complainant does not disclose the misconduct to anyone other than the employee-perpetrator, this provision means that the school is not obligated to respond. However, if the complainant tells another school employee about the misconduct, the school is charged with actual knowledge and must respond. Further, if the complainant tells a parent, or a friend, or a trusted adult in the complainant's life, that third party has the right to report sexual harassment to the school's Title IX Coordinator, obligating the school to promptly respond, even if that third party has no affiliation with the school.[518]

As previously explained in the "Employees' Obligations" subsection of this "Actual Knowledge" section, the definition of actual knowledge in these final regulations does not necessarily narrow the scope of an elementary or secondary school's obligation to respond to Title IX sexual harassment as compared to the approach taken in Department guidance. Under the 2001 Guidance, a school had "notice if a responsible employee 'knew or in the exercise of reasonable care should have known,' about the harassment."[519] Responsible employees, however, did not include all employees. Under these final regulations, notice of sexual harassment or allegations of sexual harassment to any employee of an elementary or secondary school charges the recipient with actual knowledge to the elementary or secondary school and triggers the recipient's obligation to respond. The Department's revised definition of actual knowledge with respect to elementary and secondary schools, thus, arguably broadens and does not narrow an elementary or secondary school's obligation to respond to Title IX sexual harassment compared to the approach taken in Department guidance.

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[518] Section 106.8(a) (emphasizing that "any person" may report sexual harassment to the Title IX Coordinator).
[519] 2001 Guidance at 13.

The Department recognizes that most State laws require elementary and secondary school employees to report sexual harassment when it constitutes a form of child abuse. Even though the Department is not required to align these Federal regulations with mandatory reporter requirements in State laws, the Department chooses to do so in the context of elementary and secondary schools. The Department's prior guidance did not require an elementary or secondary school to respond to Title IX sexual harassment when any employee had notice of Title IX sexual harassment.[520] These final regulations do so. The Department acknowledges that State laws may exceed the requirements in these final regulations as long as State laws do not conflict with these final regulations as explained more fully in the "Section 106.6(h) Preemptive Effect" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble. Commenters have not identified a conflict with respect to the actual knowledge definition in § 106.30, and any State law, in the context of elementary and secondary schools.

Changes: The Department revised § 106.30 to specify that notice of sexual harassment to any employee of an elementary and secondary school constitutes actual knowledge to the recipient, and triggers the recipient's obligation to respond to sexual harassment.

Large Schools

Comments: Multiple commenters asserted that students at large institutions – such as schools with more than one campus or with enrollments over 5,000 students – are disadvantaged by the actual knowledge requirement because students will be required to seek out a single administrator (the Title IX Coordinator) whose office may be located on a different campus or in

[520] *Id*.

another zip code and who has responsibilities for tens of thousands of other students, faculty, and staff.

Several commenters also questioned how the proposed rules, including the actual knowledge definition in § 106.30, will burden Title IX Coordinators. Commenters asserted that the requirement for actual knowledge will significantly burden Title IX Coordinators who must now receive and process all sexual harassment and assault reports. Commenters expressed concern that for larger campuses, this could overwhelm an already overtaxed position on campuses, cause higher turnover rates for the position of Title IX Coordinator, and result in ineffective administration of Title IX. Many commenters argued that the proposed rules, and their focus on the Title IX Coordinator's responsibilities, would add to schools' overall administrative burdens.

Discussion: The Department's regulatory authority under Title IX extends to recipients of Federal financial assistance which operate education programs or activities.[521] Requirements such as designation of a Title IX Coordinator therefore apply to each "recipient," for example to a school district, or to a university system, regardless of the recipient's size in terms of student enrollment or number of schools or campuses. Title IX's non-discrimination mandate extends to every recipient's education programs or activities.[522] These final regulations at § 106.8(a), similar to current 34 CFR 106.9, require recipients to designate "at least one" employee to serve

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[521] 20 U.S.C. 1681(a) (referring to any education program or activity that receives Federal financial assistance); 34 CFR 106.2(i) (defining "recipient" to mean "any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives such assistance, including any subunit, successor, assignee, or transferee thereof").

[522] *See* 20 U.S.C. 1687 (defining "program or activity"); 34 CFR 106.2(h) (defining "program or activity").

as a Title IX Coordinator. As the Department has recognized in guidance documents,[523] some recipients serve so many students, or find it administratively convenient for other reasons, that the recipient may need to or wish to designate multiple employees as Title IX Coordinators, or designate a Title IX Coordinator and additional staff to serve as deputy Title IX Coordinators, or take other administrative steps to ensure that the Title IX Coordinator can adequately fulfill the recipient's Title IX obligations, including all obligations imposed under these final regulations. The Department is sensitive to the financial and resource challenges faced by many recipients, the Department's responsibility is to regulate in a manner that best effectuates the purposes of Title IX, to prevent recipients that allow discrimination on the basis of sex from receiving Federal financial assistance, and to provide individuals with effective protections against discriminatory practices.[524] The Department is aware that many recipients face high turnover rates with respect to the Title IX Coordinator position[525] and that some recipients struggle to understand the critical role that Title IX Coordinators need to have in fulfilling a recipient's Title

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[523] *E.g.*, 2001 Guidance at 21 ("Because it is possible that an employee designated to handle Title IX complaints may himself or herself engage in harassment, a school may want to designate more than one employee to be responsible for handling complaints in order to ensure that students have an effective means of reporting harassment."); 2011 Dear Colleague Letter at 7 (stating that each recipient must designate one Title IX Coordinator but may designate more than one). The Department's Title IX implementing regulations have, since 1975, required each recipient to designate at least one employee to coordinate the recipient's efforts to comply with Title IX. 34 CFR 106.8(a). These final regulations are thus consistent with current regulations and with all past Department guidance on this matter, but impose new legal obligations on recipients to, for example, include an e-mail address for the Title IX Coordinator and require all the contact information for the Title IX Coordinator to be posted on the recipient's website. § 106.8.

[524] *See, e.g.*, *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979) (describing the purposes of Title IX).

[525] *E.g.*, Sarah Brown, *Life Inside the Title IX Pressure Cooker*, CHRONICLE OF HIGHER EDUCATION (Sept. 5, 2019) ("Nationwide, the administrators who are in charge of dealing with campus sexual assault and harassment are turning over fast. Many colleges have had three, four, or even five different Title IX coordinators in the recent era of heightened enforcement, which began eight years ago. Two-thirds of Title IX coordinators say they've been in their jobs for less than three years, according to a 2018 survey by the Association of Title IX Administrators, or ATIXA, the field's national membership group. One-fifth have held their positions for less than a year."); Jacquelyn D. Wiersma-Mosley & James DiLoreto, *The Role of Title IX Coordinators on College and University Campuses*, 8 BEHAVIORAL. SCI. 4 (2018) (finding that most Title IX Coordinators have fewer than three years of experience, and approximately two-thirds are employed in positions in addition to serving as the Title IX Coordinator).

IX responsibilities. However, the Department intends through these final regulations to further stress the critical role of each recipient's Title IX Coordinator, a role that is emphasized throughout the final regulations[526] in ways that the Department is aware will require recipients to carefully "designate and authorize" Title IX Coordinators. The Department revised § 106.8(a) to require a recipient to give the Title IX Coordinator authority (i.e., authorize) to meet specific responsibilities as well as to coordinate the recipient's overall efforts to comply with Title IX and these final regulations. The Department believes this emphasis on the need for recipients to rely heavily on Title IX Coordinators to fulfill recipient's obligations will result in more recipients effectively responding to Title IX sexual harassment because recipients will be incentivized to properly train and authorize qualified individuals to serve this important function. The Department understands some commenters' concerns that Title IX Coordinators will be burdened by, and that recipients will face administrative burdens under, these final regulations, but the Department believes that the obligations in these final regulations are the most effective way to effectuate Title IX's non-discrimination mandate, and believes that the function of a Title IX Coordinator is necessary to increase the likelihood that recipients will fulfill those obligations. At the same time, the Department will not impose a requirement on recipients to

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[526] *E.g.*, § 106.8(a) (stating recipients now must not only designate, but also "authorize" a Title IX Coordinator, and must notify students and employees (and others) of the Title IX Coordinator's contact information); § 106.8(b)(2) (requiring a recipient to post contact information for any Title IX Coordinators on the recipient's website); § 106.30 (defining "actual knowledge" and stating notice to a Title IX Coordinator gives the recipient actual knowledge and "notice" includes but is not limited to a report to the Title IX Coordinator as described in § 106.8(a)); § 106.30 (defining "formal complaint" and stating a Title IX Coordinator may sign a formal complaint initiating a § 106.45 grievance process); § 106.44(a) (stating the Title IX Coordinator must contact each complainant to discuss the availability of supportive measures); § 106.30 (defining "supportive measures" and mandating that Title IX Coordinators are responsible for effective implementation of supportive measures); § 106.45(b)(1)(iii) (stating Title IX Coordinators must be free from conflicts of interest and bias, and must be trained on, among other things, how to serve impartially); § 106.45(b)(3)(ii) (stating a complainant may notify the Title IX Coordinator that the complainant wishes to withdraw a formal complaint); § 106.45(b)(7)(iv) (mandating that Title IX Coordinators are responsible for the effective implementation of remedies).

designate multiple Title IX Coordinators, so that recipients devote their resources in the most effective and efficient manner. If a recipient needs more than one Title IX Coordinator in order to meet the recipient's Title IX obligations, the recipient will take that administrative step, but the Department declines to assume the conditions under which a recipient needs more than one Title IX Coordinator in order to meet the recipient's Title IX obligations.

Because of the crucial role of Title IX Coordinators, the final regulations update and strengthen the requirements that recipients notify students, employees, parents of elementary and secondary school students, and others, of the Title IX Coordinator's contact information and about how to make a report or file a formal complaint.[527] In further response to commenters' concerns that students may not know how to contact a Title IX Coordinator, the final regulations require the Title IX Coordinator's contact information (which must include an office address, telephone number, and e-mail address) to be posted on recipients' websites,[528] expressly state that any person may report sexual harassment using the listed contact information for the Title IX Coordinator or any other means that results in the Title IX Coordinator receiving the person's verbal or written report, specify that such a report may be made "at any time (including during non-business hours)" using the Title IX Coordinator's listed telephone number or e-mail address.[529] The final regulations also revise the definition of "formal complaint" to specify that a formal complaint may be filed in person, by mail, or by e-mail using the listed contact information for the Title IX Coordinator.[530] The Department's intent is to increase the likelihood

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[527] *E.g.*, § 106.8(a); § 106.8(c). These requirements apply specifically to reports and formal complaints of sexual harassment, but also apply to reports and complaints of non-sexual harassment forms of sex discrimination.
[528] Section 106.8(b)(2).
[529] Section 106.8(a).
[530] Section 106.30 (defining "formal complaint").

that students and employees know how to contact, and receive supportive measures and accurate information from, a trained Title IX Coordinator.[531] Requiring the contact information for a Title IX Coordinator to include an office address, e-mail address, and telephone number pursuant to § 106.8(a) obviates some commenters' concerns that complainants will need to travel to physically report in person or face-to-face with a Title IX Coordinator.[532] Thus, even if the recipient's Title IX Coordinator is located on a different campus from the student or in an administrative building outside the school building where a student attends classes, any person may report to the Title IX Coordinator using the Title IX Coordinator's listed contact information, providing accessible reporting options.[533] The Department believes these requirements concerning a Title IX Coordinator are sufficient to hold recipients accountable for complying with these final regulations, while leaving recipients flexibility to decide, in a recipient's discretion, whether designation of multiple Title IX Coordinators, or deputy Title IX Coordinators, might be necessary and where any Title IX office(s) should be located, given a recipient's needs in terms of enrollment, geographic campus locations, and other factors.

Changes: Section 106.8(a) is revised to require that recipients must not only designate, but also "authorize" a Title IX Coordinator to coordinate the recipient's Title IX obligations. This provision is also revised to require recipients to notify students, employees, parents of elementary and secondary school students, and others, of the Title IX Coordinator's contact

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[531] Section 106.45(b)(1)(iii) (describing required training for Title IX Coordinators and other Title IX personnel).
[532] This requirement also mirrors the requirement (updated to include modern communication via e-mail) in the 2001 Guidance that the "school must notify all of its students and employees of the name, office address, and telephone number of the employee or employees designated" to coordinate its efforts to comply with and carry out its Title IX responsibilities. 2001 Guidance at 21.
[533] For additional accessibility and ease of reporting, revised § 106.8(a) further states that any person may report at any time (including during non-business hours) by using the telephone number or e-mail address, or by mail to the office address, listed for the Title IX Coordinator.

information including office address, telephone number, and electronic mail address and to state that any person may report to the Title IX Coordinator using the contact information listed for the Title IX Coordinator (or any other means that results in the Title IX Coordinator receiving the person's verbal or written report). This provision is also revised to state that a report may be made at any time (including during non-business hours) by using the telephone number or e-mail address or by mail to the office address, listed for the Title IX Coordinator. Section 106.8(b)(2) is revised to require the contact information for Title IX Coordinator(s) to be prominently displayed on the recipient's website and in each of the recipient's handbooks or catalogs.

Miscellaneous Comments and Questions

Comments: One commenter recommended that the final sentence of § 106.30 be deleted, and that the word "apparent" be inserted before "authority" in the first sentence of the same provision.

One commenter asked whether a Title IX Coordinator can initiate a grievance process in the absence of a signed complaint (for example, when evidence is readily available and/or an ongoing threat to campus exists). The same commenter also asked whether the Title IX Coordinator may serve as a complainant or whether such a case must proceed outside the Title IX process.

Several commenters asked whether the Department would provide training recommendations dedicated to addressing a responsible employee's obligation to respond to sexual assault reports. Some of these commenters also asked whether the Department would provide guidance on disseminating this information to students.

One commenter recommended adding to the final regulations a statement that meeting with confidential resources on campus, such as organizational ombudspersons who comply with

industry standards of practice and codes of ethics, does not constitute notice conveying actual knowledge to a recipient. The commenter reasoned that organizational ombudspersons are not "responsible employees" under the Department's current guidance, and that to ensure that organizational ombudspersons continue to be a valuable resource providing informal, confidential services to complainants and respondents, the final regulations should note that organizational ombudspersons are a confidential resource exempt from the categories of persons to whom notice charges a recipient with actual knowledge.

Discussion: The Department declines to follow a commenter's suggestion to delete the sentence of § 106.30[534] concerning reporting obligations and training, or to insert the word "apparent" before the word "authority" in the first sentence of § 106.30.[535] The framework for holding a recipient responsible for the recipient's response to peer-on-peer or employee-on-student sexual harassment adopted in the final regulations is the *Gebser/Davis* condition of actual knowledge, adapted as the Department has deemed reasonable for the administrative enforcement context with differences in elementary and secondary schools, and postsecondary institutions. The sentence of the actual knowledge definition regarding reporting obligations represents a proposition applied by Federal courts under the Supreme Court's *Gebser/Davis* framework.[536] If an employee's mere ability or obligation to report "up" the employee's supervisory chain were

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[534] The last sentence of § 106.30 defining "actual knowledge" to which a commenter referred, is now the second to last sentence in that section in the final regulations and provides: "The mere ability or obligation to report sexual harassment *or to inform a student about how to report sexual harassment, or having been trained to do so*, does not qualify an *individual* as one who has authority to institute corrective measures on behalf of the recipient." (Emphasis added. The italicized portions in this quotation have been added in the final regulations.).

[535] The first sentence of § 106.30, defining "actual knowledge" in the final regulations, provides: "*Actual knowledge* means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to *any employee of an elementary and secondary school*." (Emphasis added. The italicized portions in this quotation have been added in the final regulations.).

[536] *Davis*, 526 U.S. at 646-48, *Gebser*, 524 U.S. at 289-91.

sufficient to qualify that employee as an "official with authority to institute corrective measures," then the rationale underlying actual knowledge would be undercut because virtually every employee might have the "ability" to report "up."[537] For the reasons described above and in the "Actual Knowledge" subsection of the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, the Department believes that administrative enforcement of Title IX's non-discrimination mandate is best served by distinguishing between elementary and secondary schools (where notice to any employee triggers a recipient's response obligations) and postsecondary institutions (where notice to the Title IX Coordinator or officials with authority triggers a recipient's response obligations).

As explained above, the final sentence in § 106.30 does not have as much applicability for recipients that are elementary and secondary schools under the final regulations due to the Department's expanded definition of actual knowledge in that context to include notice to any school employee. As explained in the "Employees' Obligations" subsection of this "Actual Knowledge" section, we have revised the final sentence in § 106.30 to expressly state that the mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient. Accordingly, elementary and secondary schools may choose to train non-employees such as volunteers about how to report sexual harassment or require volunteers to do so even though these final requirements do not impose such a requirement, and such schools would not face expanded Title IX liability by doing so. Similarly, a postsecondary institution may choose to require all employees to report sexual

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[537] *See id*.

harassment or to inform a student about how to report sexual harassment, or train all employees to do so, without fearing adverse repercussions from the Department. Recipients might not be willing to engage in training or impose reporting requirements that these final regulations do not impose, if doing so would cause the recipient to incur additional liability.

Pursuant to § 106.8, the burden is on the recipient to designate a Title IX Coordinator, and the definition of "actual knowledge" in revised § 106.30 clearly provides that notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator constitutes actual knowledge, which triggers a recipient's obligation to respond to sexual harassment. The recipient must notify all its students, employees, and others of the name or title, office address, e-mail address, and telephone number of the employee or employees designated as the Title IX Coordinator (and post that contact information on its website), under § 106.8. Accordingly, all students and employees have clear, accessible channels through which to make a report of sexual harassment such that a recipient is obligated to respond to that report. Additionally, notice to other officials who have the authority to institute corrective measures on behalf of the recipient will convey actual knowledge to a recipient, and a recipient may choose to identify such officials by providing a list of such officials to students and employees. The level of authority that a person may have to take corrective measures is generally known to students and employees. For example, employees generally know that a supervisor but not a co-worker has authority to institute corrective measures. Similarly, a student in a postsecondary institution likely understands that deans generally have the authority to institute corrective measures. Students in elementary and secondary schools may report sexual harassment or allegations of sexual harassment to any employee. Students in postsecondary institutions can always report sexual harassment to the Title IX Coordinator.

For reasons discussed in the "Formal Complaint" subsection of the "Section 106.30 Definitions" section of this preamble, the final regulations retain the discretion of a Title IX Coordinator to sign a formal complaint initiating a grievance process against a respondent, but the final regulations clarify that in such situations, the Title IX Coordinator is not a complainant or otherwise a party to the grievance process.[538] The Department believes this preserves the ability of a recipient to utilize the § 106.45 grievance process when safety or similar concerns lead a recipient to conclude that a non-deliberately indifferent response to actual knowledge of Title IX sexual harassment may require the recipient to investigate and potentially sanction a respondent in situations where the complainant does not wish to file a formal complaint.

Although the Department recognizes that recipients may desire guidance on training (particularly now that the final regulations in § 106.45(b)(10)(i)(D) require the recipients to publish all training materials on recipient websites), the Department declines to recommend certain training practices or techniques aside from the requirements of § 106.45(b)(1)(iii),[539] leaving flexibility to recipients to determine how to meet training requirements in a manner that best fits the recipient's unique educational community. Regarding the dissemination of information to students, the Department notes that § 106.8 requires recipients to notify students and employees of the recipient's policy of non-discrimination under Title IX, the Title IX Coordinator's contact information, and information about how to report and file complaints of sex discrimination and how to report and file formal complaints of sexual harassment.

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[538] Section 106.30 (defining "formal complaint" by stating that a formal complaint may be filed by a complainant or signed by a Title IX Coordinator, and adding language providing that where a Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party in the grievance process, and must remain free from conflicts of interest and bias).

[539] Section 106.45(b)(1)(iii) (requiring training of Title IX Coordinators, investigators, decision-makers, and any person who facilitates informal resolution processes).

The Department appreciates the opportunity to emphasize that whether a person affiliated with a recipient, such as an organizational ombudsperson, is or is not an "official with authority to institute corrective measures" requires a fact-specific inquiry, and understands the commenter's assertion that an organizational ombudsperson adhering to industry standards and codes of ethics should be deemed categorically a "confidential resource" and not an official with authority. The Department encourages postsecondary institution recipients to examine campus resources such as organizational ombudspersons and determine whether, given how such ombudspersons work within a particular recipient's system, such ombudspersons are or are not officials with authority to take corrective measures so that students and employees know with greater certainty the persons to whom parties can discuss matters confidentially without such discussion triggering a recipient's obligation to respond to sexual harassment. We note that with respect to elementary and secondary schools, notice to any employee, including an ombudsperson, triggers the recipient's response obligations.

Changes: None.

Complainant

Comments: A few commenters supported the proposed rules' definition of "complainant" in § 106.30 as an appropriate, sensible definition. Commenters asserted that using neutral terms like "complainant" and "respondent" avoids injecting bias generated by referring to anyone who makes an allegation as a "victim." One commenter asserted that labeling an accuser a "victim"

before there has been any investigation or adjudication turns the principle of innocent until proven guilty on its head.[540]

In contrast, many commenters urged the Department to use a term such as "reporting party" instead of "complainant." Commenters argued that "complainant" suggests that a person is making a complaint (as opposed to reporting), or that the term "complainant" suggests a negative connotation that a person is "complaining" about discrimination which could create a barrier to reporting, and that "reporting party" is current, best practice terminology that better avoids bias and negative implications that a person is "complaining." One commenter asserted that the Clery Act uses the term "victim" throughout its statute and regulations and asked why the § 106.30 definition of "complainant" uses the word victim without referring to that person as a victim throughout the proposed regulations.

Some commenters asserted that the definition of complainant unfairly excluded third parties (non-victims, such as bystanders or witnesses to sexual harassment) from reporting sexual harassment because the definition of complainant referred to an individual "who has reported being the victim" and because the definition also stated that the person to whom the individual has reported must be the Title IX Coordinator or other person to whom notice constitutes actual knowledge. Commenters argued that in order to further Title IX's non-discrimination mandate, a school must be required to respond to sexual harassment regardless of who has reported it and regardless of the school employee to whom a person reports. Commenters argued that if the survivor is the only person who can be a complainant, even fewer sexual assaults will be

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[540] Commenter cited: *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 573 (D. Mass. 2016) ("Whether someone is a 'victim' is a conclusion to be reached at the end of a fair process, not an assumption to be made at the beginning.").

reported, and that third-party intervention can save lives and educational opportunities.[541] Commenters argued that some students are non-verbal due to young age, disability, language barriers, or severe trauma, and the definition of complainant would exclude these students because these students are incapable of being the individual "who has reported being the victim." Commenters argued that Federal courts have held schools liable for deliberate indifference to third-party reports of sexual harassment and the proposed rules should not set a lower threshold by excusing schools from responding to reports that come from anyone other than the victim.[542] Commenters asserted that the definition of complainant should be modified to include parents of minor students, or parents of students with disabilities. A few commenters supported the definition of complainant believing that the definition appropriately excluded third-party reporting; these commenters argued that a school should only respond to alleged sexual harassment where the victim has personally reported the conduct.

Some commenters suggested changing the definition of complainant to a person who has reported being "the victim of sex-based discriminatory conduct" instead of a person who has reporting being the victim of "sexual harassment," arguing that the general public understands sexual harassment to be broader than how "sexual harassment" is defined in § 106.30 and these regulations should only apply to sex discrimination under Title IX.

One commenter asserted that the phrase "or on whose behalf the Title IX Coordinator has filed a formal complaint" in the definition of "complainant" created confusion because proposed

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[541] Commenters cited: *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 180 (2005) ("teachers and coaches . . . are often in the best position to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators. Indeed, sometimes adult employees are 'the only effective adversar[ies]' of discrimination in schools.") (internal citation omitted; brackets in original).
[542] *Id*.

§ 106.44(b)(2) required a Title IX Coordinator to file a formal complaint upon receiving multiple reports against a respondent, but that proposed provision did not indicate on which complainant's behalf such a formal complaint would be filed.

Discussion: The Department appreciates commenters' support for the proposed definition of "complainant" in § 106.30 as a sensible, neutral term to describe a person alleged to be the victim of sexual harassment. We appreciate commenters who asserted that "reporting party" would be a preferable term due to concerns that "complainant" suggests that the person has filed a complaint (as opposed to having reported conduct), or that there is a negative connotation to the word "complainant" suggesting that the person is complaining about discrimination. The Department does not disagree that a term such as "reporting party" could be an appropriate equivalent term for "complainant" in terms of neutrality; however, the Department believes that both terms reflect the neutral, impartial intent of describing a person who is an alleged victim but a fair process has not yet factually determined whether the person was victimized. Further, the final regulations ensure that a person must be treated as a "complainant" any time such a person has been alleged to be the victim of sexual harassment; "reporting party" would imply that the alleged victim themselves had to be the person who reported. The Department retains the word "complainant" in these final regulations, instead of using "reporting party," also to avoid potential confusion with respect to the phrase "reporting party," and the use throughout the final regulations of the word "party" to refer to either a complainant or respondent, and also to reinforce that a recipient must treat a person as a complainant (i.e., an alleged victim) no matter who reported to the school that the alleged victim may have suffered conduct that may constitute sexual harassment. We believe that the context of the final regulations makes it clear that a "complainant" (as the definition states in the final regulations) is a person who is alleged to be

the victim of sexual harassment irrespective of whether a formal complaint has been filed. The Department notes that "complainant" and "complaint" are commonly used terms in various proceedings designed to resolve disputed allegations without pejoratively implying that a person is unjustifiably "complaining" about something but instead neutrally describing that the person has brought allegations or charges of some kind.[543] While the definition of "complainant" uses the word "victim" to refer to the complainant as a person alleged to be the victim of sexual harassment, we do not use the word victim throughout the final regulations because the word "victim" suggests a factual determination that a person has been victimized by the conduct alleged, and that conclusion cannot be made unless a fair process has reached that determination. We acknowledge that the Clery Act uses the word "victim" throughout that statute and regulations, but we believe the term "complainant" more neutrally, accurately describes a person who is allegedly a victim without suggesting that the facts of the situation have been prejudged.

The proposed definition of complainant did not prevent third-party reporting, and while the final regulations revise the § 106.30 definition of complainant, the final regulations also do not prevent third-party reporting. Under both the proposed and final regulations, any person (i.e., the victim of alleged sexual harassment, a bystander, a witness, a friend, or any other person) may report sexual harassment and trigger a recipient's obligation to respond to the sexual

[543] For example, OCR refers to a "complainant" as a person who files a "complaint" with OCR, alleging a civil rights law violation. *E.g.*, U.S. Dep't. of Education, Office for Civil Rights, *How the Office for Civil Rights Handles Complaints* (Nov. 2018), https://www2.ed.gov/about/offices/list/ocr/complaints-how.html.

harassment.[544] Nothing in the final regulations requires an alleged victim to be the person who reports; any person may report that another person has been sexually harassed.

We agree that third party reporting of sexual harassment promotes Title IX's non-discrimination mandate. In response to commenters' concerns, we have revised § 106.8(a) to expressly state that "any person" may report sexual harassment "whether or not the person reporting is the person alleged to be the victim" by using the Title IX Coordinator's listed contact information. Further, such a report may be made at any time including during non-business hours, using the telephone number or e-mail address (or by mail to the office address) listed for the Title IX Coordinator. We have also revised § 106.30 defining "actual knowledge" to expressly state that "notice" triggering a recipient's response obligations includes reporting to the Title IX Coordinator as described in § 106.8(a). The intent of these final regulations is to ensure that any person (whether that person is the alleged victim, or anyone else) has clear, accessible channels for reporting sexual harassment to trigger a recipient's response obligations (which include promptly offering supportive measures to the person alleged to be the victim). While any person (including third parties) can report, the person to whom notice (i.e., a report) of sexual harassment is given must be the Title IX Coordinator or official with authority to take corrective action, or any employee in the elementary and secondary school context, in order to trigger the

[544] Section 106.44(a) (stating that a recipient with actual knowledge of sexual harassment in the recipient's education program or activity against a person in the United States must respond promptly and in a manner that is not clearly unreasonable in light of the known circumstances, including by offering supportive measures to the complainant, informing the complainant of the availability of supportive measures with or without the filing of a formal complaint, considering the complainant's wishes with respect to supportive measures, and explaining to the complainant how to file a formal complaint).

recipient's response obligations – but *any person* can report.[545] The benefits of third-party reporting do not, however, require the third party themselves to become the "complainant" because, for example, supportive measures must be offered to the alleged victim, not to the third party who reported the complainant's alleged victimization. Similarly, while we agree that where a parent or guardian has a legal right to act on behalf of an individual, the parent or guardian must be allowed to report the individual's victimization (and to make other decisions on behalf of the individual, such as considering which supportive measures would be desirable and whether to exercise the option of filing a formal complaint), in such a situation the parent or guardian does not, themselves, *become* the complainant; rather, the parent or guardian acts *on behalf of* the complainant (i.e., the individual allegedly victimized by sexual harassment). We have added § 106.6(g) to expressly acknowledge the legal rights of parents or guardians to act on behalf of a complainant (or any other individual with respect to exercising Title IX rights).

We agree with commenters that allowing third-party reporting is necessary to further Title IX's non-discrimination mandate for a variety of reasons, including, as commenters asserted, that some complainants (i.e., alleged victims) cannot verbalize their own experience or

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[545] For reasons explained in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section, and the "Actual Knowledge" subsection of the "Section 106.30 Definitions" section, of this preamble, the final regulations expand the definition of actual knowledge in the elementary and secondary school context, but the final regulations retain the requirement that a recipient must have actual knowledge of sexual harassment in order to be required to respond. We have revised the definition of actual knowledge to state expressly that notice conveying actual knowledge includes, but is not limited to, reporting sexual harassment to the Title IX Coordinator as described in § 106.8(a). We have revised § 106.8(a) to expressly state that any person may report sexual harassment (whether or not the person reporting is the person alleged to be the victim of sexual harassment, or is a third party) by using the contact information for the Title IX Coordinator (which must include an office address, telephone number, and e-mail address), and stating that a report may be made at any time (including during non-business hours) by using the Title IX Coordinator's listed telephone number or e-mail address (or by mailing to the listed office address). Thus, any person (including a non-victim third party) may report sexual harassment, but in order to trigger a recipient's response obligations the report must give notice to a Title IX Coordinator or to an official with authority to institute corrective measures, or to any employee in the elementary and secondary school context.

report it (whether verbally or in writing) yet when parents, bystanders, witnesses, teachers, friends, or other third parties report sexual harassment to a person to whom notice charges the recipient with actual knowledge, then the recipient must be obligated to respond. In response to commenters' confusion as to whether the proposed definition of complainant in § 106.30 allowed or prohibited third-party reporting, and in agreement with commenters' assertions that third-party reporting is a critical part of furthering Title IX's purposes, we have revised the definition of complainant in the final regulations to state (emphasis added): "An individual *who is alleged to be the victim* of conduct that could constitute sexual harassment" and removed the sentence in the NPRM that referenced to whom the report of sexual harassment was made. This revision clarifies that the person alleged to be the victim does not need to be the same person who reported the sexual harassment. This revision also ensures that any person reported to be the victim of sexual harassment (whether the report was made by the alleged victim themselves or by a third party) will be treated by the recipient as a "complainant" entitled to, for example, the right to be informed of the availability of supportive measures and of the process for filing a formal complaint, under § 106.44(a).

The final regulations, like the proposed rules, draw a distinction between a recipient's general response to reported incidents of sexual harassment (including offering supportive measures to the complainant), on the one hand, and the circumstances that obligate a recipient to initiate a grievance process, on the other hand. With respect to a grievance process, the final regulations retain the proposed rules' approach that a recipient is obligated to begin a grievance process against a respondent (that is, to investigate and adjudicate allegations) only where a complainant has filed a formal complaint or a Title IX Coordinator has signed a formal complaint. Other than the Title IX Coordinator (who is in a specially trained position to evaluate

whether a grievance process is necessary under particular circumstances even without a complainant desiring to file the formal complaint or participate in the grievance process), a person who does not meet the definition of "complainant" under § 106.30 cannot file a formal complaint requiring the recipient to initiate a grievance process. Other than a Title IX Coordinator, third parties cannot file formal complaints.[546] The Department believes the final regulations appropriately delineate between the recipient's obligation to respond promptly and meaningfully to actual knowledge of sexual harassment in its education program or activity (including where the actual knowledge comes from a third party), with the reality that permitting third parties to file formal complaints would result in situations where a complainant's autonomy is not respected (i.e., where the complainant does not wish to file a formal complaint or participate in a grievance process),[547] and other situations where recipients are required to

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[546] As discussed above, a parent or guardian with the legal right to act on a complainant's behalf may file a formal complaint on the complainant's behalf. § 106.6(g).

[547] As one aspect of respect for complainant autonomy, every complainant retains the right to refuse to participate in a grievance process, and the Department has added § 106.71 to the final regulations, prohibiting retaliation generally, and specifically protecting the right of any individual who chooses *not to participate* in a grievance process. When a grievance process is initiated in situations where the complainant did not wish to file a formal complaint, this results in the complainant being treated as a party throughout the grievance process (e.g., the recipient must send *both parties* written notice of allegations, a copy of the evidence for inspection and review, written notice of interviews requested, a copy of the investigative report, written notice of any hearing, and a copy of the written determination regarding responsibility). This means that the complainant will receive notifications about the grievance process even where the complainant does not wish to participate in the process. The Department agrees with commenters who urged the Department to recognize the importance of a survivor's autonomy and control over what occurs in the aftermath of a sexual harassment incident. The Department thus desires to restrict situations where a grievance process is initiated contrary to the wishes of the complainant to situations where the Title IX Coordinator (and not a third party) has determined that signing a formal complaint even without a complainant's participation is necessary because not initiating a grievance process against the respondent would be clearly unreasonable in light of the known circumstances. Although a complainant who did not wish to file a formal complaint and does not want to participate in a grievance process may not want to receive notifications throughout the grievance process, the recipient must treat the complainant as a party by sending required notices, and must not retaliate against the complainant for choosing not to participate. Nothing in the final regulations precludes a recipient from communicating to a non-participating complainant that the recipient is required under these final regulations to send the complainant notices throughout the grievance process and that such a requirement is intended to preserve the complainant's right to choose to participate, not to pressure the complainant into participating. Such a practice adopted by a recipient would need to be applied equally to respondents who choose not to participate in a grievance process; *see* introductory sentence of § 106.45(b).

undertake investigations that may be futile in terms of lack of evidence because the complainant does not wish to participate.

In response to commenters' concerns that the definitions of "complainant" and "formal complaint" do not allow for situations where a parent or guardian appropriately must be the person who makes the decision to file a formal complaint on behalf of a minor child or student with a disability, the final regulations add § 106.6(g) acknowledging that nothing about the final regulations may be read in derogation of the legal rights of parents or guardians to act on behalf of any individual in the exercise of rights under Title IX, including filing a formal complaint on a complainant's behalf. In such a situation, the parent or guardian does not become the "complainant" yet § 106.6(g) clarifies that any parent or guardian may act on behalf of the complainant (i.e., the person alleged to be the victim of sexual harassment). If a parent or guardian has a legal right to act on a person's behalf, the parent or guardian may always be the one who files a formal complaint for a complainant. This parental or guardianship authority to act on behalf of a party applies throughout all aspects of a Title IX matter, from reporting sexual harassment to considering appropriate and beneficial supportive measures, and from choosing to file a formal complaint to participating in the grievance process.[548]

We decline commenters' suggestions to define a complainant as a person reported to be the victim of "sex-discriminatory conduct" instead of "conduct that could constitute sexual harassment," because these final regulations specifically address a recipient's response to allegations of sexual harassment and clearly define the term "sexual harassment" in § 106.30.

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[548] *See* discussion in the "Section 106.6(g) Exercise of Rights by Parents/Guardians" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble.

In the response to commenters' concerns that the phrase "or on whose behalf the Title IX Coordinator has filed a formal complaint" in the proposed definition of § 106.30 created confusion in situations where the Title IX Coordinator would have been required to file a formal complaint upon receiving multiple reports against a respondent,[549] we have removed the phrase "or on whose behalf the Title IX Coordinator has filed a formal complaint" from the definition of complainant in § 106.30. Numerous commenters urged the Department to respect the autonomy of survivors, and we have concluded that when a Title IX Coordinator signs a formal complaint, that action is not taken "on behalf of" a complainant (who may not wish to file a formal complaint or participate in a grievance process).[550] Removal of this phrase is more consistent with the Department's goal of ensuring that every complainant receives a prompt, meaningful response when a recipient has actual knowledge of sexual harassment in a manner that better respects a complainant's autonomy by not implying that a Title IX Coordinator has the ability to act "on behalf of" a complainant when the Title IX Coordinator signs a formal complaint. Removal of this phrase also helps clarify that when a Title IX Coordinator signs a formal complaint, that action does not place the Title IX Coordinator in a position adverse to the respondent; the Title IX Coordinator is initiating an investigation based on allegations of which the Title IX Coordinator has been made aware, but that does not prevent the Title IX Coordinator from being free from bias or conflict of interest with respect to any party.

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[549] For reasons discussed in the "Proposed § 106.44(b)(2) [removed in the final regulations]" subsection of the "Recipient's Response in Specific Circumstances" section of this preamble, we have removed the provision in the NPRM that would have required the Title IX Coordinator to file a formal complaint upon receiving multiple reports against a respondent. However, the final regulations still grant a Title IX Coordinator the discretion to decide to sign a formal complaint, and the Title IX Coordinator's decision will be evaluated based on what was not clearly unreasonable in light of the known circumstances.

[550] We have also revised the definition of "formal complaint" in § 106.30 to clarify that signing a formal complaint does not mean the Title IX Coordinator has become a complainant or otherwise a party to the grievance process.

Changes: The final regulations revise the definition of "complainant' in § 106.30 by revising this provision to state that complainant means "an individual who is alleged to be the victim of conduct that could constitute sexual harassment" thereby removing the phrase "who has reported to be the victim," the phrase "or on whose behalf the Title IX Coordinator has filed a formal complaint," and the sentence describing to whom a complainant had to make a report.

The final regulations add § 106.6(g) addressing "Exercise of rights by parents or guardians" and providing that nothing in the final regulations may be read in derogation of any legal right of a parent or guardian to act on behalf of a "complainant," "respondent," "party," or other individual.

Consent

Comments: Some commenters supported the proposed rules because the proposed rules did not mandate an "affirmative consent" standard for recipients to use in adjudicating sexual assault allegations. One commenter expressed general support for the proposed rules and asserted that courts across the country are ruling in favor of accused males for reasons including schools' misuse of affirmative consent policies. One commenter agreed with the fact that the proposed rules do not mandate affirmative consent, arguing that affirmative consent often ends up shifting the burden to the accused to prove innocence. One commenter supported the proposed rules, asserting that under current policies the responsibility to obtain and prove consent is on men, but the commenter believed that under the proposed rules women will speak up and learn to be more assertive.

One commenter expressed concern about not defining consent in the proposed rules, asserting that with respect to rape, consent definitions may vary across States and in some States there is no consent element. One commenter discussed the importance of consent because every

person at every moment has the right to do whatever they choose with their own body, and argued that sexual consent should be as obvious as other kinds of consent in our society; for example, asserted the commenter, a restaurant does not beg a patron incessantly to finish a burger until the patron feels reluctantly forced to eat. This commenter referenced internet videos sharing personal examples of the results of violations of consent.[551]

One commenter recommended that language be added requiring the complainant to prove absence of consent as opposed to requiring the respondent to prove presence of consent. The commenter asserted that this would make it clear that the burden of proof stays with the complainant (or the school). One commenter urged the Department to adopt the concept of implied consent as a safe harbor against sexual assault claims in dating situations. One commenter advocated a definition of sexual assault that recognizes that consent can be negated by explicit and implicit threats, so that "coercive sexual violence" that "often includes a layer of nominal and deeply guilt inducing ambiguity" (due to a victim verbally expressing consent but only because of fear based on the perpetrator's threats) would also be covered under Title IX.

One commenter stated that some institutions use affirmative consent while others use "no means no" and asked the Department to clarify whether recipients are expected to use a specific definition for consent because sexual assault depends on whether a victim consented.

Several commenters stated that universities should strive to provide clear rules with respect to what is considered consensual sexual conduct.

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[551] Commenter cited, *e.g.*: Jennifer Gunsaullus, *Sex and The Price of Masculinity: My personal story of consent violation*, THE GOOD MEN PROJECT (Aug. 8, 2016), https://goodmenproject.com/featured-content/sex-and-the-price-of-masculinity-gmp/.

Some commenters urged the Department to provide additional clarification for how schools should handle consent in situations where both students were drunk. One commenter suggested that the Department should clarify that Title IX's non-discrimination language means that when male and female students are both drunk and have sex, the school may not automatically assign blame to the male and victimhood to the female because, the commenter asserted, this approach is based on outdated gender stereotypes and violates Title IX. Another commenter opined that while drunken hookups are never a good idea, colleges must recognize that students do get intoxicated and have sex, as do many non-students, yet a young couple getting married and drinking champagne are not raping each other if they consummate the marriage later that night while their blood alcohol is beyond the legal limit to drive; the commenter asserted that colleges can make their policies stricter than the law, but must make that language clear. A few commenters asserted that schools have often failed to recognize the idea that when school policies states that any sign of intoxication means consent is invalid, that policy should go both ways (i.e., applied equally to men and women).

One commenter, a female university student, expressed concern that under current consent rules, being drunk while consenting is often not truly considered consent, and that in situations where both parties could be perceived as assaulting each other – because both had been drinking so that neither party gave valid consent – the woman's position is usually the only one taken into account, leading the commenter to believe that if a woman has an encounter she regrets, but did not communicate lack of consent at the time, she can report to the school and it will be investigated without getting the partner's perspective in a fair manner. Another commenter supported treating women and men equally when it comes to drug or alcohol-infused sex.

Some commenters provided articles discussing the meaning of consent, including whether the level of intoxication is relevant to the definition of consent. One commenter stated that one of the areas recipients appear to be struggling with is that lack of consent may be based on temporary or permanent mental or physical incapacity of the victim, and the commenter recommended that the Department inform recipients that inebriation is not equivalent to incapacitation.

Several commenters were concerned that the proposed rules did not impose an affirmative consent standard. One commenter argued that failing to include affirmative consent buys into rape myths including that silence is consent. One commenter criticized the proposed rules for ignoring the best practice standard of affirmative consent, or the "yes means yes" model for consent to any sexual activity, and the commenter argued that not imposing an affirmative consent standard will do a disservice to people who do not give a clear "No," who freeze, or revoke consent, and that this will override the important work many institutions have done to get students to understand the value and intricacies of affirmative consent. One commenter stated that affirmative consent policies are not best practices, are often confusing and difficult to enforce in a consistent, non-arbitrary manner, and end up shifting the burden onto a respondent to prove innocence; this commenter cited a law review article noting that affirmative consent policies often require the accused to show clear, unambiguous (and in some policies, "enthusiastic") consent.[552] One commenter argued that affirmative consent policies violate Title

[552] Commenter cited: Jacob E. Gerson & Jeannie Suk Gersen, *The Sex Bureaucracy*, 104 CAL. L. REV. 881 (2016).

IX because such policies discriminate against men.[553] Another commenter asserted that based on personal experience representing respondents in campus Title IX proceedings, many schools require the respondent to prove that there was consent, either by using an affirmative consent standard or by placing undue emphasis on a common provision in institutional policies and practices, that consent to one sexual act does not necessarily imply consent to another sexual act but that in either scenario, institutions often shift the burden of proof to respondents to prove their innocence, which the commenter asserted is inconsistent with centuries-old understandings of due process.

One commenter was concerned that the proposed rules do not prevent a school from using an affirmative consent standard and recommended that the Department clarify that an affirmative consent standard violates Title IX because it unfairly shifts the burden of proof to respondents and has a disparate impact on men because, the commenter argued, women are content to let men initiate sexual conduct even when sexual advances turn out to be welcome. One commenter expressed concern about affirmative consent and asserted that college administrators have no right to regulate the private lives of adults when neither person is compelled by threats or force. One commenter opined that while affirmative consent makes sense when gauging overt sexual initiatives between strangers, it is a ridiculous standard to apply to people in sexual relationships, or even to the typical college party situation, because under

[553] Commenter cited: Samantha Harris, *University of Miami Law Prof: Affirmative Consent Effectively Shifts Burden of Proof to Accused*, Foundation for Individual Rights in Education (FIRE) (Sept. 11, 2015), https://www.thefire.org/university-of-miami-law-prof-affirmative-consent-effectively-shifts-burden-of-proof-to-accused/.

affirmative consent, waking up a lover with a kiss is sexual assault, as is every thrust if consent is not somehow re-communicated in between.

One commenter expressed concern that some sexual assault laws say that "not saying no" can be considered assault. One commenter argued that "overthinking" about sexual consent causes men not to approach women as much, and the commenter stated this is not good for society because it causes educated folks not to approach each other.

Another commenter stated that while the idea of affirmative consent sounds good, in practice it seems as if colleges look at this as the responsibility of one person, usually the male; the commenter suggested rebranding affirmative consent as affirmative communication, and recommended that colleges make clear that both parties have a duty to seek consent, but also that both parties are responsible for communicating discomfort or communicating if they do not want to proceed with sexual activity.

One commenter recommended that the Department address training standards for decision-makers, including faculty, to address what commenters believed is shoddy research from dubious sources used in training materials that contributes to unjust decisions. The commenter referenced training around topics such as the amount of inebriation that violates consent and situations in which both parties are too drunk to consent.

One commenter expressed concern that the proposed rules would permit the introduction of evidence regarding the complainant's sexual history, when offered to prove consent. The commenter asserted that by permitting this evidence to prove consent, but not providing a definition of consent, the proposed rules will lead to an increase in ambiguity and the possibility of abuse by the accused in using evidence about a complainant's sexual history.

Discussion: The third prong of the § 106.30 definition of sexual harassment includes "sexual assault" as used in the Clery Act, 20 U.S.C. 1092(f)(6)(A)(v), which, in turn, refers to the FBI's Uniform Crime Reporting Program (FBI UCR) and includes forcible and nonforcible sex offenses such as rape, fondling, and statutory rape which contain elements of "without the consent of the victim." The Department acknowledges that the Clery Act, FBI UCR, and these final regulations do not contain a definition of consent. The Department believes that the definition of what constitutes consent for purposes of sexual assault within a recipient's educational community is a matter best left to the discretion of recipients, many of whom are under State law requirements to apply particular definitions of consent for purposes of campus sexual misconduct policies. The Department's focus in these final regulations is on recipients' response to sexual harassment when such conduct constitutes sex discrimination prohibited by Title IX. The Department believes that the definition of sexual assault used by the Federal government for crime reporting purposes appropriately captures conduct that constitutes sex discrimination under Title IX, regardless of whether the "without the consent" element in certain sex offenses is as narrow as some State criminal laws define consent, or broader as some State laws have required for use in campus sexual assault situations. Recipients may consider relevant State laws in adopting a definition of consent. For these reasons, the Department declines to impose a federalized definition of consent for Title IX purposes, notwithstanding commenters who would like the Department to adopt an affirmative consent standard, a "no means no" standard, an implied consent doctrine, or definitions of terms commonly used to indicate the absence or negation of consent (such as coercion, duress, or incapacity). In response to commenters asking for clarification, the Department has revised § 106.30 to include an entry for

"Consent" confirming that the Department will not require recipients to adopt a particular definition of consent with respect to sexual assault.

The Department agrees that recipients must clearly define consent and must apply that definition consistently, including as between men and women and as between the complainant and respondent in a particular Title IX grievance process because to do otherwise would indicate bias for or against complainants or respondents generally, or for or against an individual complainant or respondent, in contravention of § 106.45(b)(1)(iii), and could potentially be "treatment of a complainant" or "treatment of a respondent" that § 106.45(a) recognizes may constitute sex discrimination in violation of Title IX. We have revised the introductory sentence of § 106.45(b)(3) to state that any rules or practices that a recipient adopts and applies to its grievance process must equally apply to both parties.

The Department appreciates the variety of commenters' views regarding whether intoxication negates consent, whether verbal pressure amounts to coercion negating consent, and whether affirmative consent standards do, or do not, represent a best practice. However, for the reasons discussed above, the Department declines to impose on recipients a particular definition of consent, or terms used to describe the absence or negation of consent (such as coercion or incapacity).

The Department disagrees that affirmative consent standards inherently place the burden of proof on a respondent, but agrees with commenters who observed that to the extent recipients "misuse affirmative consent" (or any definition of consent) by applying an instruction that the respondent must prove the existence of consent, such a practice would not be permitted under a §

106.45 grievance process.[554] Regardless of how a recipient's policy defines consent for sexual assault purposes, the burden of proof and the burden of collecting evidence sufficient to reach a determination regarding responsibility, rest on the recipient under § 106.45(b)(5)(i). The final regulations do not permit the recipient to shift that burden to a respondent to prove consent, and do not permit the recipient to shift that burden to a complainant to prove absence of consent.

The final regulations require Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution, to be trained on how to conduct an investigation and grievance process; this would include how to apply definitions used by the recipient with respect to consent (or the absence or negation of consent) consistently, impartially, and in accordance with the other provisions of § 106.45.

Because a recipient's definition of consent must be consistently applied, the Department does not believe that the reference to consent in the "rape shield" protections contained in § 106.45(b)(6)(i)-(ii) will cause the proceedings contemplated in those provisions to be ambiguous or subject to abuse by a respondent. While the Department declines to impose a definition of consent on recipients, a recipient selecting its own definition of consent must apply such definition consistently both in terms of not varying a definition from one grievance process to the next and as between a complainant and respondent in the same grievance process. The scope of the questions or evidence permitted and excluded under the rape shield language in § 106.45(b)(6)(i)-(ii) will depend in part on the recipient's definition of consent, but, whatever that definition is, the recipient must apply it consistently and equally to both parties, thereby avoiding the ambiguity feared by the commenter. In further response to the commenter's concern, we have

[554] Section 106.45(b)(5)(i) (stating burden of proof must rest on the recipient and not on the parties).

revised § 106.45(b)(1)(iii) specifically to require investigators and decision-makers to be trained on issues of relevance, including how to apply the rape shield provisions (which deem questions and evidence about a complainant's prior sexual history to be irrelevant with two limited exceptions). Because a recipient cannot place the burden of proving consent on a respondent (or on a complainant to prove absence of consent), while questions and evidence subject to the rape shield language in § 106.45(b)(6)(i)-(ii) *may* come from a respondent, it is not the respondent's burden to prove or establish consent; questions and evidence may also be posed or presented by the recipient during the recipient's investigation and adjudication.

Changes: The Department revises § 106.30 to state that the Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault.

Comments: Some commenters emphasized the need to teach about sexual consent. One commenter supported providing greater consent education to students, including treating both parties equally with respect to situations where both parties were under the influence of alcohol or drugs. One commenter stated that there needs to be more teaching about consent because there is a lot of confusion, and another commenter urged the Department to make it mandatory for every freshman in college to attend a course on bullying, sexual harassment, and consent.

One commenter expressed general opposition for the proposed rules, asserting that children should live in a world that takes consent and assault seriously. One commenter, who works as a counselor at a university, expressed opposition to the proposed rules, stating that they would undo the important work of educators to instill in young people an understanding of how consent works. One commenter who works as a prevention educator teaching students about consent argued that the proposed rules paint women as liars, which makes useless the work of teaching students that consent should be celebrated, and ends up failing the young people of our

country. One commenter expressed general opposition to the proposed rules and stated "consent first." One commenter expressed general opposition to the proposed rules and asserted a belief in sex education and teaching consent. One commenter stated that the commenter's school requires mandatory courses on sexuality and rape prevention that stress the importance of consent, open communication, and bystander intervention. The commenter stated that even with this training the commenter has still been subjected to sexual harassment in college and asserted that the absence of Title IX protections will ruin the commenter's ability to learn.

Discussion: The Department appreciates commenters who expressed a belief in the importance of educating students about consent, healthy relationships and communication, drug and alcohol issues, and sexual assault prevention (as well as bullying and harassment, generally). The Department shares commenters' beliefs that measures preventing sexual harassment from occurring in the first place are beneficial and desirable. Although the Department does not control school curricula and does not require recipients to provide instruction regarding sexual consent, nothing in these final regulations impedes a recipient's discretion to provide educational information to students.

Changes: None.

Elementary and Secondary Schools

Comments: At least one commenter requested clarity as to the definition of "schools."

Discussion: In the proposed regulations, the Department referred to recipients that are elementary and secondary schools,[555] but did not provide a definition for "elementary and secondary schools." To provide clarity, the Department adds a definition of "elementary and

[555] 83 FR 61498.

secondary schools" that aligns with the definition of "educational institutions" in 34 CFR 106.2(k), which is a definition that applies to Part 106 of Title 34 of the Code of Federal Regulations. Section 106.2(k) defines an educational institution in relevant part as a local educational agency as defined in the Elementary and Secondary Education Act of 1965, which has been amended by the Every Student Succeeds Act (hereinafter "ESEA"), a preschool, or a private elementary or secondary school. Consistent with the first part of the definition in 34 CFR 106.2(k), the Department includes a definition of "elementary and secondary schools" to mean a local educational agency (LEA), as defined in the ESEA, a preschool, or a private elementary or secondary school. The remainder of the entities described as educational institutions in 34 CFR 106.2(k) constitute postsecondary institutions as explained in the section, below, on the definition of "postsecondary institutions." The definitions of "elementary and secondary school" and "postsecondary institution" apply only to §§ 106.44 and 106.45 of these final regulations.

Changes: The Department includes a definition of elementary and secondary schools as used in §§ 106.44 and 106.45 to mean a LEA as defined in the ESEA, a preschool, or a private elementary or secondary school.

Formal Complaint

Support for Formal Complaint Definition

Comments: Some commenters supported the definition of a "formal complaint" in § 106.30, and asserted that requiring a formal complaint to initiate an investigation is reasonable and appropriate, and will bring clarity to the process of investigating allegations of sexual harassment. Some commenters supported the formal complaint definition as a benefit to complainants by giving complainants control over what happens to their report, and a benefit to

institutions by ensuring the institution has written documentation indicating that the complainant wanted an investigation to begin.

Commenters supported requiring a formal complaint before an investigation begins because, commenters asserted, complainants may wish for informal discussions to remain confidential and the formal complaint requirement will empower complainants to decide when to report and when to start an investigation. Commenters asserted that the process for filing a formal complaint described in § 106.30 did not seem much different or more burdensome from other formal processes that students are accustomed to following in college, such as registering for classes or applying to study abroad. Commenters asserted that under the withdrawn 2011 Dear Colleague Letter, survivor advocates often worked with survivors who found themselves involved in Title IX processes that the survivor had not wished to initiate, due to disclosing sexual assault to an individual the survivor did not know was required to report to the Title IX Coordinator. Commenters asserted that many survivors choose not to report for a variety of reasons,[556] and involuntary participation in a conduct process goes against standard knowledge of trauma and sexual violence recovery that emphasizes the importance of allowing survivors to retain control of their recovery to the extent possible. Commenters argued that when victims are unexpectedly or unwillingly involved in Title IX processes, this contradicts best practices because healing from the trauma of sexual violence is promoted when victims are able to maintain control of their recovery. Commenters argued that implementing a formal complaint process will empower survivors to report to higher education institutions if and when they are

[556] Commenters cited: U.S. Dep't. Of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Criminal Victimization: 2016 Revised* 5 (2018).

ready, and to file a formal complaint to institutions by the victim's own informed choice, on their own terms, by their own volition.

Other commenters supported the formal complaint definition as a benefit to respondents, so that schools begin investigations only after a complainant has signed a document describing the allegations; commenters argued this is important for due process given the serious nature of the accusations at issue and the potential punishment. Commenters asserted that requiring a formal complaint will encourage only complainants with serious accusations to come forward.

One commenter expressed support for the formal complaint requirement, but urged the Department to require that formal complaints be filed "without undue delay" because, the commenter asserted, passage of time can prejudice a fair investigation due to memories fading and evidence being lost.

Discussion: The Department appreciates the support from commenters for the definition of "formal complaint" in § 106.30 and the requirement that recipients must investigate the allegations in a formal complaint.[557] We agree that defining a formal complaint and requiring a recipient to initiate a grievance process in response to a formal complaint brings clarity to the circumstances under which a recipient is required to initiate an investigation into allegations of sexual harassment. The Department believes that complainants, respondents, and recipients benefit from the clarity and transparency of specifying the conditions that trigger the initiation of a grievance process. As explained below, in response to commenters' concerns and questions we

[557] *E.g.*, § 106.44(b)(1); § 106.45(b)(3)(i).

have revised the definition of "formal complaint"[558] and made revisions throughout the final regulations,[559] to clarify how a recipient must respond to any report or notice of sexual harassment, versus when a recipient specifically must respond by initiating a grievance process.

The Department believes that the final regulations benefit complainants by obligating recipients to offer complainants supportive measures regardless of whether the complainant files a formal complaint, and informing complainants of how to file a formal complaint; obligating recipients to initiate a grievance process if the complainant decides to file a formal complaint; and giving strong due process protections to a complainant who decides to participate in a grievance process.

The Department believes that the final regulations benefit respondents by ensuring that recipients do not impose disciplinary sanctions against a respondent without following a grievance process that complies with § 106.45, [560] and that the prescribed grievance process gives strong due process protections to both parties.

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[558] As discussed throughout this section of the preamble, we have revised the § 106.30 definition of "formal complaint" to broaden the definition of what constitutes a written, signed document, simplify, clarify, and make more accessible the process for filing, and provide that signing a formal complaint does not mean a Title IX Coordinator becomes a party to a grievance process.

[559] For example, we have revised § 106.44(a) to clarify specific steps a recipient must take as part of a prompt, non-deliberately indifferent response, including offering supportive measures with or without the filing of a formal complaint, and explaining to a complainant how to file a formal complaint, so that if a complainant wants to exercise the option of filing, the complainant (including a parent or legal guardian, as appropriate) knows how to do so. We have added § 106.6(g) to acknowledge the legal rights of parents or guardians to act on behalf of a complainant, respondent, or other party, including with respect to the filing of a formal complaint.

[560] Revised §§ 106.44(a) and 106.45(b)(1)(i) state that a recipient must treat respondents equitably by not imposing disciplinary sanctions or other actions that are not "supportive measures" as defined in § 106.30, against a respondent without first following the § 106.45 grievance process. Exceptions to this prohibition are that any respondent may be removed from an education program or activity on an emergency basis, whether or not a grievance process is pending, under § 106.44(c), and a non-student employee respondent may be placed on administrative leave during the pendency of an investigation, under § 106.44(d), for reasons described in the "Additional Rules Governing Recipients' Responses to Sexual Harassment" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this preamble.

The Department believes that the final regulations benefit recipients by specifying a recipient's obligation to respond promptly and without deliberate indifference to every complainant (i.e., a person alleged to be the victim of sexual harassment), while clarifying the recipient's obligation to conduct an investigation and adjudication of allegations of sexual harassment when the complainant files, or the Title IX Coordinator signs, a formal complaint.

We do not agree that a formal complaint requirement encourages only complainants with "serious accusations" to come forward. While certain acts of sexual harassment may have even greater traumatic, harmful impact than other such acts, the Department believes that all conduct that constitutes sexual harassment under § 106.30 is serious misconduct that warrants a serious response. All the conduct defined as "sexual harassment" in § 106.30 is misconduct that is likely to deny a person equal access to education, and recipients must respond promptly and supportively to every known allegation of sexual harassment whether or not a complainant wants to also file a formal complaint.[561] Filing a formal complaint is not required for a complainant to receive supportive measures.

We decline to impose a requirement that formal complaints be filed "without undue delay." The Department believes that imposing a statute of limitations or similar time limit on the filing of a formal complaint would be unfair to complainants because, as many commenters noted, for a variety of reasons complainants sometimes wait various periods of time before desiring to pursue a grievance process in the aftermath of sexual harassment, and it would be difficult to discern what "undue" delay means in the context of a particular complainant's

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[561] Section 106.44(a) (requiring a prompt, non-deliberately indifferent response any time a recipient has actual knowledge of sexual harassment in the recipient's education program or activity, against a person in the United States).

experience. Title IX obligates recipients to operate education programs or activities free from sex discrimination, and we do not believe Title IX's non-discrimination mandate would be furthered by imposing a time limit on a complainant's decision to file a formal complaint. The Department does not believe that a statute of limitations or "without undue delay" requirement is needed to safeguard the rights of respondents, because the extensive due process protections afforded under the § 106.45 grievance process appropriately safeguard the fundamental fairness and reliability of Title IX proceedings by requiring procedures that take into account any effect of passage of time on party or witness memories or the availability or quality of other evidence.[562] We have, however, revised the § 106.30 definition of formal complaint to state that at the time of filing a formal complaint, the complainant must be participating in or attempting to participate in the recipient's education program or activity. This ensures that a recipient is not required to expend resources investigating allegations in circumstances where the complainant has no affiliation with the recipient, yet refrains from imposing a time limit on a complainant's decision to file a formal complaint.

Changes: As discussed in more detail throughout this section of the preamble, we have revised the § 106.30 definition of "formal complaint" to: broaden the definition of what constitutes a written, signed document, simplify the process for filing, state that at the time of filing the formal complaint the complainant must be participating or attempting to participate in the recipient's

[562] For example, the final regulations provide both parties equal opportunity to gather, present, and review relevant evidence, such that parties can note whether passage of time has resulted in unavailability of evidence and raise arguments about how the decision-maker should weigh the evidence that remains. Further, the final regulations provide in § 106.45(b)(3)(ii) that a recipient has discretion to dismiss a formal complaint where specific circumstances prevent the recipient from meeting the recipient's burden to gather sufficient evidence. Passage of time could in certain fact-specific circumstances result in the recipient's inability to gather evidence sufficient to reach a determination regarding responsibility.

education program or activity, and clarify that signing a formal complaint does not mean a Title IX Coordinator becomes a party to a grievance process.

We have revised § 106.44(a) to clarify specific steps a recipient must take as part of a prompt, non-deliberately indifferent response to actual knowledge of any sexual harassment incident (regardless of whether any formal complaint has been filed), including offering supportive measures to the complainant irrespective of whether a formal complaint is filed, and explaining to the complainant how to file a formal complaint. We have added § 106.6(g) to acknowledge the legal rights of parents or guardians to act on behalf of a complainant, respondent, or other party, including with respect to filing a formal complaint.

No Formal Complaint Required to Report Sexual Harassment

Comments: Several commenters believed that the proposed rules required complainants to file formal complaints in order to report sexual harassment, or that a formal complaint meeting the definition in § 106.30 was required before a school would have to take any action to help a student who reported sexual harassment, including offering supportive measures. Commenters argued that effective reporting systems must be flexible enough to give survivors as much control as possible over how they report sexual harassment and assault, including the option to remain anonymous or to report the crime without pursuing charges. Commenters asserted that when a victim reports shortly after a sexual harassment incident, the victim is often overwhelmed with emotions, and requiring them to provide formal, written, signed documentation would be an enormous emotional task that would cause some victims to question whether reporting is worth it at all.

Commenters argued that requiring a formal complaint before a school must respond to notice of sexual harassment would violate the Supreme Court's standards in *Davis*, which

requires an institutional response without a written or signed complaint. Commenters argued that a "formal complaint standard" imposes a more rigorous notice standard than the *Davis* standard, contradicts the Department's stated intent to use the *Davis* standard, and leaves recipients vulnerable to private litigation.

Some commenters believed that the proposed rules would require survivors to file formal complaints such that every report would trigger an investigation; commenters argued that this would violate survivors' autonomy and reduce the likelihood that survivors would come forward to get help. Commenters argued that formal complaints initiating a grievance process should not be required in order to report sexual assault, because not every survivor wants an investigation after experiencing sexual assault. Commenters argued that requiring survivors to report sexual harassment by filing formal complaints, involving writing down details of a traumatic experience in a signed document, would deter survivors from ever coming forward. Commenters believed that the proposed rules would require a formal complaint in order for the recipient to respond to a report and argued that this would chill reporting of sexual assault, which would affect the number of Clery crime reports and artificially make campuses appear safer than they are. Commenters argued that instead, schools should have to respond to any information about sexual harassment, assess the information, and take appropriate steps to stop the harassment.

Commenters believed that the proposed rules created two different "prompt and equitable" grievance systems – one process for a school's response to a "formal complaint" of sexual harassment, and a different process for a school's response to an "informal complaint" of sexual harassment.

Discussion: Contrary to some commenters' understanding, neither the proposed rules, nor the final regulations, requires a formal complaint as a condition for any person to report sexual

harassment to trigger a recipient's obligation to respond promptly and meaningfully. Like the proposed rules, the final regulations obligate a recipient to respond[563] in a manner that is not clearly unreasonable in light of the known circumstances, whenever a recipient has actual knowledge of sexual harassment in the recipient's education program or activity, against a person in the United States.[564] The requirement that a recipient must investigate allegations in a formal complaint does not change the fact that a recipient must respond, every time the recipient has actual knowledge, in a way that is not deliberately indifferent – even in the absence of a formal complaint.[565] The requirement that a recipient must investigate allegations in a formal complaint provides clarity to complainants, respondents, and recipients as to when a recipient's response must *also* consist of investigating allegations. Under the final regulations, a Title IX Coordinator has discretion to sign a formal complaint that initiates a grievance process; thus, if a non-deliberately indifferent response to actual knowledge of sexual harassment necessitates investigating allegations, the recipient (via the Title IX Coordinator) has the authority to take that action. As discussed in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment," the conditions triggering a recipient's response obligations (i.e., actionable sexual harassment, and actual knowledge) are built on the foundation of the same concepts used in the *Gebser/Davis* framework. Similarly, the deliberate indifference standard is built on the same concept used in the *Gebser/Davis* framework, but these final regulations tailor

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[563] The final regulations revise § 106.44(a) to require a recipient to respond "promptly."
[564] Revised § 106.44(a) specifies that a recipient's response must include offering supportive measures to a complainant (i.e., the person alleged to be the victim of conduct that could constitute sexual harassment), and requires the Title IX Coordinator promptly to contact the complainant to discuss the availability of supportive measures with or without the filing of a formal complaint, consider the complainant's wishes, and explain to the complainant the option of filing a formal complaint.
[565] Section 106.44(b)(1) (stating that with or without a formal complaint, a recipient must comply with all the response obligations described in § 106.44(a)).

that standard to require the recipient to take actions in response to every instance of actual knowledge of sexual harassment, including specific obligations that are not required under the *Gebser/Davis* framework. These final regulations clarify that a recipient's response obligations must always include offering supportive measures to the complainant, and must also include initiating a grievance process against the respondent when the complainant files, or the Title IX Coordinator signs, a formal complaint. The formal complaint definition, and the requirement that recipients must investigate formal complaints, therefore comport with the *Gebser/Davis* framework used in private Title IX lawsuits and do not increase recipients' vulnerability to legal challenges.

While we adopt the *Gebser/Davis* framework, we adapt that framework by requiring recipients to take certain steps as part of every non-deliberately indifferent response to actual knowledge of sexual harassment, irrespective of whether a formal complaint is filed.[566] We have revised § 106.44(a) to specify that a recipient's prompt, non-deliberately indifferent response must include offering supportive measures to each complainant (i.e., a person who is alleged to be the victim), and specifically having the Title IX Coordinator contact the complainant to discuss the availability of supportive measures with or without the filing of a formal complaint, consider the complainant's wishes regarding supportive measures, and explain to the complainant the process for filing a formal complaint.

We agree with commenters who asserted that requiring a complainant to sign formal documentation describing allegations of sexual harassment in order to report and receive

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[566] Section 106.44(b)(1) clarifies that whether or not a formal complaint requiring investigation has also been filed, the recipient must provide the prompt, non-deliberately indifferent response described in § 106.44(a), which includes offering supportive measures to the complainant.

supportive measures would place an unreasonable burden on survivors, and the final regulations obligate recipients to respond promptly and meaningfully – including by offering supportive measures – whenever the recipient has actual knowledge that a person has been allegedly victimized by sexual harassment in the recipient's education program or activity, regardless of whether the complainant or Title IX Coordinator initiates a grievance process by filing or signing a formal complaint. The manner by which a recipient receives actual knowledge need not be a written statement, much less a formal complaint; actual knowledge may be conveyed on a recipient via "notice" from any person – not only from the complainant (i.e., person alleged to be the victim) – regardless of whether the person who reports does so anonymously.[567] The final regulations thus effectuate the purpose of Title IX's non-discrimination mandate by requiring recipients to respond to information about sexual harassment in the recipient's education program or activity, from whatever source that information comes,[568] while reserving the specific obligation to respond by investigating and adjudicating allegations to situations where the complainant (i.e., the person alleged to be the victim) or Title IX Coordinator has decided to file

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[567] Section 106.30 (defining "actual knowledge"). Where a person reports anonymously (regardless of whether the person is the complainant (i.e., the person alleged to be the victim) or a third party), the nature of the recipient's non-deliberately indifferent response may depend on whether the report contains information identifying the alleged victim; for example, § 106.44(a) requires a recipient to respond to actual knowledge by offering the complainant supportive measures, but a recipient may not be capable of taking that action if the person who reported refuses to identify the complainant. A recipient's response is judged on whether the response is clearly unreasonable in light of the known circumstances, which includes what information the recipient received about the identity of the complainant.

[568] To ensure that a recipient's educational community has clear, accessible reporting options, and understands that any person may report sexual harassment to trigger the recipient's obligation to offer supportive measures and explain the option of filing a formal complaint to a person allegedly victimized by sexual harassment, we have revised § 106.8 to: state that any person may report, using contact information that a recipient must list for the Title IX Coordinator; state that reports may be made in person, by mail, phone, or e-mail, or by any other method that results in a Title IX Coordinator receiving the person's written or verbal report; and require recipients to post the Title IX Coordinator's contact information on the recipient's website. We have also revised § 106.30 (defining "actual knowledge") to provide that notice of sexual harassment allegations to any elementary or secondary school employee triggers the school's response obligations.

a formal complaint. The formal complaint definition thus ensures that complainants retain more autonomy and control over when the complainant's reported victimization leads to a formal grievance process, and recipients are not forced to expend resources investigating situations over the wishes of a complainant, unless the Title IX Coordinator has determined that such an investigation is necessary. We agree with commenters that not every complainant wants a recipient to respond to reported sexual harassment by initiating a grievance process; some complainants want an investigation, others do not, and some do not initially desire an investigation but later decide they do want to file formal "charges." The final regulations ensure that every complainant is informed of the option and process for filing a formal complaint, yet never require a complainant to file a formal complaint in order to receive supportive measures. We believe that by respecting complainants' autonomy the final regulations will not chill reporting of sexual harassment, but instead will provide complainants with clearer options and greater control over the process.[569]

Contrary to some commenters' understanding, the final regulations do not create two separate systems of "prompt and equitable grievance procedures" for how a recipient responds to sexual harassment based on whether the recipient receives a formal complaint or informal

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[569] Denying a survivor control over how a disclosure of sexual assault is handled by the survivor's school can also constitute a harmful form of institutional betrayal, and the final regulations desire to mitigate such harm by giving the complainant a clear, accessible *option* to file, or not file, a formal complaint (while receiving supportive measures either way) and by protecting the complainant's right to participate, or choose not to participate, in a grievance process whether the grievance process is initiated by the complainant or by the Title IX Coordinator. *See, e.g.*, Merle H. Weiner, *Legal Counsel for Survivors of Campus Sexual Violence*, 29 YALE J. OF L. & FEMINISM 123, 140-141 (2017) (identifying one type of institutional betrayal as the harm that occurs when "the survivor thinks she [or he] is speaking to a confidential resource, but then finds out the advocate cannot keep their conversations private"); Carly Parnitzke Smith & Jennifer J. Freyd, *Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma*, 26 J. OF TRAUMATIC STRESS 1, 120 (2013) (describing "institutional betrayal" as when an important institution, or a segment of it, acts in a way that betrays its member's trust). Where a Title IX Coordinator signs a formal complaint knowing the complainant did not wish to do so, the recipient must respect the complainant's wishes regarding whether to participate or not in the grievance process. § 106.71 (prohibiting retaliation).

complaint. Rather, the final regulations obligate the recipient to respond to every known allegation of sexual harassment (regardless of how, or from whom, the recipient receives notice) promptly and non-deliberately indifferently, and obligate the recipient to respond by initiating a grievance process when the recipient receives a formal complaint of sexual harassment. If commenters referred to an "informal complaint of sexual harassment" to describe a report or disclosure of sexual harassment that is not a "formal complaint" as defined in § 106.30, the final regulations require recipients to respond promptly and non-deliberately indifferently (including by offering the complainant supportive measures) to such a report or disclosure, but the recipient need not initiate investigation or adjudication procedures unless the recipient receives a "formal complaint of sexual harassment." Furthermore, § 106.44(a) precludes recipients from responding to reports, disclosures, or notice of alleged sexual harassment by imposing disciplinary sanctions on a respondent without first following a grievance process that complies with § 106.45. The "prompt and equitable" grievance procedures to which commenters referred still must be adopted, published, and used by a recipient to address complaints of *non-sexual harassment* sex discrimination, under § 106.8(c), while recipients must respond to formal complaints of sexual harassment by following a grievance process that complies with § 106.45.

Changes: None.

Burden on Complainants to File a Formal Complaint

Comments: Commenters argued that requiring a formal complaint in order to begin an investigation places an unfair burden on victims who want an investigation but should not have to comply with specific paperwork and procedures, or because requiring a victim to put their name in writing and flesh out the details of a harrowing experience in a written narrative may be retraumatizing. Commenters argued that many institutions follow a principle that a victim should

only have to make a single statement about an incident, and therefore a victim's written or oral disclosure to a police officer, or to any responsible campus employee, should be sufficient to trigger an investigation. Commenters asserted that some State protocols for sexual assault investigations (for example, in New Hampshire) caution against collecting written statements from victims.

Commenters argued that making victims sign a document with a statement of facts is inappropriate due to the potential effect of such a document on any future litigation. Commenters argued that it is unfair to make victims sign a written statement to start an investigation because the written statement could be wrongfully used to discredit a victim during the investigation if the victim's later statements show any inconsistencies with the formal complaint, and victims in the immediate aftermath of sexual violence may have trouble focusing or recalling details, due to trauma.[570] One commenter proposed a detailed alternate process for starting investigations, under which the complainant would orally describe an incident to a compliance team, the compliance team would inform the complainant of the option for signing a written statement initiating an investigation, and the complainant would have 72 hours to decide whether to sign such a written statement.

Commenters argued that any report of a sexual assault, to any school or college employee, whether oral or written, formal or informal, should be sufficient to start an investigation because otherwise a significant number of sexual assaults will go un-investigated, and because schools could ignore openly hostile environments just because no one filed a formal

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[570] Commenters cited: Russell W. Strand, *The Forensic Experiential Trauma Interview (FETI)*, https://responsesystemspanel.whs mil/Public/docs/meetings/20130627/01_Victim_Overview/Rumburg_FETI_Interview.pdf.

document. Commenters argued there are many ways schools can investigate a report without involving the victim, so victims should never be forced to file complaints but schools should still investigate all credible reports. Commenters argued that the burden of starting an investigation should be on the school, not on the survivor to jump through the hoop of filing a formal complaint. Commenters argued that in order to maintain a safe, non-discriminatory learning environment, institutions must not be confined by the formalities of signatures on a complaint before they are able to move forward with an investigation. Commenters argued that if schools can ignore known sexual harassment just because no one has filed a formal complaint, institutions of higher education will have even less incentive to try to stop sex abuse scandals by their employees. Commenters argued that it is expecting a student to undergo too much risk to file a written complaint against a faculty member who is sexually abusing the student, so more students will fall prey to serial abuse by faculty.

Commenters argued that the § 106.30 definition of "formal complaint" would preclude third parties (such as teachers, witnesses, or school employees other than the Title IX Coordinator) from filing complaints to initiate grievance procedures, representing a departure from past Department guidance and reducing schools' efforts to redress offending behavior. Other commenters supported restricting third parties from filing formal complaints because confiding in a resident advisor or professor should not trigger an obligation for that employee to file a formal complaint on the victim's behalf. Some commenters argued that no investigation should be initiated without the consent of the victim because the victim should be the one with the power to initiate a formal process, and victims should be given the opportunity to be educated on the law, process, and rights of victims.

Commenters argued that the burden of filing a formal complaint would fall especially hard on K-12 students because the proposed safe harbor in § 106.44(b)(2) only ensured that students in higher education would receive supportive measures in the absence of a formal complaint, so younger students, who may not even be capable of writing down a description of sexual harassment, would get no help at all.

Discussion: The Department appreciates commenters' concerns that requiring complainants who wish to initiate an investigation to sign a written document may seem like an unnecessary "paperwork" procedure, or that a victim may find it retraumatizing to write out details of a sexual harassment experience. However, absent a written document signed by the complainant alleging sexual harassment against a respondent and requesting an investigation,[571] the Department believes that complainants and recipients may face confusion about whether an investigation is initiated because the complainant desires it, because the Title IX Coordinator believes it necessary, both, or neither. We reiterate that when a recipient has actual knowledge of sexual harassment, the recipient must offer supportive measures to the complainant whether or not a formal complaint is ever filed. However, a complainant's decision to initiate a grievance process should be clear, to avoid situations where a recipient involves a complainant in a grievance process when that was neither what the complainant wanted nor what the Title IX Coordinator believed was necessary. A grievance process is a weighty, serious process with consequences that affect the complainant, the respondent, and the recipient. Clarity as to the

[571] As discussed herein, the final regulations broaden the meaning of a "document filed by a complainant" to include a document or electronic submission (such as an e-mail, or use of an online portal provided for this purpose by the recipient) that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.

nature and scope of the investigation necessitates that a formal complaint initiating the grievance process contain allegations of sexual harassment against the respondent, so the recipient may then prepare the written notice of allegations to be sent to both parties (under § 106.45(b)(2)), which advises both parties of essential details of allegations under investigation, and of important rights available to both parties under the grievance process.

The Department acknowledges the principle, followed by some institutions and State protocols, that avoids asking victims for written statements or avoids asking victims to recount allegations more than once. We reiterate that a complainant may report (once, and verbally) in order to require a recipient to respond promptly by offering supportive measures. Reports of sexual harassment (whether made by the alleged victim themselves or by any third party) do not need to be in writing, much less in the form of a signed document.[572] The final regulations desire to ensure that every complainant receives this prompt, supportive response regardless of whether a grievance process is ever initiated. The formal complaint requirement ensures that a grievance process is the result of an intentional decision on the part of either the complainant or the Title IX Coordinator. A complainant (or a third party) may report sexual harassment to a school for a different purpose than desiring an investigation. Thus, if an investigation is an action the complainant desires, the complainant must file a written document requesting an investigation. No written document is required to put a school on notice (i.e., convey actual knowledge) of sexual harassment triggering the recipient's response obligations under § 106.44(a).

The § 106.30 definition of "formal complaint" requires a document "alleging sexual harassment against a respondent," but contains no requirement as to a detailed statement of facts.

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[572] Section 106.8(a).

Whether or not statements made during a Title IX grievance process might be used in subsequent litigation, clarity, predictability, and fairness in the Title IX process require both parties, and the recipient, to understand that allegations of sexual harassment have been made against the respondent before initiating a grievance process. We reiterate that no written statement is required in order to receive supportive measures,[573] and that there is no time limit on a complainant's decision to file a formal complaint, so the decision to sign and file a formal complaint need not occur in the immediate aftermath of sexual violence when a survivor may have the greatest difficulty focusing, recalling details, or making decisions. A complainant may disclose or report immediately (if the complainant desires) to receive supportive measures and receive information about the option for filing a formal complaint, and that disclosure or report may be verbal, in writing, or by any other means of giving notice.[574] But such a disclosure or report may be entirely separate from a complainant's later decision to pursue a grievance process by filing a formal complaint. We disagree with a commenter's suggestion to require a complainant to decide within 72 hours whether to file a formal complaint; even with the detailed steps in such a process suggested by the commenter, for reasons explained above it does not further Title IX's non-discrimination mandate to impose a time limit on a complainant's decision to file a formal complaint.

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[573] We have revised § 106.8(a) to specify that any person may report sexual harassment using the Title IX Coordinator's contact information (including during non-business hours by using the listed telephone number or e-mail address) "or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report."

[574] *See* § 106.30 defining "actual knowledge" to mean "notice" to the Title IX Coordinator, to any official with authority to take corrective action, or to any elementary or secondary school employee, where "notice" includes (but is not limited to) a report of sexual harassment to the Title IX Coordinator as described in § 106.8(a).

The Department disagrees that every report of a sexual assault to any recipient employee should be sufficient to start an investigation. We believe that every allegation of sexual harassment of which the recipient becomes aware[575] must be responded to, promptly and meaningfully, including by offering supportive measures to the person alleged to be the victim of conduct that could constitute sexual harassment.[576] However, we believe that complainants should retain as much control as possible[577] over whether a school's response includes involving the complainant in a grievance process. When a complainant believes that investigation and adjudication of allegations is in the complainant's best interest, the complainant should be able to require the recipient to initiate a grievance process.[578] When a Title IX Coordinator believes that with or without the complainant's desire to participate in a grievance process, a non-deliberately indifferent response to the allegations requires an investigation, the Title IX Coordinator should have the discretion to initiate a grievance process. Not investigating every report of sexual harassment will not allow schools to ignore complainants or ignore "openly hostile environments," because § 106.44(a) requires the recipient to respond promptly in a manner that is not unreasonable in light of the known circumstances, to every instance of alleged sexual harassment in the recipient's education program or activity of which the recipient becomes aware, including offering supportive measures to the complainant with or without a grievance

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[575] As discussed above, a recipient is charged with actual knowledge of sexual harassment when notice is given to a Title IX Coordinator, an official with authority to take corrective action, or any elementary or secondary school employee. § 106.30 (defining "actual knowledge").
[576] Section 106.44(a) § 106.30 (defining "complainant").
[577] A complainant's control over a school's response may be circumscribed by a recipient's obligations under laws other than these final regulations; for example, State laws mandating schools to report suspected child sexual abuse to law enforcement or child welfare authorities. However, these final regulations protect a complainant against being intimidated, threatened, coerced, or discriminated against for participating, or refusing to participate, in a Title IX grievance process. § 106.71.
[578] Section 106.6(g) (acknowledging that where a parent or guardian has the legal right to act on a complainant's behalf, the parent or guardian may file a formal complaint on behalf of the complainant).

process. Part of whether a decision not to investigate is "clearly unreasonable" may include a Title IX Coordinator's communication with the complainant to understand the complainant's desires with respect to a grievance process against the respondent. When a Title IX Coordinator determines that an investigation is necessary even where the complainant (i.e., the person alleged to be the victim) does not want such an investigation, the grievance process can proceed without the complainant's participation; however, the complainant will still be treated as a party in such a grievance process. The grievance process will therefore impact the complainant even if the complainant refuses to participate. The Department desires to respect a complainant's autonomy as much as possible and thus, if a grievance process is initiated against the wishes of the complainant, that decision should be reached thoughtfully and intentionally by the Title IX Coordinator, not as an automatic result that occurs any time a recipient has notice that a complainant was allegedly victimized by sexual harassment. We do not believe this places "the burden" of starting an investigation on the complainant. Rather, the final regulations enable a complainant, or the Title IX Coordinator, to initiate an investigation. The final regulations appropriately leave recipients flexibility to investigate allegations even where the complainant does not wish to file a formal complaint where initiating a grievance process is not clearly unreasonable in light of the known circumstances (including the circumstances under which a complainant does not desire an investigation to take place), so that recipients may, for example, pursue a grievance process against a potential serial sexual perpetrator. The recipient is required to document its reasons why its response to sexual harassment was not deliberately indifferent, under § 106.45(b)(10), thereby emphasizing the need for a decision to initiate a grievance process over the wishes of a complainant to be intentionally, carefully made taking into account the circumstances of each situation.

The § 106.30 definition of "formal complaint" does preclude third parties from filing formal complaints.[579] For the reasons discussed above, we believe that respecting a complainant's autonomy to the greatest degree possible means that an investigation against a complainant's wishes or without a complainant's willingness to participate, should happen only when the Title IX Coordinator has determined that the investigation is necessary under the particular circumstances.[580] We reiterate that any person may disclose or report a sexual harassment incident, whether that person is the complainant (i.e., the individual who is alleged to be the victim) or any third party, such as a teacher, witness, parent, or school employee.[581] When the disclosure or report gives notice of sexual harassment allegations to a Title IX Coordinator,[582] an official with authority to institute corrective measures on the recipient's behalf, or any elementary and secondary school employee,[583] the recipient must respond promptly in a non-deliberately indifferent manner. Thus, even if neither the complainant nor the Title IX Coordinator decides to file a formal complaint, the recipient must still respond to the

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[579] *Cf.* § 106.6(g).
[580] *See* Michelle L. Meloy & Susan L. Miller, *The Victimization of Women: Law, Policies, and Politics* 147-48 (Oxford University Press 2010) (anti-violence policies must embrace "notions of victim empowerment for self-protection by allowing victims to drop criminal charges"). The Title IX equivalent of this premise is that the Department should not require schools to investigate in the absence of a complainant's consent. The formal complaint definition in § 106.30 ensures that schools *must* investigate when the complainant desires that action (*see also* § 106.44(b)(1)), and ensures that a school only overrides a complainant's desire for the school *not* to investigate if the Title IX Coordinator has determined on behalf of the recipient that an investigation is needed, and in such circumstances the final regulations protect the complainant's right to refuse to participate in the grievance process. § 106.71.
[581] Section 106.8(a) (expressly stating that any person may report sexual harassment using the listed contact information for the Title IX Coordinator, whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sexual harassment).
[582] Section 106.30 (defining "actual knowledge" and expressly stating that "notice" includes a report to the Title IX Coordinator as described in § 106.8(a)).
[583] Section 106.30 (defining "actual knowledge").

reported sexual harassment incident by offering supportive measures to the complainant and informing the complainant of the option of filing a formal complaint.[584]

We disagree that no formal complaint should ever be filed without the consent of the victim, because some circumstances may require a recipient (via the Title IX Coordinator) to initiate an investigation and adjudication of sexual harassment allegations in order to protect the recipient's educational community or otherwise avoid being deliberately indifferent to known sexual harassment. However, we have added § 106.71 to prohibit retaliation against any person exercising rights under Title IX, including the right not to participate in a Title IX grievance process, so that a complainant is protected from being coerced, intimated, threatened, or otherwise discriminated against based on the complainant's refusal to participate in a grievance process. We agree that complainants should be given the opportunity to be informed of the law, process, and victims' rights, and the final regulations require recipients to notify students, employees, and parents of elementary and secondary school students (among others) of the recipient's Title IX non-discrimination policy, contact information for the Title IX Coordinator, how to report sexual harassment, and the recipient's grievance process for formal complaints of sexual harassment.[585] The final regulations further require recipients to offer supportive measures to a complainant, discuss with each individual complainant the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.[586]

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[584] Sections 106.44(a), 106.44(b)(1).
[585] Section 106.8.
[586] Section 106.44(a).

In response to commenters' concerns that elementary and secondary school students might not receive supportive measures in the absence of a formal complaint because the supportive measures safe harbor in proposed § 106.44(b)(2) applied only to postsecondary institutions, we have removed the safe harbor in proposed § 106.44(b)(2), and revised § 106.44(a) to require all recipients to offer supportive measures to every complainant, obviating the need for a "safe harbor" that results from providing supportive measures. As to all recipients, the final regulations enable the complainant (i.e., the individual who is alleged to be the victim) or the Title IX Coordinator, to file a formal complainant that initiates a grievance process. As discussed below in this section of the preamble, the final regulations also acknowledge the legal right of a parent to act on behalf of their child, addressing the concern that children are expected to write or sign a formal complaint.

Changes: We have removed the supportive measures safe harbor in proposed § 106.44(b)(2) and have revised § 106.44(a) to require all recipients to offer supportive measures to each complainant irrespective of whether a formal complaint is ever filed. We have added § 106.6(g) acknowledging the legal rights of parents or guardians to act on behalf of a complainant, respondent, or other individual, including but not limited to the filing of a formal complaint. We have added § 106.71 to prohibit retaliation against any person exercising rights under Title IX, including the right not to participate in a Title IX grievance process.

Anonymous Reporting and Anonymous Filing of Formal Complaints

Comments: Commenters requested clarification as to whether the proposed rules discouraged or prohibited anonymous reporting; some commenters asserted that anonymous reports may disclose valid information about openly hostile environments on campus that should be investigated even though the reporting party is anonymous. Commenters argued that disallowing

confidential and anonymous reporting would deter reporting because research shows that concern about confidentiality is one reason why victims of sexual crimes do not report.[587] Commenters argued that requiring a signed statement may act as a deterrent to reporting, citing to a report finding that several police departments have permitted victims to report anonymously in an effort to allow a victim more options and control over whether to participate in an investigation, and that police find it advantageous because they can learn more about crimes committed in the area, and anonymous reporting may allow them to track a predator who commits multiple offenses.[588] Commenters argued that prohibiting victims from filing formal complaints anonymously would conflict with State law (such as in Illinois, and Texas) where institutions are required to provide an option for anonymous reporting and State law (such as Texas) that requires electronic reporting to be an option.

Discussion: The Department appreciates the opportunity to clarify that the final regulations do not prohibit recipients from implementing anonymous (sometimes called "blind") reporting options. Anonymous or blind reporting options that have been implemented by law enforcement agencies, for example, may enable the police to gain more information about crimes and may assist in identifying patterns of repeat offenders, while providing victims with "another option for healing – an option that falls in between not reporting the crime, and being involved in a full criminal investigation."[589] As commenters noted, anonymous reports sometimes disclose valid information about sexual harassment on campus. Under the final regulations, when a recipient

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[587] Commenters cited: U.S. Dep't. of Justice, Office of Justice Programs, National Institute of Justice, *Sexual Assault on Campus: What Colleges and Universities Are Doing About It* (2005).
[588] Commenters cited: Human Rights Watch, *Improving Police Response to Sexual Assault* (2013).
[589] National Resource Center on Domestic Violence, VAWnet, Introduction to Sabrina Garcia & Margaret Henderson, *Blind Reporting of Sexual Violence*, 68 FBI LAW ENFORCEMENT BULLETIN 6 (June 1999), https://vawnet.org/material/blind-reporting-sexual-violence.

has actual knowledge of alleged sexual harassment in the recipient's education program or activity the final regulations require a recipient to respond in a manner that is not clearly unreasonable in light of the known circumstances. A recipient has actual knowledge whenever notice of sexual harassment is given to the Title IX Coordinator, an official with authority to institute corrective measures, or any elementary and secondary school employee.[590] The final regulations do not restrict the form that "notice" might take, so notice conveyed by an anonymous report may convey actual knowledge to the recipient and trigger a recipient's response obligations. A recipient's non-deliberately indifferent response must include offering supportive measures to a complainant (i.e., person alleged to be the victim of sexual harassment).[591] A recipient's ability to offer supportive measures to a complainant, or to consider whether to initiate a grievance process against a respondent, will be affected by whether the report disclosed the identity of the complainant or respondent. In order for a recipient to provide supportive measures to a complainant, it is not possible for the complainant to remain anonymous because at least one school official (e.g., the Title IX Coordinator) will need to know the complainant's identity in order to offer and implement any supportive measures. Section 106.30 defining "supportive measures" directs the recipient to maintain as confidential any supportive measures provided to either a complainant or a respondent, to the extent that maintaining confidentiality does not impair the recipient's ability to provide the supportive measures. A complainant (or third party) who desires to report sexual harassment without disclosing the complainant's identity to anyone may do so, but the recipient will be unable to

[590] Section 106.30 (defining "actual knowledge").
[591] Section 106.44(a).

provide supportive measures in response to that report without knowing the complainant's identity. If a complainant desires supportive measures, the recipient can, and should, keep the complainant's identity confidential (including from the respondent), unless disclosing the complainant's identity is necessary to provide supportive measures for the complainant (e.g., where a no-contact order is appropriate and the respondent would need to know the identity of the complainant in order to comply with the no-contact order, or campus security is informed about the no-contact order in order to help enforce its terms).

Separate and apart from whether a grievance process is initiated, the final regulations require recipients to respond non-deliberately indifferently even where sexual harassment allegations were conveyed to the recipient via an anonymous report (made by the complainant themselves, or by a third party), including offering the complainant supportive measures if the anonymous report identified a complainant (i.e., person alleged to be a victim of sexual harassment). Nothing in the final regulations precludes a recipient from implementing reporting systems that facilitate or encourage an anonymous or blind reporting option. Thus, recipients who are obligated under State laws to offer anonymous reporting options may not face any conflict with obligations under the final regulations. The final regulations do not preclude recipients from offering electronic reporting systems, so recipients obligated to do so under State laws may not face any conflict with obligations under the final regulations. To ensure that complainants (and third parties, because any person may report sexual harassment) have clear, accessible reporting options, we have revised § 106.8(a) to expressly state that any person may report sexual harassment using the Title IX Coordinator's listed contact information, and such a report may be made at any time (including during non-business hours) by using the listed

telephone number or e-mail address (or by mail to the listed office address) for the Title IX Coordinator. Recipients may additionally offer other types of electronic reporting systems.

A formal complaint initiates a grievance process (i.e., an investigation and adjudication of allegations of sexual harassment). A complainant (i.e., a person alleged to be the victim of sexual harassment) cannot file a formal complaint anonymously because § 106.30 defines a formal complaint to mean a document or electronic submission (such as an e-mail or using an online portal provided for this purpose by the recipient) that contains the complainant's physical or digital signature or otherwise indicates that the complainant is the person filing the formal complaint. The final regulations require a recipient to send written notice of the allegations to both parties upon receiving a formal complaint. The written notice of allegations under § 106.45(b)(2) must include certain details about the allegations, including the identity of the parties, if known.

Where a complainant desires to initiate a grievance process, the complainant cannot remain anonymous or prevent the complainant's identity from being disclosed to the respondent (via the written notice of allegations). Fundamental fairness and due process principles require that a respondent knows the details of the allegations made against the respondent, to the extent the details are known, to provide adequate opportunity for the respondent to respond. The Department does not believe this results in unfairness to a complainant. Bringing claims, charges, or complaints in civil or criminal proceedings generally requires disclosure of a person's identity for purposes of the proceeding. Even where court rules permit a plaintiff or victim to remain anonymous or pseudonymous, the anonymity relates to identification of the plaintiff or victim in court records that may be disclosed *to the public*, not to keeping the identity of the

plaintiff or victim unknown *to the defendant*.[592] The final regulations ensure that a complainant may obtain supportive measures while keeping the complainant's identity confidential from the respondent (to the extent possible while implementing the supportive measure), but in order for a grievance process to accurately resolve allegations that a respondent has perpetrated sexual harassment against a complainant, the complainant's identity must be disclosed to the respondent, if the complainant's identity is known. However, the identities of complainants (and respondents, and witnesses) should be kept confidential from anyone not involved in the grievance process, except as permitted by FERPA, required by law, or as necessary to conduct the grievance process, and the final regulations add § 106.71 to impose that expectation on recipients.[593]

When a formal complaint is signed by a Title IX Coordinator rather than filed by a complainant, the written notice of allegations in § 106.45(b)(2) requires the recipient to send both parties details about the allegations, including the identity of the parties *if known*, and thus, if the complainant's identity is known it must be disclosed in the written notice of allegations. However, if the complainant's identity is unknown (for example, where a third party has reported that a complainant was victimized by sexual harassment but does not reveal the complainant's

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[592] *See, e.g.*, Jayne S. Ressler, *#WorstPlaintiffEver: Popular Public Shaming and Pseudonymous Plaintiffs*, 84 TENN. L. REV. 779, 828 (2017) (arguing that Federal and State courts should adopt broader rules allowing plaintiffs to file civil lawsuits anonymously or pseudonymously, and emphasizing that this anonymity relates to whether a plaintiff is named in court records that may be viewed by the public, but does not affect the *defendant's* knowledge of the identity of the plaintiff) ("The plaintiff's anonymity would extend only to court filings and any other documents that would be released to the public. In other words, the defendant would have the same information about the plaintiff had the plaintiff filed the case under her own name.").

[593] Section 106.71(a) (prohibiting retaliation and providing in relevant part that the recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness except as may be permitted by FERPA, or required by law, or to the extent necessary to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder).

identity, or a complainant has reported anonymously), then the grievance process may proceed if the Title IX Coordinator determines it is necessary to sign a formal complaint, even though the written notice of allegations does not include the complainant's identity.[594]

The Department agrees with commenters that concerns about confidentiality often affect a victim's willingness to report sexual assault. The final regulations aim to give complainants as much control as possible over: whether and how to report that the complainant has been victimized by sexual harassment; whether, or what kinds, of supportive measures may help the complainant maintain equal access to education; and whether to initiate a grievance process against the respondent. Each of the foregoing decisions can be made by a complainant with awareness of the implications for the complainant's anonymity or confidentiality. The final regulations ensure that complainants have any or all of the following options: the ability to report anonymously (though a recipient will be unable to provide supportive measures without knowing the complainant's identity); the ability to report and receive supportive measures while keeping the complainant's identity confidential from the respondent (unless the respondent must know the complainant's identity in order for the recipient to implement a supportive measure); and the right to file a formal complaint against the respondent, realizing that doing so means the

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[594] If the complainant's identity is discovered during the investigation, the recipient would need to send supplemental notice of allegations to the parties and treat the complainant as a party throughout the grievance process. *See* § 106.45(b)(2)(ii). Without a complainant (i.e., a person alleged to be the victim of sexual harassment) at some point being identified during an investigation, a recipient may find itself unable to meet the recipient's burden to gather evidence sufficient to reach a determination regarding responsibility. For example, without knowing a complainant's identity a recipient may not be able to gather evidence necessary to establish elements of conduct defined as "sexual harassment" under § 106.30, such as whether alleged conduct was unwelcome, or without the consent of the victim. In such a situation, the final regulations provide for discretionary dismissal of the formal complaint, or allegations therein. § 106.45(b)(3)(ii). A recipient's decision (made via the Title IX Coordinator) to initiate a grievance process over the wishes of a complainant, or where the complainant does not wish to participate, or where the complainant's identity is unknown, is evaluated under the deliberate indifference standard set forth in § 106.44(a).

respondent will know the complainant's identity, yet as to people outside the grievance process the complainant's identity must be kept confidential except as permitted by FERPA, required by law, or as necessary to conduct the grievance process.

Changes: We have added § 106.71(a) requiring recipients to keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as permitted by FERPA, required by law, or as necessary to carry out the purposes of 34 CFR part 106 to conduct any investigation, hearing, or judicial proceeding arising thereunder, which includes a grievance process.

Officials Other Than the Title IX Coordinator Filing a Formal Complaint

Comments: Commenters asked for clarification as to whether "officials with authority to institute corrective measures on behalf of the recipient" are authorized to file a formal complaint, or whether the Title IX Coordinator is the sole employee authorized to file a formal complaint. Commenters requested that § 106.30 be modified so that the complainant, the Title IX Coordinator, or "any institutional administrator" can file a formal complaint; commenters argued that there are many administrators who have a significant interest in ensuring that the recipient investigates potential violations of school policy. Commenters requested clarification as to whether by filing a formal complaint, the Title IX Coordinator becomes a party in the investigation, and if this means that the Title IX Coordinator must be given the rights that the grievance procedures give to complainants, or if not, then commenters wondered who would be treated as the complainant in cases where the victim did not sign the formal complaint. Commenters argued that a Title IX Coordinator who signs a formal complaint initiating

grievance procedures against a respondent is no longer neutral or impartial, is biased, and/or has a conflict of interest, especially where the Title IX Coordinator will also be the investigator.

Discussion: We appreciate the opportunity to clarify that the final regulations do not permit a formal complaint to be filed or signed by any person other than the complainant (i.e., the person alleged to be the victim of sexual harassment or the alleged victim's parent or guardian on the alleged victim's behalf, as appropriate) or the Title IX Coordinator. While it is true that school administrators other than the Title IX Coordinator may have significant interests in ensuring that the recipient investigate potential violations of school policy, for reasons explained above, the decision to initiate a grievance process in situations where the complainant does not want an investigation or where the complainant intends not to participate should be made thoughtfully and intentionally, taking into account the circumstances of the situation including the reasons why the complainant wants or does not want the recipient to investigate. The Title IX Coordinator is trained with special responsibilities that involve interacting with complainants, making the Title IX Coordinator the appropriate person to decide to initiate a grievance process on behalf of the recipient. Other school administrators may report sexual harassment incidents to the Title IX Coordinator, and may express to the Title IX Coordinator reasons why the administrator believes that an investigation is warranted, but the decision to initiate a grievance process is one that the Title IX Coordinator must make.[595]

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[595] This does not preclude recipient employees or administrators other than the Title IX Coordinator from implementing supportive measures for the complainant (or for a respondent). The final regulations, § 106.30 defining "supportive measures," require that the Title IX Coordinator is *responsible* for the effective implementation of supportive measures; however, this does not preclude other recipient employees or administrators from implementing supportive measures for a complainant (or a respondent) and in fact, effective implementation of most

The Department does not view a Title IX's Coordinator decision to sign a formal complaint as being adverse to the respondent. A Title IX Coordinator's decision to sign a formal complaint is made on behalf of the recipient (for instance, as part of the recipient's obligation not to be deliberately indifferent to known allegations of sexual harassment), not in support of the complainant or in opposition to the respondent or as an indication of whether the allegations are credible, have merit, or whether there is evidence sufficient to determine responsibility. To clarify this, we have removed the phrase "or on whose behalf the Title IX Coordinator has filed a formal complaint" from the proposed rules' definition of "complainant" in § 106.30. We have also revised the § 106.30 definition of "formal complaint" to state that when the Title IX Coordinator signs a formal complaint, the Title IX Coordinator does not become a complainant, or otherwise a party, to a grievance process, and must still serve free from bias or conflict of interest for or against any party.

In order to ensure that a recipient has discretion to investigate and adjudicate allegations of sexual harassment even without the participation of a complainant, in situations where a grievance process is warranted, the final regulations leave that decision in the discretion of the recipient's Title IX Coordinator. However, deciding that allegations warrant an investigation does not necessarily show bias or prejudgment of the facts for or against the complainant or respondent. The definition of conduct that could constitute sexual harassment, and the conditions necessitating a recipient's response to sexual harassment allegations, are sufficiently clear that a

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supportive measures requires the Title IX Coordinator to coordinate with administrators, employees, and offices outside the Title IX office (for example, notifying campus security of the terms of a no-contact order, or working with the school registrar to appropriately reflect a complainant's withdrawal from a class, or communicating with a professor that a complainant needs to re-take an exam).

Title IX Coordinator may determine that a fair, impartial investigation is objectively warranted as part of a recipient's non-deliberately indifferent response, without prejudging whether alleged facts are true or not. Even where the Title IX Coordinator is also the investigator,[596] the Title IX Coordinator must be trained to serve impartially,[597] and the Title IX Coordinator does not lose impartiality solely due to signing a formal complaint on the recipient's behalf.

Changes: We have revised the § 106.30 definition of "formal complaint" to mean a document "filed by a complainant or signed by the Title IX Coordinator" and clarified that when a Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party during the grievance process, and the Title IX Coordinator must comply with these final regulations including the obligation in § 106.45(b)(1)(iii) to be free from bias or conflict of interest. We have also revised the definition of "complainant" in § 106.30 to remove the phrase "or on whose behalf the Title IX Coordinator has filed a formal complaint."

Complexity of a Document Labeled "Formal Complaint"

Comments: Commenters argued that the document initiating a grievance process should be labeled something other than a "formal complaint" because calling it a formal complaint makes it sound as though the survivor is complaining, or whining, about having been assaulted.

Commenters argued that requiring signed complaints is one aspect of the proposed rules that would make the Title IX campus system too much like the legal system, and survivors already feel deterred from pursuing justice through criminal and legal systems. Commenters

[596] Section 106.45(b)(7) specifies that the decision-maker must be a different person from the Title IX Coordinator or investigator, but the final regulations do not preclude a Title IX Coordinator from also serving as the investigator.
[597] Section 106.45(b)(1)(iii).

argued that the § 106.30 definition of formal complaint was so legalistic that lawyers would have to get involved in every Title IX matter.

Commenters argued that students may think they have triggered a grievance procedure by reporting to the Title IX Coordinator only to find out that no investigation has begun because the student did not file a document meeting the requirements of a "formal complaint." Commenters argued that requiring a complainant to sign a written document with specific language about "requesting initiation of a grievance procedure" would result in some complainants believing they had filed a formal complaint when the exact paperwork was not filled out or signed correctly. Commenters asked whether a recipient would be deliberately indifferent if the recipient failed to tell a complainant who intended to file a formal complaint that the document filed failed to meet the requirements in § 106.30 and thus no grievance procedures had begun. Commenters requested clarification as to how a Title IX Coordinator should treat an "informal complaint" that did not meet the precise definition of a formal complaint. Commenters argued that the definition of "formal complaint" means that a recipient could dismiss a meritorious complaint, or refuse to investigate, solely for immaterial technical reasons, such as the document not being signed or failing to include specific language "requesting initiation" of the grievance procedures. Commenters argued that the definition of "formal complaint" would provide an arbitrary bureaucratic loophole that would excuse recipients for their willful indifference when paperwork is not completed perfectly.

Commenters argued that the § 106.30 definition of "formal complaint" would make it difficult or impossible for some students to file a formal complaint. Commenters stated, for example, that young children may not have learned how to write. Commenters stated that, for example, individuals with certain disabilities may have difficulty communicating in writing.

Commenters suggested that the definition be modified so that a formal complaint is "signed (or affirmed via another effective communication modality)" because otherwise, a student with a disability – especially with a communication disability or disorder – may be unable to file. Commenters suggested the definition be expanded to accommodate the needs of individuals with disabilities by accepting different communication modalities including oral, manual, AAC (augmentative and alternative communication) techniques, and assistive technologies.

Discussion: The final regulations continue to use the phrase "formal complaint" to describe the document that initiates a grievance process resolving sexual harassment allegations. The word "complaint" is commonly used in proceedings designed to resolve disputed allegations, and the word is used neutrally to describe that the person has brought allegations or charges of some kind, not pejoratively to imply that a person is unjustifiably "complaining" or "whining."[598]

"Formal complaint" is a specific term used in these final regulations to describe a document that initiates a grievance process against a respondent alleging Title IX sexual harassment. A grievance process that is consistent, transparent, and fair is necessarily a formal process, and parties should be apprised that initiating a grievance process is a serious matter. This does not necessitate involvement of lawyers or convert a recipient's Title IX grievance process into a court proceeding. However, we agree with commenters that the way that a formal complaint was described in proposed § 106.30[599] was more restrictive than necessary and did not take into account the common use of electronic or digital transmissions. We have revised and

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[598] For example, OCR refers to a "complainant" as a person who files a "complaint" with OCR alleging a civil rights law violation. *E.g.*, U.S. Dep't. of Education, Office for Civil Rights, *How the Office for Civil Rights Handles Complaints* (Nov. 2018), https://www2.ed.gov/about/offices/list/ocr/complaints-how.html.

[599] Proposed § 106.30 defined "formal complaint" as "a document signed by a complainant or by the Title IX Coordinator alleging sexual harassment against a respondent and requesting initiation of the recipient's grievance procedures consistent with § 106.45."

simplified the definition of a "formal complaint" to mean "a document filed by the complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment."

The § 106.30 definition of a formal complaint describes the purpose of the document, not requirements for specific language that can be used as a bureaucratic loophole for a recipient to avoid initiating a grievance process. The purpose of the formal complaint is to clarify that the complainant (or Title IX Coordinator) believes that the recipient should investigate allegations of sexual harassment against a respondent. The Department does not assume that recipients will treat complainants attempting to file a formal complaint differently from students who attempt to file similar school paperwork; for example, when a form is missing a signature, recipients generally inquire with the student to correct the paperwork. Recipients are under an obligation under § 106.44(a) to respond promptly in a way that is not clearly unreasonable in light of the known circumstances and this obligation extends to the circumstances under which a recipient processes a formal complaint (or a document or communication that purports to be a formal complaint). Under the final regulations, recipients also must document the basis for the recipient's conclusion that the recipient's response was not deliberately indifferent;[600] this provides an additional safeguard against a recipient intentionally treating imperfect paperwork as grounds for refusing to take action upon receipt of a document that purports to be a formal complaint.

We appreciate commenters' concerns that some students may be incapable of signing a document (for example, young students who have not learned how to write, or students with

[600] Section 106.45(b)(10)(ii).

certain disabilities). To address these concerns, we have revised the § 106.30 definition of "formal complaint" to describe a "document signed by a complainant" as "a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint." We have also added § 106.6(g) recognizing the legal rights of parents and guardians to act on behalf of complainants, including with respect to filing a formal complaint of sexual harassment.

Changes: We have revised the § 106.30 definition of "formal complaint" to describe a document, filed by a complainant or signed by a Title IX Coordinator, alleging sexual harassment, against a respondent, and requesting that the recipient investigate the allegation of sexual harassment. We have also revised the § 106.30 definition of "formal complaint" to explain that the phrase "document filed by a complainant" refers to a document or electronic submission (such as an e-mail or through an online portal provided for this purpose by the recipient) that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.

Parents' and Guardians' Rights to File a Formal Complaint

Comments: Commenters asserted that the proposed rules did not acknowledge that parents can file formal complaints on behalf of minor students and that the proposed rules therefore expect, for example, a third grade student to write down and sign a complaint document before getting help after experiencing sexual harassment. Commenters asserted that the formal complaint definition would leave minor students who may be incapable of writing and signing a document unprotected unless the Title IX Coordinator chooses to file a formal complaint on the student's behalf. Commenters argued that it is inappropriate to require a minor to sign any document

because minors lack the legal capacity to bind themselves by signature. Commenters wondered what schools must do if a parent later disagrees with their child's decision to file a formal complaint or if the minor's parent is not consulted prior to filing. Other commenters wondered how a school must handle a situation where the parent, but not the child, wishes to file a formal complaint. Commenters wondered if the proposed rules would allow a Title IX Coordinator to help a complainant fill out the contents of a formal complaint.

Discussion: To address commenters' concerns that the proposed rules did not contemplate the circumstances under which a parent might have the right to file a formal complaint on their child's behalf, we have added § 106.6(g), which acknowledges the legal rights of parents and guardians to act on behalf of a complainant, respondent, or other individual with respect to exercise of rights under Title IX, including but not limited to the filing of a formal complaint. Thus, if a parent has the legal right to act on behalf of their child, the parent may act on the student's behalf by, for example, signing a formal complaint alleging that their child was sexually harassed and asking the recipient to investigate. The parent does not, in that circumstance, become the complainant (because "complainant" is defined as an individual *who is alleged to be the victim* of sexual harassment)[601] but the final regulations clarify that a parent's (or guardian's) legal right to act on behalf of the complainant (or respondent) is not altered by these final regulations. The extent to which a recipient must abide by the wishes of a parent, especially in circumstances where the student is expressing a different wish from what the

[601] Section 106.30 (defining "complainant" to mean an individual "an individual *who is alleged to be the victim* of conduct that could constitute sexual harassment") (emphasis added).

student's parent wants, depends on the scope of the parent's legal right to act on the student's behalf.

Nothing in these final regulations precludes a Title IX Coordinator from assisting a complainant (or parent) from filling out a document intended to serve as a formal complaint; however, a Title IX Coordinator must take care not to offer such assistance to pressure the complainant (or parent) to file a formal complaint as opposed to simply assisting the complainant (or parent) administratively to carry out the complainant's (or parent's) desired intent to file a formal complaint. No person may intimidate, threaten, or coerce any person for the purpose of interfering with a person's rights under Title IX, which includes the right *not* to participate in a grievance process.[602]

Changes: We have added § 106.6(g) to the final regulations, acknowledging the legal rights of parents or guardians to act on behalf of a complainant, respondent, or other individual. We have added § 106.71 prohibiting retaliation and specifically protecting any individual's right to participate, or not participate, in a grievance process.

Methods of Reporting and Methods of Filing a Formal Complaint

Comments: Some commenters believed that the proposed rules would require students to report in person to a Title IX Coordinator (which, commenters asserted, is challenging for many students including those in schools that have satellite campuses and a single Title IX Coordinator located on a different campus). Commenters argued that a student who goes through the inconvenience of locating the Title IX Coordinator to make an in-person report, and then later

[602] Section 106.71 (prohibiting retaliation and specifically protecting any individual's right to participate or to choose not to participate in a grievance process).

decides to pursue a formal process, would need to once again go meet the Title IX Coordinator in-person to file a formal complaint. These commenters argued that the narrow, formal definition of "formal complaint" proposed in § 106.30 would impose unnecessary barriers for complainants and result in fewer formal complaints being filed. Commenters argued that requiring complainants to file formal complaints only with the Title IX Coordinator – who may be a school official with whom the complainant has no relationship – will make survivors less comfortable with the reporting process, when already only about ten percent of campus sexual assaults are reported.[603]

Commenters argued that a formal complaint should be allowed to be filed by telephone, e-mail, or in-person, at the complainant's discretion. Commenters wondered whether Title IX Coordinators have the discretion to help a complainant fill out a formal complaint; whether a Title IX Coordinator could write out a complainant's verbal report and have the complainant sign the document; and whether the complainant's signature could be an electronic signature. Commenters argued that without clarifying that the complainant may sign electronically, the proposed rules would make it impossible for complainants who are not physically present on campus (for example, due to studying abroad, or being enrolled in an online course) to file formal complaints. Other commenters expressed concern that electronic reporting systems would not be allowed under the proposed regulations. Commenters stated that many recipients (both elementary and secondary schools, and postsecondary institutions) use exclusively online, electronic submission systems; commenters suggested that § 106.30 should specify that a formal

[603] Commenters cited: U.S. Dep't. of Justice, Office of Justice Programs, National Institute of Justice, *Research Report: The Sexual Victimization of College Women* (2000).

complaint may be "submitted" or "filed" (but not "signed") to clarify that electronic submission systems can be used for the Title IX Coordinator to receive a formal complaint.

Discussion: Neither the proposed rules, nor the final regulations, required students to report in person to a Title IX Coordinator. However, to address commenters' concerns in this regard and to clarify that reporting to a Title IX Coordinator, and filing a formal complaint with the Title IX Coordinator, should be as accessible as possible for complainants, we have revised the § 106.30 definition of "formal complaint" to explain that a formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail by using the contact information required to be listed for the Title IX Coordinator under § 106.8(a), and by any additional method designated by the recipient. A formal complaint cannot be filed by telephone, because a formal complaint consists of a written document (or electronic submission, such as an e-mail or use of an online portal provided by the recipient for the purpose of accepting formal complaints); however, "any additional method designated by the recipient" may include an online submission system, and the final regulations now expressly reference the option for recipients to offer online portals for submission of formal complaints. The Department has also revised § 106.8(b) to specify that the contact information required to be listed for the Title IX Coordinator under § 106.8(a) must be prominently displayed on the recipient's website (if the recipient has a website) and in any of the recipient's handbooks or catalogs. As discussed above, neither the proposed rules, nor the final regulations, restrict the form in which notice (e.g., a report of alleged sexual harassment) is given to the Title IX Coordinator, an official with authority to institute corrective measures, or an elementary or secondary school employee. Such notice may be given to the Title IX Coordinator via the same contact information listed for the Title IX Coordinator in § 106.8(a) (including in person or by mail at the Title IX Coordinator's office address, by telephone, or by

e-mail), or by other means of communicating with the Title IX Coordinator.[604] The final regulations thus ensure that complainants have multiple clear, accessible methods for reporting (e.g., in person, telephone, mail, electronic mail) and multiple methods for filing formal complaints (e.g., in person, mail, electronic mail, any online portal provided by the recipient to allow electronic submissions of formal complaints), to reduce the inconvenience of "locating" the Title IX Coordinator in order to report or to file a formal complaint.[605]

We understand commenters' concerns that a student may not have a preexisting relationship with a Title IX Coordinator; however, we reiterate that filing a formal complaint is not necessary in order to report and receive supportive measures. The revisions to § 106.30 defining "formal complaint" give complainants the options of filing a formal complaint in person, by mail, by e-mail, and "any additional method designated by the recipient" so that the recipient has discretion to designate other methods for a formal complaint to be filed; further, a "document filed by a complainant" is stated to mean a mean a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant's physical or digital signature or otherwise indicates

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[604] Section 106.8(a) (expressly stating that any person may report sexual harassment by using any of the listed contact information for the Title IX Coordinator or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report, and such a report may be made "at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator.").

[605] We also reiterate that *any person* may report sexual harassment triggering the recipient's response obligations, although only a complainant (or Title IX Coordinator) may initiate a grievance process by filing or signing a formal complaint. We have revised § 106.8(a) to emphasize the fact that any person may report sexual harassment, whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sexual harassment, and we have also revised § 106.30, defining "actual knowledge," to state that "notice" constituting actual knowledge includes, but is not limited to, a report to the Title IX Coordinator as described in § 106.8(a). We have further revised § 106.8 to require recipients to notify all students, employees, parents and guardians of elementary and secondary school students, and others of the Title IX Coordinator's contact information, including prominently displaying that contact information on the recipient's website. These provisions ensure that all persons (not only complainants themselves) have a clear, accessible method of reporting sexual harassment.

that the complainant is the person filing the formal complaint. The final regulations therefore authorize a recipient to utilize electronic submission systems, both for reporting and for filing formal complaints. The final regulations do not preclude a Title IX Coordinator from helping a complainant fill out a formal complaint, so long as what the complainant files is a document or electronic submission that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.

Changes: We have revised the § 106.30 definition of "formal complaint" to specify that a formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under § 106.8(a), and by any additional method designated by the recipient. We have further revised this provision to state that "document filed by a complainant" means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant's digital or physical signature, or otherwise indicates that the complainant is the person filing the formal complaint.

Miscellaneous Concerns About the Formal Complaint Definition

Comments: Commenters wondered whether a complainant can file a formal complaint after having graduated. Commenters wondered whether a formal complaint could be filed against an unknown or unidentified respondent; commenters opined that the formal grievance procedures in § 106.45 seemed "elaborate" for circumstances where the perpetrator was not identified and thus there would be no possibility of punishment through a grievance proceeding. Commenters suggested that complainants should be allowed to make a formal complaint about systemic culture of harassment on a campus, not only against an individual respondent.

Discussion: The Department appreciates commenters' questions regarding whether a complainant may file a formal complaint after the complainant has graduated. The definition of "complainant" is any individual alleged to be the victim of conduct that could constitute sexual harassment; there is no requirement that the complainant must be a student, employee, or other designated relationship with the recipient in order to be treated as a "complainant" entitled to a prompt, non-deliberately indifferent response from the recipient. To clarify the circumstances under which a complainant may file a formal complaint (thereby requiring the recipient to investigate sexual harassment allegations) we have revised the § 106.30 definition of "formal complaint" to state that a complainant must be participating in, or attempting to participate in, the recipient's education program or activity at the time of filing a formal complaint. A complainant who has graduated may still be "attempting to participate" in the recipient's education program or activity; for example, where the complainant has graduated from one program but intends to apply to a different program, or where the graduated complainant intends to remain involved with a recipient's alumni programs and activities. Similarly, a complainant who is on a leave of absence may be "participating or attempting to participate" in the recipient's education program or activity; for example, such a complainant may still be enrolled as a student even while on leave of absence, or may intend to re-apply after a leave of absence and thus is still "attempting to participate" even while on a leave of absence. By way of further example, a complainant who has left school because of sexual harassment, but expresses a desire to re-enroll if the recipient appropriately responds to the sexual harassment, is "attempting to participate" in the recipient's education program or activity. Because a complainant is entitled under these final regulations to a prompt response that must include offering supportive measures, the Department's intention is that recipients will promptly implement individualized services

designed to restore or preserve the complainant's equal access to education,[606] regardless of whether a complainant files a formal complaint, so that if a complainant later decides to file a formal complaint, the complainant has already been receiving supportive measures that help a complainant maintain educational access.

The § 106.30 definition of "formal complaint" states that a formal complaint is a document that alleges sexual harassment "against a respondent," but the final regulations do not require a complainant to identify the respondent in a formal complaint. However, § 106.44(a) prohibits a recipient from imposing disciplinary sanctions on a respondent without first following a grievance process that complies with § 106.45.[607] Section 106.45(b)(2) requires the recipient to send the parties written notice of allegations including the identities of the parties, if known, "upon receipt of a formal complaint." Thus, a recipient in receipt of a complainant's formal complaint, where the complainant has refused to identify the respondent, will be unable to comply with the § 106.45 grievance process and will not be permitted to impose disciplinary sanctions against a respondent. In such a circumstance, the recipient still must promptly respond by offering supportive measures to the complainant, pursuant to §§ 106.44(a) and 106.44(b)(1).

Nothing in the final regulations precludes a recipient from responding to a complainant's request to investigate sexual harassment that allegedly has created a hostile environment on campus; however, a recipient cannot impose disciplinary sanctions against a respondent accused of sexual harassment unless the recipient first follows a grievance process that complies with § 106.45. A complaint filed by a complainant would not constitute a formal complaint triggering a

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[606] Section 106.44(a); § 106.30 (defining "supportive measures").
[607] *See also* § 106.45(b)(1)(i).

recipient's obligation to investigate unless it is a document alleging sexual harassment against a respondent, and the recipient would not be able to impose disciplinary sanctions against a respondent unless the respondent's identity is known so that the recipient follows a grievance process that complies with § 106.45. A recipient must investigate a complainant's formal complaint even if the complainant does not know the respondent's identity, because an investigation might reveal the respondent's identity, at which time the recipient would be obligated to send both parties written notice of the allegations under § 106.45(b)(2) and fulfill all other requirements of the § 106.45 grievance process.

Changes: We have revised § 106.30 defining "formal complaint" to provide that at the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.

Postsecondary Institution

Comments: Some commenters assumed that the Department's use of the term "institution of higher education" in the NPRM means an institution as defined in the Department's regulations implementing Title IV of the Higher Education Act of 1965, as amended, ("HEA") and thus concluded that the Department must undergo negotiated rulemaking in order to promulgate these final regulations.

Discussion: The Department's use of the term "institution of higher education" in the NPRM did not refer to "institution of higher education" as defined in the Department's regulations implementing Title IV of the HEA. As explained in more detail elsewhere in this preamble including the "Executive Orders and Other Requirements" subsection of the "Miscellaneous" section of this preamble, the Department is promulgating these regulations under Title IX and

not under the HEA. Accordingly, the Department is not subject to the requirement of negotiated rulemaking under Title IV of the HEA.

To make it exceedingly clear that these final regulations do not refer to "institutions of higher education" in the context of the HEA, the Department revised the final regulations to refer to "postsecondary institutions" instead of "institutions of higher education." The Department derives its definition of "postsecondary institution" from the existing definitions in Part 106 of Title 34 of the Code of Federal Regulations. The definition of "educational institution" in § 106.2(k) is a definition that applies to Part 106 of Title 34 of the Code of Federal Regulations. Section 106.2(k) defines an educational institution in relevant part as an applicant or recipient of the type defined by paragraph (l), (m), (n), or (o) of § 106.2. Paragraphs (l), (m), (n), and (o) of § 106.2 define an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, respectively. Accordingly, the Department defines a postsecondary institution as an institution of higher education as defined in § 106.2(l), an institution of undergraduate higher education as defined in § 106.2(m), an institution of professional education as defined in § 106.2(n), and an institution of vocational education as defined in § 106.2(o). In this manner, the Department defines the subset of educational institutions as defined in § 106.2(k) that constitute postsecondary institutions as defined in § 106.30. The remainder of the entities described as educational institutions in § 106.2(k) constitute elementary and secondary schools as explained in the section above on the definition of "elementary and secondary school." The definition of "postsecondary institution" applies only to §§ 106.44 and 106.45 of these final regulations.

Changes: The Department revises § 106.30 to define a "postsecondary institution" as used in §§ 106.44 and 106.45 to mean an institution of higher education as defined in § 106.2(l), an

institution of undergraduate higher education as defined in § 106.2(m), an institution of professional education as defined in § 106.2(n), and an institution of vocational education as defined in § 106.2(o), and replaces "institutions of higher education" with "postsecondary institutions" throughout the final regulations.

Respondent

Comments: At least one commenter appreciated that the Department clarified in its proposed definition that only a person in their individual capacity could be subjected to a Title IX investigation rather than an entire organization. Several commenters suggested that the Department alter the language from "respondent" to "responding party." Other commenters recommended adding the word "accused" instead of the word "reported" in an effort to eliminate bias from the proceedings. One commenter asserted that the word "reported" implies that only a mere accusation exists and the commenter argued that a mere accusation should not make a person a respondent. One commenter requested that the Department clarify that a respondent need not be a student, but may be a faculty or staff member. Another commenter asked for clarification regarding what constitutes a person "reported to be a perpetrator" since schools' obligations to the parties are only triggered when someone actually becomes a respondent or complainant.

Discussion: We acknowledge commenters' concerns with the language in the § 106.30 definition of "respondent." However, the Department declines to alter the term "respondent" to "responding party" because the two terms do not vary in a significant way and the term "respondent" is just as neutral as the proposed modification, without introducing potential confusion from use of "responding party" when throughout the final regulations the word "party" is used to refer to either a complainant or a respondent. The Department also disagrees with the

specific concern that using the language "reported" as opposed to "accused" to define the respondent, has the potential to bias the proceedings. The Department believes that the term "reported" carries a less negative connotation than the term "accused" without disadvantaging the complainant. We also acknowledge the suggestion that the final regulations clarify that a respondent can be a student, a faculty member, or other employee of the recipient, and the suggestion that the Department clarify whether a formal complaint is required for a party to become a "respondent." The Department believes that § 106.30 contains sufficiently clear, broad language indicating that any "individual" can be a respondent, whether such individual is a student, faculty member, another employee of the recipient, or other person with or without any affiliation with the recipient. The Department intentionally does not limit a "respondent" to include only individuals against whom a formal complaint has been filed, because even where a grievance process is not initiated, the recipient still has general response obligations under § 106.44(a) that may affect the person alleged to have committed sexual harassment (i.e., the respondent). While the terms "complainant" and "respondent" are commonly used when a formal proceeding is pending, in an effort to eliminate confusion and to promote consistency throughout the final regulations, the Department uses the terms "complainant" and "respondent" to identify the parties in situations where a formal complaint has not been filed as well as where a grievance process is pending.

Changes: None.

Sexual Harassment

Overall Support and Opposition for the § 106.30 Sexual Harassment Definition

Comments: Many commenters expressed support for the § 106.30 definition of sexual harassment. One commenter commended the Department's § 106.30 definition because it makes

clear that Title IX governs misconduct by colleges, not students, and addresses the real problem of sexual harassment while acknowledging that not all forms of unwanted sexual behavior – inappropriate and problematic as they may be – rise to the level of a Title IX violation on the part of colleges and universities. One commenter expressed strong support for shifting Title IX regulations to provide a clear, rational, understandable definition of what, precisely, constitutes sexual harassment and assault as opposed to current vague guidelines. One commenter stated that although some misinformed commenters and advocates have claimed the proposed rules would not require a school to respond to allegations of rape, the third prong of the § 106.30 definition clearly prohibits criminal sexual conduct itemized in incorporated regulation 34 CFR 668.46(a) including a single instance of rape. This commenter further expressed support for the second prong of the definition, which is limited to unwelcome conduct that is "severe, pervasive, and objectively offensive," which, the commenter stated, has proven to be the most controversial prong yet has three advantages: (1) it provides greater clarity and consistency for colleges and universities; (2) it minimizes the risk that federal definitions of sexual harassment will violate academic freedom and the free speech rights of members of the campus community; and (3) it recognizes that the Department's job is not to write new law. This commenter argued that if stakeholders desire a more expansive definition of sexual harassment, they should direct their concerns to Congress, and stated that the proposed rules clearly leave schools with the discretion to use their own, broader definitions of misconduct that do not fall within the school's Title IX obligations.

Several commenters supported the § 106.30 definition because they asserted that it would protect free speech and academic freedom while still requiring recipients to respond to sexual harassment that constitutes sex discrimination. One commenter argued that Title IX grants the

Department authority to impose procedural requirements on schools to effectuate the purpose of Title IX but not to redefine what discrimination is, and when it comes to peer harassment particularly, application of broad definitions modeled on Title VII (which, the commenter asserted, does not require denial of equal access or severity), rather than Title IX's narrower definition, has led to numerous infringements on student and faculty speech and expression. This commenter stated that based on the Department's experience observing how a broader definition has been applied, the Department reasonably may wish to adopt a narrower, clearer definition of harassment to avoid free speech problems, citing a Supreme Court case for the proposition that courts will not allow agencies to adopt regulations broadly interpreting a statute in a manner that raises potential constitutional problems.[608] This commenter argued that the Department cannot ban all unwelcome verbal conduct (i.e., speech), or even seriously offensive speech, and that correcting an overly broad definition of harassment is an appropriate exercise of an agency's authority. The commenter argued that a broad definition may result in an agency finding liability that a court later reverses or subjecting a recipient to a lengthy, speech-chilling investigation that courts later view as a free speech violation;[609] thus, an agency needs to define harassment narrowly to avoid free speech problems *ex ante* rather than try to rely on ad-hoc First Amendment exceptions to a broad definition.

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[608] Commenters cited: *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. and Const. Trades Council*, 485 U.S. 568, 574-575 (1988) (rejecting agency's broad interpretation of law because it would raise possible free speech problems); *NAACP v. Button*, 371 U.S. 415, 438 (1963) (stating broad prophylactic rules in the area of free expression are forbidden because the First Amendment demands precision of regulation).

[609] Commenters cited: *Rodriguez v. Maricopa Cmty. Coll. Dist.*, 605 F.3d 703 (9th Cir 2010); *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000); *Lyle v. Warner Bros.*, 132 P.3d 211, 300 (Cal. 2006) (Chin, J., concurring); *Meltebeke v. Bureau of Labor & Indus.*, 903 P.2d 351 (Or. 1995).

Several commenters supported the § 106.30 definition, arguing that the proposed rules correctly defined the harassment a college must respond to as severe, pervasive conduct that denies equal access to an education – not conduct or speech that is merely "unwelcome," as other commenters would like. One commenter argued that students and faculty must be able to discuss sexual issues, even if that offends some people who hear it, and the fact that speech is deeply offensive to a listener is not a sufficient reason to suppress it.[610] One commenter asserted that, contrary to the suggestion of other commenters who have argued that individual instances of unwelcome speech should be suppressed to prevent any possibility of a hostile environment later developing, such a prophylactic rule to prevent harassment would be a sweeping rule, grossly overbroad in violation of the First Amendment.[611] The commenter further argued that this First Amendment rule fully applies to colleges because the Supreme Court rejected the idea that "First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, 'the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'"[612] Thus, the commenter asserted, even vulgar or indecent college speech is protected.[613] This commenter argued that because the First Amendment does not permit broad prophylactic rules against harassing speech, for a college to punish speech that is not severe and pervasive is a violation of the First Amendment.[614] The commenter further argued that even if speech is severe *or* pervasive, and thus could otherwise violate Federal employment laws like Title VII, faculty speech that offends co-workers may be

[610] Commenters cited: *Snyder v. Phelps*, 562 U.S. 443 (2011).
[611] Commenters cited: *NAACP v. Button*, 371 U.S. 415, 438 (1963).
[612] Commenters cited: *Healy v. James*, 408 U.S. 169, 180 (1972).
[613] Commenters cited: *Papish v. Bd. of Curators*, 410 U.S. 667 (1973).
[614] Commenters cited: *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008).

protected under academic freedom when it does not target a specific employee based on race or gender[615] and the Supreme Court intentionally has adopted a narrower definition of harassment under Title IX than under Title VII, requiring that conduct be both severe and pervasive enough to deny equal educational access, as opposed to merely fostering a hostile environment through severe or pervasive conduct.[616] By contrast to the second prong of the § 106.30 definition, the commenter argued that the Department does have authority to require schools to process claims of groping-based assaults, even if the groping did not by itself deny educational access, as a prophylactic rule to prevent such conduct from recurring and spreading, and potentially causing more harm to the victim that culminates in denial of educational access; according to this commenter, the difference is that because ignoring even a misdemeanor sexual assault creates a high risk that such conduct will persist or spread to the point of denying access and prophylactic rules are constitutionally acceptable when applied to conduct (such as sexual assault), not speech.

One commenter asserted that we live in a hypersensitive age in which disagreeable views are considered an assault on students' emotional safety or health, even though such disagreement is protected by the First Amendment.[617] This commenter agreed with the proposed rules' requirement that speech must interfere with educational "access" and not merely create a hostile environment because from a First Amendment perspective, under schools' hostile learning environment harassment codes, students and campus newspapers have been charged with racial

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[615] Commenters cited: *Rodriguez v. Maricopa Cmty. Coll. Dist.*, 605 F.3d 703 (9th Cir. 2010).
[616] Commenters cited: *Davis v. Monroe Dep't. of Educ.*, 526 U.S. 629, 633, 650, 651, 652, 654 (1999) (noting that the Court repeated the severe "and" pervasive formulation five times).
[617] Commenters cited: Jonathan Haidt & Greg Lukianoff, *The Coddling of the American Mind* (Penguin Press 2018).

or sexual harassment for expressing commonplace views about racial or sexual subjects, such as criticizing feminism, affirmative action, sexual harassment regulations, homosexuality, gay marriage, or transgender rights, or discussing the alleged racism of the criminal justice system.[618] The commenter argued that to prevent speech on campus about racial or sexual subjects from being unnecessarily chilled or suppressed, a more limited definition of sexual harassment is necessary than the expansive hostile environment concept.[619] Another commenter stated that courts have struck down campus racial and gender harassment codes that banned speech that created a hostile environment, but did not cause more tangible harm to students.[620] This commenter argued that if a regulation or campus code bans hostile environments created from verbal conduct, without requiring more tangible harm, people can and will file complaints, and bring lawsuits, over constitutionally protected speech that offended them and that including a vague First Amendment exception in such codes or regulations is not enough to protect free speech because when liability or punishment is imposed, the decision-maker doing so will just claim that the penalty is not based on the content of the speech and that any First Amendment exception does not apply. The commenter argued that to protect free speech, the very definition of harassment must include a requirement that verbal conduct deny access to an education.

The commenter argued that the § 106.30 definition of harassment properly requires that verbal conduct be severe, not just pervasive or persistent as prior Department guidance

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[618] Commenters cited: Jerome Woehrle, *Free Speech Shrinks Due to Bans on Hostile or Offensive Speech*, LIBERTY UNYIELDING (Nov. 23, 2017), https://libertyunyielding.com/2017/11/23/free-speech-shrinks-due-bans-hostile-offensive-speech/ (citing various sources including books and articles).
[619] Commenters cited: *Rodriguez v. Maricopa Cmty. Coll. Dist.*, 605 F.3d 703 (9th Cir. 2010) (dismissing racial harassment lawsuit over instructor's racially insensitive e-mails about immigration based on the First Amendment, even though the e-mails were offensive to Hispanic employees).
[620] Commenters cited: *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995); *UWM Post v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991).

suggested. The commenter asserted that just because offensive ideas are pervasive or persistent on a college campus does not strip the ideas of First Amendment protection and thus, only severe verbal conduct, such as fighting words, threats, and intentional infliction of severe emotional distress, should be prohibited. One commenter similarly argued that the same result is appropriate in the elementary and secondary school context, arguing that the Supreme Court's *Davis* decision expressly required that conduct be severe and pervasive for Title IX liability, unlike workplace conduct under Title VII, and that the Court did so precisely because of the inevitability that elementary and secondary school students frequently behave in ways that would be unacceptable among adult workers.[621] The commenter surmised that the *Davis* Court also likely did so to address free speech concerns raised by amici, who discussed serious problems with using the broader workplace severe or pervasive standard for college students' speech. According to this commenter, college students have broader free speech rights than employees do, and the harassment definition as to their verbal conduct thus needs to be narrower under Title IX than under Title VII. Similarly, another commenter asserted that colleges are not like workplaces where it may be natural to ban offensive speech to maximize efficiency or prevent a hostile or offensive environment; rather, colleges exist for the purpose of exchanging ideas and pursuing the truth even if words and ideas offend listeners.[622] Thus, the commenter asserted, schools should not be required to punish speakers unless their speech interferes with access to an education; according to this commenter, discussion of unpleasant sexual realities and unpopular viewpoints should not be silenced.

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[621] Commenters cited: *Davis*, 526 U.S. 629, 652 (1999).
[622] Commenters cited: *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) (holding hostile environment harassment code was unconstitutionally vague and overbroad and was not a valid prohibition of fighting words).

One commenter asserted that the *Davis* standard, incorporated into the second prong of the § 106.30 definition, allows schools to prohibit sexual violence, to discipline those who commit it, and to remedy its effects and also allows schools to punish students when they determine that a student has engaged in expression (without accompanying physical or other conduct) that is discriminatory based on sex and that interferes with a student's access to education because of its severity, pervasiveness, and objective offensiveness.[623] This commenter stated it is precisely because expression, and not just physical conduct, may be restricted or punished as harassment that the Supreme Court carefully crafted the *Davis* standard for Title IX, reiterating it multiple times in its majority opinion and distinguishing it from the employment standard applied under Title VII.

One commenter asserted that, to the extent the proposed regulations appear to be a departure from a legally sound approach, as some critics have alleged, that is only because the Departments of Education and Justice have, in recent years, insisted upon an unconstitutionally broad definition of sexual harassment unsupported by statutes, regulations, or case law while the new proposed definition is in fact a welcome return to consistency with the law itself. This commenter further noted that while *Davis* sets forth constitutional guidelines for what may and

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[623] Commenters further argued that there is no doubt that First Amendment interests are implicated when expression on public college campuses is regulated; as the Supreme Court has established, "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). The Supreme Court has also rejected the idea that "because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, 'the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" *Healy v. James*, 408 U.S. 169, 180 (1972) (internal citations omitted). Further, these protections apply even to highly offensive speech on campus: "[T]he mere dissemination of ideas – no matter how offensive to good taste – on a state university campus may not be shut off in the name alone of 'conventions of decency.'" *Papish v. Bd. of Curators*, 410 U.S. 667, 670 (1973) (internal citations omitted).

may not be punished under Title IX, it does not preclude recipients from addressing conduct that does not meet that standard, in non-punitive ways including for example providing the complainant with supportive measures, responding to the conduct in question with institutional speech, or offering programming designed to foster a welcoming campus climate more generally.

One commenter supported the § 106.30 definition based on belief that the Federal government should not make a solution to problems of interpersonal relations (and sometimes intimate relations) a precondition to the receipt of Federal funds because schools do not hold a "magic bullet" to prevent all student relationships from going bad, and university resources should not be diverted to respond to civil rights investigations or litigation based on just a student's post-hoc, subjective feelings of being harassed or disrespected. Another commenter believed the new definition would stop schools from acting as the "sex police." This commenter argued that schools have interpreted the current, extremely broad, definition to include asking too many times for sex; nine second stares; fist bumps; and wake up kisses, effectively requiring schools to police the sex lives of students. One commenter supported the § 106.30 definition asserting that harassment definitions should not assume weaknesses or vulnerabilities that the genders have spent decades trying to erase. Other commenters supported the definition believing it would benefit those truly sexually harassed or assaulted and put a stop to false accusations after regretful hookups. One commenter asserted that a clear definition of sexual harassment actionable under Title IX is crucial to ensure that no woman feels ignored or mistreated by a particular investigator or administrator and thus making the definition consistent with Supreme Court precedent is an important advancement for women.

Discussion: The Department appreciates commenters' support for the § 106.30 definition of sexual harassment. The Department agrees that the final regulations utilize a sexual harassment

definition appropriate for furthering Title IX's non-discrimination mandate while acknowledging the unique importance of First Amendment freedoms in the educational context. As described in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, the NPRM proposed a three-pronged definition of sexual harassment recognizing *quid pro quo* harassment by any recipient employee (first prong), unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to education (second prong), and sexual assault (third prong).

Overall, as revised in these final regulations, this three-part definition in § 106.30 adopts the Supreme Court's formulation of actionable sexual harassment, yet adapts the formulation for administrative enforcement in furtherance of Title IX's broad non-discrimination mandate by adding other categories (*quid pro quo*; sexual assault and three other Clery Act/VAWA offenses[624]) that, unlike the *Davis* formulation, do not require elements of severity, pervasiveness, or objective offensiveness. The Department assumes that a victim of *quid pro quo* sexual harassment or the sex offenses included in the Clery Act, as amended by VAWA, has been effectively denied equal access to education. The § 106.30 definition captures categories of misconduct likely to impede educational access while avoiding a chill on free speech and academic freedom. The Department agrees with commenters noting that the Department has a responsibility to enforce Title IX while not interfering with principles of free speech and academic freedom, which apply in elementary and secondary schools as well as postsecondary

[624] These final regulations expressly include four Clery Act/VAWA offenses as sexual harassment as defined in § 106.30: sexual assault, dating violence, domestic violence, and stalking.

institutions in a manner that differs from the workplace context where Title VII prohibits sex discrimination.

The Department agrees that the Supreme Court carefully and deliberately crafted the *Davis* standard for when a recipient must respond to sexual harassment in recognition that school environments are unlike workplace environments. Precisely because expressive speech, and not just physical conduct, may be restricted or punished as harassment, it is important to define actionable sexual harassment under Title IX in a manner consistent with respect for First Amendment rights, and principles of free speech and academic freedom, in education programs and activities. Likewise, the Department agrees with the commenter who noted the distinction between a standard for when speech is actionable versus a standard for when physical conduct is actionable; the former requires a narrowly tailored formulation that refrains from effectively applying, or encouraging recipients to apply, prior restraints on speech and expression, while the latter raises no constitutional concerns with respect to application of broader prohibitions. Thus, *quid pro quo* harassment[625] and the four Clery Act/VAWA offenses constitute *per se* actionable sexual harassment, while the "catch-all" *Davis* formulation that covers purely verbal harassment also requires a level of severity, pervasiveness, and objective offensiveness. The "catch-all"

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[625] While *quid pro quo* harassment by a recipient's employee involves speech, the speech is, by definition, designed to compel conduct; thus, the Department believes that a broad prohibition against an employee conditioning an educational benefit on participation in unwelcome sexual conduct does not present constitutional concerns with respect to protection of speech and expression. *See, e.g.*, *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 207 (3d Cir. 2001) ("government may constitutionally prohibit speech whose *non-expressive* qualities promote discrimination. For example, a supervisor's statement 'sleep with me or you're fired' may be proscribed not on the ground of any expressive idea that the statement communicates, but rather because it facilitates the threat of discriminatory conduct. Despite the purely verbal quality of such a threat, it surely is no more 'speech' for First Amendment purposes than the robber's demand 'your money or your life.'") (emphasis in original).

Davis formulation is a narrowly tailored standard to ensure that speech and expression are prohibited only when their seriousness and impact avoid First Amendment concerns.

The Department does not intend, through these final regulations, to encourage or discourage recipients from governing the sex and dating lives of students, or to opine on whether or not recipients have become the "sex police;" whether such a trend is positive or negative is outside the purview of these final regulations. The Department's definition of sexual harassment is designed to hold recipients accountable for meaningful, fair responses to sexual harassment that violates a person's civil right to be free from sex discrimination, not to dictate a recipient's role in the sex or dating lives of its students. The Department emphasizes that any person can be a victim, and any person can be a perpetrator, of sexual harassment, and like the Title IX statute itself, these final regulations are drafted to be neutral toward the sex of each party.[626]

Changes: We have revised the § 106.30 definition of sexual harassment in four ways: First, by moving the clause "on the basis of sex" from the second prong to the introductory sentence of the entire definition to align with Title IX's focus on discrimination "on the basis of sex" for all conduct that constitutes sexual harassment; second, by specifying that the *Davis* elements in the second prong (severe, pervasive, objectively offensive, denial of equal access) are determined under a reasonable person standard; third, by adding the other three Clery Act/VAWA sex offenses (dating violence, domestic violence, and stalking) to the sexual assault reference in the third prong; and fourth, by referencing the Clery Act and VAWA statutes rather than the Clery Act regulations.

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[626] *Compare* 20 U.S.C. 1681(a) ("*No person* in the United States shall, on the basis of sex, be excluded …") (emphasis added) *with* § 106.30 (defining "complainant" to mean "*an individual* who is alleged to be the victim…") (emphasis added).

Comments: Many commenters opposed the § 106.30 definition of sexual harassment, with some commenters arguing that the definition is unfair, would make schools unsafe and vulnerable and retraumatize survivors, is misogynistic, and promotes a hostile environment. Commenters also stated that it would negatively impact all students, especially LGBTQ students including transgender and non-binary people who are already more reluctant to report for fear of facing bias. Many commenters directed the Department to information and data about prevalence, impact, and other dynamics of sexual harassment that is addressed in the "General Support and Opposition" section of this preamble, arguing that the "narrowed" or "stringent" definition of sexual harassment in the NPRM would increase the prevalence, impact, and costs of sexual harassment on all victims and decrease or chill reporting of sexual harassment including disproportionately negative consequences for particular demographic populations. Many commenters asserted that the proposed definition fails to encompass the wide range of types of sexual harassment that students frequently face. Many commenters argued that requiring schools to only investigate the most serious cases gives a green light to all kinds of inappropriate behavior that should also be investigated. A few commenters contended that screening out harassment claims that do not meet certain thresholds contributes to a society-wide problem where from a young age girls are told in subtle and less subtle ways to be good, nice, and quiet, that girls don't matter as much as boys, and that speaking up to say something against a boy will not be taken seriously.

One commenter asserted that *Alexander v. Yale* established that sexual harassment and assault in schools is not only a crime, but also impedes equitable access to education.[627] Several

[627] Commenters cited: *Alexander v. Yale Univ.*, 459 F. Supp. 1 (D. Conn. 1977).

commenters asserted that any act of rape or assault denies the victim the ability to successfully participate in college and that a person who is raped or assaulted is traumatized, which affects all aspects of college participation and academic performance. Many commenters contended that if enacted, the proposed rules would raise a question for a victim: was my rape/assault bad enough or severe enough to warrant someone listening to me?

Several commenters asserted that by narrowing the definition of sexual harassment, the proposed rules would invalidate the adverse experiences to which victims have been subjected. One commenter argued that while there is no silver bullet to fixing the problem of sexual assault and harassment, narrowing what actions are deemed assault in the realm of Title IX will muddy the waters even further; the commenter argued that what people perceive as vague is necessary to ensure victims are being treated fairly. Several commenters asserted that as all victims of harassment are unique, so are forms of harassment unique and should remain widely defined.

Several commenters argued that the definitions of sexual harassment need to be developed further to include cultural differences in sexual harassment and discrimination. Other commenters asserted that the § 106.30 definition of sexual harassment is very limiting compared to what students on campus really feel and experience; further, students may understand an experience differently based on race, sex, and cultural factors leading to misunderstanding as to what sexual assault or sexual harassment is or is not. A few commenters argued that sexual violence or sexual violation would be a better term to use than sexual harassment. At least one commenter asserted that accused students sometimes do not recognize their behavior as violent and wondered how that reality plays into Title IX reform. At least one commenter characterized the use of qualifiers like severe and pervasive in the sexual harassment definition as creating a

fact-bound focus on the behavior of the victim, an unfair result given that much of the conduct complained about may also be criminal.

Discussion: The Department disagrees that the three-pronged definition of sexual harassment in § 106.30 is unfair, misogynistic, will make schools unsafe, leave students vulnerable, retraumatize survivors, promote a hostile environment, or disadvantage LGBTQ students. As described above, the definition is rooted in Supreme Court Title IX precedent and principles of free speech and academic freedom, applies equally to all persons regardless of sexual orientation or gender identity, provides clear expectations for when schools legally must respond to sexual harassment, and leaves schools discretion to address misconduct that does not meet the Title IX definition. The Department appreciates the data and information commenters referred to regarding the prevalence and impact of sexual harassment on students (and employees) of all ages and characteristics. Precisely because sexual harassment affects so many students in such detrimental ways, the Department has chosen, for the first time, to exercise its authority under Title IX to codify regulations that mandate school responses to assist survivors in the aftermath of sexual harassment.

The Department does not disagree with commenters' characterizations of the *Davis* standard as "narrow" or even "stringent," but we contend that as a whole, the range of conduct prohibited under Title IX is adequate to ensure that abuse of authority (i.e., *quid pro quo*), physical violence, and sexual touching without consent (i.e., the four Clery Act/VAWA offenses) trigger a school's obligation to respond without scrutiny into the severity or impact of the conduct, while verbal and expressive conduct crosses into Title IX sex discrimination (in the form of sexual harassment) when such conduct is so serious that it effectively denies a person equal access to education. As a whole, the definition of sexual harassment in § 106.30 is

significantly broader than the *Davis* standard alone,[628] and in certain ways broader than the judicial standards applied to workplace sexual harassment under Title VII.[629] The final regulations provide students, employees, and recipients clear direction that when incidents of *quid pro quo* harassment or Clery Act/VAWA offenses are reported to the recipient, the recipient must respond without inquiring into the severity or pervasiveness of such conduct. The Department understands commenters' concerns that the *Davis* standard's elements (severity, pervasiveness, and objective offensiveness) will exclude from Title IX incidents of verbal harassment that do not meet those elements. However, the Department does not agree that this standard for verbal harassment (and physical conduct that does not constitute a Clery Act/VAWA offense included in these final regulations) will discourage students or employees from reporting harassment, fail to require recipient responses to a wide range of sexual harassment frequently faced by students, or send the message that girls do not matter as much as boys. The Department believes that State and local educators desire a safe, learning-conducive environment for students and employees, and that recipients will evaluate incidents under the *Davis* standard from the perspective of a reasonable person in the shoes of the complainant, such that the ages, abilities, and relative positions of authority of the individuals involved in an incident will be taken into account. To reinforce this, the final regulations revise the second

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[628] This is because the *Davis* standard, alone, evaluates even physical assaults and violence through the lens of whether an incident is severe, pervasive, and objectively offensive so as to deny a person equal access; however, under these final regulations these elements do not apply to sex-based incidents of *quid pro quo* harassment, sexual assault, dating violence, domestic violence, or stalking.

[629] Under Title VII, sexual harassment (including *quid pro quo*, hostile environment, and even sexual assault) must be shown to alter the conditions of employment. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986). Under these final regulations, *quid pro quo* harassment, sexual assault, dating violence, domestic violence, and stalking do not require a showing of alteration of the educational environment. As previously stated, the Department assumes that a victim of *quid pro quo* sexual harassment or the criminal sex offenses included in the Clery Act, as amended by VAWA, has been effectively denied equal access to education.

prong of the sexual harassment definition to specify that the *Davis* elements are "determined by a reasonable person" to be so severe, pervasive, and objectively offensive that a person is effectively denied equal access to education. The Department does not dispute commenters' characterization that only serious situations will be actionable under this definition, but following the Supreme Court's reasoning in *Davis*, that stricture is appropriate in educational environments where younger students are still learning social skills and older students benefit from robust exchange of ideas, opinions, and beliefs.

Contrary to commenters' assertions, neither the *Davis* standard nor the sexual harassment definition holistically gives a green light to inappropriate behavior. Rather, the three-pronged definition of sexual harassment in § 106.30 provides clear requirements for recipients to respond to sexual harassment that constitutes sex discrimination prohibited under Title IX, while leaving recipients flexibility to address other forms of misconduct to the degree, and in the manner, best suited to each recipient's unique educational environment.

The Department agrees with commenters that for decades, sexual harassment has been a recognized form of sex discrimination that impedes equal access to education, and that rape and assault traumatize victims in ways that negatively affect participation in educational programs and activities. For this reason, contrary to the misunderstanding of many commenters, the Department intentionally included sexual assault as a *per se* type of sexual harassment rather than leaving sexual assault to be evaluated for severity or pervasiveness under the *Davis* standard. No student or employee traumatized by sexual assault needs to wonder whether a rape or sexual assault was "bad enough" or severe enough to report and expect a meaningful response from the survivor's school, college, or university. Far from narrowing what constitutes sexual assault, the Department incorporates the offense of sexual assault used in the Clery Act, which

broadly defines sexual assault to include all the sex offenses listed by the FBI's Uniform Crime Reporting system. The Department agrees that all victims of harassment are unique, and that harassment can take a myriad of unique forms. For this reason, the Department defines sexual harassment to include the four Clery Act/VAWA offenses, leaves the concept of *quid pro quo* harassment broad and applicable to any recipient employee, and does not limit the endless variety of verbal or other conduct that could meet the *Davis* standard. While understanding that sexual harassment causes unique harm to victims distinct from the harm caused by other misconduct, the final regulations define sexual harassment similar to the way in which fraud is understood in the legal system, where "Fraud is a generic term, which embraces all the multifarious means which human ingenuity can devise and which are resorted to by one individual to gain an advantage over another by false suggestions or by the suppression of the truth."[630] Similarly, sexual harassment under § 106.30 is a broad term that encompasses the "multifarious means which human ingenuity can devise" to foist unwelcome sex-based conduct on a victim jeopardizing educational pursuits. Thus, the Department agrees with commenters that some level of open-endedness is necessary to ensure that relevant misconduct is captured. The Department believes that the § 106.30 definition provides standards that are clear enough so that victims, perpetrators, and recipients understand the type of conduct that will be treated as sex discrimination under Title IX, and open-ended enough to not artificially foreclose behaviors that may constitute actionable sexual harassment.

The Department understands commenters' concerns that cultural differences can impact the way that sexual harassment is experienced. Cultural and other personal factors can affect

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[630] *Stapleton v. Holt*, 250 P.2d 451, 453-54 (Okla. 1952).

sexual harassment and sexual violence dynamics, and the Department believes the definition of sexual harassment must remain applicable to all persons, regardless of cultural or other identity characteristics. To the extent that cultural or other personal factors affect a person's understanding about what constitutes sexual harassment, the Department notes that with one exception,[631] no type of sexual harassment depends on the intent or purpose of the perpetrator or victim. Thus, if a perpetrator commits misconduct that meets one or more of the three prongs, any misunderstanding due to cultural or other differences does not negate the commission of a sexual harassment violation. Similarly, a respondent's lack of comprehension that conduct constituting sexual harassment violates the bodily or emotional autonomy and dignity of a victim does not excuse the misconduct, though genuine lack of understanding may (in a recipient's discretion) factor into the sanction decision affecting a particular respondent, or a recipient's willingness to facilitate informal resolution of a formal complaint of sexual harassment.

While the Department appreciates commenters' suggestions that "sexual violence" or "sexual violations" would be preferred terms in place of "sexual harassment," for clarity and ease of common understanding, the Department uses "sexual harassment" as the Supreme Court used that term when acknowledging that sexual harassment can constitute a form of sex discrimination covered by Title IX.

The Department disagrees that the *Davis* standard inappropriately or unfairly creates a fact-bound focus on the *victim's* behavior; rather, elements of severity, pervasiveness, and

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[631] The one exception is the offense of "fondling," included in the Clery Act under the term "sexual assault." Under the Clery Act (referring to the FBI's Uniform Crime Reporting system), fondling is a sex offense that means the "touching of the private body parts of another person *for the purpose of sexual gratification*, without the consent of the victim[.]" *E.g.,* U.S. Dep't. of Education, Office of Postsecondary Education, *The Handbook for Campus Safety and Security Reporting* 3-6 (2016), https://www2.ed.gov/admins/lead/safety/handbook.pdf. (emphasis added).

objective offensiveness focus factually on the nature of the misconduct itself – not on the victim's response to the misconduct. To reinforce and clarify that position, we have revised § 106.30 defining "sexual harassment" to expressly state that the *Davis* elements of severity, pervasiveness, objective offensiveness, and effective denial of equal access, are evaluated from the perspective of a "reasonable person," so that the complainant's individualized reaction to sexual harassment is not the focus when a recipient is identifying and responding to Title IX sexual harassment incidents or allegations.

Changes: We have revised the § 106.30 definition of sexual harassment by specifying that the elements in the *Davis* standard (severe, pervasive, objectively offensive, and denial of equal access) are determined under a reasonable person standard.

Comments: Several commenters asserted that the § 106.30 definition ignores a multitude of objectionable actions thereby excusing large swaths of harassing activity from scrutiny under Title IX. Other commenters objected to the § 106.30 definition on the ground that there are a wide variety of circumstances in which unwelcome conduct on the basis of sex would violate Title IX, but which would fall outside the proposed definition of sexual harassment; several such commenters argued that the net effect of the proposed definition would be to exempt from enforcement by the Department several distinct categories of Title IX violations, and under Title IX the Department has no authority to create such exemptions.

A few commenters asserted that some sexual predators engage in grooming behaviors intended to sexualize an abuser's relationships with children gradually while building a sense of

trust with intended victims.[632] Commenters asserted that grooming behaviors can include behaviors such as making inappropriate jokes, sharing pornographic photos or videos, inappropriately entering locker rooms when students are undressing, singling out children for gifts, trips or special tasks, and finding times and places to be alone with children. Commenters argued that under the proposed rules, these behaviors might not meet the definition of sexual harassment, yet responding to such behaviors is essential to preventing child sexual abuse.

Some commenters expressed concern that the § 106.30 definition discounts certain types of sex-based harassment that, although ostensibly "less severe," nonetheless adversely affect survivors' participation in educational programs. A few such commenters categorized types of sex-based harassment[633] as: (i) "Sexual assault" defined as involving any unwelcome sexual contact, which the commenters stated is covered by the proposed rules' definition of harassment; (ii) "sex-based harassment" as an umbrella term to mean behavior that derogates, demeans, or humiliates an individual based on that individual's sex but does not involve physical contact, and which comes in three forms: "sexual coercion" or *quid pro quo* involving bribes or threats that make an important outcome contingent on the victim's sexual cooperation; "unwanted sexual attention" involving expressions of romantic or sexual interest that are unwelcome, unreciprocated, and offensive to the recipient; and "gender harassment" encompassing verbal

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[632] Commenters cited: Helen C. Whittle *et al.*, *A Comparison of Victim and Offender Perspectives of Grooming and Sexual Abuse*, 36 DEVIANT BEHAVIOR 7 (2015).

[633] Commenters cited: Louise Fitzgerald *et al.*, *Measuring sexual harassment: Theoretical and psychometric advances*, 17 BASIC & APPLIED SOCIAL PSYCHOL. 4 (1995); Jennifer L. Berdahl, *Harassment based on sex: Protecting social status in the context of gender hierarchy*, 32 ACAD. OF MGMT. REV. 641 (2007); Emily Leskinen *et al.*, *Gender harassment: Broadening our understanding of sex-based harassment at work*, 35 LAW & HUM. BEHAVIOR 1 (2011); National Academies of Science, Engineering, and Medicine, *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine* (Frasier F. Benya *et al.* eds., 2018).

and nonverbal behaviors not aimed at sexual cooperation but that convey insulting, hostile, and degrading attitudes about one sex (though devoid of sexual content). These commenters asserted that while sexual coercion remains covered under the §106.30 definition (under the first prong regarding *quid pro quo* harassment), unwanted sexual attention is covered only if it is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to education, and gender harassment is not covered at all by the regulatory definition even though it is the most common type of sex-based harassment in academia as well as the workplace. These commenters also asserted that research shows that gender harassment that is either severe or occurs frequently over a period of time can result in the same level of negative professional, academic, and psychological outcomes as isolated incidents of sexual coercion.[634] These commenters concluded that the only way to truly combat sexual harassment is to enact policies that address and prevent the most common form of sexual harassment (i.e., gender harassment).

Several commenters expressed concern that the proposed rules do not expressly address how technology has changed in the decades since Title IX was enacted (e.g., e-mail, the internet) and asserted that the final regulations must squarely address cyber-harassment on the basis of sex, which commenters stated is a severe and growing trend for students.[635] In addition to asking

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[634] Commenters cited: National Academies of Science, Engineering, and Medicine, *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine* 69 (Frasier F. Benya *et al.* eds., 2018). Commenters further noted that sexual minorities experience gender harassment at more than double the rates of heterosexuals. *Id.* at 46.

[635] Commenters cited: American Association of University Women, *Crossing the Line: Sexual Harassment at School* (2011), for the proposition that: in the 2010-2011 school year, 36 percent of girls, 24 percent of boys, and 30 percent of all students who took the survey in grades seven through 12 experienced sexual harassment online; 18 percent of these students did not want to go to school, 13 percent found it hard to study, 17 percent had trouble sleeping, and eight percent wanted to stay home from school. Commenters also asserted that college students, too, face online sexual harassment, and in support of this assertion, some commenters cited to: David Goldman, *Campus Uproar Over Yik Yak App After Sex, Harassment, Murder*, CNN.COM (May 7, 2015), https://money.cnn.com/2015/05/07/technology/yik-yak-university-of-mary-washington/index html.

that online or cyber-harassment be explicitly referenced, several of these commenters also asserted that the appropriate standard for judging whether cyber-harassment must be responded to is whether such harassment meets the description of harassment set forth in the Department's 2001 Guidance.

Several commenters asserted that school boards in elementary and secondary schools will encounter confusion among the proposed Title IX sexual harassment regulatory definition, State laws governing bullying, abuse, or crimes that mandate reports to law enforcement or child welfare agencies, and school discipline violations, each of which has its own procedures that must be followed. Similarly, several commenters asserted that postsecondary institutions will encounter confusion due to differences between the § 106.30 definition of sexual harassment and various State laws that define sexual harassment or sexual misconduct more broadly; these commenters referenced laws in states such as California, New York, New Jersey, Illinois, and others.

At least one commenter asserted that the requirement that any of the conduct defined as sexual harassment under § 106.30 must be "on the basis of sex" lacks guidance as to how that element must be applied; one commenter wondered if this element means that a complainant must try to prove the respondent's state of mind when most respondents would simply deny acting on the basis of the victim's sex and insist that the action was based on romance, anger, emotion, etc., or whether a complainant would need to provide statistics to show a disparate impact on people of the victim's sex in order to show that the respondent's conduct was "on the basis of sex."

At least one commenter urged the Department to seek input from stakeholders, including education leaders, on what types of technical assistance would be most helpful to school districts seeking to implement the regulatory definition.

Discussion: The Department acknowledges that not every instance of subjectively unwelcome conduct is captured under the three-pronged definition of sexual harassment in § 106.30. However, the Department believes that the conduct captured as actionable under Title IX constitutes precisely the sex-based conduct that the Supreme Court has indicated amounts to sex discrimination under Title IX, as well as physical conduct that might not meet the *Davis* definition (e.g., a single instance of rape, or a single instance of *quid pro quo* harassment). The Department disagrees that it is exempting categories of Title IX violations from coverage under Title IX; to the contrary, the § 106.30 definition ensures that sex discrimination in the form of sexual harassment clearly falls under recipients' Title IX obligations to operate education programs and activities free from sex discrimination.

The Department appreciates commenters' concerns regarding grooming behaviors, which can facilitate sexual abuse. While the sexual harassment definition does not identify "grooming behaviors" as a distinct category of misconduct, some of the conduct identified by commenters and experts as constituting grooming behaviors may constitute § 106.30 sexual harassment, and behaviors that do not constitute sexual harassment may still be recognized as suspect or inappropriate and addressed by recipients outside Title IX obligations.

Similarly, the Department understands commenters' and experts' assertions that unwelcome conduct that is not "severe" can still adversely impact students and employees. The 2018 comprehensive report on "Sexual Harassment of Women" by the National Academies of

Sciences, Engineering, and Medicine (NASEM)[636] helpfully synthesizes decades of sexual harassment research and analysis to classify sex-based harassment as either sexual assault, or any of three types of sex-based harassment (sexual coercion, unwanted sexual attention, or gender harassment). The Department agrees with commenters' assertions that sexual assault and sexual coercion[637] are covered under the regulatory definition, and agrees that unwanted sexual attention is covered if such conduct meets the second prong (the *Davis* standard), but the Department disagrees with commenters' assertion that what NASEM and others label as "gender harassment" is not covered under § 106.30. What the Department understands NASEM and commenters to mean by gender harassment is verbal and nonverbal behaviors, devoid of sexual content, that convey insulting, hostile, degrading attitudes about a particular sex. The language of the second prong of the § 106.30 definition describes conduct on the basis of sex that is unwelcome, determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to education. That description encompasses what commenters label as "gender harassment" (as well as what commenters label "unwanted sexual attention") where the verbal or other conduct meets the *Davis* elements. Thus, the § 106.30 definition appropriately covers what NASEM and commenters describe as the most common type of sex-based harassment in academia and the workplace, as well as other types of sexual harassment identified by such commenters and experts. The Department appreciates the efforts made by NASEM and others to analyze the prevalence of sexual harassment within

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[636] Commenters cited: National Academies of Science, Engineering, and Medicine, *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine* (Frasier F. Benya *et al.* eds., 2018).

[637] Commenters referred to "sexual coercion" as *quid pro quo* harassment.

academia and to recommend approaches to reduce that prevalence, and believes that these final regulations appropriately regulate sexual harassment as a form of Title IX sex discrimination, while respecting the Department's legal obligations to enforce the civil rights statute as passed by Congress, and apply statutory interpretations consistent with First Amendment and other constitutional protections. The Department understands that research demonstrates that the negative impact of persistent (though not severe) harassment may be similar to the impact of a single instance of severe harassment. However, guided by the Supreme Court's *Davis* opinion, the Department believes that unwelcome conduct (that does not constitute *quid pro quo* harassment or a Clery Act/VAWA offense included in § 106.30) rises to a civil rights violation where the seriousness (determined by a reasonable person to be so severe, pervasive, objectively offensive, that it negatively impacts equal access) jeopardizes educational opportunities. While non-severe instances of unwelcome harassment may negatively impact a person, and recipients retain authority to address such instances, Title IX is focused on sex discrimination that jeopardizes educational access.

The Department understands that technology has evolved in the decades since Title IX was enacted, and that the means for perpetrating sexual harassment in modern society may include use of electronic, digital, and similar methods. The § 106.30 sexual harassment definition does not make sexual harassment dependent on the method by which the harassment is carried out; use of e-mail, the internet, or other technologies may constitute sexual harassment as much as use of in-person, postal mail, handwritten, or other communications. For reasons described throughout this section of the preamble, and in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, the Department

believes that the § 106.30 definition is superior to the definition of sexual harassment in the 2001 Guidance.

The Department acknowledges that a myriad of State and Federal laws overlap in addressing misconduct, some of which may be criminal, violative of State civil rights laws, or safety-related (such as anti-bullying legislation), and that elementary and secondary schools, as well as postsecondary institutions, face challenges in meeting obligations under various laws, as well as recipients' own policies. The Department notes that a recipient's agreement to accept Federal financial assistance obligates the recipient to comply with Title IX with respect to education programs or activities, and that compliance with Title IX does not obviate the need for a recipient also to comply with other laws. The Department does not view a difference between how "sexual harassment" is defined under these final regulations and a different or broader definition of sexual harassment under various State laws as creating undue confusion for recipients or a conflict as to how recipients must comply with Title IX and other laws. While Federal Title IX regulations require a recipient to respond to sexual harassment as defined in § 106.30, a recipient may also need to respond to misconduct that does not meet that definition, pursuant to a State law. The Department more thoroughly discusses the interaction between these final regulations and State laws in the "Section 106.6(h) Preemptive Effect" subsection of the "Clarifying Amendments to Existing Regulations" section.

The Department appreciates commenters' concerns about how to apply the prerequisite element that sexual harassment is conduct "on the basis of sex." The Department notes that the Title IX statute prohibits exclusion, denial of benefits, and subjection to discrimination "on the basis of sex," and the Department cannot remove that qualifier in describing conduct prohibited under Title IX because Congress intended for Title IX to provide individuals with effective

protections against discriminatory practices[638] "on the basis of sex."[639] Discriminatory practices on other bases or protected characteristics are not part of Title IX's non-discrimination mandate. To clarify that all the conduct defined as sexual harassment must be "on the basis of sex," the final regulations revise § 106.30 by removing that phrase from the second prong, and inserting it into the introductory sentence that now begins "Sexual harassment means conduct on the basis of sex that satisfies one or more of the following" and then goes on to list the three prongs of the definition.

The Department appreciates the opportunity to clarify that whether conduct is "on the basis of sex" does not require probing the subjective motive of the respondent (e.g., whether a respondent subjectively targeted a complainant because of the complainant's or the respondent's actual or perceived sex, as opposed to because of anger or romantic feelings). Where conduct is sexual in nature, or where conduct references one sex or another, that suffices to constitute conduct "on the basis of sex." In *Gebser* and again in *Davis*, the Supreme Court accepted sexual harassment as a form of sex discrimination without inquiring into the subjective motive of the perpetrator (a teacher in *Gebser* and a student in *Davis*).[640] The Department follows the Supreme

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[638] *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979).
[639] 20 U.S.C. 1681(a).
[640] *See, e.g.*, *Davis*, 526 U.S. at 643 (assuming without analysis that sexual harassment constitutes sex discrimination, in stating that *Gebser* recognized that "whether viewed as discrimination or subjecting students to discrimination, Title IX unquestionably . . . placed on [the Board] the duty not to permit teacher-student harassment in its schools") (internal quotation marks and citation omitted); *id.* at 650 ("having previously determined that 'sexual harassment' is 'discrimination' in the school context under Title IX, we are constrained to conclude that student-on-student sexual harassment, if sufficiently severe, can likewise rise to the level of discrimination actionable under the statute."); *id.* at 650-51 (equating physical threats directed at female students, not of a sexual nature, with sexual harassment and thereby sex discrimination by stating: "The most obvious example of student-on-student sexual harassment . . . would thus involve the overt, physical deprivation of access to school resources. Consider, for example, a case in which male students physically threaten their female peers every day, successfully preventing the female students from using a particular school resource – an athletic field or a computer lab, for instance.").

Court's approach in interpreting conduct "on the basis of sex" to include conduct of a sexual nature, or conduct referencing or aimed at a particular sex.[641]

The Department appreciates a commenter's recommendation to seek input from stakeholders on what types of technical assistance would be most helpful to school districts in implementing the final regulations, and the Department will act on that recommendation by seeking such input from school districts and other recipients with respect to robust technical assistance to help recipients implement the § 106.30 definition and other provisions of the final regulations.

Changes: We have revised § 106.30 defining "sexual harassment" by moving the phrase "on the basis of sex" from the second prong to the introductory sentence applying to all three prongs of the definition of sexual harassment, such that any of the conduct defined as "sexual harassment" must be "on the basis of sex."

Prong (1) *Quid pro quo*

Comments: At least two commenters questioned whether the *quid pro quo* prong of the § 106.30 definition would apply only if the employee's conditioning of an educational benefit was express (as opposed to implied, or reasonably perceived by the victim as a threat to withhold a benefit),

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[641] This approach finds analytic support in works such as Kathleen M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 771-72 (1997), noting that "to date, the Supreme Court has been disinclined to do more than summarily conclude that sexual harassment is a form of sex discrimination" under Title VII and supporting an approach to "because of sex" that focuses on the conduct, not the perpetrator's motive, but arguing that a theoretical justification for why sexual harassment constitutes sex discrimination that justifies such "evidentiary short cuts" should rely on recognition that sexual harassment is a "tool or instrument of gender regulation," undertaken "in the service of hetero-patriarchal norms" that are "punitive in nature [and] produce gendered subjects: feminine women as sex objects and masculine men as sex subjects" making sexual harassment a form of sex discrimination "precisely because its use and effect police hetero-patriarchal gender norms[.]" With a theoretical understanding of why sexual harassment might constitute sex discrimination as a backdrop, sex discrimination can be inferred in individual cases from the existence of sexual harassment, justifiably obviating a need to require "proof" that a particular plaintiff experienced sexual harassment on the basis of, or because of, the plaintiff's and/or defendant's sex, instead keeping the focus of each case on the misconduct itself. *Id*.

and if this prong required a subjective intent on the part of the recipient's employee to deny the aid or benefit even if such intent was not communicated when the harassment occurred. One such commenter asserted that it is important for potential harassers and potential victims to understand what conduct is prohibited and thus the final regulations need to specify whether the *quid pro quo* nature of the harassment must be expressly communicated, or may be implied by the circumstances; this commenter stated that even courts do not require that a harasser explicitly articulate all the terms and conditions of the "bargain of exchange" being proposed in a *quid pro quo* harassment situation.

At least one commenter asserted that the final regulations need to clarify that "consenting" to unwelcome sexual conduct, or avoiding potential adverse consequences without providing the requested sexual favors, does not mean that *quid pro quo* harassment did not occur.

One commenter believed that *quid pro quo* harassment needs to also be severe, pervasive, and objectively offensive.

A few commenters asserted that the *quid pro quo* prong of the sexual harassment definition should be expanded to include more persons than just "employees" of the recipient, because students may also hold positions of authority over other students (for example, team captains, club presidents, graduate assistants, resident advisors) and non-employees often have regular, recipient-approved contact with students and function as agents of the recipient (for example, people supervising internships or clinical experiences, employees of vendors or contracted service providers, volunteers who regularly participate in programs or activities, or board of trustees members who serve as unpaid volunteers). One such commenter argued that the *quid pro quo* prong is too narrow because all people (not just employees) providing any services

as part of a recipient's business should not condition services on sexual favors but also should not perpetrate any unwelcome sexual conduct or create a hostile environment.

One commenter urged the Department to clarify that in the elementary and secondary school context, even a consensual, welcome sexual relationship between a student and teacher counts as sexual harassment because such a relationship is an abuse of the teacher's power over the student; the commenter asserted that the teacher-student relationship in *Gebser* may have been consensual but was still sexual harassment.

Discussion: The Department appreciates the opportunity to clarify that the first prong of the § 106.30 definition, describing *quid pro quo* harassment, applies whether the "bargain" proposed by the recipient's employee is communicated expressly or impliedly. Making educational benefits or opportunities contingent on a person's participation in unwelcome conduct on the basis of sex strikes at the heart of Title IX's mandate that education programs and activities remain free from sex discrimination; thus, the Department interprets the *quid pro quo* harassment description broadly to encompass situations where the *quid pro quo* nature of the incident is implied from the circumstances.[642] For the same reason, the Department declines to require that *quid pro quo* harassment be severe and pervasive; abuse of authority in the form of even a single instance of *quid pro quo* harassment (where the conduct is not "pervasive") is inherently

[642] As the *Davis* Court recognized, the relationship between a teacher and student makes it even more likely than with peer harassment that sexual harassment threatens the equal educational access guaranteed by Title IX. *See Davis*, 526 U.S. at 653 ("The fact that it was a teacher who engaged in harassment in *Franklin* and *Gebser* is relevant. The relationship between the harasser and the victim necessarily affects the extent to which the misconduct can be said to breach Title IX's guarantee of equal access to educational benefits and to have a systemic effect on a program or activity. Peer harassment, in particular, is less likely to satisfy these requirements than is teacher-student harassment.").

offensive and serious enough to jeopardize equal educational access,[643] and although such harassment may involve verbal conduct there is no risk of chilling protected speech or academic freedom by broadly prohibiting *quid pro quo* harassment because such verbal conduct by definition is aimed at compelling a person to submit to unwelcome conduct as a condition of maintaining educational benefits.[644] The Department notes that when a complainant acquiesces to unwelcome conduct in a *quid pro quo* context to avoid potential negative consequences, such

[643] Similarly, where *quid pro quo* harassment may not be "severe" (for example, where the unwelcome sexual conduct consists of rubbing student's back or other conduct that may not meet the "severity" element and would not constitute sexual assault but does consist of unwelcome conduct of a sexual nature), *quid pro quo* harassment is inherently serious enough to jeopardize equal educational access. Thus, *quid pro quo* harassment constitutes sexual harassment under § 106.30, without being evaluated for severity, pervasiveness, and objective offensiveness. Determining whether unwelcome sexual conduct is proposed, suggested, or directed at a complainant, by a recipient's employee, as part of the employee "conditioning" an educational benefit on participation in the unwelcome conduct, does not require the employee to expressly tell the complainant that such a bargain is being proposed, and the age and position of the complainant is relevant to this determination. For example, elementary and secondary school students are generally expected to submit to the instructions and directions of teachers, such that if a teacher makes a student feel uncomfortable through sex-based or other sexual conduct (e.g., back rubs or touching students' shoulders or thighs), it is likely that elementary and secondary school students will interpret that conduct as implying that the student must submit to the conduct in order to maintain educational benefits (e.g., not getting in trouble, or continuing to please the teacher and earn good grades). This approach to sexual harassment by a recipient's employees is in line with the *Gebser/Davis* framework, where the Supreme Court noted that any sexual harassment by a teacher or school employee likely deprives a student of equal educational opportunities. *See Davis*, 526 U.S. at 653. In situations where an employee did not intend to commit *quid pro quo* harassment (for instance, where the teacher did not realize that what the teacher believed were friendly back rubs had sexual overtones and made students feel uncomfortable), the recipient may take the specific factual circumstances into account in deciding what remedies are appropriate for the complainants and what disciplinary sanctions are appropriate for the respondent.

[644] *Quid pro quo* harassment should be interpreted broadly in part because although a teacher, coach, or other employee perpetrating a *quid pro quo* conditioning of benefits may use speech in proposing or inflicting such a Hobson's choice on a student, that speech is incidental to the conduct (sex discriminatory abuse of authority) and a broad rule prohibiting such conduct raises no constitutional concerns. *See, e.g.*, *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 207 (3d Cir. 2001) ("government may constitutionally prohibit speech whose *non-expressive* qualities promote discrimination. For example, a supervisor's statement 'sleep with me or you're fired' may be proscribed not on the ground of any expressive idea that the statement communicates, but rather because it facilitates the threat of discriminatory conduct. Despite the purely verbal quality of such a threat, it surely is no more 'speech' for First Amendment purposes than the robber's demand 'your money or your life.'") (emphasis in original).

"consent" does not necessarily mean that the sexual conduct was not "unwelcome" or that prohibited *quid pro quo* harassment did not occur.[645]

The Department believes that the *quid pro quo* harassment description is appropriately and sufficiently broad because it applies to all of a recipient's employees, so that it includes situations where, for instance, a teacher, faculty member, or coach holds authority and control over a student's success or failure in a class or extracurricular activity, and the Department declines to expand the description to include non-employee students, volunteers, or others not deemed to be a recipient's employee. The Department understands commenters' concerns that non-employees are sometimes in positions sanctioned by the recipient to exercise control over students (or employees) or to distribute benefits on behalf of the recipient. However, the Department is persuaded by the Supreme Court's rationale in *Gebser* that Title IX and Title VII differ with respect to statutory reliance on agency principles.[646] The Department believes that the § 106.30 *quid pro quo* harassment prong reasonably holds recipients responsible for the conduct of the recipient's employees without expanding that liability to all agents of a recipient. However, the unwelcome conduct of a non-employee individual may constitute sexual harassment under the second or third prongs of the § 106.30 definition.

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[645] The approach in these final regulations to *quid pro quo* harassment is consistent with the 2001 Guidance at 5 (stating that *quid pro quo* harassment does not depend on whether "the student resists and suffers the threatened harm or submits and avoids the threatened harm" and that a prohibited *quid pro quo* bargain may occur "explicitly or implicitly").

[646] *Gebser*, 524 U.S. at 283 ("Moreover, *Meritor*'s rationale for concluding that agency principles guide the liability inquiry under Title VII rests on an aspect of that statute not found in Title IX: Title VII, in which the prohibition against employment discrimination runs against 'an employer,' *42 U.S.C. 2000e-2(a)*, explicitly defines 'employer' to include 'any agent,' *§ 2000e(b)*. . . . Title IX contains no comparable reference to an educational institution's 'agents,' and so does not expressly call for application of agency principles.").

In response to a commenter's request that the final regulations state that sexual conduct between a teacher and student counts as sexual harassment even where the conduct is consensual and welcome from the student's viewpoint, the third prong of the § 106.30 definition refers to "sexual assault" as described in the Clery Act, which in turn references sex offenses under the FBI's Uniform Crime Reporting system, including statutory rape (that is, sex with a person who is under the statutory age of consent).[647] With respect to students who are underage in their jurisdiction, a sexual relationship like that in *Gebser* between a teacher and student[648] would therefore count as sexual harassment under § 106.30, regardless of whether the victim nominally consented or welcomed the sexual activity. Furthermore, the Department interprets "unwelcome" as used in the first and second prongs of the § 106.30 definition of sexual harassment as a subjective element; thus, even if a complainant in a *quid pro quo* situation pretended to welcome the conduct (for instance, due to fear of negative consequences for objecting to the employee's suggestions or advances in the moment), the complainant's subjective statement that the complainant found the conduct to be unwelcome suffices to meet the "unwelcome" element.

Changes: None.

Prong (2) *Davis* standard

Davis standard generally

Comments: Several commenters supported the second prong of the § 106.30 definition of sexual harassment, which is derived from the Supreme Court's *Davis* opinion. One commenter stated that previous Department guidance changed the "and" to "or" in the "severe, pervasive, and

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[647] 20 U.S.C. 1092(f)(6)(A)(v).

[648] *Gebser*, 524 U.S. at 278 (describing the relationship between the teacher and student in that case as involving sexual intercourse).

objectively offensive" formulation and asserted that this resulted in over-enforcement and sparked criticism from experts and law professors, including the Association of Title IX Administrators (ATIXA).[649] This commenter argued that while victim advocates have argued that the *Davis* standard should apply only to private lawsuits against schools, it seems illogical to subject schools to two separate standards of responsibility concerning the same conduct, and the *Davis* standard does not let schools "off the hook."

On the contrary, many commenters opposed the second prong of the § 106.30 definition because it uses a standard designed to award money damages in private litigation, not administrative enforcement designed to promote equal educational opportunity. Some commenters argued that *Gebser* does not actually define sexual harassment and that *Davis* cited to the Supreme Court's *Meritor* opinion indicating intent to utilize the same definition for sexual harassment under Title IX as the Court has used under Title VII. One commenter argued that the *Davis* Court inaccurately paraphrased the *Meritor* decision when stating "and" instead of "or" (in "severe, pervasive, and objectively offensive"), and asserted there is nothing in the *Davis* opinion that indicates that the Court intended to apply a higher standard for hostile environment harassment under Title IX than under Title VII.

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[649] Commenters cited: Eugene Volokh, *Open Letter from 16 Penn Law Professors about Title IX and Sexual Assault Complaints*, VOLOKH CONSPIRACY (Feb. 19, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/02/19/open-letter-from-16-penn-law-school-professors-about-title-ix-and-sexual-assault-complaints/; *Law Professors' Open Letter Regarding Campus Free Speech and Sexual Assault* (May 16, 2016), https://www.lankford.senate.gov/imo/media/doc/Law-Professor-Open-Letter-May-16-2016.pdf; Jacob E. Gerson & Jeannie Suk Gersen, *The Sex Bureaucracy*, 104 CAL. L. REV. 881 (2016); National Center for Higher Education Risk Management (NCHERM), *The 2017 NCHERM Group Whitepaper: Due Process and the Sex Police* 2, 15 (2017) ("Some pockets in higher education have twisted the 2011 Office for Civil Rights (OCR) Dear Colleague Letter (DCL) and Title IX into a license to subvert due process and to become the sex police. . . . [T]his Whitepaper [and another ATIXA publication] push back strongly against both of those trends in terms of best practices.").

At least one commenter asserted that if students cannot receive different recourse from the Department than they can in Federal courts, then students will find civil litigation to be a better avenue which will lead to costly redirection of school resources toward defending Title IX litigation, a result exacerbated by the fact that the final regulations expressly prohibit awards of money damages in Department enforcement actions while money damages are available in private lawsuits.

At least one commenter argued that with regard to student-on-student harassment, the Supreme Court in *Davis* did not modify *Gebser* by *defining* "sexual harassment" in some limited way; rather, *Davis* addressed the amount and type of sexual harassment (as that phrase is commonly understood) which, if engaged in by a student harasser, would constitute "discrimination" and thus violate Title IX. At least one commenter argued that the NPRM failed to recognize the difference between the anti-discrimination clause and the anti-exclusion clause of the Title IX statute[650] by incorrectly assigning the purpose of the anti-discrimination clause to the anti-exclusion clause. One such commenter argued that the purpose of the anti-discrimination clause is to forbid gender-based adverse action under a covered program or activity, regardless of whether that action has any impact on the victim's access to that program or activity while the purpose of the anti-exclusion clause is to protect access to a program or activity, regardless of whether the misconduct potentially affecting access occurs under, or outside, that program or activity.

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

One commenter argued that the NPRM's definition of hostile environment sexual harassment does not allow for the central method of analysis that both courts and existing Department guidance have instructed schools to use in evaluating sexual harassment complaints: balancing relevant factors in recognition of the totality of the circumstances. The commenter asserted that this holistic approach is crucial for recipients to fulfill their Title IX responsibilities to prevent the discriminatory conduct's occurrence and end it when it does occur. At least one commenter similarly argued that the "severe and pervasive" prong of the definition creates ambiguity from lack of guidance on how to apply the standard and without such guidance schools will screen out situations that should be addressed.

A few commenters noted that the second prong of the § 106.30 definition appropriately requires actionable harassment to be severe, pervasive, and objectively offensive yet leaves recipients flexibility to address misconduct that does not meet that standard through codes of conduct outside the Title IX context.

Discussion: The Department appreciates commenters' support for the *Davis* definition of actionable sexual harassment embodied in the second prong of the § 106.30 definition. The Department agrees that adopting the *Davis* standard for harassment that does not constitute *quid pro quo* harassment or a Clery Act/VAWA offense, included in § 106.30, appropriately holds recipients responsible for addressing serious, unwelcome sex-based conduct that deprives a person of equal access to education, while avoiding constitutional concerns raised by subjecting speech and expression to the chilling effect of prior restraints. The Department agrees that aligning the Title IX sexual harassment definition in administrative enforcement and private litigation contexts provides clear, consistent expectations for recipients without letting recipients "off the hook." The Department chooses to adopt in these final regulations the *Davis* standard

defining actionable sexual harassment, as one of three parts of a sexual harassment definition. This approach provides consistency with the Title IX rubric for judicial and administrative enforcement and gives a recipient flexibility and discretion to address sexual harassment while ensuring that complainants can rely on their school, college, or university to meaningfully respond to a sexual harassment incident.

The Department understands the argument of many commenters that adoption of the *Gebser/Davis* framework is not legally required and therefore the Department should adopt a broader approach to administrative enforcement than that applied by the Supreme Court in private Title IX lawsuits. The Supreme Court did not restrict its *Gebser/Davis* approach to private lawsuits for money damages, and the Department believes that the Supreme Court's framework provides the appropriate starting point for administrative enforcement of Title IX, with adaptions of that framework to hold recipients responsible for more than what the *Gebser/Davis* framework alone would require.[651]

The Department disagrees with a commenter who asserted that the *Davis* Court mistakenly or inaccurately "paraphrased" the *Meritor* description of actionable workplace harassment; rather, the Department believes that the *Davis* Court intentionally and accurately acknowledged the "severe or pervasive" formulation in *Meritor* yet determined that the "severe and pervasive" standard was more appropriate in the educational context. The Department notes that the *Davis* Court repeated the "severe and pervasive" formulation five times[652] showing that

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[651] For further discussion, see the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble.
[652] *Davis*, 526 U.S. at 633, 650, 651, 652, 654.

the Court noted differences between an educational and workplace environment that warranted a different standard under Title IX than under Title VII.[653]

The Department disagrees with the commenter who asserted that the Department's adoption of *Davis* standards will lead to increased litigation against recipients because students will see no difference between recourse from the Department and recourse available in private litigation. While one of the three prongs of the § 106.30 sexual harassment definition is adopted from *Davis*, the other two prongs differ from the *Davis* standard; moreover, the other parts of the *Gebser/Davis* framework adopted by the Department in the final regulations adapt that framework in a way that broadens the scope of a complainant's rights vis-à-vis a recipient (for example, the actual knowledge condition in the final regulations is defined broadly to include notice to any Title IX Coordinator and any elementary or secondary school employee, in addition to officials with authority to take corrective action; the deliberate indifference standard expressly requires a recipient to offer supportive measures to a complainant and for a Title IX Coordinator to discuss supportive measures with a complainant, with or without the filing of a formal complaint and to explain to a complainant the process for filing a formal complaint). Therefore, while rooted in the Supreme Court's framework, the final regulations appropriately impose requirements on recipients that benefit complainants, which Federal courts applying the *Davis* framework do not impose.[654] We have also revised § 106.3(a) to remove reference to whether the

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[653] *Id.* at 651 ("Courts, moreover, must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults. . . . Indeed, at least early on, students are still learning how to interact appropriately with their peers.").

[654] Consistent with constitutional due process and fundamental fairness, these final regulations also ensure that a recipient's supportive response to a complainant treats respondents equitably by refraining from punishing or

Department will or will not seek money damages as part of remedial action required of a recipient for Title IX violations; for further discussion, see the "Section 106.3(a) Remedial Action" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble.

The Department agrees with a commenter's characterization of *Davis* as not so much redefining sexual harassment as describing the amount and type of sexual harassment that constitutes sex discrimination under Title IX. Likewise, while the Department refers to a "definition" of sexual harassment in § 106.30, the Department notes that the provision describes what amount and type of sexual harassment is actionable under Title IX; that is, what conditions activate a recipient's legal obligation to respond.

The Department disagrees with commenters who argued that the *Davis* standard in the second prong of § 106.30 fails to recognize the difference between the anti-discrimination clause and the anti-exclusion clause of Title IX. In *Davis*, the Supreme Court acknowledged that Title IX contains three separate clauses (anti-exclusion, denial of benefits, anti-discrimination), yet with respect to actionable sexual harassment under Title IX the *Davis* Court repeatedly used the formulation of sexual harassment that is "severe, pervasive, and objectively offensive," at one point seeming to equate it with the denial of benefits clause and at others seeming to equate it with the "subjected to discrimination" clause.[655] Regardless of which of the three Title IX

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disciplining a respondent without following a grievance process that complies with § 106.45. § 106.44(a); § 106.45(b)(1)(i); § 106.30 (defining "supportive measures" as non-punitive, non-disciplinary, not unreasonably burdensome to the other party); *see also* the "Role of Due Process in the Grievance Process" section of this preamble.

[655] 526 U.S. at 650 ("The statute's other prohibitions, moreover, help give content to the term 'discrimination' in this

statutory clauses the *Davis* Court attached to its sexual harassment standard, the Court emphasized several times that the harassment must "deprive the victims of access to the educational opportunities or benefits provided by the school"[656] or must have "effectively denied equal access to an institution's resources and opportunities"[657] or "that it denies its victims the equal access to education that Title IX is designed to protect."[658] The Supreme Court's understanding of sexual harassment as prohibited conduct under Title IX requires sexual harassment to meet a seriousness standard involving denial of equal access to education, regardless of whether the sexual harassment is viewed as causing denial of benefits, exclusion from participation, or subjection to discrimination.

The Department disagrees that the § 106.30 definition of sexual harassment precludes or disallows a totality of the circumstances analysis to evaluate whether alleged conduct does or does not meet the definition. The *Davis* Court noted that evaluation of whether conduct rises to actionable sexual harassment depends on a constellation of factors including the ages and numbers of parties involved,[659] and nothing in the final regulations disallows or disapproves of that common sense approach to determinations of severity, pervasiveness, and objective

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context. Students are not only protected from discrimination, but also specifically shielded from being 'excluded from participation in' or 'denied the benefits of' any 'education program or activity receiving Federal financial assistance.' 20 U.S.C. § 1681(a). The statute makes clear that, whatever else it prohibits, students must not be denied access to educational benefits and opportunities on the basis of gender. We thus conclude that funding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."); *id.* at 644-45 (holding that a recipient is liable where its "deliberate indifference 'subjects' its students to harassment – "That is, the deliberate indifference must, at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it.") (internal citations omitted).

[656] *Id*. at 650.

[657] *Id.* at 651.

[658] *Id.* at 652.

[659] *Id.* at 651.

offensiveness. To reinforce this, the final regulations include language in the second prong of the § 106.30 definition stating that the *Davis* elements are determined under a reasonable person standard. The Department does not believe that recipients will "screen out" situations that should be addressed due to lack of guidance on how to apply the "severe and pervasive" elements; the Department is confident that recipients' desire to provide students with a safe, non-discriminatory learning environment will lead recipients to evaluate sexual harassment incidents using common sense and taking circumstances into consideration, including the ages, disability status, positions of authority of involved parties, and other factors.

The Department appreciates commenters who stated, accurately, that the final regulations leave recipients flexibility to address misconduct that does not meet the § 106.30 definition of sexual harassment, through a recipient's own code of conduct that might impose behavioral expectations on students and faculty distinct from Title IX's non-discrimination mandate, and we have revised § 106.45(b)(3) to clarify that even when a recipient must dismiss a formal complaint because the alleged conduct does not meet the definition of sexual harassment in § 106.30, such dismissal is only for purposes of Title IX and does not preclude the recipient from responding to the allegations under the recipient's own code of conduct.

Changes: We have revised the § 106.30 definition of sexual harassment by specifying that the elements in the *Davis* standard (severe, pervasive, objectively offensive, and denial of equal access) are determined under a reasonable person standard. We have revised § 106.45(b)(3)(i) to clarify that dismissal of a formal complaint because the alleged conduct does not constitute sexual harassment as defined in § 106.30 is a dismissal for purposes of Title IX but does not preclude the recipient from responding to the allegations under the recipient's own code of conduct. We have also revised § 106.3(a) to remove reference to whether the Department will or

will not seek money damages as part of remedial action required of a recipient for Title IX violations.

Comments: Many commenters argued that the definition for Title IX sexual harassment should be aligned with the definition for Title VII, under which employers are liable for harassment that is sufficiently severe *or* pervasive to alter the conditions of employment.[660] Some commenters argued that under the proposed rules, schools would be held to a lower standard under Title IX to protect students (some of whom are minors) than the standard of protection for employees under Title VII. Some such commenters asserted that everyone on campus benefits from a culture in which sexual assault and harassment are deterred as they would be in a work environment and that Title IX, which applies to students, must not be weaker than Title VII.[661] Several commenters argued that the Title VII standard protects against visual and graphic displays, slurs, comments, and an array of other activities that are severe *or* pervasive on the basis of sex, while the NPRM would deny students the same protections by requiring conduct be both severe *and* pervasive.

Other commenters argued that college students must be able to succeed in college without being told that sexual assault and harassment is just something they must endure so they can finally get jobs at companies that do protect them from assault and harassment. Some commenters further argued that colleges and universities do a severe disservice to would-be

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[660] Commenters cited: *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986) (holding under Title VII "For sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment.") (internal quotation marks and citation omitted; brackets in original) (emphasis added); U.S. Equal Emp. Opportunity Comm'n, *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors* (Jun. 18, 1999).

[661] Commenters cited: *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991) for the proposition that if an employer is aware of and allows the continuation of sexual harassment creating a hostile work environment, it is a violation of Title VII.

harassers and assaulters by creating an environment where, unlike their future work environments, harassment and assault are tolerated. A few commenters asserted that because students can simultaneously be both students and employees it is necessary for the prohibited conduct to be the same under both Title VII and Title IX.

Many commenters asserted that the hostile environment standard expressed in the 2001 Guidance or the withdrawn 2011 Dear Colleague Letter should be adopted in the final regulations, such that sexual harassment is "unwelcome conduct of a sexual nature" and such harassment is actionable when the conduct is "sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the school's programs." Some commenters asserted that the "looser" definition from Department guidance provides greater protection for victims compared to the subjectivity and gray areas created by ill-fitting terminology used in the § 106.30 definition. Many commenters argued that "unwelcome conduct of a sexual nature" is a simple definition of harassment that avoids the self-doubt and discouragement victims may feel if victims are required under the proposed rules to wonder if the harassment they experience fits the § 106.30 definition. Some commenters argued that the § 106.30 definition makes it too easy to dismiss cases as not severe enough when any case of unwelcome sexual conduct should be clearly prohibited out of common sense and fairness.

Some commenters asserted that the Department's guidance definition is more in line with the reality of the type of misconduct that occurs most often. Other commenters pointed to the "Factors Used to Evaluate Hostile Environment Sexual Harassment" section of the 2001

Guidance[662] outlining a variety of factors used to determine if a hostile environment has been created and argued that schools should continue to use these factors to evaluate conduct in order to draw common sense conclusions about what conduct is actionable.

Discussion: The Department acknowledges, as has the Supreme Court, that both Title VII and Title IX prohibit sex discrimination. Significant differences in these statutes, however, lead to different standards for actionable harassment in the workplace, and in schools, colleges, and universities. The Department disagrees with commenters who asserted that an identical standard for prohibited conduct in the workplace and in an educational environment is the appropriate outcome. In the elementary and secondary school context, students and recipients benefit from an approach to non-discrimination law that distinguishes between school and workplace settings.[663] In the higher education context, as some commenters noted, students and faculty must be able to discuss sexual issues even if that offends some people who hear the discussion.[664] Similarly, as a commenter stated, the Supreme Court rejected the idea that "First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, 'the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'"[665] Thus, even vulgar or indecent college speech is

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[662] Commenters cited: 2001 Guidance at 5-7 (listing factors including: the degree to which the conduct affected one or more students' education; the type, frequency, and duration of the conduct; the identity of the relationship between the alleged harasser and the subject or subjects of the harassment; the number of individuals involved; the age and sex of the alleged harasser and the subject or subjects of the harassment; the size of the school, location of the incidents, and context in which they occurred; other incidents at the school; and incidents of gender-based, but nonsexual harassment).

[663] *See Davis*, 526 U.S. at 650 ("Courts, moreover, must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults. . . . Indeed, at least early on, students are still learning how to interact appropriately with their peers.").

[664] *See Snyder v. Phelps*, 562 U.S. 443 (2011).

[665] *Healy v. James*, 408 U.S. 169, 180 (1972) (internal citation omitted).

protected.[666] The *Davis* standard ensures that speech and expressive conduct is not peremptorily chilled or restricted, yet may be punishable when the speech becomes serious enough to lose protected status under the First Amendment.[667] The rationale for preventing a hostile workplace environment free from any severe or pervasive sexual harassment that alters conditions of employment does not raise the foregoing concerns (i.e., allowing for the social and developmental growth of young students learning how to interact with peers in the elementary and secondary school context; fostering robust exchange of speech, ideas, and beliefs in a college setting). Thus, the Department does not believe that aligning the definitions of sexual harassment under Title VII and Title IX furthers the purpose of Title IX or benefits students and employees participating in education programs or activities.[668]

The *Davis* standard embodied in the second prong of the § 106.30 definition differs from the third prong prohibiting sexual assault (and in the final regulations, dating violence, domestic violence, and stalking) because the latter conduct is not required to be evaluated for severity, pervasiveness, offensiveness, or causing a denial of equal access; rather, the latter conduct is assumed to deny equal access to education and its prohibition raises no constitutional concerns. In this manner, the final regulations obligate recipients to respond to single instances of sexual

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[666] *Papish v. Bd. of Curators*, 410 U.S. 667 (1973).
[667] The Department notes that requiring severity, pervasiveness, objective offensiveness, and resulting denial of equal access to education for a victim, matches the seriousness of conduct and consequences of other types of speech unprotected by the First Amendment, such as fighting words, threats, and defamation.
[668] *See* Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights*, 35 JOURNAL OF COLL. & UNIV. L. 385, 449 (2009) (arguing that restrictions on workplace speech "ultimately do not take away from the workplace's essential functions – to achieve the desired results, make the client happy, and get the job done" and free expression in the workplace "is typically not necessary for that purpose" such that workplaces are often "highly regulated environments" while "[o]n the other hand, freedom of speech and unfettered discussion are so essential to a college or university that compromising them fundamentally alters the campus environment to the detriment of everyone in the community" such that free speech and academic freedom are necessary preconditions to a university's success.).

assault and sex-related violence more broadly than employers' response obligations under Title VII, where even physical conduct must be severe or pervasive and alter the conditions of employment, to be actionable.[669] The Department therefore disagrees that the final regulations provide students less protection against sexual assault than employees receive in a workplace, or that sexual assault is tolerated to a greater extent under these Title IX regulations than under Title VII.

For reasons discussed above and in the "Adoption and Adaption of the Supreme Court Framework to Address Sexual Harassment" section of this preamble, the Department believes that the *Davis* definition in § 106.30 provides a definition for non-*quid pro quo*, non-Clery Act/VAWA offense sexual harassment better aligned with the purpose of Title IX than the definition of hostile environment harassment in the 2001 Guidance or the withdrawn 2011 Dear Colleague Letter. The *Davis* Court carefully crafted its formulation of actionable sexual harassment under Title IX for private lawsuits under Title IX, and the Department is persuaded by the Supreme Court's reasoning that administrative enforcement of Title IX is similarly best served by requiring a recipient to respond to sexual harassment that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to education. The Department believes that rooting a definition of sexual harassment in the Supreme Court's

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[669] *E.g.*, *Meritor*, 477 U.S. at 67 ("not all workplace conduct that may be described as harassment affects a term, condition, or privilege of employment within the meaning of Title VII") (internal quotation marks and citation omitted); *Brooks v. City of San Mateo*, 229 F.3d 917, 927 (9th Cir. 2000) (where the plaintiff alleged a sexual assault in the form of fondling plaintiff's breast: "The harassment here was an entirely isolated incident. It had no precursors, and it was never repeated. In no sense can it be said that the city imposed upon Brooks the onerous terms of employment for which Title VII offers a remedy."). Under the final regulations, a single instance of sexual assault (which includes fondling) requires a recipient's prompt response, including offering the complainant supportive measures and informing the complainant of the option of filing a formal complaint. § 106.30 (defining "sexual harassment" to include "sexual assault"); § 106.44(a).

interpretation of Title IX provides more clarity without unnecessarily chilling speech and expressive conduct; these advantages are lacking in the looser definitions used in Department guidance. The *Davis* definition in § 106.30 utilizes the phrase unwelcome conduct on the basis of sex, which is broader than the "unwelcome conduct of a sexual nature" phrase used in Department guidance.[670] The other elements in § 106.30 (severe, pervasive, and objectively offensive) provide a standard of evaluation more precise than the "sufficiently serious" description in Department guidance, yet serve a similar purpose – ensuring that conduct addressed as a Title IX civil rights issue represents serious conduct unprotected by the First Amendment or principles of free speech and academic freedom. As discussed further below, the "effectively denies a person equal access" element in § 106.30 has the advantage of being adopted from the Supreme Court's interpretation of Title IX, yet does not act as a more stringent element than the "interferes with or limits a student's ability to participate in or benefit from the school's programs" language found in Department guidance. The Department does not believe that recipients will err on the side of ignoring reports of conduct that might be considered severe and pervasive, and believes that a prohibition on *any* unwelcome sexual conduct would sweep up speech and expression protected by the First Amendment, and require schools to intervene in situations that do not present a threat to equal educational access. Because the § 106.30 definition provides precise standards for evaluating actionable harassment focused on whether sexual harassment has deprived a person of equal educational access, the Department believes it

[670] As noted by some commenters, sex-based harassment includes unwelcome conduct of a sexual nature but also includes unwelcome conduct devoid of sexual content that targets a particular sex. The final regulations use the phrase "sexual harassment" to encompass both unwelcome conduct of a sexual nature, and other forms of unwelcome conduct "on the basis of sex." § 106.30 (defining "sexual harassment").

is unnecessary to list the factors from the 2001 Guidance that purport to evaluate whether a hostile environment has been created.

Changes: None.

Comments: Many commenters believed that the second prong of the § 106.30 definition means that rape and sexual assault incidents will be scrutinized for severity and set a "pain scale" for sexual assault such that only severe sexual assault will be recognized under Title IX, or that a definition that requires a school to intervene only if sexual violence is "severe, pervasive, and objectively offensive" means that someone would need to be repeatedly, violently raped before the school would act to support the survivor.

Many commenters criticized the second prong of the § 106.30 definition by asserting that, under that standard, only the most severe harassment situations will be investigated, which will reduce and chill reporting of sexual harassment when sexual harassment is already underreported. Many such commenters argued that victims will be afraid to report because the school will scrutinize whether the harassment suffered was "bad enough" and that instead the Department needs to err on the side of caution by including more, not less, conduct as reportable harassment. Many commenters similarly argued that many victims are already unsure of whether their experience qualifies as serious enough to report and therefore narrowing the definition will only discourage victims from reporting unwanted sexual conduct. Many commenters argued that a broad definition of sexual harassment is needed because research shows that students are unlikely to report when their experience does not match common beliefs about what rape is, and because even "less severe" forms of harassment may also lead to negative outcomes and increase a victim's risk of further victimization. Similarly, some commenters noted that research shows

that victims already minimize their experiences[671] and knowing that school administrators will be judging their report for whether it is really serious, really pervasive, and really objectively offensive, will result in more victims feeling dissuaded from reporting due to uncertainty about whether their report will meet the definition or not.

Several commenters argued that the Federal government should stand by a zero-tolerance policy against sexual harassment, and that applying a narrow definition means that some forms of harassment are acceptable, contrary to Title IX's bar on sex discrimination. Several commenters argued that the § 106.30 definition will allow abusers to do everything just short of the narrowed standard while keeping their victims in a hostile environment, further silencing victims.

A few commenters stated that if a student believes conduct "makes me feel uncomfortable," that should be sufficient to require the school to respond. At least one commenter suggested that the final regulations provide guidance on what misconduct is actionable by using behavioral measures such as the Sexual Experiences Survey[672] or the Sexual Experiences Questionnaire.[673]

At least one commenter argued that the language of offensiveness and severity clouds the necessary understanding of unequal power relations and negates a culture of consent. Several

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[671] Commenters cited: The Association of American Universities, *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct* iv (Westat 2015) ("More than 50 percent of the victims of even the most serious incidents (e.g., forced penetration) say they do not report the event because they do not consider it 'serious enough.'").
[672] Commenters cited: Mary Koss & Cheryl J. Oros, *Sexual Experiences Survey: A research instrument investigating sexual aggression and victimization*, 50 JOURNAL OF CONSULTING & CLINICAL PSYCHOL. 3 (1982).
[673] Commenters cited: Louise Fitzgerald *et al.*, *Measuring sexual harassment: Theoretical and psychometric advances*, 17 BASIC & APPLIED SOCIAL PSYCHOL. 4 (1995).

commenters asserted that a definition of sexual harassment that holds up only the dramatic and extreme as worthy of investigation would do little to change rape culture. Many commenters argued that while individual acts are rarely pervasive, individual acts across a society can result in pervasiveness throughout society so that what seem like one-off or minor incidents, or "normal" sexual gestures and conventions, actually do create a pervasive rape culture because they are rooted in patriarchy (for example, a culture that accepts statements like "these women come to parties to get laid"), misunderstanding or ignorance of consent (for example, "she didn't say no" despite several cues of discomfort and unwillingness), and lack of support from authority figures (for example, reactions from school personnel like "boys will be boys," or "this is just college campus culture"). Some commenters argued that to achieve a drop in cases of sexual misconduct, even seemingly minor incidents that make women feel threatened need to be taken seriously.

Similarly, a few commenters argued that the threat of potential violence against women permeates American society and interferes with educational equity. At least one commenter argued that young women already are affected in many ways by the constant presence of potential violence, such that women feel that they cannot be alone with another student for study group purposes, with a teaching assistant to get extra help, or with a professor during office hours. This commenter further stated that young women already do not feel safe attending an academic function if it means walking to her car in the dark, or collaborating online for fear of enduring cyber harassment. A few commenters argued that a narrow definition of harassment ignores the scope of gender-based violence in our society and does nothing to address patterns of harassment as opposed to just an individual case that moves through a formal process.

A few commenters asserted by adding the "and" between "severe, pervasive and objectively offensive" survivors will be forced to quantify their suffering to fit into an imaginary scale determined according to a pass or fail rubric and artificially create categories of legitimate and illegitimate misconduct, when misconduct that is either severe or pervasive or objectively offensive should be more than enough to warrant stopping the misconduct. Many commenters opined that the § 106.30 definition sets an arbitrary and unnecessarily high threshold for when conduct would even constitute harassment. Many commenters viewed the § 106.30 definition as raising the burden of proof on victims to an unnecessary degree, making their reporting process more strenuous and exhausting, and requiring survivors to prove their abuse is worthy of attention. Other commenters noted that the burden is on recipients to show the severity of the reported conduct yet asserted that survivors will still feel pressured to present their complaint in a certain way in order to be perceived as credible enough. A few commenters asserted that this raises concerns especially for people with disabilities, who may react to and communicate about trauma differently. At least one commenter stated that to the extent that the § 106.30 definition is in response to the perception that students and Title IX Coordinators have been pursuing a lot of formal complaints over low-level harassment, such a perception is inaccurate.

Many commenters argued that what is severe, pervasive, and objectively offensive leaves too much room for interpretation and will be subject to the biases of Title IX Coordinators and other school administrators. Another commenter expressed concern that schools would have too much discretion to decide whether conduct was severe, pervasive, and offensive and this will lead to arbitrary decisions to turn away reporting parties. Several commenters asserted that permitting administrators to judge the severity, pervasiveness, and offensiveness of reported conduct will foster a culture of institutional betrayal because some institutions will choose to

investigate misconduct while others will not. A few commenters asserted that courts have found some unwanted sexual behavior (for example, a supervisor forcibly kissing an employee) is not severe *and* pervasive even though such behavior may constitute criminal assault or battery under State laws and that a definition of sexual harassment must at least cover misconduct that would be considered criminal.

Several commenters argued that a narrow definition would contribute to the overall effect of the proposed rules to eliminate most sexual harassment from coverage under Title IX, to the point of absurdity. Several commenters asserted that research shows that narrow definitions of sexual assault indicate that reports will decrease while underlying violence does not decrease.[674] At least one commenter argued that the proposed rules seek to use a single definition of sexual harassment in all settings, from prekindergarten all the way up to graduate school, and this lack of a nuanced approach fails to take into account the vast developmental differences between children, young adults, and college and graduate students. One commenter stated that especially for community college students, whose connections to a physical campus and its resources can be limited, a narrower definition of sexual harassment with "severe and pervasive" rather than "severe or pervasive" could make it harder for reporting parties to prove their victimization.

One commenter asserted that conduct that may not be considered severe in an isolated instance can qualify as severe when that conduct is pervasive, because "severe" and "pervasive" should not always entail two separate inquiries. One commenter suggested that the second prong of § 106.30 be changed to mirror the Title IX statute, by using the phrase "causes a person to be

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[674] Commenters cited: Mary P. Koss, *The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students*, 55 JOURNAL OF CONSULTING & CLINICAL PSYCHOL. 2 (1987).

excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity."

Discussion: The Department appreciates the opportunity to clarify that sexual assault (which includes rape) is referenced in the third prong of the § 106.30 definition of "sexual harassment," while the *Davis* standard (with the elements of severe, pervasive, and objectively offensive) is the second prong. This means that any report of sexual assault (including rape) is not subject to the *Davis* elements of whether the incident was "severe, pervasive, and objectively offensive." Thus, contrary to commenters' concerns, the final regulations do not require rape or sexual assault incidents to be "scrutinized for severity," rated on a pain scale, or leave students to be repeatedly or violently raped before a recipient must intervene. The Department intentionally did not want to leave students (or employees) wondering if a single act of sexual assault might not meet the *Davis* standard, and therefore included sexual assault (and, in the final regulations, dating violence, domestic violence, and stalking) as a stand-alone type of sexual harassment that does not need to demonstrate severity, pervasiveness, objective offensiveness, or denial of equal access to education, because denial of equal access is assumed. Complainants can feel confident turning to their school, college, or university to report and receive supportive measures in the wake of a sexual assault, without wondering whether sexual assault is "bad enough" to report. The Department understands that research shows that rape victims often do not report due to misconceptions about what rape is (e.g., a misconception that rape must involve violence inflicted by a stranger), and that rape victims may minimize their own experience and not report

sexual assault, for a number of reasons.[675] The definition of sexual assault referenced in § 106.30 broadly defines sexual assault to include all forcible and nonforcible sex offenses described in the FBI's Uniform Crime Reporting system. Those offenses do not require an element of physical force or violence, but rather turn on lack of consent of the victim. The Department believes that these definitions form a sufficiently broad definition of sexual assault that reflects the range of sexually violative experiences that traumatize victims and deny equal access to education. The Department believes that by utilizing a broad definition of sexual assault, these final regulations will contribute to greater understanding on the part of victims and perpetrators as to the type of conduct that constitutes sexual assault. The FBI's Uniform Crime Reporting system similarly does not exclude from sexual assault perpetration by a person known to the victim (whether as an acquaintance, romantic date, or intimate partner relationship), and the final regulations' express inclusion of dating violence and domestic violence reinforces the reality that sex-based violence is often perpetrated by persons known to the victim rather than by strangers.

As to unwelcome conduct that is not *quid pro quo* harassment, and is not a Clery Act/VAWA offense included in § 106.30, the *Davis* standard embodied in the second prong of the § 106.30 definition applies. The Department understands commenters' concerns that this means that only "the most severe" harassment situations will be investigated and that complainants will feel deterred from reporting non-sexual assault harassment due to wondering if the harassment is "bad enough" to be covered under Title IX. The Department understands that research shows that even "less severe" forms of sexual harassment may cause negative outcomes

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[675] The Association of American Universities, *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct* iv (Westat 2015) ("More than 50 percent of the victims of even the most serious incidents (e.g., forced penetration) say they do not report the event because they do not consider it "serious enough.").

for those who experience it. The Department believes, however, that severity and pervasiveness are needed elements to ensure that Title IX's non-discrimination mandate does not punish verbal conduct in a manner that chills and restricts speech and academic freedom, and that recipients are not held responsible for controlling every stray, offensive remark that passes between members of the recipient's community. The Department does not believe that evaluating verbal harassment situations for severity, pervasiveness, and objective offensiveness will chill reporting of unwelcome conduct, because recipients retain discretion to respond to reported situations not covered under Title IX. Thus, recipients may encourage students (and employees) to report any unwanted conduct and determine whether a recipient must respond under Title IX, or chooses to respond under a non-Title IX policy.

The Department believes that the Supreme Court's *Gebser* and *Davis* opinions provide the appropriate principles to guide the Department with respect to appropriate interpretation and enforcement of Title IX as a non-sex discrimination statute. Title IX is not an anti-sexual harassment statute; Title IX prohibits sex discrimination in education programs or activities. The Supreme Court has held that sexual harassment may constitute sex discrimination under Title IX, but only when the sexual harassment is so severe, pervasive, and objectively offensive that it effectively denies a person's equal access to education. Title IX does not represent a "zero tolerance" policy banning sexual harassment as such, but does exist to provide effective protections to individuals against discriminatory practices, within the parameters set forth under the Title IX statute (20 U.S.C. 1681 *et seq*.) and Supreme Court case law. While the Supreme Court interpreted the level of harassment differently under Title VII than under Title IX, neither Federal non-sex discrimination civil rights law represents a "zero-tolerance" policy banning all

sexual harassment.[676] Rather, interpretations of both Title VII and Title IX focus on sexual harassment that constitutes sex discrimination interfering with equal participation in a workplace or educational environment, respectively. Contrary to the concerns of commenters, the fact that not every instance of sexual harassment violates Title VII or Title IX does not mean that sexual harassment not covered under one of those laws is "acceptable" or encourages perpetration of sexual harassment.[677] The Department does not believe that parameters around what constitutes actionable sexual harassment under a Federal civil rights statute creates an environment where abusers "do everything just short of the narrowed standard" to torment and silence victims. A course of unwelcome conduct directed at a victim to keep the victim fearful or silenced likely crosses over into "severe, pervasive, and objectively offensive" conduct actionable under Title IX. Whether or not misconduct is actionable under Title IX, it may be actionable under another part of a recipient's code of conduct (e.g., anti-bullying). These final regulations only prescribe a recipient's mandatory response to conduct that does meet the § 106.30 definition of sexual

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[676] *E.g.*, *Chesier v. On Q Financial Inc.*, 382 F. Supp. 3d 918, 925-26 (D. Ariz. 2019) (reviewing Title VII cases involving single instances of sexual harassment determined not to be sufficiently severe enough to affect a term of employment under Title VII) ("not all workplace conduct that may be described as 'harassment' affects a term, condition, or privilege of employment within the meaning of Title VII. . . . For sexual harassment to be actionable, it must be *sufficiently severe or pervasive* to alter the conditions of [the victim's] employment and create an abusive working environment.") (citing to *Meritor*, 477 U.S. at 67) (emphasis and brackets in original); Julie Davies, *Assessing Institutional Responsibility for Sexual Harassment in Education*, 77 TULANE L. REV. 387, 398, 407 (2002) ("Although the Court adopted different standards for institutional liability under Titles VII and IX, several themes serve as leitmotifs, running through the cases regardless of the technical differences. Neither Title VII nor Title IX is construed as a federal civility statute; the Court does not want entities to be obliged to litigate cases where plaintiffs have been subjected to 'minor' annoyances and insults.") (internal citation omitted).

[677] *See, e.g.*, *Brooks v. City of San Mateo*, 229 F.3d 917, 927 (9th Cir. 2000) ("Our holding in no way condones [the supervisor's] actions. Quite the opposite: The conduct of which [the plaintiff] complains was highly reprehensible. But, while [the supervisor] clearly harassed [the plaintiff] as she tried to do her job, not all workplace conduct that may be described as harassment affects a term, condition, or privilege of employment within the meaning of Title VII. The harassment here was an entirely isolated incident. It had no precursors, and it was never repeated. In no sense can it be said that the city imposed upon [the plaintiff] the onerous terms of employment for which Title VII offers a remedy.") (internal quotation marks and citation omitted).

harassment; these final regulations do not preclude a recipient from addressing other types of misconduct.

For the same reasons that Title IX does not stand as a zero-tolerance ban on all sexual harassment, Title IX does not stand as a Federal civil rights law to prevent all conduct that "makes me feel uncomfortable." The Supreme Court noted in *Davis* that school children regularly engage in "insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it" yet a school is liable under Title IX for responding to such behavior only when the conduct is "so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect."[678] Though not specifically in the Title IX context, the Supreme Court has noted that speech and expression do not lose First Amendment protections on college campuses, and in fact, colleges and universities represent environments where it is especially important to encourage free exchange of ideas, viewpoints, opinions, and beliefs.[679] The Department believes that the *Davis*

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[678] *Davis*, 526 U.S. at 650-51*; see also* Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights*, 35 JOURNAL OF COLL. & UNIV. L. 385, 399 (2009) ("misapplication of harassment law . . . has contributed to a sense among students that there is a general 'right' not to be offended' – a false notion that ill serves students as they transition from the relatively insulated college or university setting to the larger society. Colleges and universities too often address the problems of sexual and racial harassment by targeting any expression which may be perceived by another as offensive or undesirable.") (citing Alan Charles Kors & Harvey A. Silverglate, *The Shadow University: The Betrayal of Liberty on America's Campuses* (Free Press 1998) ("At almost every college and university, students deemed members of 'historically oppressed groups' . . . are informed during orientations that their campuses are teeming with illegal or intolerable violations of their 'right' not to be offended.")).

[679] *Healy v. James*, 408 U.S. 169, 180-81 (1972) ("At the outset we note that state colleges and universities are not enclaves immune from the sweep of the First Amendment. 'It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.' *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Of course, as Mr. Justice Fortas made clear in *Tinker*, First Amendment rights must always be applied 'in light of the special characteristics of the . . . environment in the particular case.' *Ibid*. And, where state-operated educational institutions are involved, this Court has long recognized 'the need for affirming the comprehensive authority of the States and of school officials, consistent with

formulation, applied to unwelcome conduct that is not *quid pro quo* harassment and not a Clery Act/VAWA offense included in § 106.30, appropriately safeguards free speech and academic freedom,[680] while requiring recipients to respond even to verbal conduct so serious that it loses First Amendment protection and denies equal access to the recipient's educational benefits.

While the Department appreciates a commenter's suggestion to describe prohibited conduct by references to terms used in the Sexual Experiences Survey or the Sexual Experiences

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fundamental constitutional safeguards, to prescribe and control conduct in the schools.' *Id.*, at 507. Yet, the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, '(t)he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.") (internal citations omitted).

[680] As noted in the "Role of Due Process in the Grievance Process" section of this preamble, the Department is aware that Title IX applies to all recipients operating education programs or activities regardless of a recipient's status as a public institution with obligations to students and employees under the U.S. Constitution or as a private institution not subject to the U.S. Constitution. However, the principles of free speech, and of academic freedom, are crucial in the context of both public and private institutions. *E.g.*, Kelly Sarabynal, 39 JOURNAL OF L. & EDUC. 145, 145, 181-82 (2010) (noting that "The vast majority of [public and private] universities in the United States promote themselves as institutions of free speech and thought, construing censorship as antipathetic to their search for knowledge") and observing that where public universities restrict speech (for example, through anti-harassment or anti-hate speech codes) the First Amendment "solves the conflict between a university's policies promising free speech and its speech-restrictive policies by rendering the speech-restrictive policies unconstitutional" and arguing that as to private universities, First Amendment principles embodied in a private university's policies should be enforced contractually against the university so that private liberal arts and research universities are held "to their official promises of free speech" which leaves private institutions control over changing their official promises of free speech if they so choose, for instance if the private institution expects students to "abide by the dictates of the university's ideology"). The Department is obligated to interpret and enforce Federal laws consistent with the U.S. Constitution. *E.g.*, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 574-575 (1988) (refusing to give deference to an agency's interpretation of a statute where the interpretation raised First Amendment concerns); 2001 Guidance at 22. While the Department has recognized the importance of responding to sexual harassment under Title IX while protecting free speech and academic freedom since 2001, as explained in the "Adoption and Adaption of the Supreme Court Framework to Address Sexual Harassment" section of this preamble, protection of free speech and academic freedom was weakened by the Department's use of wording that differed from the *Davis* definition of what constitutes actionable sexual harassment under Title IX and for reasons discussed in this section of the preamble, these final regulations return to the *Davis* definition verbatim, while also protecting against even single instances of *quid pro quo* harassment and Clery/VAWA offenses, which are not entitled to First Amendment protection.

Questionnaire,[681] for the above reasons the Department believes that the better formulation of prohibited conduct under Title IX is captured in § 106.30, prohibiting conduct on the basis of sex that is either *quid pro quo* harassment, unwelcome conduct so severe, pervasive, and objectively offensive that it effectively denies a person equal access to education, or sexual assault, dating violence, domestic violence, or stalking under the Clery Act and VAWA.

The Department understands commenters' concerns that the § 106.30 definition of sexual harassment, and the *Davis* standard in the second prong particularly, does not sufficiently acknowledge unequal power relations and societal factors that contribute to perpetuation of violence against women, and commenters' arguments that in order to reduce the prevalence of sexual misconduct across society even minor-seeming incidents should be taken seriously. The Department believes that the Supreme Court's recognition of sexual harassment as a form of sex discrimination[682] represents an important acknowledgement that sexual harassment often is not a matter of private, individualized misbehavior but is representative of sex-based notions and attitudes that contribute to systemic sex discrimination. However, the Department heeds the Supreme Court's interpretation of sexual harassment as sex discrimination under Title IX, premised on conditions that hold recipients liable for how to respond to sexual harassment. The § 106.30 definition of sexual harassment adopts the Supreme Court's *Davis* definition, adapted

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[681] Mary Koss & Cheryl J. Oros, *Sexual Experiences Survey: A research instrument investigating sexual aggression and victimization*, 50 JOURNAL OF CONSULTING & CLINICAL PSYCHOL. 3 (1982) (discussing survey questions designed to assess experiences with sexual harassment consisting of a series of questions about whether a respondent has encountered specific examples of sexual behavior); Louise Fitzgerald *et al.*, *Measuring sexual harassment: Theoretical and psychometric advances*, 17 BASIC & APPLIED SOCIAL PSYCHOL. 4 (1995).

[682] *E.g.*, *Meritor*, 477 U.S. at 64 ("Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."); *Gebser*, 524 U.S. at 283 (reference in *Franklin* to *Meritor* "was made with regard to the general proposition that sexual harassment can constitute discrimination on the basis of sex under Title IX, . . . an issue not in dispute here.") (internal citations omitted).

under the Department's administrative enforcement authority to provide broader protections for students (i.e., by ensuring that *quid pro quo* harassment and Clery Act/VAWA offenses included in § 106.30 count as sexual harassment without meeting the *Davis* standard). Similarly, the Department believes that by clearly defining sexual harassment to include sexual assault, dating violence, domestic violence, and stalking, affected parties will understand that no instance of sexual violence is tolerated under Title IX and may reduce the fear commenters described being felt by some young women participating in educational activities that involve proximity with fellow students or professors.

The Department does not believe that the § 106.30 definition creates categories of "legitimate" sexual misconduct or makes victims prove that their abuse is worthy of attention. The three-pronged definition of sexual harassment in § 106.30 captures physical and verbal conduct serious enough to warrant the label "abuse," and thereby assures complainants that sex-based abuse is worthy of attention and intervention by a complainant's school, college, or university. The Department appreciates the opportunity to clarify that the burden of describing or proving elements of the § 106.30 definition does not fall on complainants; there is no magic language needed to "present" a report or formal complaint in a particular way to trigger a recipient's response obligations. Rather, the burden is on recipients to evaluate reports of sexual harassment in a common sense manner with respect to whether the facts of an incident constitute one (or more) of the three types of misconduct described in § 106.30. This includes taking into account a complainant's age, disability status, and other factors that may affect how an individual complainant describes or communicates about a situation involving unwelcome sex-based conduct.

The Department disagrees with commenters' contention that § 106.30 gives school officials too much discretion to decide whether conduct was severe, pervasive, and objectively offensive or that these elements will lead to arbitrary decisions to turn away reporting parties based on biases of school administrators, fostering a culture of institutional betrayal, or that the § 106.30 definition eliminates "most" sexual harassment from coverage under Title IX, or that this definition is problematic because not all unwanted sexual behavior is severe and pervasive. Elements of severity, pervasiveness, and objective offensiveness must be evaluated in light of the known circumstances and depend on the facts of each situation, but must be determined from the perspective of a reasonable person standing in the shoes of the complainant. The final regulations revise the second prong of the § 106.30 definition to state that the *Davis* elements must be determined under a reasonable person standard. Title IX Coordinators are specifically required under the final regulations to serve impartially, without bias for or against complainants or respondents generally or for or against an individual complainant or respondent.[683] A recipient that responds to a report of sexual harassment in a manner that is clearly unreasonable in light of the known circumstances violates the final regulations,[684] incentivizing Title IX Coordinators and other recipient officials to carefully, thoughtfully, and reasonably evaluate each complainant's report or formal complaint.

The Department appreciates commenters' contention that recipients' Title IX offices have not been processing great quantities of "low-level" harassment cases; however, if that is accurate, then the § 106.30 definition simply will continue to ensure that sexual harassment is

[683] Section 106.45(b)(1)(iii).
[684] Section 106.44(a).

adequately addressed under Title IX, for the benefit of victims of sexual harassment. Far from excluding "most" sexual harassment from Title IX coverage, the definition of sexual harassment in § 106.30 requires recipients to respond to three separate broadly-defined categories of sexual harassment. While not all unwanted sexual conduct is both severe and pervasive, as explained above, the Supreme Court has long acknowledged that not all misconduct amounts to sex discrimination prohibited by Federal civil rights laws like Title VII and Title IX, even where the misconduct amounts to a criminal violation under State law.[685] Where a Federal civil rights law does not find sexual harassment to also constitute prohibited sex discrimination, this does not mean the conduct is acceptable or does not constitute a different violation, such as assault or battery, under non-sex discrimination laws. The Department does not believe that the § 106.30 definition of sexual assault is a "narrow" definition, as it includes all forcible and nonforcible sex offenses described in the FBI's Uniform Crime Reporting system and thus this definition will not discourage reporting of sexual assault.

The Department disagrees that it is inappropriate to use a uniform definition of sexual harassment in elementary and secondary school and postsecondary institution contexts. No person, of any age or educational level, should endure *quid pro quo* harassment, severe, pervasive, objectively offensive unwelcome conduct, or a Clery Act/VAWA offense included in § 106.30, without recourse from their school, college, or university. The § 106.30 definition

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[685] *See, e.g.*, *Brooks v. City of San Mateo*, 229 F.3d 917, 924, 927 (9th Cir. 2000) (Plaintiff alleged a workplace sexual assault in the form of a supervisor fondling plaintiff's breast, which is "egregious" and the perpetrator "spent time in jail" for the assault, yet the Court held that "[t]he harassment here was an entirely isolated incident. It had no precursors, and it was never repeated. In no sense can it be said that the city imposed upon [the plaintiff] the onerous terms of employment for which Title VII offers a remedy."); *see also Davis*, 526 U.S. at 634 (noting that the peer harasser in that case was charged with, and pled guilty to, sexual battery, yet still evaluating the harassment by whether it amounted to severe, pervasive, objectively offensive conduct).

applies equally in every educational setting, yet the definition may be applied in a common sense manner that takes into account the ages and developmental abilities of the involved parties.

The Department disagrees with a commenter's contention that community college students will find it more difficult to report sexual harassment because such students have less of a connection to a physical campus. Under § 106.8 of the final regulations, contact information for the Title IX Coordinator, including an office address, telephone number, and e-mail address, must be posted on the recipient's website, and that provision expressly states that any person may report sexual harassment by using the Title IX Coordinator's contact information. We believe this will simplify the process for community college students, as well as other complainants, to make a report to the recipient's Title IX Coordinator.

The Department disagrees with a commenter's assertion that pervasiveness necessarily transforms harassment into also being severe, because these elements are separate inquiries; however, the Department reiterates that a course of conduct reported as sexual harassment must be evaluated in the context of the particular factual circumstances, under a reasonable person standard, when determining whether the conduct is both severe and pervasive. The Department appreciates a commenter's suggestion to revise the second prong of the § 106.30 definition by stating that severe, pervasive, objectively offensive conduct counts when it "causes a person to be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity" instead of "effectively denies a person equal access to the recipient's education program or activity" to more closely mirror the language in the Title IX statute. However, as discussed above, the Department notes that when considering sexual harassment as a form of sex discrimination under Title IX, the Supreme Court in *Davis* repeatedly used the "denial of equal access" phrase to describe when sexual harassment is

actionable, implying that this is the equivalent of a violation of Title IX's prohibition on exclusion from participation, denial of benefits, and/or subjection to discrimination.[686] We believe this element as articulated by the *Davis* Court thus represents the full scope and intent of the Title IX statute.

Changes: We have revised the § 106.30 definition of sexual harassment by specifying that the elements in the *Davis* definition of sexual harassment (severe, pervasive, objectively offensive, and denial of equal access) are determined under a reasonable person standard.

Comments: Several commenters described State laws under which a recipient is required to respond to a broader range of misconduct than what meets the *Davis* standard, and stated that the NPRM places recipients in a "Catch-22" by requiring recipients to dismiss cases that do not meet the narrower § 106.30 definition; one such commenter urged the Department to either broaden the definition of sexual harassment or remove the mandatory dismissal provision in § 106.45(b)(3). A few commenters requested clarification on whether a school may choose to include a wider range of misconduct than conduct that meets this definition. Many commenters urged the Department not to prevent recipients from addressing misconduct that does not meet

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[686] *Davis*, 526 U.S. at 650 ("The statute's other prohibitions, moreover, help give content to the term 'discrimination' in this context. Students are not only protected from discrimination, but also specifically shielded from being 'excluded from participation in' or 'denied the benefits of' any 'education program or activity receiving Federal financial assistance.' 20 U.S.C. § 1681(a). The statute makes clear that, whatever else it prohibits, students must not be denied access to educational benefits and opportunities on the basis of gender. We thus conclude that funding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."); *id.* at 644-45 (holding that a recipient is liable where its "deliberate indifference 'subjects' its students to harassment – "[t]hat is, the deliberate indifference must, at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it."); *id.* at 650-652 (expressing the denial of access element in different ways as "depriv[ing] the victims of access to the educational opportunities or benefits provided by the school," "effectively den[ying] equal access to an institution's resources and opportunities," and "den[ying] its victims the equal access to education that Title IX is designed to protect.").

the § 106.30 definition because State laws and institutional policies often require recipients to respond. A few commenters asserted that even if the final regulations allow recipients to choose to address misconduct that does not meet the § 106.30 definition, this creates two different processes and standards (one for "Title IX sexual harassment" and one for other sexual misconduct) which will lead to confusion and inefficiency. At least one commenter stated that the Title IX equitable process should be used for all sexual misconduct violations such that the final regulations should allow recipients to use that process for Title IX, VAWA, Clery Act, and State law sex and gender offenses under a single campus policy and process. At least one commenter recommended that the Department clarify that the final regulations establish minimum Federal standards for responses to sex discrimination and that recipients retain discretion to exceed those minimum standards.

Discussion: The Department is aware that various State laws define actionable sexual harassment differently than the § 106.30 definition, and that the NPRM's mandatory dismissal provision created confusion among commenters as to whether the NPRM purported to forbid a recipient from addressing conduct that does not constitute sexual harassment under § 106.30. In response to commenters' concerns, the final regulations revise § 106.45(b)(3)(i)[687] to clearly state that dismissal for Title IX purposes does not preclude action under another provision of the recipient's code of conduct. Thus, if a recipient is required under State law or the recipient's own policies to investigate sexual or other misconduct that does not meet the § 106.30 definition, the

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

final regulations clarify that a recipient may do so. Similarly, if a recipient wishes to use a grievance process that complies with § 106.45 to resolve allegations of misconduct that do not constitute sexual harassment under § 106.30, nothing in the final regulations precludes a recipient from doing so. Alternatively, a recipient may respond to non-Title IX misconduct under disciplinary procedures that do not comply with § 106.45. The final regulations leave recipients flexibility in this regard, and prescribe a particular grievance process only where allegations concern sexual harassment covered by Title IX. The Department does not agree that this results in inefficiency or confusion, because so long as a recipient complies with these final regulations for Title IX purposes, a recipient retains discretion as to how to address non-Title IX misconduct. Because the final regulations extend the § 106.30 definition to include all four Clery Act/VAWA offenses (sexual assault, dating violence, domestic violence, stalking), the Title IX grievance process will apply to formal complaints alleging the Clery Act/VAWA offenses included in § 106.30, and recipients may choose to use the same process for State-law offenses, too.

The Department appreciates a commenter's suggestion to clarify (and does so here) that the final regulations establish Federal standards for responding to sex discrimination in the form of sexual harassment, and recipients retain discretion to respond to more conduct than what these final regulations require.

Changes: The final regulations revise § 106.45(b)(3)(i) to clearly state that dismissal for Title IX purposes does not preclude action under another provision of the recipient's code of conduct.

Comments: Many commenters opposed the second prong of the § 106.30 sexual harassment definition by giving examples of harassing conduct that might not be covered. One such commenter stated that the "severe and pervasive" standard will conflict with elementary and secondary school anti-bullying policies, asserting that, for example, a classmate repeatedly

taunting a girl about her breasts may not be considered both severe and pervasive enough to fall under the proposed rules, whereas a similarly-described scenario was clearly covered under the 2001 Guidance (at p. 6).

A few commenters raised examples such as snapping a girl's bra, casual jokes and comments of a sexual nature, or unwelcome e-mails with sexual content, which commenters asserted can be ignored under § 106.30 because the unwanted behavior might be considered not severe even though it is pervasive, leaving victims in a state of anxiety and negatively impacting victims' ability to access education.

One commenter asserted that under § 106.30, a professor whispering sexual comments to a female student would be "severe" but since it happened once it would not be "pervasive" so even if the female student felt alarmed and uncomfortable and dropped that class, the recipient would not be obligated to respond. The same commenter asserted that the following example would not be sexual harassment under § 106.30 because the conduct would be pervasive but not severe: a graduate assistant e-mails an undergraduate student multiple times per week for two months, commenting each time in detail about what the student wears and how she looks, making the student feel uncomfortable about the unwanted attention to the point where she drops the class.

One commenter described attending a holiday party for graduate students where a fellow student wore a shirt with the words "I'm just here for the gang bang" and while the offensive shirt did not prevent the commenter from continuing an education it made the commenter feel unsafe and showed how deep-seated toxic rape culture is on college campuses; the commenter contended that narrowing the definition of harassment will only perpetuate this culture.

One commenter recounted the experience of a friend who was drugged at a dorm party; the commenter contended that because the boys who drugged the girl did not also rape her, the situation would not even be investigated under the new Title IX rules even though an incident of boys drugging a girl creates a dangerous, ongoing threat on campus.

One commenter urged the Department to authorize recipients to create lists of situations that constitute *per se* harassment, for example where a recipient receives multiple reports of students having their towels tugged away while walking to the dorm bathrooms, or reports of students lifting the skirts or dresses of other students. The commenter asserted that creating lists of such *per se* violations will create more consistent application of the harassment definition within recipient communities and address problematic situations that occur frequently at some institutions.

Discussion: In response to commenters who presented examples of misconduct that they believe may not be covered under the *Davis* standard in the second prong of the § 106.30 definition, the Department reiterates that whether or not an incident of unwanted sex-based conduct meets the *Davis* elements is a fact-based inquiry, dependent on the circumstances of the particular incident. However, the Department does not agree with some commenters who speculated that certain examples would *not* meet the *Davis* standard, and encourages recipients to use common sense in evaluating conduct under a reasonable person standard, by taking into account the ages and abilities of the individuals involved in an incident or course of conduct.

Furthermore, the Department reiterates that the *Davis* standard is only one of three categories of conduct on the basis of sex prohibited under § 106.30, and incidents that do not meet the *Davis* standard may therefore still constitute sexual harassment under § 106.30 (for example, as fondling, stalking, or *quid pro quo* harassment). The Department also reiterates that

inappropriate or illegal behavior may be addressed by a recipient even if the conduct clearly does not meet the *Davis* standard or otherwise constitute sexual harassment under § 106.30, either under a recipient's own code of conduct or under criminal laws in a recipient's jurisdiction (e.g., with respect to a commenter's example of drugging at a dorm party).

The Department understands commenters' concerns that anything less than the broadest possible definition of actionable harassment may result in some situations that make a person feel unsafe or uncomfortable without legal recourse under Title IX; however, for the reasons described above, the Department chooses to adopt the Supreme Court's approach to interpreting Title IX, which requires schools to respond to sexual harassment that jeopardizes the equal access to education promised by Title IX. Whether or not a college student wearing a t-shirt with an offensive slogan constitutes sexual harassment under Title IX, other students negatively impacted by the t-shirt are free to opine that such expression is inappropriate, and recipients remain free to utilize institutional speech to promote their values about respectful expressive activity.

The Department notes that nothing in the final regulations prevents a recipient from publishing a list of situations that a recipient has found to meet the § 106.30 definition of sexual harassment, to advise potential victims and potential perpetrators that particular conduct has been found to violate Title IX, or to create a similar list of situations that a recipient finds to be in violation of the recipient's own code of conduct even if the conduct does not violate Title IX.

Changes: None.

Comments: At least one commenter urged the Department to expressly include verbal sexual coercion in the § 106.30 definition of sexual harassment, noting that studies indicate that college women are likely to experience verbal sexual coercion as a tactic of sexual assault on a

continuum ranging from non-forceful verbal tactics to incapacitation to physical force, and that studies indicate that verbal sexual coercion is the most common sexual assault tactic.[688]

One commenter insisted that the second prong of the § 106.30 definition of sexual harassment is too broad and contended that the Department should adopt the minority view in the *Davis* case, or alternatively change the second prong to "unwelcome physical conduct on the basis of sex that is so severe, and objectively offensive" (eliminating the word pervasive because a single act of a physical nature could trigger the statute while excluding purely verbal conduct from the definition).

At least one commenter suggested that the second prong should be subject to a general requirement of objective reasonableness; the commenter asserted that objective offensiveness is no substitute for requiring all the elements of the hostile environment claim be not only subjectively valid but also objectively reasonable. The commenter asserted that the stakes are high: many complaints come to Title IX offices from students who sincerely believe that they have experienced sexual harassment, meeting any subjective test, but which cannot survive reasonableness scrutiny and thus objective reasonableness under all the circumstances is a necessary guard against arbitrary enforcement.

At least one commenter stated that subjective factors must be taken into consideration to decide if conduct is severe and pervasive because how severe the experience is to a particular victim depends on factors such as the status of the offender, the power the offender holds over

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[688] Commenters cited: Brandie Pugh & Patricia Becker, *Exploring Definitions and Prevalence of Verbal Sexual Coercion and its Relationship to Consent to Unwanted Sex: Implications for Affirmative Consent Standards on College Campuses*, 8 BEHAVIORAL SCI. 8 (2018).

the victim's life, the victim's prior history of trauma, or whether the victim has a support system for dealing with the trauma.

Discussion: The Department appreciates commenters' concerns that verbal sexual coercion is the most common sexual assault tactic, but declines to list verbal coercion as an element of sexual harassment or sexual assault. As explained in the "Consent" subsection of the "Section 106.30 Definitions" section of this preamble, the Department leaves flexibility to recipients to define consent as well as terms commonly used to describe the absence or negation of consent (e.g., incapacity, coercion, threat of force), in recognition that many recipients are under State laws requiring particular definitions of consent, and that other recipients desire flexibility to use definitions of consent and related terms that reflect the unique values of a recipient's educational community.

The Department disagrees with commenters who argued that the *Davis* standard is too broad and that the Department should adopt the dissenting viewpoint from the *Davis* decision. For reasons explained in the "Adoption and Adaption of the Supreme Court Framework to Address Sexual Harassment" section of this preamble, the Department believes that the Supreme Court appropriately described the conditions under which sexual harassment constitutes sex discrimination under Title IX, and the Department's goal through these final regulations is to impose requirements for recipients to provide meaningful, supportive responses fair to all parties when allegations of sexual harassment are brought to a recipient's attention. Similarly, the Department declines a commenter's recommendation to restrict the *Davis* standard solely to "physical" conduct because the Supreme Court has acknowledged that not all speech is protected by the First Amendment, and that verbal harassment can constitute sex discrimination requiring a

response when it is so severe, pervasive, and objectively offensive that it denies a person equal access to education.

The Department is persuaded by commenters' recommendation that the second prong of the § 106.30 definition must be applied under a general reasonableness standard. We have revised § 106.30 to state that sexual harassment includes "unwelcome conduct" on the basis of sex "determined by a reasonable person" to be so severe, pervasive, and objectively offensive that it effectively denies a person equal educational access. We interpret the *Davis* standard formulated in § 106.30 as subjective with respect to the unwelcomeness of the conduct (i.e., whether the complainant viewed the conduct as unwelcome), but as to elements of severity, pervasiveness, objective offensiveness, and denial of equal access, determinations are made by a reasonable person in the shoes of the complainant.[689] The Department believes this approach appropriately safeguards against arbitrary application, while taking into account the unique circumstances of each sexual harassment allegation.

Changes: We have revised the § 106.30 definition of sexual harassment by specifying that the elements in the *Davis* standard (severe, pervasive, objectively offensive, and denial of equal access) are determined under a reasonable person standard.

Comments: Many commenters opposed the § 106.30 definition on the ground that a narrow definition fails to stop harassing behavior before it escalates into more serious violations. Some

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[689] *See Davis*, 526 U.S. at 653-54 (applying the severe, pervasive, objectively offensive, denial of access standard to the facts at issue under an objective) ("Petitioner alleges that her daughter was the victim of repeated acts of sexual harassment by G. F. over a 5-month period, and there are allegations in support of the conclusion that G. F.'s misconduct was severe, pervasive, and objectively offensive. The harassment was not only verbal; it included numerous acts of objectively offensive touching, and, indeed, G. F. ultimately pleaded guilty to criminal sexual misconduct. . . . Further, petitioner contends that the harassment had a concrete, negative effect on her daughter's ability to receive an education.").

commenters urged the Department to consider statistics regarding violent offenders who could be identified by examining their history of harassment that escalated over time into violence. Other commenters emphasized that sexual harassment is often a first stop on a continuum of violence and schools have a unique opportunity and duty to intervene early. At least one commenter asserted that the definition should be more in line with academic definitions of sexual harassment.[690] At least one commenter analogized to laws against drunk driving, asserting that such laws do not distinguish between instances where a driver is marginally above the legal intoxication limit from those where a driver is significantly above the limit; the commenter argued that just as all driving while intoxicated situations are dangerous, all harassment regardless of severity is dangerous. Another commenter likened the § 106.30 approach to choosing not to address a rodent infestation until the problem escalates and becomes costlier to redress.

A few commenters argued that waiting until sexually predatory behavior becomes extremely serious risks women's lives, pointing to instances where women reporting domestic violence have been turned away by police due to individual incidents seeming "non-severe" and then been killed by their violent partners.[691]

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[690] Commenters cited: *Handbook for Achieving Gender Equity Through Education* 215-229 (Susan G. Klein *et al.* eds., 2d ed. 2007).

[691] Commenter cited: Elizabeth Bruenig, *What Do We Owe Her Now?*, THE WASHINGTON POST (Sept. 21, 2018); Lindsay Gibbs, *College track star warned police about her ex-boyfriend 6 times in the 10 days before he killed her*, THINKPROGRESS (Dec. 18, 2018), https://thinkprogress.org/mccluskey-university-of-utah-warned-police-about-ex-boyfriend-6-times-bc08aed0fad5/; Sirin Kale, *Teen Killed By Abusive Ex Even After Reporting Him to Police Five Times*, VICE (Jan. 15, 2019), https://broadly.vice.com/en_us/article/59vnbx/teen-killed-by-abusive-ex-even-after-reporting-him-to-police-five-times.

Many commenters stated that a victim turned away while trying to report a less severe instance of harassment will be unlikely to try and report a second time when the harassing conduct has escalated into a more severe situation.

Discussion: The Department understands commenters' concerns that sometimes harassing behavior escalates into more serious harassment, up to and even including violence and homicide, and that commenters therefore advocate using a very broad definition of sexual harassment that captures even seemingly "low level" harassment. The Department is persuaded that every instance of dating violence, domestic violence, and stalking should be considered sexual harassment under Title IX and has therefore revised § 106.30 to include these offenses in addition to sexual assault. However, for the reasons described above, the Department chooses to follow the Supreme Court's framework recognizing that Title IX is a non-sex discrimination statute and not a prohibition on all harassing conduct, and declines to define actionable sexual harassment as broadly as some academic researchers define harassment. The Department further believes that § 106.30 appropriately recognizes certain forms of harassment as *per se* sex discrimination (i.e., *quid pro quo* and Clery Act/VAWA offenses included in § 106.30), while adopting the *Davis* definition for other types of harassment such that free speech and academic

freedom[692] are not chilled or curtailed by an overly broad definition of sexual harassment.[693] The Department believes that as a whole, the § 106.30 definition appropriately requires recipient intervention into situations that form a course of escalating conduct, without requiring recipients to intervene in situations that might – but have not yet – risen to a serious level. By adding dating violence, domestic violence, and stalking to the third prong of the § 106.30 definition, it is even more likely that conduct with potential to escalate into violence or even homicide will be reported and addressed before such escalation occurs.

The Department contends that, similar to laws setting a legal limit over which a person's blood alcohol level constitutes illegal driving while intoxicated,[694] the § 106.30 definition as a whole sets a threshold over which a person's unwelcome conduct constitutes sexual harassment. While some harassment does not meet the threshold, serious incidents that jeopardize equal educational access exceed the threshold and are actionable. In addition, the § 106.30 definition

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[692] The Supreme Court has recognized academic freedom as protected under the First Amendment. *See, e.g.*, *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. . . . The classroom is peculiarly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, (rather) than through any kind of authoritative selection.") (internal quotation marks and citations omitted).

[693] Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 RUTGERS L. REV. 563 (1995) ("[T]he vagueness of harassment law means the law actually deters much more speech than might ultimately prove actionable."); Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L. J. 481, 483 (1991) ("A broad definition of sexual and racial harassment necessarily delegates broad powers to courts to determine matters of taste and humor, and the vagueness of the definition of 'harassment' leaves those subject to regulation without clear notice of what is permitted and what is forbidden. The inescapable result is a substantial chilling effect on expression.").

[694] While several States have zero-tolerance laws for driving while intoxicated that set illegal blood alcohol content levels at anything over 0.00, those zero-tolerance laws only apply to persons under the legal drinking age; for persons age 21 and older, all States have laws that set an illegal blood alcohol content level at 0.08 – in other words, not all levels of intoxication are prohibited, but rather only blood alcohol content levels above a certain amount. *See* Michael Wechsler, *DUI, DWI, and Zero Tolerance Laws by State*, THELAW.COM, https://www.thelaw.com/law/dui-dwi-and-zero-tolerance-laws-by-state.178/.

includes single instances of *quid pro quo* harassment and Clery Act/VAWA offenses, requiring recipients to address serious problems before such problems have repeated or multiplied and become more difficult to address. Similarly, the Department disagrees that § 106.30 makes complainants wait until sexually predatory behavior becomes extremely serious, because the definition as a whole captures serious conduct (not just "extremely" serious conduct) that Title IX prohibits.

The Department understands commenters' concerns that if a complainant reports a sexual harassment incident that does not meet the § 106.30 definition, that complainant may feel discouraged from reporting a second time if the sexual harassment escalates to meet the § 106.30 definition. However, complainants and recipients have long been familiar with the concept that sexual harassment must meet a certain threshold to be considered actionable under Federal non-discrimination laws.[695] The final regulations follow the same approach, and the Department does not believe that having a threshold for when harassment is actionable will chill reporting. The Department also reiterates that recipients retain discretion to respond to misconduct not covered by Title IX.

Changes: None.

Comments: Several commenters argued that adopting a narrower definition of sexual harassment makes it easier for sexist, misogynistic, and homophobic microaggressions, including sexist

[695] In the workplace under Title VII, and in educational environments under Title IX as interpreted in the Department's 2001 Guidance, not all sexual harassment is actionable. Title VII requires severe or pervasive conduct that alters a condition of employment. *E.g.*, *Meritor*, 477 U.S. at 67 ("For sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment.") (internal quotation marks and citation omitted). The 2001 Guidance requires conduct "sufficiently serious" to deny or limit the complainant's ability to participate in education to be actionable under Title IX. 2001 Guidance at 5.

hostility and crude behavior, to continue unchecked. Commenters argued that making the definition of sexual harassment less inclusive tacitly condones microaggressions, making campuses less safe and decreasing diversity because more students from underrepresented groups will perform worse in school or leave school entirely.

A few commenters recommended that the definition include microaggressions. Some commenters asserted that microaggressions can cause the same negative impact on victims as more severe harassment does.[696] Other commenters asserted that using a "severe, pervasive, and objectively offensive" standard fails to consider personal, cultural, and religious differences in determining what constitutes sexual harassment, ignoring the fact that especially for individuals in marginalized identity groups, microaggressions may not seem pervasive or severe to an outsider but accumulate to make marginalized students feel unwelcome and unable to continue their education. One commenter suggested that rather than narrow the definition of harassment, it should be expanded to include what one professor has called "creepiness."[697] A few commenters asserted that cat-calling and other microaggressions may constitute more subtle forms of sexual harassment yet cause very real harms to victims[698] and the final regulations should protect more students from harmful violations of bodily and mental autonomy and dignity. At least one commenter argued that research indicates that gendered microaggressions, while not extreme,

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[696] Commenter cited: Lucas Torres & Joelle T. Taknint, *Ethnic microaggressions, traumatic stress symptoms, and Latino depression: A moderated mediational model*, 62 JOURNAL OF COUNSELING PSYCHOL. 3 (2015).
[697] Commenters cited: Bonnie Mann, *Creepers, Flirts, Heroes, and Allies: Four Theses on Men and Sexual Harassment*, 11 AM. PHIL. ASS'N NEWSLETTER ON FEMINISM & PHILOSOPHY 24 (2012).
[698] Commenter cited: Emma McClure, *Theorizing a Spectrum of Aggression: Microaggressions, Creepiness, and Sexual Assault*, 14 THE PLURALIST 1 (2019) (noting an accepted definition of "microaggressions" as "the brief and commonplace daily verbal, behavioral, and environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative racial, gender, sexual-orientation, and religious slights and insults to the target person or group" and stating that "although each individual microaggression may seem negligible, when repeated over time, microaggressions can seriously damage the target's mental and physical health").

increase the likelihood of high-severity sexual violence[699] and that unaddressed subtly aggressive behavior leads to more extreme sexual harassment.[700]

One commenter suggested that recipients will save money by investigating all survivor complaints, including of microaggressions, rather than waiting until harassment is severe and pervasive, because trauma from sexual harassment is analogous to chronic traumatic encephalopathy (CTE) in contact sports – it is not necessarily one big trauma that causes CTE but many repeated and seemingly asymptomatic injuries that accumulate over time causing CTE. Commenters argued that schools should be required, or at least allowed, to intervene in cases less severe than the § 106.30 definition.

Discussion: The Department appreciates commenters' concerns about the harm that can result from microaggressions, cat-calling, and hostile, crude, or "creepy" behaviors that can make students feel unwelcome, unsafe, disrespected, insulted, and discouraged from participating in a community or in programs or activities. However, the Supreme Court has cautioned that while Title VII and Title IX both prohibit sex discrimination, neither of these Federal civil rights laws is designed to become a general civility code.[701] The Supreme Court interpreted Title IX's non-

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[699] Commenters cited: Rachel E. Gartner & Paul R. Sterzing, *Gender Microaggressions as a Gateway to Sexual Harassment and Sexual Assault: Expanding the Conceptualization of Youth Sexual Violence*, 31 AFFILIA: J. OF WOMEN & SOCIAL WORK 4 (2016).

[700] Commenters cited: Dorothy Espelage *et al.*, *Longitudinal Associations Among Bullying, Homophobic Teasing, and Sexual Violence Perpetration Among Middle School Students*, 30 JOURNAL OF INTERPERSONAL VIOLENCE 14 (2015).

[701] *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) ("These standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a 'general civility code.' . . . Properly applied, they will filter out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.") (internal quotation marks and citations omitted); *Davis*, 526 U.S. at 684 (Kennedy, J., dissenting) ("the majority seeks, in effect, to put an end to student misbehavior by transforming Title IX into a Federal Student Civility Code."); *id.* at 652 (refuting dissenting justices' arguments that the majority

discrimination mandate to prohibit sexual harassment that rises to a level of severity, pervasiveness, and objective offensiveness such that it denies equal access to education.[702] The *Davis* Court acknowledged that while misbehavior that does not meet that standard may be "upsetting to the students subjected to it,"[703] Title IX liability attaches only to sexual harassment that does meet the *Davis* standard. The Department declines to prohibit microaggressions as such, but notes that what commenters and researchers consider microaggressions[704] could form part of a course of conduct reaching severity, pervasiveness, and objective offensiveness under § 106.30, though a fact-specific evaluation of specific conduct is required. As to a commenter's likening of microaggressions to "asymptomatic" injuries that in the aggregate cause CTE from playing contact sports, actionable sexual harassment under Title IX involves conduct that is unwelcome and so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity. Where harm results from behavior that does not meet the § 106.30 definition of sexual harassment, nothing in these final regulations precludes recipients from addressing such behavior under a recipient's own student or employee conduct code.

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opinion permits too much liability under Title IX or turns Title IX into a general civility code, by emphasizing that it is not enough to show that a student has been teased, called offensive names, or taunted, because liability attaches only to sexual harassment that is severe and pervasive); Julie Davies, *Assessing Institutional Responsibility for Sexual Harassment in Education*, 77 TULANE L. REV. 387, 398, 407 (2002) ("Although the Court adopted different standards for institutional liability under Titles VII and IX, several themes serve as leitmotifs, running through the cases regardless of the technical differences. Neither Title VII nor Title IX is construed as a federal civility statute; the Court does not want entities to be obliged to litigate cases where plaintiffs have been subjected to 'minor' annoyances and insults.") (internal citation omitted).

[702] *Davis*, 526 U.S. at 652.

[703] *Id.* at 651-52.

[704] *See, e.g.*, Emma McClure, *Theorizing a Spectrum of Aggression: Microaggressions, Creepiness, and Sexual Assault*, 14 THE PLURALIST 1 (2019) (noting an accepted definition of "microaggressions" as "the brief and commonplace daily verbal, behavioral, and environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative racial, gender, sexual-orientation, and religious slights and insults to the target person or group").

As noted above, the fact that not every harassing or offensive remark is prohibited under Title IX in no way condones or encourages crude, insulting, demeaning behavior, which recipients may address through a variety of actions; as a commenter pointed out, a recipient's response could include providing a complainant with supportive measures, responding to the conduct in question with institutional speech, or offering programming designed to foster a more welcoming campus climate generally, including with respect to marginalized identity groups. We have revised § 106.45(b)(3) in the final regulations to clarify that mandatory dismissal of a formal complaint due to the allegations not meeting the § 106.30 definition of sexual harassment does not preclude a recipient from acting on the allegations through non-Title IX codes of conduct. The final regulations also permit a recipient to provide supportive measures to a complainant even where the conduct alleged does not meet the § 106.30 definition of sexual harassment.

Changes: We have revised § 106.45(b)(3) to clarify that mandatory dismissal of a formal complaint because the allegations do not constitute sexual harassment as defined in § 106.30 does not preclude a recipient from addressing the allegations through the recipient's code of conduct.

Comments: Several commenters argued that concern for protecting free speech and academic freedom does not require or justify using the *Davis* definition of sexual harassment in the second prong of the § 106.30 definition because harassment is not protected speech if it creates a hostile

environment.[705] Commenters asserted that schools have the authority to regulate harassing speech,[706] that there is no conflict between the First Amendment and Title IX's protection against sexually harassing speech, and that the Department has no evidence that a broader definition of harassment over the last 20 years has infringed on constitutionally protected speech or academic freedom. On the other hand, at least one commenter argued that verbal conduct creating a hostile environment may still be constitutionally protected speech.[707]

Discussion: The Supreme Court has not squarely addressed the intersection between First Amendment protection of speech and academic freedom, and non-sex discrimination Federal civil rights laws that include sexual harassment as a form of sex discrimination (i.e., Title VII and Title IX).[708] With respect to sex discriminatory conduct in the form of admissions or hiring and firing decisions, for example, prohibiting such conduct does not implicate constitutional concerns even when the conduct is accompanied by speech,[709] and similarly, when sex

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[705] Commenters cited: Joanna L. Grossman & Deborah L. Brake, *A Sharp Backward Turn: Department of Education Proposes to Protect Schools, Not Students, in Cases of Sexual Violence*, VERDICT (Nov. 29, 2018) ("There is no legitimate First Amendment or academic freedom protection afforded to unwelcome sexual conduct that creates a hostile educational environment.").

[706] Commenters cited: *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513-14 (1969) (holding school officials can regulate student speech if they reasonably forecast "substantial disruption of or material interference with school activities" or if the speech involves "invasion of the rights of others").

[707] Commenters cited: *White v. Lee*, 227 F.3d 1214, 1236-37 (9th Cir. 2000) (refusing to extend labor law precedents allowing restrictions on workplace speech to non-workplace contexts such as discriminatory speech about housing projects); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991) (holding student speech that created a hostile environment was protected even though workplace speech creating a hostile environment is banned by Title VII).

[708] *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 204, 207 (3d Cir. 2001) ("There is no categorical 'harassment exception' to the First Amendment's free speech clause.") ("Although the Supreme Court has written extensively on the scope of workplace harassment, it has never squarely addressed whether harassment, when it takes the form of pure speech, is exempt from First Amendment protection") ("Loosely worded anti-harassment laws may pose some of the same problems as the St. Paul hate speech ordinance [struck down by the Supreme Court as unconstitutional in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992)]: they may regulate deeply offensive and potentially disruptive categories of speech based, at least in part, on subject matter and viewpoint.").

[709] *E.g.*, John F. Wirenius, *Actions as Words, Words as Actions: Sexual Harassment Law, the First Amendment and Verbal Acts*, 28 WHITTIER L. REV. 905 (2007) (identifying a First Amendment issue only with respect to hostile environment sexual harassment, as opposed to discriminatory conduct in the form of discrete employment decisions and *quid pro quo* sexual harassment).

discrimination occurs in the form of non-verbal sexually harassing conduct, or speech used to harass in a *quid pro quo* manner, stalk, or threaten violence against a victim, no First Amendment problem exists.[710] However, with respect to speech and expression, tension exists between First Amendment protections and the government's interest in ensuring workplace and educational environments free from sex discrimination when the speech is unwelcome on the basis of sex.[711]

In striking down a city ordinance banning bias-motivated disorderly conduct, the Supreme Court in *R.A.V. v. City of St. Paul* emphasized that the First Amendment generally prevents the government from proscribing speech or expressive conduct "because of disapproval

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[710] *Id.*; *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993) (citing Supreme Court cases in support of the view that a variety of conduct can be prohibited even where the person engaging in the conduct uses speech or expresses an idea, such that the First Amendment provides no protection for physical assault, violence, threat of violence, or other special harms distinct from communicative impact); *United States v. Osinger*, 753 F.3d 939, 953 (9th Cir. 2014) ("Because the sole immediate object of [the defendant's] speech was to facilitate his commission of the interstate stalking offense, that speech isn't entitled to constitutional protection.") (internal quotation marks and citation omitted).

[711] Andrea Meryl Kirshenbaum, *Hostile Environment Sexual Harassment Law and the First Amendment: Can the Two Peacefully Coexist?*, 12 TEX. J. OF WOMEN & THE L. 67, 68-70 (2002) ("Although the Supreme Court has never directly addressed this issue, the tension between the First Amendment and hostile environment sexual harassment law is evidenced by an increase in litigation involving these issues in courts throughout the nation." . . . "the clash between the First Amendment and the hostile environment sexual harassment doctrine is acute."); Peter Caldwell, *Hostile Environment Sexual Harassment & First Amendment Content-Neutrality: Putting the Supreme Court on the Right Path*, 23 HOFSTRA LAB. & EMP. L. J. 373 (2006) ("Where pure expression is involved, Title VII steers into the territory of the First Amendment. It is no use to deny or minimize this problem because, when Title VII is applied to sexual harassment claims founded solely on verbal insults, pictorial or literary matter, the statute imposes content-based, viewpoint-discriminatory restrictions on speech."); John F. Wirenius, *Actions as Words, Words as Actions: Sexual Harassment Law, the First Amendment and Verbal Acts*, 28 WHITTIER L. REV. 905 (2007) ("For nearly two decades, a debate has smoldered over the perceived tension between the law of sexual harassment and the First Amendment's guarantee of freedom of speech. As the protection against sexual harassment in the workplace spread beyond overt discrimination in discrete employment decisions and *quid pro quo* sexual harassment to include the less readily quantified 'hostile work environment,' free speech advocates became less sanguine about the compatibility between the protections against workplace discrimination and the First Amendment, especially its proscription of viewpoint discrimination."). The same tension exists with respect to the First Amendment, and verbal and expressive unwelcome conduct on the basis of sex under Title IX, and the Department aims to ensure through a carefully crafted definition of actionable sexual harassment that "discrete" sex offenses "and *quid pro quo* sexual harassment" are *per se* sexual harassment under Title IX because no First Amendment issues are raised, while verbal and expressive conduct is evaluated under the *Davis* standard so that prohibiting sexual harassment under Title IX is consistent with the First Amendment.

of the ideas expressed. Content-based regulations are presumptively invalid."[712] The Supreme Court explained that even categories of speech that can be regulated consistent with the First Amendment (for example, obscenity and defamation) cannot do so in a content-discriminatory manner (for instance, by prohibiting only defamation that criticizes the government).[713] The Supreme Court further explained that while "fighting words" can permissibly be proscribed under First Amendment doctrine, such a conclusion is based on the nature of fighting words to provoke injury and violence,[714] not merely the impact on the listener to be insulted or offended, and government still cannot regulate "based on hostility—or favoritism—towards the underlying message expressed."[715] Side-stepping the direct question of how the First Amendment prohibition against content-based regulations applies to hostile environment sexual harassment claims based on speech rather than acts, the *R.A.V.* Court stated that "sexually-based 'fighting words'" could "produce a violation of Title VII's general prohibition against sexual discrimination in employment *practices*" because "[w]here the government does not target *conduct* on the basis of its expressive conduct, *acts* are not shielded from regulation merely because they express a discriminatory idea or philosophy."[716] The *R.A.V.* Court struck down the city ordinance at issue, even though it was intended to protect persons in historically marginalized groups from victimization, in part because the "secondary effect" of whether a particular listener or audience is offended by speech does not justify restricting the speech.[717] In

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[712] *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).
[713] *See id.* at 383-84.
[714] *Id.* at 380-81 (*citing Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) for proposition that "fighting words" represent "conduct that itself inflicts injury or tends to incite immediate violence").
[715] *Id.* at 386.
[716] *Id.* at 389-90 (internal citation omitted) (emphasis added).
[717] *Id.* at 394.

striking down the ordinance, the Supreme Court noted that city officials retained the ability to communicate their hostility for certain biases – but not "through the means of imposing unique limitations upon speakers who (however benightedly) disagree."[718]

Seven years after deciding *R.A.V.* under the First Amendment, the Supreme Court decided *Davis* under Title IX. While the *Davis* Court did not raise the issue of First Amendment intersection with anti-sexual harassment regulation,[719] it focused on the sexually harassing *conduct* of the peer-perpetrator in that case,[720] indicating that the Supreme Court recognizes that proscribing conduct, as opposed to speech, raises no constitutional concerns, and that even when anti-harassment rules are applied to verbal harassment, requiring the harassment to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to education avoids putting recipients in the untenable position of protecting a recipient from legal liability

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[718] *Id.* at 395-96.

[719] The majority opinion did not address First Amendment concerns, although the dissent raised the issue. *Davis*, 526 U.S. at 667-68 (Kennedy, J., dissenting) ("A university's power to discipline its students for speech that may constitute sexual harassment is also circumscribed by the First Amendment. A number of federal courts have already confronted difficult problems raised by university speech codes designed to deal with peer sexual and racial harassment. *See*, *e.g.*, *Dambrot v. Cent. Michigan Univ.*, 55 F.3d 1177 (6th Cir. 1995) (striking down university discriminatory harassment policy because it was overbroad, vague, and not a valid prohibition on fighting words); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wisconsin Sys.*, 774 F.Supp. 1163 (E.D. Wis. 1991) (striking down university speech code that prohibited, *inter alia*, 'discriminatory comments' directed at an individual that 'intentionally . . . demean' the 'sex . . . of the individual' and 'create an intimidating, hostile or demeaning environment for education, university related work, or other university-authorized activity'); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (similar); *Iota XI Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386 (4th Cir. 1993) (overturning on First Amendment grounds university's sanctions on a fraternity for conducting an 'ugly woman contest' with 'racist and sexist' overtones) The difficulties associated with speech codes simply underscore the limited nature of a university's control over student behavior that may be viewed as sexual harassment."). Presumably, the majority believed that ensuring that even verbal harassment that meets the severe, pervasive, and objectively offensive standard avoids this constitutional problem; the majority expressed a similar rationale in response to the dissent's contention that the majority opinion permitted too much liability against recipients. *Davis*, 526 U.S. at 651-53.

[720] *Davis*, 526 U.S. at 653 ("Petitioner alleges that her daughter was the victim of repeated acts of sexual harassment by G. F. over a 5-month period, and there are allegations in support of the conclusion that G. F.'s misconduct was severe, pervasive, and objectively offensive. *The harassment was not only verbal; it included numerous acts of objectively offensive touching*, and, indeed, G. F. ultimately pleaded guilty to criminal sexual misconduct.") (emphasis added).

arising from how the recipient responds to sexual harassment only by unconstitutionally restricting its students' (or employees') rights to freedom of speech and expression.

The legal commentary and Supreme Court precedent often cited by commenters[721] arguing that the *Davis* definition of sexual harassment is not necessary for protection of First Amendment freedoms because harassment is unprotected if it creates a hostile environment, and because schools have authority to regulate harassing speech, do not support a conclusion that a categorical "harassment exception" exists under First Amendment law and do not justify applying a standard lower than the *Davis* standard for speech-based harassment in the educational context. For example, the statement in a legal commentary frequently cited by commenters that "[t]here is no legitimate First Amendment or academic freedom protection afforded to unwelcome sexual conduct that creates a hostile educational environment" contains no citations to legal authority.[722] Likewise, commenters citing *Tinker v. Des Moines Indep. Comm. Sch. Dist.* for the proposition that school officials can regulate student speech if they reasonably forecast "substantial disruption of or material interference with school activities" or if the speech involves "invasion of the rights of others" fail to acknowledge: (i) in *Tinker* the Supreme Court struck down the school decision in that case forbidding students from wearing armbands expressing opposition to war because that expressive conduct was akin to pure speech

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[721] *E.g.*, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513-14 (1969); Joanna L. Grossman & Deborah L. Brake, *A Sharp Backward Turn: Department of Education Proposes to Protect Schools, Not Students, in Cases of Sexual Violence*, VERDICT (Nov. 29, 2018).

[722] Joanna L. Grossman & Deborah L. Brake, *A Sharp Backward Turn: Department of Education Proposes to Protect Schools, Not Students, in Cases of Sexual Violence*, VERDICT (Nov. 29, 2018) (stating, without citation to legal authority, the proposition that "There is no legitimate First Amendment or academic freedom protection afforded to unwelcome sexual conduct that creates a hostile environment").

warranting First Amendment protection;[723] (ii) the *Tinker* Court insisted that the "substantial disruption" or "interference with school activities" exceptions only apply where school officials have more than unspecified fear of disruption or interference;[724] and (iii) the precise scope of *Tinker's* "interference with the rights of others" language is unclear, but is comparable to the *Davis* standard.[725] By requiring threshold levels of serious interference with work or education environments before sexual harassment is actionable, the Supreme Court standards under *Meritor*[726] (for the workplace) and *Davis*[727] (for schools, colleges, and universities) prevent these non-discrimination laws from infringing on speech and academic freedom,[728] precisely because

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[723] *Tinker*, 393 U.S. at 505-06 ("the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment.").
[724] *Id.* at 508 ("undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression").
[725] *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293 (3d Cir. 2013) ("As we have repeatedly noted, the precise scope of *Tinker's* 'interference with the rights of others' language is unclear.") (internal quotation marks and citation omitted); *cf.* Brett A. Sokolow *et al.*, *The Intersection of Free Speech and Harassment Rules*, 38 HUM. RIGHTS 19 (2011) ("The *Tinker* standard is comparable to the *Davis* standard, which places the threshold for harassment at the point where conduct 'bars the victim's access to an educational opportunity,' in that speech can be restricted only when the educational process is substantially impeded. In other words, when reviewing school policies, and the implementation thereof, it is critical to ensure students are being disciplined as a result of the objective impact of their speech, and not solely based on its content and/or the feelings of those to whom that speech is targeted.").
[726] *Meritor*, 477 U.S. at 67; *see also* John F. Wirenius, *Actions as Words, Words as Actions: Sexual Harassment Law, the First Amendment and Verbal Acts*, 28 WHITTIER L. REV. 905, 908 (2007) (arguing that the hostile work environment doctrine, properly understood with its critical threshold requirement that harassing speech be severe or pervasive enough to create an objectively hostile or abusive work environment, converts harassing speech into "verbal conduct" that may be regulated under Title VII consistent with the First Amendment). Similarly, when harassing speech is severe, pervasive, and objectively offensive enough to create deprivation of equal educational access it may be regulated under Title IX consistent with the First Amendment.
[727] *Davis*, 526 U.S. at 651 ("Rather, a plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."); Brett A. Sokolow, *et al.*, *The Intersection of Free Speech and Harassment Rules*, 38 HUM. RIGHTS 19 (2011) (cautioning that institutional anti-harassment policies must not prevent students from exercising rights of speech and expression, a result that the *Davis* standard makes clear).
[728] *E.g.*, Brett A. Sokolow *et al.*, *The Intersection of Free Speech and Harassment Rules*, 38 HUM. RIGHTS 19, 20 (2011) ("[S]chool regulations and actions that impact speech must be content and viewpoint neutral and must be

non-discrimination laws are not "categorically immune from First Amendment challenge when they are applied to prohibit speech solely on the basis of its expressive content."[729]

The First Amendment plays a crucial role in ensuring that the American government remains responsive to the will of the people and effects peaceful change by fostering free, robust exchange of ideas,[730] including those relating to sex-based equality and dignity.[731] There is no doubt that words can wound, and speech can feel like an "assault, seriously harm[ing] a private

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narrowly tailored to fit the circumstances. These regulations must be clear enough for a person of ordinary intelligence to understand, or courts will find them unconstitutionally void for vagueness. They cannot overreach by covering both protected and unprotected speech or courts will find them unconstitutionally overbroad. The regulation cannot act to preemptively prevent students from exercising their right to freely express themselves because the courts will find the prior restraint of speech presumptively unconstitutional.") ("In some ways, activist courts, agencies, and educational messages about civility and tolerance may have given a false impression that any sexist, ageist, racist, and so forth, remark is tantamount to harassment. As a society, we now use the term 'harassment' to mean being bothered, generically. We must distinguish generic harassment from discriminatory harassment. The standard laid out in *Davis* . . . makes this clear: To be considered discriminatory harassment, the conduct in question must be 'so severe, pervasive, *and* objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.'") (emphasis in original).

[729] *Saxe*, 240 F.3d at 209.

[730] *See Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) ("The vitality of civil and political institutions in our society depends on free discussion. . . . [I]t is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes. Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.") (internal citations omitted).

[731] Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights*, 35 JOURNAL OF COLL. & UNIV. L. 385, 397 (2009) ("In drafting and applying their harassment policies, colleges and universities frequently target protected speech merely because the expression in question is alleged to be sexist, prejudicial, or demeaning. . . . This approach ignores the fact that even explicitly sexist or racist speech is entitled to protection, and all the more so where it espouses views on important issues of social policy. Few people would disagree, for example, that the subjects of relations between the sexes, women's rights, and the pursuit of economic and social equality are all important matters of public concern and debate. Therefore, speech relating to such topics, regardless of whether it takes a favorable or negative view of women, is highly germane to the debate of public matters and social policy. In the marketplace of ideas, these expressions should not be suppressed merely to avoid offense or discomfort.") (citing *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985) (holding invalid under the First Amendment a statute that prohibited pornography depicting the subordination of women because the statute was a content-based restriction – that is, it applied not to all sexual depictions but to depictions of women in a disfavored manner).

individual" with effects that often linger.[732] Nonetheless, serious risks attach to soliciting the coercive power of government to enforce even laudable social norms such as respect and civility.[733] Even low-value speech warrants constitutional protection, in part because government should not be the arbiter of valuable versus worthless expression.[734] This principle holds true for elementary and secondary schools as well as postsecondary institutions.[735] Schools, colleges, and

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[732] *Snyder v. Phelps*, 562 U.S. 443, 461 (2011) (Breyer, J., concurring); s*ee also Davis*, 526 U.S. at 651-52 (acknowledging that gender-based banter, insults, and teasing can be upsetting to those on the receiving end).

[733] Catherine J. Ross, *Assaultive Words and Constitutional Norms*, 66 JOURNAL OF LEGAL EDUC. 739, 744 (2017) ("Recently, students have been in the vanguard, demanding that offensive speech be silenced. Students ask to be protected from hurtful words, sentiments, even gestures, and inadvertent facial clues or rolling eyes that communicate dismissal. They seek the coercive power of authority to enforce laudable social norms – respect, dignity, and equality regardless of race, ethnicity, gender, gender identity, and so forth. Meritorious as these proclaimed goals are, the rules and penalties some students lobby for would suppress the expressive rights of others including students, faculty, and invited guests, a particularly disturbing prospect at an institution devoted to the academic enterprise.").

[734] *Id*. at 749-50 (2017) ("Many people question whether rude epithets, crude jokes, and disparaging statements are the kind of expression that merits First Amendment protection. The Supreme Court has long held the Constitution protects the right to speak 'foolishly and without moderation.' You might maintain that racist, misogynist and other vile speech makes no contribution at all to the exchange of ideas – but the Speech Clause protects even so-called low-worth expression, in large part because no public authority can be trusted to distinguish valuable from worthless expression. The government cannot ban hateful expression, no matter how hurtful.") (citing *Cohen v. California*, 403 U.S. 15, 25-26 (1971)). Furthermore, permitting censorship of speech in an effort to be on the right side of history with respect to racial or sexual equality ignores the role that commitment to the First Amendment has played in achieving milestones for racial and sexual equality. *See, e.g.*, Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L. J. 484, 536-37 (1990) ("History demonstrates that if the freedom of speech is weakened for one person, group, or message, then it is no longer there for others. The free speech victories that civil libertarians have won in the context of defending the right to express racist and other anti-civil libertarian messages have been used to protect speech proclaiming anti-racist and pro-civil libertarian messages. For example, in 1949, the ACLU defended the right of Father Terminiello, a suspended Catholic priest, to give a racist speech in Chicago. The Supreme Court agreed with that position in a decision that became a landmark in free speech history. Time and again during the 1960s and 1970s, the ACLU and other civil rights groups were able to defend free speech rights for civil rights demonstrators by relying on the *Terminiello* decision [*Terminiello v. City of Chicago*, 337 U.S. 1 (1949)].") (internal citations omitted); *see also* Anthony D. Romero, *Equality, Justice and the First Amendment*, AMERICAN CIVIL LIBERTIES UNION (ACLU) (Aug. 15, 2017), https://www.aclu.org/blog/free-speech/equality-justice-and-first-amendment (explaining that the ACLU's nearly century-long history defending freedom of speech "including speech we abhor" is due to belief that "our democracy will be better and stronger for engaging and hearing divergent views. Racism and bigotry will not be eradicated if we merely force them underground. Equality and justice will only be achieved if society looks such bigotry squarely in the eyes and renounces it. . . . There is another reason that we have defended the free speech rights of Nazis and the Ku Klux Klan. . . . We simply never want government to be in a position to favor or disfavor particular viewpoints.").

[735] *See* Catherine J. Ross, *Assaultive Words and Constitutional Norms*, 66 JOURNAL OF LEGAL EDUC. 739, 754-55 (2017) ("Constitutional doctrine asks our youngest students to use the traditional constitutional responses to vile

universities, and their students and employees, who find speech offensive, have numerous avenues to confront offensive speech without "the means of imposing unique limitations upon speakers who (however benightedly) disagree."[736]

The Department believes that the tension between student and faculty freedom of speech, and regulation of speech to prohibit sexual harassment, is best addressed through rules that prohibit harassing and assaultive physical conduct, while ensuring that harassment in the form of speech and expression is evaluated for severity, pervasiveness, objective offensiveness, and denial of equal access to education. This is the approach taken in the § 106.30 definition of sexual harassment, under which *quid pro quo* harassment and Clery Act/VAWA offenses receive *per se* treatment as actionable sexual harassment, while other forms of harassment must meet the *Davis* standard. This approach balances the "often competing demands of the First Amendment's express guarantee of free speech and the Fourteenth Amendment's implicit promise of dignity and equality."[737]

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speech: Walk away, don't listen, or respond with 'more and better speech.' These general First Amendment principles apply with at least as much vigor to college campuses, where most students are adults, not schoolchildren, the guiding ethos of higher education supplements constitutional mandates, and students are not compelled to attend. Looking at what the Constitution requires in grades K-12 reveals a lot about what we should expect the adults enrolled in college to have the capacity to withstand. Since our constitutional framework expects this degree of coping from children beginning in elementary school, it is not asking too much of college students to handle offensive sentiments by using the standard First Amendment tools: Walk away, throw the pamphlet in the trash, get off the screen or, even better, tackle objectionable speech with more and better speech.") (discussing and citing *Nuxoll v. Indian Prairie Sch. Dist. # 204*, 523 F.3d 668, 672 (7th Cir. 2008); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 202 (3d Cir. 2001); *Nixon v. N. Local Sch. Dist. Bd. of Educ.*, 383 F. Supp. 2d 965, 967 (S.D. Ohio 2005)).

[736] *R.A.V.*, 505 U.S. at 395-96. As a commenter observed, recipients retain the ability and discretion to respond to offensive speech by a student (or employee) by providing the complainant with supportive measures, responding to the offensive speech with institutional speech, or offering programming designed to foster a welcoming campus climate more generally.

[737] Catherine J. Ross, *Assaultive Words and Constitutional Norms*, 66 JOURNAL OF LEGAL EDUC. 739, 739 (2017) ("Campuses are rocked by racially and sexually offensive speech and counter speech. Offensive speech and counter speech, including demonstrations and calls for policies that shield the vulnerable and repercussions for offenders, are

Contrary to commenters' assertions, evidence that broadly and loosely worded anti-harassment policies have infringed on constitutionally protected speech and academic freedom is widely available.[738] The fact that broadly-worded anti-harassment policies have been applied to protected speech "leads many potential speakers to conclude that it is better to stay silent and not risk the consequences of being charged with harassment. . . . This halts much campus discussion and debate, taking away from the campus's function as a true marketplace of ideas."[739] Where

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both protected by the Constitution. Yet some college administrations regulate this protected speech. Expression on both sides of a cultural and political divide brings to the fore a conflict that has been simmering in legal commentary for about two decades: the tension between the often competing demands of the First Amendment's express guarantee of free speech and the Fourteenth Amendment's implicit promise of dignity and equality. This clash between two fundamental principles seems to have been exacerbated recently by a renewed focus on identity politics both on campus and in national and international affairs.").

[738] *E.g.*, Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights*, 35 JOURNAL OF COLL. & UNIV. L. 385, 391-92 (2009) (discussing examples of universities punishing protected speech including: a student-employee charged with racial harassment merely for reading a book entitled *Notre Dame vs. The Klan*; finding a professor guilty of racial harassment for explaining in a Latin American Politics class that the term "wetbacks" is commonly used as a derogatory reference to Mexican immigrants; investigating a criminal law professor for a sexually hostile environment where the professor's exam presented a hypothetical case in which a woman seeking an abortion felt thankful after she was attacked because the physical attack resulted in the death of her fetus; finding a student guilty of sexual harassment for posting flyers joking that freshman women could lose weight by using the stairs); *see also* Nadine Strossen, Law Professor and former ACLU President, 2015 Richard S. Salant Lecture on Freedom of the Press at Harvard University (Nov. 5, 2015), https://shorensteincenter.org/nadine-strossen-free-expression-an-endangered-species-on-campus-transcript/ (identifying the free speech and academic freedom problems with "the overbroad, unjustified concept of illegal sexual harassment as extending to speech with any sexual content that anyone finds offensive," opining that the current college climate exalts a misplaced concept of "safety" by insisting that "safety seeks protection from exposure to ideas that make one uncomfortable . . . . [W]hen it comes to safety, our students are being doubly disserved. Too often, denied safety from physical violence, which is critical for their education, but too often granted safety from ideas, which is antithetical to their education," and detailing numerous examples "of campus censorship in the guise of punishing sexual harassment" including: subjecting a professor to investigation for writing an essay critical of current sexual harassment policies; punishing a professor who, during a lecture, paraphrased Machiavelli's comments about raping the goddess Fortuna; finding a professor guilty of sexual harassment for teaching about sexual topics in a graduate-level course called "Drugs and Sin in American Life;" suspending a professor for showing a documentary that examined the adult film industry; punishing a professor for having students play roles in a scripted skit about prostitution in a course on deviance; punishing a professor for requiring a class to write essays defining pornography; firing an early childhood education professor who had received multiple teaching awards, for occasionally using vulgar language and humor about sex in her lectures about human sexuality).

[739] Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights*, 35 JOURNAL OF COLL. & UNIV. L. 385, 397 (2009) ("Of course, sexual and racial

speech and expression are not given sufficient "breathing room," the "safety valve" function of speech is diminished.[740] Furthermore, even seemingly low-value speech can have a "downstream effect of leading to constructive discussion and debate which would not have taken place otherwise."[741] For these reasons, the § 106.30 definition of sexual harassment is designed to capture non-speech conduct broadly (based on an assumption of the education-denying effects of such conduct), while applying the *Davis* standard to verbal conduct so that the critical purposes of both Title IX and the First Amendment can be met.

Changes: None.

So Severe

Comments: Some commenters asserted that the "so severe" element of the second prong of the § 106.30 definition means that recipients must ignore many harassment incidents that result in academic, economic, and psychological harm and suffering including depression and post-traumatic stress disorder, whereas the better approach is to treat any level of harassment as

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harassment policies, regardless of the terms in which they are drafted, are oftentimes applied against protected speech, which again leads many potential speakers to conclude that it is better to stay silent and not risk the consequences of being charged with harassment. . . . The unfortunate result, then, is that students have a strong incentive to refrain from saying anything provocative, inflammatory, or bold and to instead cautiously stick to that which is mundane or conventional. This halts much campus discussion and debate, taking away from the campus's function as a true marketplace of ideas."); *id.* at 432-34 (discussing several Federal court cases striking down university anti-harassment codes as applied to constitutionally protected speech, including *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968 (9th Cir. 1996); *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386 (4th Cir. 1993); *Silva v. Univ. of N.H.*, 888 F. Supp. 293 (D. N.H. 1994)).

[740] Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights*, 35 JOURNAL OF COLL. & UNIV. L. 385, 398-99 (2009) ("Furthermore, one of the benefits of providing breathing room for such expression is that it allows the speaker to espouse his or her views through constructive dialogue rather than act out of frustration by committing acts of violence or hate crimes. This outlet has been labeled the 'safety valve' function of speech.").

[741] *Id.* ("By exposing the real ugliness of prejudice, ignorance and hate, such speech can reach and convince people in ways that polite conversation never could. Moreover, ignorant or misguided speech, though seemingly possessing little value or merit on its own, often has the 'downstream' effect of leading to constructive discussion and debate which would not have taken place otherwise. Consequently, the initial expression greatly benefits the marketplace of ideas and enriches students' understanding of important issues by increasing the potential for real and meaningful debate on campus.").

seriously as the most severe level. Some commenters asserted that schools should never try to tell a survivor what was or was not severe because the survivor is the only person who can determine what was severe. Other commenters wondered what threshold determines an incident as "severe," whether severity refers to the mental impact on the victim or the physical nature of the unwelcome conduct (or both), and how a victim is expected to prove severity.

Discussion: For reasons discussed above, the Department believes that severity is a necessary element to balance protection from sexual harassment with protection of freedom of speech and expression. The Department interprets the *Davis* standard formulated in § 106.30 as subjective with respect to the unwelcomeness of the conduct (i.e., whether the complainant viewed the conduct as unwelcome), and the final regulations clarify that the elements of severity, pervasiveness, objective offensiveness, and resulting denial of equal access are determined under a reasonable person standard.[742] In this way, evaluation of whether harassment is "severe" appropriately takes into account the circumstances facing a particular complainant, such as the complainant's age, disability status, sex, and other characteristics. This evaluation does not burden a complainant to "prove severity," because a complainant need only describe what occurred and the recipient must then consider whether the described occurrence was severe from the perspective of a reasonable person in the complainant's position.

Changes: None.

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[742] *See Davis*, 526 U.S. at 653-54 (applying the severe, pervasive, objectively offensive, denial of access standard to the facts at issue under an objective approach) ("Petitioner alleges that her daughter was the victim of repeated acts of sexual harassment by G. F. over a 5-month period, and there are allegations in support of the conclusion that G. F.'s misconduct was severe, pervasive, and objectively offensive. The harassment was not only verbal; it included numerous acts of objectively offensive touching, and, indeed, G. F. ultimately pleaded guilty to criminal sexual misconduct. . . . Further, petitioner contends that the harassment had a concrete, negative effect on her daughter's ability to receive an education.").

And Pervasive

Comments: Many commenters believed that the "pervasive" element of the second prong of the § 106.30 definition means that students would be forced to endure repeated, escalating levels of harassment before seeking help from schools, and that by the time schools must intervene it might be too late because victims will already have suffered emotional harm and derailed educational futures (e.g., ineligibility for an advanced placement course or rejection from admission to a dream college after grades dropped due to harassment that was not deemed pervasive). Several commenters asserted that every instance of discrimination deserves investigation, or else patterns of harassment will not be discovered because each single instance will be dismissed as not "pervasive." Some such commenters argued that without an investigation, a school will not know whether a single instance of an inappropriate remark or joke is truly an isolated incident or part of a pattern. A few commenters argued that especially in elementary and secondary schools, students whose reports are turned away for not being "pervasive" will be very unlikely to report again when the conduct repeats and does become pervasive.

Several commenters described scenarios that they asserted would not be covered as sexual harassment under § 106.30 because they fail to meet the pervasive element even though such scenarios present severe, objectively offensive, threatening, humiliating, harm-inducing consequences on victims, including: a professor blocking a teaching assistant's exit from a small office while badgering the assistant with sexual insults; a teacher inappropriately touching a student while making sexually explicit comments during an after-school meeting; students posting videos of "revenge porn" on social media.

Discussion: The Department reiterates that *quid pro quo* harassment and Clery Act/VAWA offenses (sexual assault, dating violence, domestic violence, and stalking) constitute sexual harassment under § 106.30 without any evaluation for pervasiveness. Thus, students do not have to endure repeated incidents of such abuse without recourse from a recipient. The Department further reiterates that recipients retain discretion to provide supportive measures to any complainant even where the harassment is not pervasive. The Department disagrees that an investigation into every offensive comment or joke is necessary in order to discern whether the isolated comment is part of a pervasive pattern of harassment. For reasons discussed above, chilling speech and expression by investigating each instance of unwelcome speech is not a constitutionally permissible way of ensuring that unlawful harassment is not occurring. The Department appreciates commenters' concerns that if a complainant receives no support after reporting one incident (that does not rise to the level of actionable harassment under Title IX) the complainant may feel deterred from reporting again if the harassment escalates and meets the *Davis* standard. This is one reason why the Department emphasizes that recipients remain free to provide supportive measures even where alleged conduct does not meet the § 106.30 definition of sexual harassment, and to utilize institutional speech and provide general programming to foster a respectful educational environment, none of which requires punishing or chilling protected speech.

With respect to the scenarios presented by commenters as examples of harassment that may not meet the *Davis* standard because of lack of pervasiveness, the Department declines to make definitive statements about examples, due to the necessarily fact-specific nature of the analysis. However, we note that sexual harassment by a teacher or professor toward a student or subordinate may constitute *quid pro quo* harassment, which does not need to meet a

pervasiveness element. The *Davis* standard as applied in § 106.30 is broad, encompassing any unwelcome conduct on the basis of sex that a reasonable person would find so severe, pervasive, and objectively offensive that a person is effectively denied equal educational access. Disseminating "revenge porn," or conspiring to sexually harass people (such as fraternity members telling new pledges to "score"), or other unwelcome conduct that harms and humiliates a person on the basis of sex may meet the elements of the *Davis* standard including pervasiveness, particularly where the unwelcome sex-based conduct involves widespread dissemination of offensive material or multiple people agreeing to potentially victimize others and taking steps in furtherance of the agreement. Finally, a single instance of unwelcome physical conduct may meet definitions of assault or battery prohibited by other laws, even if the incident does not meet one of the three prongs of the § 106.30 definition of sexual harassment.

Changes: None.

Objectively Offensive

Comments: Several commenters argued that the "objectively offensive" element of the second prong of the § 106.30 definition will mean different things to different school officials, and result in similar incidents being investigated by some schools and not by others. Several commenters asserted that "objectively offensive" creates an unnecessary and inappropriate scrutiny of victims and their experiences, creating barriers to reporting and making campuses less safe, contributing to victim-blaming, perpetuating myths and misconceptions about sexual violence, and minimizing the harm caused by sexual harassment.

Several commenters asserted that nothing is "objectively" offensive because what is offensive is based on how conduct subjectively makes a person feel yet "objective" means not influenced by personal feelings; these commenters argued that therefore the term "objectively

offensive" is an oxymoron. At least one commenter argued that research shows that individuals experience sex-based misconduct differently, depending on prior life experiences, previous victimization, and other factors.[743]

Commenters similarly opined that offensiveness depends on the impact of the conduct, not the intent of the perpetrator. One commenter opined that cat-calling may not sound objectively threatening, yet knowing that cat-calling and similar objectification of women may contribute to physical violence against women[744] might cause a woman targeted by cat-calling to feel unsafe.

At least one commenter argued that what is "objectively offensive" tends to be interpreted as what white, privileged men would find to be offensive, lending itself to a "boys will be boys" attitude that excuses a lot of behavior that offends women and marginalized individuals. One commenter recommended that the Department issue guidance for what factors to consider so that unconscious bias does not impact evaluation of what conduct is "offensive." One commenter claimed that the § 106.30 definition fails to account for the intersectional dynamics (race, gender, sexual orientation, culture, etc.) that may impact the severity and objective offensiveness of an act. This commenter argued that since the purpose of having an investigation is to decide whether conduct was in fact severe, pervasive, and objectively offensive it makes little sense to require schools to dismiss claims at the outset when the rape culture pyramid explains how small microaggressions and supposedly "less severe" offenses fuel

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[743] Commenters cited: Emma M. Millon *et al.*, *Stressful Life Memories Relate to Ruminative Thoughts in Women with Sexual Violence History, Irrespective of PTSD*, FRONTIERS IN PSYCHIATRY 9 (2018).
[744] Commenters cited: Eduardo A. Vasquez *et al.*, *The sexual objectification of girls and aggression towards them in gang and non-gang affiliated youth*, 23 PSYCHOL., CRIME & L. 5 (2017).

a culture for severe behaviors to become normalized. This commenter recommended that "objectively offensive" should be defined and understood with a high bar for sensitive, respectful language and conduct towards all in the community.

At least one commenter argued that because violence against women is often normalized,[745] and perpetrators of even heinous sexual crimes rationalize their behaviors through victim blaming,[746] these social realities make it very difficult for any act of sexual violence or harassment to be deemed "objectively offensive" even when the acts are disruptive or traumatic to the victim. At least one commenter asserted that the § 106.30 definition eliminates the possibility of recipients focusing on unique or personally harmful situations; for example, when private or "inside" jokes do not seem offensive to outsiders but have a harmful connotation for the victim.

Several commenters noted that under case law, what is objectively offensive is analyzed from the perspective of a reasonable person standing in the shoes of the complainant, using an approach that rejects disaggregation of allegations and instead looks at the aggregate or cumulative impact of conduct.[747] One commenter urged the Department to clarify that whether conduct is "severe, pervasive, and objectively offensive" depends on evaluation by a reasonable person and the hypothetical "reasonable person" must consider both male and female views of what is "offensive."

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[745] Commenters cited: Heather R. Hlavka, *Normalizing Sexual Violence: Young Women Account for Harassment and Abuse*, 28 GENDER & SOC'Y 3 (2014).
[746] Commenters cited: Diana Scully, & Joseph Marolla, *Convicted rapists' vocabulary of motive: Excuses and justifications*, 31 SOCIAL PROBLEMS 5 (1984).
[747] Commenters cited: *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993).

At least one commenter argued that the "objectively offensive" element undermines a longstanding analytic requirement that recipients evaluate conduct from both objective and subjective viewpoints (e.g., 2001 Guidance at p. 5).

Discussion: The Department agrees with commenters who note that whether harassing conduct is "objectively offensive" must be evaluated under a reasonable person standard, as a reasonable person in the complainant's position,[748] though the Department declines to require a commenter's suggestion that the "reasonable person" standard must consider offensiveness from both male and female perspectives because the latter suggestion would invite application of sex stereotypes. The final regulations revise the second prong of the § 106.30 definition to expressly state that the *Davis* elements are determined under a reasonable person standard.

The Department disagrees that "objectively offensive" is oxymoronic; the objective nature of the inquiry simply means that evaluation is made by a reasonable person considering whether, standing in the shoes of the complainant, the conduct would be offensive. The reasonable person standard appropriately takes into account whether a reasonable person, in the position of the particular complainant, would find the conduct offensive, thus the standard should not result in victims being blamed or excluded from receiving support regardless of whether the school officials evaluating the conduct share the same race, sex, age, or other characteristics as the complainant. It would be inappropriate for a Title IX Coordinator to evaluate conduct for

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[748] *See Davis*, 526 U.S. at 653-54 (applying the severe, pervasive, objectively offensive, denial of access standard to the facts at issue under an objective approach) ("there are allegations in support of the conclusion that G. F.'s misconduct was severe, pervasive, and objectively offensive. The harassment was not only verbal; it included numerous acts of objectively offensive touching"); s*ee also Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 81 (1998) ("We have emphasized, moreover, that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances.") (internal quotation marks and citations omitted.).

objective offensiveness by shrugging off unwelcome conduct as simply "boys being boys" or make similar assumptions based on bias or prejudice. To take that approach would risk evidencing sex-based bias in contravention of § 106.45(a) or bias for or against a complainant or respondent in violation of § 106.45(b)(1)(iii), in addition to indicating improper evaluation of the *Davis* elements under a reasonable person standard. For reasons discussed under § 106.45(b)(1)(iii), the Department leaves recipients flexibility to decide the content of the training required for Title IX personnel under that provision, and nothing in the final regulations precludes a recipient from addressing implicit or unconscious bias as part of such training.

The Department disagrees that this standard inappropriately results in different schools making different decisions about what is objectively offensive. The Department believes that a benefit of the *Davis* standard as formulated in the second prong of § 106.30 is that whether harassment is actionable turns on both subjectivity (i.e., whether the conduct is unwelcome, according to the complainant) and objectivity (i.e., "objectively offensive") with the *Davis* elements determined under a reasonable person standard, thereby retaining a similar "both subjective and objective" analytic approach that commenters point out is used in the 2001 Guidance.[749] The fact-specific nature of evaluating sexual harassment does mean that different people may reach different conclusions about similar conduct, but this is not unreasonable because the specific facts and circumstances of each incident and the parties involved may require different conclusions. The *Davis* standard does not require an "intent" element;

[749] 2001 Guidance at 5 (conduct should be evaluated from both a subjective and objective perspective); *id*. at fn. 39 (citing case law for the proposition that whether conduct is severe, or objectively offensive, must be judged from the perspective of a reasonable person in the complainant's position, such as *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 20-22 (1993) (requiring subjective and objective creation of a hostile work environment)).

unwelcome conduct so severe, pervasive, and objectively offensive that it denies a person equal educational opportunity is actionable sexual harassment regardless of the respondent's intent to cause harm.

The Department disagrees that the objectively offensive element results in unnecessary scrutiny of victims' experiences that will create reporting barriers, make campuses less safe, lead to victim-blaming, or perpetuate sexual violence myths and misconceptions. The *Davis* standard ensures that all students, employees, and recipients understand that unwelcome conduct on the basis of sex is actionable under Title IX when a reasonable person in the complainant's position would find the conduct severe, pervasive, and objectively offensive such that it effectively denies equal access to the recipient's education program or activity.

For reasons explained above, the Department appreciates commenters' concerns that even conduct characterized by commenters as low-level harassment (such as cat-calling and microaggressions) can be harmful, and that some situations have escalated from minor incidents into violence and even homicide against women. This is why, in response to commenters, we have revised final § 106.30 to include as *per se* sexual harassment every incident of the Clery Act/VAWA offenses of dating violence, domestic violence, and stalking (in addition to sexual assault, which was referenced in the NPRM and remains part of the final regulations). In this way, the § 106.30 definition stands firmly against sex-based physical conduct, including violence and threats of violence, while ensuring that verbal and expressive conduct is punishable as Title IX sex discrimination only when the conduct crosses a line from protected speech into sexual harassment that denies a person equal access to education. For the same reasons, the § 106.30 definition pushes back against an historical, societal problem of normalizing violence against women. By not imposing an "intent" element into the sexual harassment definition, § 106.30

makes clear that sexual harassment under any part of the § 106.30 definition cannot be excused by trying to blame the victim or rationalize the perpetrator's behavior, tactics pointed to by commenters (and supported by research) as common reasons why victims (particularly women) have often faced dismissiveness, shame, or ridicule when reporting sex-based violence to authorities.

Changes: We have revised the second prong of the § 106.30 definition to expressly state that the *Davis* elements are determined under a reasonable person standard.

Effectively Denies Equal Access

Comments: Many commenters objected to the element in the second prong of the § 106.30 definition that conduct "effectively denies a person equal access" as a confusing, stringent, unduly restrictive standard that will harm survivors, benefit perpetrators, and send the message to assailants that non-physical sexual harassment is acceptable. At least one commenter stated that requiring conduct to rise to the level of denying a person equal access to the recipient's education program or activity is inconsistent with the language of Title IX because it is a higher bar than the statute's provision (20 U.S.C. 1681) that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance." Several commenters asserted that waiting until a complainant's access to education has been denied means that students must wait for help until harassing or violent behaviors cause victims to reach a breaking point, making a mockery of institutional responsibility and the values of an educational community.

Many commenters believed that the "effectively denies equal access" element supports a culture that conveys acceptance of sexual harassment of women as long as the victims continue

showing up to school, leaving girls and women in situations that are difficult and discouraging without recourse until they have lost access altogether. Many commenters believed that in order to file a Title IX complaint meeting this element, a victim would need to drop out of school entirely, fail a class, have a panic attack, be unable to function, or otherwise provide evidence of denial of access. Commenters argued that this standard makes no sense because help should be given to complainants before access has been denied, and will lead to more victims dropping out of school. One commenter relayed a personal story of sexual assault and stated that the commenter felt deterred from reporting the incident because the commenter was unsure whether, under the NPRM, the university would consider the incident significant enough to respond, despite the fact that the commenter knew of witnesses who could attest to the incident, and the commenter had to switch out of a class to avoid crossing paths with the perpetrator.

Many commenters believed that this element has a perverse effect of leaving students who demonstrate resilience by managing to attend classes and participate in educational activities despite being subjected to harassment and abuse without protection from the harassment they suffer. A few commenters opposed this element because it places the focus on a survivor's response to trauma instead of on the unwelcome conduct itself, when everyone responds differently to trauma. One commenter recounted an experience of reporting sexual violence to the police and being told that they did not appear "traumatized enough" to be

credible; the commenter argued that this element of the § 106.30 definition leaves too much subjectivity with school officials to interpret a victim's reaction to trauma.[750]

One commenter supported the proposed rules because for the first time the Department is regulating sexual harassment as a form of sex discrimination under Title IX, and sexual assault as a form of sexual harassment, but expressed concern that many commenters interpret the "effectively denies equal access" element as requiring students to drop out of school before action can be taken, amounting to a "constructive expulsion" requirement that is much more strict than what Title IX requires. Many commenters expressed the belief that this element means harassment is not actionable unless a complainant has been effectively driven off campus, and most of these commenters urged the Department to use "denies or limits" or simply "limits" instead of "effectively denies" to clarify that unwelcome conduct is actionable when it limits (not only when it has already denied) equal access to education. Many such commenters noted that the 2001 Guidance used "deny or limit" to recognize that students should not be denied a remedy for sexual harassment because they continue to come to class or participate in athletic practice no matter at what personal or emotional cost. At least one commenter stated that the 2001 Guidance only prohibits conduct that is sufficiently serious to deny or limit a student's educational benefits or opportunities from both a subjective and objective perspective, so if the purpose of the proposed definition is to minimize its misapplication to low-level situations that remain protected by the First Amendment (for public institutions) and principles of academic freedom (for private

[750] Commenters cited: Rebecca Campbell, *Survivors' Help-Seeking Experiences With the Legal and Medical Systems*, 20 VIOLENCE & VICTIMS 1 (2005), for the proposition that trauma cannot be identified or understood by looking at someone and everyone responds to trauma in a different manner.

institutions), that could be accomplished simply through clarification of the 2001 Guidance rather than adopting the *Davis* definition.

Several commenters wondered how a victim is supposed to prove effective denial, and stated that such a hurdle only perpetuates the harmful concept of "the perfect victim" that already causes too many victims to question whether their experience has been "bad enough" to be considered valid and worthy of intervention. One commenter asserted that knowledge about high functioning depression is growing more common, but a victim who is attending classes and does not appear significantly affected might believe they cannot even report sexual harassment and must continue suffering in silence. One commenter wondered if this element would mean that a third grade student sexually harassed by a sixth grade student who still attends school but expresses anxiety to their parent every day, begins bed-wetting, or cries themselves to sleep at night, has experienced "effective denial" or not. The same commenter further wondered if a ninth grader joining the wrestling team who gets sexually hazed by teammates has been "effectively denied" access if he quits the team but still carries on with other school activities. Another commenter stated that "deny access" would seem to allow for a professor to make inappropriate gender related jokes, making students of that gender feel uncomfortable in the class and potentially perform poorer, although they still attend class, so thus they are not "denied," but rather just "negatively impacted."

One commenter argued that this element mirrors the statutory language of "excluded from participation," but neglects the other two clauses (denial of benefits and subjected to discrimination) in the Title IX statute. This commenter stated that while this higher standard might be appropriate under the Supreme Court's rubric for Title IX private lawsuits, the Department should not reduce its own administrative authority because sexual harassment can,

and does, deny people educational benefits and opportunities even without excluding them entirely from access to education. This commenter argued that if Congress intended for the denial of benefits clause to be as narrow as the exclusion from participation clause, Congress would not have bothered using the two phrases separately; rules of statutory construction mean that Congress does not use words accidentally or without meaning. The commenter argued that a plain interpretation of the Title IX statute means that a lower level of denial of benefits could violate Title IX as much as a higher level of exclusion from participation. The commenter asserted that this does not mean that a very minor limitation of access would meet the standard, but some limitations (short of "denial") should meet the standard and must be covered by Title IX.

One commenter expressed concern over the varied interpretations of "access" to educational activities among Federal courts, noting that some interpret it narrowly (i.e., the ability of a student to enter in or begin an educational activity) while others interpret it more broadly (i.e., the ability to enter into an educational activity free from discriminatory experiences). Another commenter requested clarification that the Department interprets the "effective denial of equal access" element as not just physical inability to attend classes but also where a complainant experiences negative impacts on learning opportunities. Some commenters expressed concern that recipients will be confused about whether they are obligated to intervene if a student skips class to avoid a harasser, has difficulty focusing in class because of harassment, or suffers a decline in their grade point average (GPA) due to harassment, since these consequences have not yet cut off the student's "access" to education.

A few commenters expressed concern that this element could have detrimental effects on international students because they rely on student visas that require them to meet a certain

academic performance, so waiting until academic performance has suffered may be too late to help the international student because the student may already have lost their student visa. At least one commenter argued that this element is inappropriate in the elementary and secondary school context because the time-limited nature of education during the developmental years means that requiring inaction until a student has already lost educational access impedes basic civil rights.

One commenter wondered if a recipient exercising disciplinary power over student misconduct that does not affect the complainant's access to its program or activity, but declining to do so for sexual harassment, would be making a gender-based exception that constitutes sex discrimination in violation of Title IX.

Several commenters urged the Department to adopt an alternative approach adapted from workplace sexual harassment law, under which unwelcome conduct is actionable where it creates an environment reasonably perceived (and actually perceived) as hostile and abusive, altering work conditions, without requiring any showing of a tangible adverse action or psychological harm.[751] One such commenter urged the Department to adopt this "tried and tested formula" because the harm done to a survivor's educational access and performance should be just one factor in determining whether harassing conduct creates an environment which would be reasonably perceived as hostile, and no single factor should be dispositive but rather based on the totality of all the circumstances.[752] One commenter suggested replacing "effectively denies a

[751] Commenters cited: *Harris*, 510 U.S. at 22.
[752] Commenters cited: *Harris*, 510 U.S. at 22-23 ("This is not, and by its nature cannot be, a mathematically precise test . . . But we can say that whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances . . . no single factor is required.").

person's equal access" with "effectively bars a person's access to an educational opportunity or benefit" because the former sets too high a standard while the "effectively bars" phrase is used in *Davis*.[753]

A few commenters argued that eliminating hostile environment in its entirety from analyses of sexual harassment leaves victims without recourse and reflects the Department's ignorance of the realities of sexual violence because conduct considered benign when examined in isolation can be oppressive and limiting when considered in the context of sexual trauma. One such commenter argued that the decision to eliminate the concept of "hostile environment" without anything in its place is a callous decision that fundamentally contradicts the purpose of Title IX. This commenter contended that harassment in the form of cat-calling, for instance, creates a hostile environment even without interfering with access to education, and should not be tolerated.

One commenter stated that the NPRM is inconsistent because at some points, the Department writes that schools must intervene in harassment that "effectively denies a person *equal* access to the recipient's education program or activity," but at other points, the Department omits the critical word "equal" before "access."

Discussion: The Department understands commenters' concerns that the "effectively denies a person equal access" element sets too high a bar for a sexual harassment complainant to seek assistance from their school, college, or university. The Department reiterates that this element does not apply to the first or third prongs of the § 106.30 definition (*quid pro quo* harassment

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[753] Commenters cited: *Davis*, 526 U.S. at 640 ("that such an action will lie only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit").

and Clery Act/VAWA offenses, none of which need a demonstrated denial of equal access in any particular situation because the Department agrees with commenters that such acts inherently jeopardize equal educational access).

The Department appreciates the opportunity to clarify that, contrary to many commenters' fears and concerns, this element does *not* require that a complainant has already suffered loss of education before being able to report sexual harassment. This element of the *Davis* standard formulated in § 106.30 requires that a person's "equal" access to education has been denied, not that a person's total or entire educational access has been denied. This element identifies severe, pervasive, objectively offensive unwelcome conduct that deprives the complainant of *equal* access, measured against the access of a person who has not been subjected to the sexual harassment. Therefore, we do not intend for this element to mean that more victims will withdraw from classes or drop out of school, or that only victims who do so will have recourse from their schools.

This element is adopted from the Supreme Court's approach in *Davis*, where the Supreme Court specifically held that Title IX's prohibition against exclusion from participation, denial of benefits, and subjection to discrimination applies to situations ranging from complete, physical exclusion from a classroom to denial of *equal* access.[754] In line with this approach, the § 106.30 definition does not apply only when a complainant has been entirely, physically excluded from educational opportunities but to any situation where the sexual harassment "so undermines and

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[754] *See Davis*, 526 U.S. at 651 ("*It is not necessary, however, to show physical exclusion* to demonstrate that students have been deprived by the actions of another student or students of an educational opportunity on the basis of sex. Rather, a plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied *equal access* to an institution's resources and opportunities.") (emphasis added).

detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."[755] Neither the Supreme Court, nor the final regulations in § 106.30, requires showing that a complainant dropped out of school, failed a class, had a panic attack, or otherwise reached a "breaking point" in order to report and receive a recipient's supportive response to sexual harassment. The Department acknowledges that individuals react to sexual harassment in a wide variety of ways, and does not interpret the *Davis* standard to require certain manifestations of trauma or a "constructive expulsion." Evaluating whether a reasonable person in the complainant's position would deem the alleged harassment to deny a person "equal access" to education protects complainants against school officials inappropriately judging how a complainant has reacted to the sexual harassment. The § 106.30 definition neither requires nor permits school officials to impose notions of what a "perfect victim" does or says, nor may a recipient refuse to respond to sexual harassment because a complainant is "high-functioning" or not showing particular symptoms following a sexual harassment incident.

School officials turning away a complainant by deciding the complainant was "not traumatized enough" would be impermissible under the final regulations because § 106.30 does not require evidence of concrete manifestations of the harassment. Instead, this provision assumes the negative educational impact of *quid pro quo* harassment and Clery Act/VAWA offenses included in § 106.30 and evaluates other sexual harassment based on whether a

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[755] *See id.* at 650-652 (describing the denial of access element variously as: "depriv[ing] the victims of access to the educational opportunities or benefits provided by the school," "effectively den[ying] *equal access* to an institution's resources and opportunities" and "den[ying] its victims the *equal access* to education that Title IX is designed to protect.") (emphasis added).

reasonable person in the complainant's position would be effectively denied *equal* access to education compared to a similarly situated person who is not suffering the alleged sexual harassment. Thus, contrary to commenters' concerns, victims do not need to suffer in silence, and do not need to worry about what types of symptoms of trauma will be "bad enough" to ensure that a recipient responds to their report. Commenters' examples of a third grader who starts bed-wetting or crying at night due to sexual harassment, or a high school wrestler who quits the team but carries on with other school activities following sexual harassment, likely constitute examples of denial to those complainants of "equal" access to educational opportunities even without constituting a total exclusion or denial of an education, and the Department reiterates that no specific type of reaction to the alleged sexual harassment is necessary to conclude that severe, pervasive, objectively offensive sexual harassment has denied a complainant "equal access."

For reasons described above, the Department believes that adoption and adaption of the *Davis* standard better serves both the purposes of Title IX's non-discrimination mandate and constitutional protections of free speech and academic freedom, and thus the final regulations retain the *Davis* formulation of effective denial of equal access rather than the language used in Department guidance documents. While commenters correctly assert that the Department is not required to use the *Davis* standard, for the reasons explained in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, the Department is persuaded that the Supreme Court's Title IX cases provide the appropriate backdrop for Title IX enforcement, and the Department has intentionally adapted that framework for administrative enforcement to provide additional protections to complainants (and respondents) not required in private Title IX litigation. With respect to the denial of equal access

element, neither the *Davis* Court nor the Department's final regulations require complete exclusion from an education, but rather denial of "equal" access. Signs of enduring *unequal* educational access due to severe, pervasive, and objectively offensive sexual harassment may include, as commenters suggest, skipping class to avoid a harasser, a decline in a student's grade point average, or having difficulty concentrating in class; however, no concrete injury is required to conclude that serious harassment would deprive a reasonable person in the complainant's position of the ability to access the recipient's education program or activity on an equal basis with persons who are not suffering such harassment. This clarification addresses the concerns of some commenters that a rule requiring total denial of access would harm international students whose student visas may be in jeopardy if their academic performance suffers, and the similar concerns from commenters that waiting to help until an elementary school student has dropped out of school would irreparably damage the student's educational pathways. For the same reasons, § 106.30 does not raise the issue identified by a commenter as to whether a school would be violating Title IX by requiring a student to suffer total exclusion before responding to sexual harassment as compared to other types of misconduct.

For reasons described above, the Department is persuaded by Supreme Court reasoning that different standards for actionable harassment are appropriate under Title IX (for educational environments) and Title VII (for the workplace). However, neither law requires "tangible adverse action or psychological harm" before the sexual harassment may be actionable, as a commenter feared would be required under these final regulations.

The Department agrees that the Supreme Court used a variety of phrasing through the majority opinion to describe the "denial of equal access" element. However, the Department does not agree with the commenter who suggested that using "effectively bars access to an

educational opportunity or benefit " instead of "effectively denies equal access to an education program or activity" yields a broader or better formulation, and in fact, the Department believes that under the *Davis* Court's reasoning, denial of "equal access" to a recipient's education program or activity reflects a broad standard that appropriately captures situations of unequal access due to sex discrimination, in conformity with Title IX's non-discrimination mandate, and § 106.30 reflects this standard by using the phrase "effectively denies a person equal access."

The Department disputes that § 106.30 eliminates the concept of hostile environment "without anything in its place." While the concept of a hostile environment originated under Title VII to describe sexual harassment creating a hostile or abusive workplace environment altering the conditions of a complainant's job, when interpreting Title IX the Supreme Court carefully applied a standard tailored to address the particular discriminatory ill addressed by Title IX: denying a person "the equal access to education that Title IX is designed to protect."[756] Contrary to the contention of some commenters that all unwelcome conduct must be covered by Title IX even if it does not interfere with education, Title IX is concerned with sex discrimination in an education program or activity, but as discussed above, does not stand as a Federal civility code that requires schools, colleges, and universities to prohibit every instance of unwelcome or undesirable behavior. The Department acknowledges that the 2001 Guidance and 2017 Q&A use the phrase "hostile environment" to describe sexual harassment that is not *quid*

[756] *Id.* at 652 (holding schools liable where the sexual harassment "denies its victims the equal access to education that Title IX is designed to protect.").

pro quo harassment[757] and that these final regulations depart from those guidance documents by describing sexual harassment as actionable when it effectively denies a person equal access to education rather than when the sexual harassment creates a hostile environment. While the two concepts may overlap, for reasons discussed above, the denial of equal access to education element is more precisely tailored to serve the purpose of Title IX (which bars discrimination in education programs or activities) than the hostile environment concept, which originated to describe the kind of hostile or abusive *workplace* environment sexual harassment may create under Title VII.[758] Under these final regulations, where sexual harassment effectively denies a person "equal access" to education, recipients must offer the complainant supportive measures (designed to restore or preserve the complainant's equal educational access)[759] and, where a fair grievance process finds the respondent to be responsible for sexually harassing the complainant,

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[757] 2001 Guidance at 5 ("By contrast, sexual harassment can occur that does not explicitly or implicitly condition a decision or benefit on submission to sexual conduct. Harassment of this type is generally referred to as hostile environment harassment."); 2017 Q&A at 1. The withdrawn 2011 Dear Colleague Letter and withdrawn 2014 Q&A similarly relied on a hostile environment theory of sexual harassment. 2011 Dear Colleague Letter at 15; 2014 Q&A at 1.

[758] To the extent that the Supreme Court in *Davis* cited to Title VII cases as authority for its formulation of the "effectively denied equal access" element for actionable sexual harassment under Title IX, we believe that such citations indicate that the Title IX focus on "effectively denied equal access" element is the educational equivalent of the workplace doctrine of "hostile environment." *E.g.*, *Davis*, 526 U.S. at 651 ("Rather, a plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities. *Cf. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. at 67*."); *id.* ("Whether gender-oriented conduct rises to the level of actionable 'harassment' thus 'depends on a constellation of surrounding circumstances, expectations, and relationships,' *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 82, 140 L. Ed. 2d 201, 118 S. Ct. 998 (1998)."). Even though these final regulations do not rely on a "hostile environment" theory of sexual harassment, a recipient may choose to deliver special training to a class, disseminate information, or take other steps that are designed to clearly communicate the message that the school does not tolerate harassment and will be responsive to any student who reports sexual harassment, as described in the 2001 Guidance, so that no person is effectively denied equal access to education. 2001 Guidance at 16.

[759] Section 106.44(a) (requiring that with or without a grievance process, the recipient's response to sexual harassment must include promptly offering supportive measures to the complainant); § 106.30 (defining "supportive measures" as individualized services provided without fee or charge to complainants or respondents, designed to restore or preserve equal access to education without unreasonably burdening the other party).

the recipient must effectively implement remedies designed to restore or preserve the complainant's equal educational access.[760]

The Department appreciates commenters' pointing out that the NPRM inconsistently used the phrases "equal access" and "access" and has revised the final regulations to ensure that all provisions referencing denial of access, or preservation or restoration of access, include the important modifier "equal." This will ensure that the appropriate interpretation of this element is better understood by students, employees, and recipients: that Title IX is concerned with "equal access," not just total denial of access.

Changes: We have revised several provisions to ensure the word "equal" appears before "access" (e.g., "effectively denies equal access" or "restore or preserve equal access") to mirror the use of "equal access" in § 106.30 defining "sexual harassment," so that the terminology and interpretation is consistent throughout the final regulations.

Prong (3) Sexual Assault, Dating Violence, Domestic Violence, Stalking

Comments: Some commenters approved of the third prong of the § 106.30 definition's reference to the Clery Act's definition of sexual assault as part of the overall definition of "sexual harassment."

Many commenters supported the reference to "sexual assault" but contended that the third prong of the definition should also reference the other VAWA crimes included in the Clery Act regulations, namely, dating violence, domestic violence, and stalking. A few commenters

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[760] Section 106.45(b)(1)(i) (requiring the recipient to provide remedies to a complainant where a respondent is found responsible following a grievance process that complies with § 106.45 and stating that remedies may consist of individualized services similar to those that meet the definition in § 106.30 of supportive measures except that remedies (unlike supportive measures) may be punitive or disciplinary against the respondent, and need not avoid burdening the respondent)); § 106.45(b)(7)(iv) (stating that the Title IX Coordinator is responsible for the effective implementation of remedies).

requested clarification as to whether dating violence, domestic violence, and stalking would only count as sexual harassment under § 106.30 if such crimes met the second prong (severe, pervasive, and objectively offensive), and expressed concern that a single instance of an offense such as dating violence or domestic violence might fail to be included because it would not be considered "pervasive." A few commenters asserted that the proposed regulations would leave dating violence, domestic violence, and stalking in an educational civil rights gray area. Many commenters urged the Department to bring the third prong of the § 106.30 definition into line with the Clery Act, as amended by VAWA, by expressly including dating violence, domestic violence, and stalking.

Several commenters argued that dating violence, domestic violence, and stalking are just as serious as sexual harassment and sexual assault.[761] A few commenters recounted working with victims where domestic violence or stalking escalated beyond the point of limiting educational access even tragically ending up in homicides. A few commenters noted that dating violence was recently added as a reportable crime under the Clery Act in part because 90 percent of all campus rapes occur via date rapes,[762] and dating violence should be included in the § 106.30 definition.

Some commenters asserted that domestic violence is prevalent among youth, and that the highest rate of dating violence and domestic violence against females occurs between the ages of

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[761] Commenters cited, *e.g.*: National Association of Student Affairs Administrators in Higher Education (NASPA) & Education Commission of the States, *State Legislative Developments on Campus Sexual Violence: Issues in the Context of Safety* 7-8 (2015); Wendy Adele Humphrey, *"Let's Talk About Sex": Legislating and Educating on the Affirmative Consent Standard*, 50 UNIV. OF S.F. L. REV. 35, 49, 58-60, 62-64, 71 (2016); Emily A. Robey-Phillips, *Federalism in Campus Sexual Violence: How States Can Protect Their Students When a Trump Administration Will Not*, 29 YALE J. OF L. & FEMINISM 373, 393-414 (2018).

[762] Commenters cited: Health Research Funding, *39 Date Rape Statistics on College Campuses*, https://healthresearchfunding.org/39-date-rape-statistics-college-campuses/.

16-24,[763] precisely when victims are likely to be in high school and college, needing Title IX protections. Commenters argued that if a school fails to properly respond to a student's domestic violence situation, the student's health and school performance may suffer and even lead to the victim dropping out of school, and that a significant number of female homicide victims of college age were killed by an intimate partner.[764]

Many commenters asserted that stalking presents a unique risk to the health and safety of college students due to the significant connection between stalking and intimate partner violence[765] insofar as stalking often occurs in the context of dating violence and sexual violence. Many commenters asserted that stalking is very common on college campuses and within the college population; persons aged 18-24 (the average age of most college students) experience the highest rates of stalking victimization of any age group;[766] and college-aged women are stalked at higher rates than the general population and that one study showed that over 13 percent of college women had experienced stalking in the academic year prior to the study.[767] One commenter cited a study that showed that in ten percent of stalking situations the victim reported that the stalker committed, or attempted, forced sexual contact.[768] At least one commenter cited research showing that sexual assault perpetrators often employed classic stalking strategies (e.g.,

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[763] Commenters cited: U.S. Dep't. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Factbook: Violence by Intimates* (1998).
[764] Commenter cited: U.S. Dep't. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Factbook: Violence by Intimates* (1998); U.S. Dep't. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Patterns and Trends: Homicide Trends in the United States, 1980-2008* (Nov. 2011); Katie J. M. Baker, *Domestic Violence on Campus is the Next Big College Controversy*, BUZZFEED NEWS (Jun. 9, 2015).
[765] Commenters cited: Judith McFarlane *et al.*, *Stalking and Intimate Partner Femicide*, 3 HOMICIDE STUDIES 300 (1999).
[766] Commenters cited: U.S. Dep't. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Special Report: Stalking Victimization in the United States* (2009).
[767] Commenters cited: U.S. Dep't. of Justice, Office of Justice Programs, National Institute of Justice, *Research Report: The Sexual Victimization of College Women* (2000).
[768] Commenters cited: *Id*.

surveillance and information-gathering) to select victims.[769] A few commenters provided examples of the kind of stalking behaviors that commonly victimize college students, including following a victim to and from classes, repeatedly contacting a student despite requests to cease communication, and threats of self-harm if a student does not pay attention to the stalker. Several commenters expressed concern that without express recognition of stalking as a sexual harassment violation, the discrete incidents involved in a typical stalking pattern might not meet the *Davis* standard and thus would not be reportable under Title IX. One commenter elaborated on an example of typical stalking behavior that would fall through the cracks of effective response under the proposed rules, where the stalking behavior is pervasive but arguably not serious (when each incident is considered separately) and the complainant declines a no-contact order because the locations where the complainant encounters the respondent are places the complainant needs to access to pursue the complainant's own educational activities. This commenter argued that failure to address sex-based stalking may have dire consequences; the commenter stated that several tragic homicides of female students[770] were preceded by this fairly standard stalking-turned-violent pattern.

Discussion: The Department appreciates commenters' support for including "sexual assault" referenced in the Clery Act as an independent category of sexual harassment in § 106.30 and we are persuaded by the many commenters who asserted that the other Clery Act/VAWA sex-based

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[769] Commenters cited: David Lisak & Paul Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 1 (2002).

[770] Commenters described three such homicide situations: the 2010 murder of University of Virginia fourth-year student, Yeardley Love, by her boyfriend who was also a fourth-year student; the 2018 murder of University of Utah student Lauren McCluskey, by her ex-boyfriend; the 2018 murder of 16 year old Texas high schooler Shana Fisher – the first victim of the 17 year old shooter who killed ten students, beginning with Shana who had recently rejected him romantically.

offenses (dating violence, domestic violence, and stalking) also should be included in the same category as sexual assault. Commenters correctly pointed out that without specific inclusion of dating violence, domestic violence, and stalking in the third prong of § 106.30, those offenses would need to meet the *Davis* standard set forth in the second prong of the § 106.30 definition. While the NPRM assumed that many such instances would meet the elements of severity and pervasiveness (as well as objective offensiveness and denial of equal access), commenters reasonably expressed concerns that these offenses may not always meet the *Davis* standard.[771] The Department agrees with commenters who urged that because these offenses concern non-expressive, often violent conduct, even single instances should not be subjected to scrutiny under the *Davis* standard. Dating violence, domestic violence, and stalking are inherently serious sex-based offenses[772] that risk equal educational access, and failing to provide redress for even a single incident does, as commenters assert, present unnecessary risk of allowing sex-based violence to escalate. The Department is persuaded by commenters' arguments and data showing that dating violence, domestic violence, and stalking are prevalent, serious problems affecting students, especially college-age students. The Department believes that a broad rule prohibiting those offenses appropriately falls under Title IX's non-discrimination mandate without raising any First Amendment concerns. The Department therefore revises the final regulations to include dating violence, domestic violence, and stalking as defined in the Clery Act and VAWA.

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[771] As commenters noted, dating violence and domestic violence may fail to meet the *Davis* standard because although a single instance is severe it may not be pervasive, while a course of conduct constituting stalking could fail to meet the *Davis* standard because the behaviors, while pervasive, may not independently seem severe.

[772] Stalking may not always be "on the basis of sex" (for example when a student stalks an athlete due to celebrity worship rather than sex), but when stalking is "on the basis of sex" (for example, when the stalker desires to date the victim) stalking constitutes "sexual harassment" under § 106.30. Stalking that does not constitute sexual harassment because it is not "on the basis of sex" may be prohibited and addressed under a recipient's non-Title IX codes of conduct.

Changes: We have revised the third prong of the final § 106.30 definition of sexual harassment to add, after sexual assault, dating violence, domestic violence, and stalking as defined in VAWA.

Comments: One commenter objected to the reference to "sexual assault" in the third prong of the § 106.30 definition by asserting that the definition seemed to be just for the purpose of having sexual assault in the proposed regulations without any intent to enforce it. A few commenters believed that the third prong's reference to "sexual assault" will not prevent sexual assault even though reported numbers of rapes might decline, because certain situations would no longer be considered rape.

A few commenters objected to the reference to the Clery Act definition of "sexual assault," asserting that the definition of "sexual assault" is too narrow because it fails to capture sex-based acts such as administration of a date rape drug, attempted rape, a respondent forcing a complainant to touch the respondent's genitals, the touching of a complainant's non-private body part (e.g., face) with the respondent's genitals, or an unwanted and unconsented-to kiss on the cheek (even if coupled with forcing apart the complainant's legs).

One commenter believed the definition of sexual assault is too narrow because it does not include a vast number of "ambiguous" sexual assaults; the commenter argued that coercive sexual violence often includes a layer of guilt-inducing ambiguity that may arise from explicit or implied threats used by the perpetrator as a means of compelling nominal (but not genuine) consent. One commenter stated that from December of 2017 to December of 2018, 2,887 people in the United States Googled the question "was I raped?" and according to the same data from Google Trends, in the same time span, 2,311 people Googled "rape definition" and over the last five years, 10,781 and 12,129 people have searched for the question and definition respectively.

This commenter argued that these numbers reflect a lack of certainty surrounding what constitutes rape and demonstrate the need for clarity and better education rather than a vague reference to "sexual assault." Another commenter stated that sexual assault cases often fit within a certain "gray area" often centered on consent issues, and that most sexual violence situations are not black and white; the commenter opined that Title IX should be available to help complainants whose experience is "a little grayer" because otherwise people will continue to pressure and coerce partners into having sex that is not truly consensual, creating more and more trauma.

At least one commenter asserted that historically, courts have considered conduct that meets any reasonable definition of criminal sexual assault, including rape, as sex-based harm under Title IX,[773] and thus a separate reference to "sexual assault" in the § 106.30 definition is unnecessary and only serves to blur the distinction between school-based administrative processes and criminal justice standards. Several other commenters, by contrast, pointed to at least one Federal court opinion holding that a rape failed to meet the "severe and pervasive" standard in private litigation under Title IX.[774]

At least one commenter expressed concern that using the Clery Act's definition of sexual assault (which includes "fondling" under the term "sexual assault") would encompass "butt slaps" (as "fondling") yet this misbehavior occurs with such frequency especially in elementary and secondary schools that school districts will be overwhelmed with needing to investigate

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[773] Commenters cited: *Soper v. Hoben*, 195 F.3d 845, 855 (6th Cir. 1999) (assertion that victim was raped, sexually abused, and harassed obviously qualifies as severe, pervasive, and objectively offensive sexual harassment).
[774] Commenters cited: *Ross v. Corp. of Mercer Univ.*, 506 F. Supp. 2d 1325, 1358 (M.D. Ga. 2007) (finding that a single instance of rape was not pervasive under the *Davis* standard).

those incidents under the strictures of the Title IX grievance process. Another commenter expressed concern that including sexual assault (particularly fondling) in the third prong of the § 106.30 definition is too broad, and wondered whether this definition could encompass innocent play by small children, such as "playing doctor." This commenter argued that where the conduct at issue does not bother the participants it cannot create a subjectively hostile environment or interfere with equal access to an education, regardless of lack of consent based on being under the age of majority.[775]

One commenter argued that because the Clery Act definition of "sexual assault" includes incest and statutory rape, such a definition will encompass incidents that are consensual when Title IX should be focused on discriminatory conduct, which should be restricted to nonconsensual or unwanted conduct; the commenter asserted that where a half-brother and half-sister, or a 13 year old and an 18 year old, engage in consensual sexual activity the Title IX process should not be used to intervene, even if such conduct may constitute criminal offenses that can be addressed through a criminal justice system. Another commenter argued that the inclusion of statutory rape sweeps up sexual conduct by underage students no matter how consensual, welcome, and reciprocated the conduct might be, and asserted that this over-inclusion threatens to turn Title IX into enforcement of high school and first-year college

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[775] Commenters cited: *Newman v. Federal Express*, 266 F.3d 401 (6th Cir. 2001) (racial harassment claim fails when victim is not seriously offended); *Jadon v. French*, 911 P.2d 20, 30-31 (Alaska 1996) (conduct that does not seriously offend the victim does not create a subjectively hostile environment and thus is not sexually harassing). Conduct must be not just "unwelcome," *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67-68 (1986), but also subjectively hostile and annoying to constitute sexual harassment. This commenter argued that "sexual assault" must include both subjective unwelcomeness and objective interference with access to education to be actionable and also cited: *Gordon v. England*, 612 F. App'x 330 (6th Cir. 2015) ("extreme groping" did not create an objectively hostile environment, by itself, and thus did not violate Title VII); *Brooks v. City of San Mateo*, 229 F.3d 917 (9th Cir. 2000) (holding misdemeanor sexual assault involving touching of breast did not create objectively hostile environment, by itself, and thus did not violate Title VII).

students through repressive administrative monitoring of youth sexuality in instances that are not severe, not pervasive, and do not impede educational access.

One commenter described a particular institution of higher education's sexual misconduct policy as defining sexual assault broadly to include "any other intentional unwanted bodily contact of a sexual nature," a standard the commenter argued is ambiguous and overbroad; the commenter argued that the final regulations should clarify that schools cannot apply a definition of "sexual assault" that equates all unwanted touching (such as a kiss on the cheek) with groping or penetration because it is unfair to treat kissing without verbal consent the same as a sex crime and, in the long run, makes it less likely that women will be taken seriously when sex crimes occur. This commenter also asserted that vague, overbroad definitions of sexual assault disproportionately harm students of color.[776]

Some commenters believed that the final regulations should include sexual assault in the definition but should use a definition of sexual assault different from the proposed rules' reference to "sexual assault" under the Clery Act regulations. One commenter believed that laypersons reading the regulation should not have to refer to yet another Federal regulation in

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[776] Commenters cited: Ben Trachtenberg, *How University Title IX Enforcement and Other Discipline Processes (Probably) Discriminate Against Minority Students*, 18 NEV. L. J. 107 (2017); Emily Yoffe, *The Question of Race in Campus Sexual-Assault Cases: Is the system biased against men of color?*, THE ATLANTIC (September 2017) (noting that male students of color are "vastly overrepresented" in the cases Yoffe has tracked and arguing that as "the definition of sexual assault used by colleges has become broader and blurrier, it certainly seems possible that unconscious biases might tip some women toward viewing a regretted encounter with a man of a different race as an assault. And as the standards for proving assault have been lowered, it seems likely that those same biases, coupled with the lack of resources common among minority students on campus, might systematically disadvantage men of color in adjudication, whether or not the encounter was interracial."); Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. FORUM 103, 106-08 (2015) ("American racial history is laced with vendetta-like scandals in which black men are accused of sexually assaulting white women" followed by revelations "that the accused men were not wrongdoers after all . . . . morning-after remorse can make sex that seemed like a good idea at the time look really alarming in retrospect; and the general social disadvantage that black men continue to carry in our culture can make it easier for everyone in the adjudicative process to put the blame on them . . . . Case after Harvard case that has come to my attention . . . has involved black male respondents.").

order to know the definition of "sexual assault." Another commenter stated that by including a cross-reference to the Clery Act regulation, this Title IX regulation could have its definition of sexual assault changed due to regulatory changes under the Clery Act, and that sexual assault should be explicitly defined rather than relying on a cross-reference to a different regulation. One commenter, supportive of the three-prong definition of sexual harassment in § 106.30, suggested that the provision should include a full definition of sexual assault to better clarify prohibited conduct rather than a cross-reference to the Clery Act.

A few other commenters asserted that the Clery Act definition of sexual assault poses problems; they argued that reference to the Clery Act regulations should be replaced by inserting a definition of sexual assault directly into § 106.30. One such commenter argued that the Clery Act definition of sexual assault is biased against men because under the definitions of rape and fondling, a male who performs oral sex on a female victim likely commits "rape" while a female who performs oral sex on a male victim at most commits "fondling," but not the more serious-sounding offense of rape.

One commenter proposed an alternate definition of sexual assault that would define sexual assault by reference to crimes under each State law as classified under the FBI Uniform Crime Reporting Program's ("FBI UCR") National Incident-Based Reporting System (NIBRS). This commenter asserted that this alternative definition of sexual assault would better serve the Department's purpose because it does not require the Department to issue new definitions for Title IX purposes of the degree of family connectedness for incest, the statutory age of consent for statutory rape, consent and incapacity for consent for rape, and other elements in the listed sex offenses. This commenter further asserted that the commenter's alternative definition would not use the definition of rape in the FBI UCR's Summary Reporting System (SRS), because the

FBI has announced that it is retiring the SRS on January 1, 2021 and will collect crime data only through NIBRS thereafter.

Another commenter asserted that the reference in § 106.30 to 34 CFR 668.46(a) for a definition of sexual assault fails to provide meaningful guidance on what conduct recipients must include under Title IX, because the Clery Act regulation relies on the FBI UCR, which is a reporting system designed to aggregate crime data across the Nation, not intended to provide guidance about what conduct is acceptable or unacceptable for enforcement purposes. Under the Clery Act regulation, this commenter points out that "rape" and "fondling" do not define what consent (or lack of consent) means, and "fondling" does not identify which body parts are considered "private." This commenter argued that the need for clarity about what constitutes sexual assault is too important to leave recipients to muddle through vague definitions, and proposed that the third prong of § 106.30 use the following alternative definition of sexual assault: the penetration or touching of another's genitalia, buttocks, anus, breasts, or mouth without consent; a person acts without consent when, in the context of all the circumstances, the person should reasonably be aware of a substantial risk that the other person is not voluntarily and willingly engaging in the conduct at the time of the conduct; sexual assault must effectively deny a person equal access to the recipient's education program or activity.

Discussion: The Department emphasizes that including sexual assault as a form of sexual harassment is not an empty reference; the Department will enforce each part of the § 106.30 definition, including requiring recipients to respond to sexual assault, vigorously for the benefit of all persons in a recipient's education program or activity. The Department believes that the Clery Act's reference to sexual assault is appropriately broad and thus does not agree with the

commenter's contention that the sexual assault reference excludes acts that should be considered rape or sexual assault.

The Department acknowledges commenters' concerns that not every act related to or potentially involved in a sexual assault would meet the Clery Act definition of sexual assault. With respect to violative acts such as commenters' examples of administration of a date rape drug, touching a non-private body part with the perpetrator's private body part, and so forth, such acts constitute criminal acts and/or torts under State laws and likely constitute separate offenses under recipients' own codes of conduct. Therefore, such egregious acts can be addressed even if they do not constitute sexual harassment under Title IX. With respect to an attempted rape, we define "sexual assault" in § 106.30 by reference to the Clery Act,[777] which in turn defines sexual assault by reference to the FBI UCR,[778] and the FBI has stated that the offense of rape includes attempts to commit rape.[779]

The Department disputes a commenter's contention that the sexual assault definition in § 106.30 lacks sufficient precision to capture sexual assault that occurs under what the commenter called "guilt-inducing ambiguity" or "gray areas" often centered around whether the complainant genuinely consented or only consented due to coercion. For reasons explained in the "Consent" subsection of the "Section 106.30 Definitions" section of this preamble, the Department intentionally leaves recipients flexibility and discretion to craft their own definitions of consent (and related terms often used to describe the absence or negation of consent, such as coercion).

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[777] Section 106.30 (defining "sexual harassment" to include "Sexual assault" as "defined in 20 U.S.C. 1092(f)(6)(A)(v)").
[778] 20 U.S.C. 1092(f)(6)(A)(v) ("The term 'sexual assault' means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.").
[779] U.S. Dep't. of Justice, Federal Bureau of Investigation, *UCR Offense Definitions* (with respect to rape, "Attempts or assaults to commit rape are also included"), https://ucrdatatool.gov/offenses.cfm.

The Department believes that a recipient should select a definition of sexual consent that best serves the unique needs, values, and environment of the recipient's own educational community. So long as a recipient is required to respond to sexual assault (including offenses such as rape, statutory rape, and fondling, which depend on lack of the victim's consent), the Department believes that recipients should retain flexibility in this regard. The Department has revised the final regulations to state that it will not require recipients to adopt a particular definition of consent.[780] With respect to the commenter's point regarding a lack of certainty about what constitutes rape, the Department believes that including sexual assault in these Title IX regulations will contribute to greater societal understanding of what sexual assault is and why every person should be protected against it.

Because Federal courts applying the *Davis* standard have reached different conclusions about whether a single rape has constituted "severe and pervasive" sexual harassment sufficient to be covered under Title IX, we are including single instances of sexual assault as actionable under the § 106.30 definition. We believe that sexual assault inherently creates the kind of serious, sex-based impediment to equal access to education that Title IX is designed to prohibit, and decline to require "denial of equal access" as a separate element of sexual assault.

The Department understands the concerns of some commenters that including "fondling" under the term sexual assault poses a perceived challenge for recipients, particularly elementary and secondary schools, where, for instance, "butt slaps" may be a common occurrence. The Department appreciates the opportunity to clarify that under the Clery Act, fondling is a sex offense defined (by way of reference to the FBI UCR) as the touching of a person's private body

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[780] Section 106.30 (entry for "consent").

parts without the consent of the victim *for purposes of sexual gratification*. This "purpose" requirement separates the sex offense of fondling from the touching described by commenters as "children playing doctor" or inadvertent contact with a person's buttocks due to jostling in a crowded elevator, and so forth. Where the touching of a person's private body part occurs *for the purpose of sexual gratification*, that offense warrants inclusion as a sexual assault, and if the "butt slaps" described by one commenter as occurring frequently in elementary and secondary schools do constitute fondling, then those elementary and secondary schools must respond to knowledge of those sex offenses for the protection of students. The definition of fondling, properly understood, appropriately guides schools, colleges, and universities to consider fondling as a sex offense under Title IX, while distinguishing touching that does not involve the requisite "purpose of sexual gratification" element, which still may be addressed by a recipient outside a Title IX process. The Department notes that recipients may find useful guidance in State law criminal court decisions that often recognize the principle that, with respect to juveniles, a sexualized purpose should not be ascribed to a respondent without examining the circumstances of the incident (such as the age and maturity of the parties).[781] The Department declines to create an exception for fondling that occurs where both parties engage in the conduct willingly even though they are underage, because of an underage party's inability to give legal consent to sexual activity, and as discussed above the "for the purposes of sexual gratification" element of fondling

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[781] *See, e.g.*, *In re* K.C., 226 N.C. App. 452, 457 (N.C. App. 2013) ("On the question of sexual purpose, however, this Court has previously held – in the context of a charge of indecent liberties between children – that such a purpose does not exist without some evidence of the child's maturity, intent, experience, or other factor indicating his purpose in acting[.] . . . Otherwise, sexual ambitions must not be assigned to a child's actions. . . . The element of purpose may not be inferred solely from the act itself. . . . Rather, factors like age disparity, control by the juvenile, the location and secretive nature of the juvenile's actions, and the attitude of the juvenile should be taken into account. . . . The mere act of touching is not enough to show purpose.") (internal quotation marks and citations omitted).

protects against treating innocuous, non-sexualized touching between children as sexual harassment under Title IX.

For similar reasons, the Department declines to exclude incest and statutory rape from the definition of sexual assault. The Department understands commenters' concerns, but will not override the established circumstances under which consent cannot legally be given (e.g., where a party is under the age of majority) or under which sexual activity is prohibited based on familial connectedness (e.g., incest). The Department notes that where sexual activity is not unwelcome, but still meets a definition of sexual assault in § 106.30, the final regulations provide flexibility for how such situations may be handled under Title IX. For instance, not every such situation will result in a formal complaint requiring the recipient to investigate and adjudicate the incident;[782] the recipient has the discretion to facilitate an informal resolution after a formal complaint is filed;[783] the final regulations remove the NPRM's previous mandate that a Title IX Coordinator must file a formal complaint upon receipt of multiple reports against the same respondent;[784] the final regulations allow a recipient to dismiss a formal complaint where the complainant informs the Title IX Coordinator in writing that the complainant wishes to withdraw the formal complaint;[785] and the final regulations do not require or prescribe disciplinary

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[782] Section 106.30 (defining "formal complaint" to mean a document "filed by a complainant or signed by a Title IX Coordinator" and defining "complainant" to mean "an individual who is alleged to be the victim of conduct that could constitute sexual harassment"). Situations where an individual does not view themselves as a "victim" likely will not result in the filing of a formal complaint triggering a § 106.45 grievance process.
[783] Section 106.45(b)(9) (permitting a recipient to facilitate informal resolution, with the voluntary written consent of both parties, of any formal complaint except those alleging that an employee sexually harassed a student).
[784] *See* the "Proposed § 106.44(b)(2) Reports by Multiple Complainants of Conduct by Same Respondent [removed in final regulations]" subsection of the "Recipient's Response in Specific Circumstances" section of this preamble.
[785] Section 106.45(b)(3)(ii).

sanctions.[786] Thus, the final regulations provide numerous avenues to avoid situations where a recipient is placed in a position of feeling compelled to drag parties through a grievance process where no party found the underlying incident unwelcome, offensive, or impeding access to education, and recipients should not feel incentivized by the final regulations to become repressive monitors of youth sexuality.[787]

The Department understands a commenter's concern that some recipients have defined sexual misconduct very broadly, including labeling a wide range of physical contact made without verbal consent as "sexual assault." For reasons described above and in the "Consent" subsection of the "Section 106.30 Definitions" section of this preamble, the Department declines to require recipients to adopt particular definitions of consent, and declines to prohibit recipients from addressing conduct that does not meet the § 106.30 definition of sexual harassment under non-Title IX codes of conduct. The Department believes that recipients should retain flexibility to set standards of conduct for their own educational communities that go beyond conduct prohibited under Title IX (or, in the case of defining consent, setting standards for that element of sexual assault). The Department notes that many commenters submitted information and data showing that conduct "less serious" than that constituting § 106.30 sexual harassment can still

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[786] *See* the "Deliberate Indifference" subsection of the "Adoption and Adaptation of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, noting that the final regulations intentionally refrain from second guessing recipients' decisions with respect to imposition of disciplinary sanctions following an accurate, reliable determination reached by following a § 106.45 grievance process. This leaves recipients flexibility to decide appropriate sanctions in situations where behavior constituted sexual harassment under § 106.30 yet did not subjectively offend or distress the complainant.

[787] *See* the "Formal Complaint" subsection of the "Section 106.3 Definitions" section of this preamble, discussing the reasons why these final regulations permit a formal complaint (which triggers a recipient's grievance process) to be filed only by a complainant (i.e., the alleged victim) or by the Title IX Coordinator, and explaining that a Title IX Coordinator's decision to override a complainant's wishes by initiating a grievance process when the complainant does not desire that action will be evaluated by whether the Title IX Coordinator's decision was clearly unreasonable in light of the known circumstances (that is, under the general deliberate indifference standard described in § 106.44(a)).

have negative impacts on victims, and can escalate into actionable harassment or assault when left unaddressed[788] and therefore recipients should retain discretion to decide how to address student and employee misconduct that is not actionable under Title IX. The Department shares commenters' concerns that vague, ambiguously-worded sexual misconduct policies have resulted in some respondents being punished unfairly. The Department is equally concerned that complainants, too, have often been denied opportunity to understand and participate in Title IX grievance processes to vindicate instances of sexual violation. These concerns underlie the § 106.45 grievance process prescribed in the final regulations, for the benefit of each complainant and each respondent, regardless of race or other demographic characteristics. Thus, even if a recipient chooses a definition of "consent" that results in a broad range of conduct prohibited as sexual assault, the recipient's students and employees will be aware of the breadth of conduct encompassed and benefit from robust procedural protections to further each party's respective views and positions with respect to particular allegations.

The Department appreciates commenters' concerns about including sexual assault by reference to the Clery Act regulations at 34 CFR 668.46(a). Postsecondary institutions are already familiar with the Clery Act[789] and the Department's implementing regulations, and although the Clery Act does not apply to elementary and secondary schools, requiring schools,

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[788] *E.g.*, Rachel E. Gartner & Paul R. Sterzing, *Gender Microaggressions as a Gateway to Sexual Harassment and Sexual Assault: Expanding the Conceptualization of Youth Sexual Violence*, 31 AFFILIA: J. OF WOMEN & SOCIAL WORK 491 (2016); Dorothy Espelage *et al*., *Longitudinal Associations Among Bullying, Homophobic Teasing, and Sexual Violence Perpetration Among Middle School Students*, 30 JOURNAL OF INTERPERSONAL VIOLENCE 14 (2014); Eduardo A. Vasquez *et al.*, *The sexual objectification of girls and aggression towards them in gang and non-gang affiliated youth*, 23 PSYCHOL., CRIME & LAW 5 (2016); National Academies of Science, Engineering, and Medicine, *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine* (Frasier F. Benya *et al.* eds., 2018).

[789] The Clery Act applies to institutions of higher education that receive Federal student financial aid under Title IV of the Higher Education Act of 1965, as amended; *see* discussion under the "Clery Act" subsection of the "Miscellaneous" section of this preamble.

colleges, and universities to reference the same range of sex offenses under both the Clery Act and Title IX will harmonize compliance obligations under both statutes (for postsecondary institutions) while providing elementary and secondary school recipients with a preexisting Federal reference to sex offenses rather than a new definition created by the Department solely for Title IX purposes. In response to commenters' concerns that reference to the Clery Act regulations leaves these final regulations subject to changes to the Clery Act regulations, the final regulations now reference sexual assault by citing to the Clery Act statute (and as to dating violence, domestic violence, and stalking, the VAWA statute[790]), rather than to the Clery Act regulations. The Clery Act statute references sex offenses as defined in the FBI UCR,[791] a national crime reporting program designed to standardize crime statistics across jurisdictions. At the same time, this modification preserves the benefit of harmonizing Clery Act and Title IX obligations that arise from a recipient's awareness of sex offenses.

The Department disagrees that the Clery Act's definition of sexual assault is biased or discriminatory against men. Although under the FBI UCR definitions it is possible that, for example, oral sex performed on an unconscious woman may be designated as a different offense

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[790] VAWA at 34 U.S.C. 12291(a)(10), (a)(8), and (a)(30), defines dating violence, domestic violence, and stalking, respectively.

[791] The Clery Act, 20 U.S.C. 1092(f)(6)(A)(v) defines "sexual assault" to mean an "offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation." The FBI UCR, in turn, consists of two crime reporting systems: The Summary Reporting System (SRS) and the National Incident-Based Reporting System (NIBRS). U.S. Dep't. of Justice, Criminal Justice Information Services, *SRS to NIBRS: The Path to Better UCR Data* (Mar. 28, 2017). The current Clery Act regulations, 34 CFR 668.46(a), direct recipients to look to the SRS for a definition of rape and to NIBRS for a definition of fondling, statutory rape, and incest as the offenses falling under "sexual assault." The FBI has announced it will retire the SRS and transition to using only the NIBRS in January 2021. Federal Bureau of Investigation, Criminal Justice Information Services, Uniform Crime Reporting (UCR) Program, *National Incident-Based Reporting System* (NIBRS), https://www.fbi.gov/services/cjis/ucr/nibrs. NIBRS' forcible and nonforcible sex offenses consist of: rape, sodomy, and sexual assault with an object (as well as fondling, statutory rape, and incest, as noted above). Thus, reference to the Clery Act will continue to cover the same range of sex offenses under the FBI UCR regardless of whether or when the FBI phases out the SRS.

than oral sex performed on an unconscious man, the difference is not discriminatory or unfairly biased against men, because any such difference results from differentiation between a penetrative versus non-penetrative act, yet under the FBI UCR both offenses fall under the term sexual assault, and further, penetrative acts against both men and women (and touching the genitalia of men, and of women) all fall under FBI UCR sex offenses. While conduct might be classified differently based on whether the victim was male or female, such offenses would fall under the term sexual assault. All the sex offenses designated under the Clery Act as sexual assault represent serious violations of a person's bodily and emotional autonomy, regardless of whether a particular sexual assault is categorized as rape, fondling, or other forcible or non-forcible sex offense under the FBI UCR.

For similar reasons, the Department declines to adopt the alternative definitions of sexual assault proposed by commenters. The Department believes that, with the final regulations' modification to reference the Clery Act and VAWA statutes rather than solely the Clery Act regulations, "sexual assault" under § 106.30 is appropriately broad, capturing all conduct falling under forcible and non-forcible sex offenses determined by reference to the FBI UCR, while facilitating postsecondary institution recipients' understanding of their obligations under both the Clery Act and Title IX and providing an appropriate reference for elementary and secondary schools to protect students from sex offenses under Title IX.

The Department disagrees that the definitions of rape and fondling in the FBI UCR are too narrow. The violative sex acts covered by offenses described in the FBI UCR were designed to cover a broad range of sexual misconduct regardless of how different jurisdictions have

defined such offenses under State criminal laws,[792] an approach that lends itself to the purpose of these final regulations, which is to ensure that recipients across all jurisdictions include a variety of sex offenses as discrimination under Title IX.

The Department disagrees that including statutory rape and incest makes the sexual assault category too broad, and declines to adopt the specific alternative definitions of sexual assault proposed by commenters. The Department believes that, in response to commenters' concerns, the final regulations appropriately capture a broad range of sex offenses referenced in the Clery Act and VAWA (which refer to the FBI UCR without specifying whether to look to the SRS or NIBRS, foreclosing any problem resulting from the FBI's transition from the SRS to the NIBRS system) while leaving recipients the discretion to select particular definitions of consent (and what constitutes a lack of consent) that best reflect each recipient's values and community standards and adopt a broader or narrower definition of, e.g., fondling by specifying which body parts are considered "private" or whether the touching must occur underneath or over a victim's clothing. Regardless of how narrowly or broadly a recipient defines "consent" with respect to the FBI UCR's categories of forcible and nonforcible sex offenses, the Department believes that any such offenses would constitute conduct jeopardizing equal access to education in violation of Title IX without raising constitutional concerns, and that the § 106.45 grievance process gives complainants and respondents opportunity to fairly resolve factual allegations of such conduct.

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[792] In explaining one of the two systems used in the FBI UCR, the FBI has stated: "the definitions used in the NIBRS [National Incident-Based Reporting System] must be generic in order not to exclude varying state statutes relating to the same type of crime. Accordingly, the offense definitions in the NIBRS are based on common-law definitions found in *Black's Law Dictionary*, as well as those used in the *Uniform Crime Reporting Handbook* and the NCIC Uniform Offense Classifications. Since most state statutes are also based on common-law definitions, even though they may vary as to the specifics, most should fit into the corresponding NIBRS offense classifications." U.S. Dep't. of Justice, Uniform Crime Reporting System, *National Incident-Based Reporting System* (2011), https://ucr.fbi.gov/nibrs/2011/resources/nibrs-offense-definitions.

Changes: The third prong of the § 106.30 definition of sexual harassment now references "sexual assault" per the Clery Act at 20 U.S.C. 1092(f)(6)(A)(v) (instead of referencing the Clery Act regulations at 34 CFR 668.46); and adds reference to VAWA to include "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), and "stalking" as defined in 34 U.S.C. 12291(a)(30).

Gender-based harassment

Comments: A number of commenters discussed issues related to gender-based harassment, sexual orientation, and gender identity.

Some commenters expressed the general view that LGBTQ individuals need to be protected and were concerned that the proposed rules would make campuses even more unsafe for LGBTQ students and have a negative impact on addressing issues of gender-based discrimination and harassment.

Several commenters stated the LGBTQ community experiences sexual violence at much higher rates.

Some commenters expressed specific concerns about the impact of the proposed rules, including the definition of sexual harassment, on transgender individuals.

A few commenters also stated that transgender students should be treated consistent with their gender identity. Some commenters specifically asked the Department to maintain protections presumably found in the withdrawn Letter from James A. Ferg-Cadima, Acting Deputy Assistant Secretary for Policy, Office for Civil Rights at the Department of Education regarding transgender students' access to facilities such as restrooms dated January 7, 2015, and "Dear Colleague Letter on Transgender Students" jointly issued by the Civil Rights Division of

the Department of Justice and the Office for Civil Rights of the Department of Education, dated May 13, 2016.[793]

Some commenters expressed concern that the proposed rules promote heterosexuality as the normal or preferred sexual orientation and therefore fail to recognize and capture the identities and experiences of the LGBTQ community and recommended that the Department explicitly state that Title IX protections apply to members of the LGBTQ community.

One commenter believed that all public school districts should adopt and enforce policies stating that harassment for any reason, including on the basis of gender identity, will not be tolerated and that appropriate disciplinary measures will be taken and urged the Department to add language to the proposed rules making clear that such harassment is within the meaning of Title IX.

Some commenters urged the Department to include specific language referring to sexual harassment based on gender identity, including transgender and gender-nonconforming identities or expressions and expressed concern about the lack of such language in the proposed rules. Some of these commenters noted that some courts have interpreted Title IX, Title VII, and similar statutes to prohibit discrimination on the basis of gender identity and sexual orientation because discrimination on either of these bases of discrimination is discrimination on the basis of sex. One commenter acknowledged that contrary case law exists, but asserted Title IX clearly

[793] *See* U.S. Department of Education & U.S. Department of Justice, Dear Colleague Letter (Feb. 22, 2017) (withdrawing letters), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf.

prohibits discrimination on the basis of sex stereotyping which underlies discrimination, harassment, and assaults against LGBTQ people.[794]

On the other hand, one commenter stated that Title IX is about sex and not gender identity and urged the Department to make clear that biology, not gender identity, determines the definition of men and women.

Another commenter asserted that the Department's use of the phrase "on the basis of sex" in defining sexual harassment is limiting. This commenter asserted that the phrase "on the basis of sex" minimizes and confines experiences of gender discrimination and gender-based violence to a binary understanding by aligning it with sex assigned at birth.

Another commenter urged the Department to keep transgender males out of female sports categories as it is unfair to women and girls in competitions.

One commenter stated that OCR has long understood that gender-based discrimination, even where discrimination is not sexual in nature, might also fall under Title IX by creating a hostile environment for students. The commenter expressed concern that the term gender only appears once in a footnote in the proposed rules and asked how students' gender presentation, gender identity, and sexual orientation can be considered under the proposed rules and whether the Department made a conscious decision not to include gender and sexual orientation.

Another commenter asked the Department to clarify whether gender-based harassment is still covered under Title IX and whether incidents of sexual exploitation are to be included in these grievance procedures.

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[794] Commenters cited, *e.g.*: *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Comm'n*, 884 F.3d 560 (6th Cir.), appeal docketed, No. 18-107 (U.S. August 16, 2019); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir.), appeal docketed, No. 17-1623 (U.S. June 1, 2018).

Other commenters were generally concerned that the proposed rules would discourage participation of women and gender nonconforming students in academia. One commenter asserted that the single greatest danger to women's health is men. The commenter reminded the Department that Title IX helps protect women (as well as those who have been harassed or assaulted) and asked the Department not to endanger women.

Another commenter recommended that the Department add language stating that sexual harassment is bi-directional (male-to-female and female-to-male).

Discussion: The Department appreciates the concerns of the commenters. Prior to this rulemaking, the Department's regulations did not expressly address sexual harassment. We believe that sexual harassment is an important issue, meriting regulations with the force and effect of law rather than mere guidance documents, which cannot create legally binding obligations.[795]

Title IX, 20 U.S.C. 1681(a), expressly prohibits discrimination "on the basis of sex," which is why the Department incorporates the phrase "on the basis of sex" in the definition of sexual harassment in § 106.30. The word "sex" is undefined in the Title IX statute. The Department did not propose a definition of "sex" in the NPRM and declines to do so in these final regulations.

The focus of these regulations remains prohibited conduct. For example, the first prong of the Department's definition of sexual harassment concerns an employee of the recipient conditioning the provision of an educational aid, benefit, or service on an individual's participation in unwelcome sexual conduct, which is commonly referred to as *quid pro quo*

[795] *Perez v. Mortgage Bankers Ass'n*, 525 U.S. 92, 96-97 (2015).

sexual harassment. Any individual may experience *quid pro quo* sexual harassment. The second prong of the § 106.30 definition of sexual harassment involves unwelcome conduct on the basis of sex determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; any individual may experience this form of harassment, as well. The third prong of the sexual harassment definition in these final regulations is sexual assault, dating violence, domestic violence, or stalking on the basis of sex as defined in the Clery Act and VAWA, respectively, and again, any individual may be sexually assaulted or experience dating violence, domestic violence, or stalking on the basis of sex. Thus, any individual – irrespective of sexual orientation or gender identity – may be victimized by the type of conduct defined as sexual harassment to which a recipient must respond under these final regulations.

Title IX and its implementing regulations include provisions that presuppose sex as a binary classification, and provisions in the Department's current regulations, which the Department did not propose to revise in this rulemaking, reflect this presupposition. For example, 20 U.S.C. 1681(a)(2), which concerns educational institutions commencing planned changes in admissions, refers to "an institution which admits only students of one sex to being an institution which admits students of both sexes." Similarly, 20 U.S.C. 1681(a)(6)(B) refers to "men's" and "women's" associations as well as organizations for "boys" and "girls" in the context of organizations "the membership of which has traditionally been limited to persons of one sex." Likewise, 20 U.S.C. 1681(a)(7)(A) refers to "boys'" and "girls'" conferences. Title IX does not prohibit an educational institution "from maintaining separate living facilities for the different sexes" pursuant to 20 U.S.C. 1686. Additionally, the Department's current Title IX regulations expressly permit sex-specific housing in 34 CFR 106.32 ("[h]ousing provided by a

recipient to students of one sex, when compared to that provided to students of the other sex"), separate intimate facilities on the basis of sex in 34 CFR 106.33 ("separate toilet, locker room, and shower facilities on the basis of sex" with references to "one sex" and "the other sex"), separate physical education classes on the basis of sex in 34 CFR 106.34 ("[t]his section does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact"), separate human sexuality classes on the basis of sex in 34 CFR 106.34 ("[c]lasses or portions of classes in elementary and secondary schools that deal primarily with human sexuality may be conducted in separate sessions for boys and girls"), and separate teams on the basis of sex for contact sports in 34 CFR 106.41 ("a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport"). In promulgating regulations to implement Title IX, the Department expressly acknowledged physiological differences between the male and female sexes. For example, the Department's justification for not allowing schools to use "a single standard of measuring skill or progress in physical education classes . . . [if doing so] has an adverse effect on members of one sex"[796] was that "if progress is measured by determining whether an individual can perform twenty-five push-ups, the standard may be virtually out-of-reach for many more women than men because of the difference in strength between average persons of each sex."[797]

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[796] 34 CFR 106.43.

[797] U.S. Dep't. of Health, Education, and Welfare, General Administration, Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 40 FR 24128, 24132 (June 4, 1975). Through that rulemaking, the Department promulgated § 86.34(d), which is substantially similar to the Department's current regulation 34 CFR 106.43.

The Department declines to take commenters' suggestions to include a definition of the word "sex" in these final regulations because defining sex is not necessary to effectuate these final regulations and has consequences that extend outside the scope of this rulemaking. These final regulations primarily address a form of sex discrimination – sexual harassment – that does not depend on whether the definition of "sex" involves solely the person's biological characteristics (as at least one commenter urged) or whether a person's "sex" is defined to include a person's gender identity (as other commenters urged). Anyone may experience sexual harassment, irrespective of gender identity or sexual orientation. As explained above, the Department acknowledged physiological differences based on biological sex in promulgating regulations to implement Title IX with respect to physical education. Defining "sex" will have an effect on Title IX regulations that are outside the scope of this rulemaking, such as regulations regarding discrimination (e.g., different treatment) on the basis of sex in athletics. The scope of matters addressed by the final regulations is defined by the subjects presented in the NPRM, and the NPRM did not propose to define sex. The Department declines to address that matter in these final regulations. The Department will continue to look to the Title IX statute and the Department's Title IX implementing regulations with respect to the meaning of the word "sex" for Title IX purposes.

To address a commenter's assertion that Title IX prohibits sex stereotyping that underlies discrimination against LGBTQ individuals, the Department notes that some of the cases the commenter cited are cases under Title VII and are on appeal before the Supreme Court of the United States. The most recent position of the United States in these cases is (1) that the ordinary public meaning of "sex" at the time of Title VII's passage was biological sex and thus the appropriate construction of the word "sex" does not extend to a person's sexual orientation or

transgender status, and (2) that discrimination based on transgender status does not constitute sex stereotyping but a transgender plaintiff may use sex stereotyping as evidence to prove a sex discrimination claim if members of one sex (e.g., males) are treated less favorably than members of the other sex (e.g., females).[798] Although the U.S. Attorney General and U.S. Solicitor General interpret the word "sex" solely within the context of Title VII, the current position of the United States may be relevant as to the public meaning of the word "sex" in other contexts as well. As explained above, the Department does not define "sex" in these final regulations. These final regulations focus on prohibited conduct, irrespective of a person's sexual orientation or gender identity. Whether a person has been subjected to the conduct defined in § 106.30 as sexual harassment does not necessarily require reliance on a sex stereotyping theory. Nothing in these final regulations, or the way that sexual harassment is defined in § 106.30, precludes a theory of sex stereotyping from underlying unwelcome conduct on the basis of sex that constitutes sexual harassment as defined in § 106.30.

With respect to sexual harassment as a form of sex discrimination in these final regulations, the Department's position in these final regulations remains similar to its position in the 2001 Guidance, which provides:

> Although Title IX does not prohibit discrimination on the basis of sexual orientation, sexual harassment directed at gay or lesbian students that is sufficiently

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[798] *See* Brief of Respondent Equal Employment Opportunity Commission at 16, 22-27, 50-53, *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Comm'n*, 884 F.3d 560 (6th Cir.), appeal docketed, No. 18-107 (U.S. August 16, 2019), https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf; *accord* Amicus Curiae Brief for the United States in *Bostock* and *Zarda*, https://www.supremecourt.gov/DocketPDF/17/17-1618/113417/20190823143040818_17-1618bsacUnitedStates.pdf, *Bostock v. Clayton County, Ga.*, 723 F. App'x 964 (11th Cir.), appeal docketed, No. 17-1618 (U.S. June 1, 2018); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir.), appeal docketed, No. 17-1623 (U.S. June 1, 2018); *see also* Memorandum from the U.S. Attorney General to the U.S. Attorneys & Heads of Department Components, "*Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964*" (Oct. 4, 2017) https://www.justice.gov/ag/page/file/1006981/download ("Attorney General's Memorandum").

> serious to limit or deny a student's ability to participate in or benefit from the school's program constitutes sexual harassment prohibited by Title IX under the circumstances described in this guidance. For example, if a male student or a group of male students target a gay student for physical sexual advances, serious enough to deny or limit the victim's ability to participate in or benefit from the school's program, the school would need to respond promptly and effectively, as described in this guidance, just as it would if the victim were heterosexual. On the other hand, if students heckle another student with comments based on the student's sexual orientation (e.g., "gay students are not welcome at this table in the cafeteria"), but their actions do not involve conduct of a sexual nature, their actions would not be sexual harassment covered by Title IX.[799]
>
> …[G]ender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, but not involving conduct of a sexual nature, is also a form of sex discrimination to which a school must respond[.] For example, the repeated sabotaging of female graduate students' laboratory experiments by male students in the class could be the basis of a violation of Title IX.

These final regulations provide a definition of sexual harassment that differs in some respects from the definition of sexual harassment in the 2001 Guidance, as explained in more detail in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section, the "Sexual Harassment" subsection in the "Section 106.30 Definitions" section, and throughout this preamble. These final regulations include sexual harassment as unwelcome conduct on the basis of sex that a reasonable person would determine is so severe, pervasive, and objectively offensive that it denies a person equal educational access; this includes but is not limited to unwelcome conduct of a sexual nature, and may consist of unwelcome conduct based on sex or sex stereotyping. The Department will not tolerate sexual harassment as defined in § 106.30 against any student, including LGBTQ students.

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[799] 2001 Guidance at 3.

For similar reasons to those discussed above, the Department declines to address discrimination on the basis of gender identity or other issues raised in the Department's 2015 letter regarding transgender students' access to facilities such as restrooms and the 2016 "Dear Colleague Letter on Transgender Students."

These final regulations concern sexual harassment and not the participation of individuals, including transgender individuals, in sports or other competitive activities. We do not believe these final regulations serve to discourage the participation of women in a recipient's education programs and activities, including sports or other competitive activities.

These final regulations address sexual exploitation to the extent that sexual exploitation constitutes sexual harassment as defined in § 106.30, and the grievance process in § 106.45 applies to all formal complaints alleging sexual harassment.

Sexual harassment is not limited to being bi-directional (male-to-female and female-to-male). As explained above, these final regulations focus on prohibited conduct, irrespective of the identity of the complainant and respondent. As explained above, any person may experience sexual harassment as a form of sex discrimination, irrespective of the identity of the complainant or respondent.

Changes: None.

Comments: One commenter urged the Department to require that all policies, information, education, training, reporting options, and adjudication processes be accessible and fair and balanced to all students regardless of race, ethnicity, disability, sexual orientation, or other potentially disenfranchising characteristics. One commenter recommended that the Department remove "sex discrimination issues" from the summary section of the preamble because the scope is too narrow and inconsistent with the spirit of Title IX and discrimination in higher education

extends beyond sex discrimination. This commenter also stated that the proposed rules refer to recipients' responsibilities related to actionable harassment under Title IX, but the commenter suggested that the term discrimination would be more appropriate because sex- and gender-based harassment is only one form of discrimination that Title IX prohibits. One commenter stated that if the scope of the proposed rules must be limited to sexual harassment, this scope should be clearly stated in the preamble to not give the impression that other forms of discrimination included in Title IX do not require due process.

Discussion: Title IX expressly prohibits discrimination on the basis of sex and not race, disability, or other protected characteristics, and the Department does not have the legal authority to promulgate regulations addressing discrimination on the basis of protected characteristics, other than sex, under Title IX. The Department enforces other statutes such as Title VI, which prohibits discrimination on the basis of race, color, and national origin. The Department's other regulations specifically address discrimination based on these and other protected characteristics.

These final regulations require that all policies, information, education, training, reporting options, and adjudication processes be accessible and fair for all students. For example, any complainant will be offered supportive measures, even if that person does not wish to file a formal complaint under § 106.44(a). Any respondent will receive the due process protections in the § 106.45 grievance process before the imposition of any disciplinary sanctions for sexual harassment under § 106.44(a). Additionally, the recipient's non-discrimination statement, designation of a Title IX Coordinator, policy, grievance procedures, and training materials should be readily accessible to all students pursuant to § 106.8 and § 106.45(b)(10)(i)(D).

For the reasons previously explained, the Department does not define sex in these final regulations, as these final regulations focus on prohibited conduct, namely sexual harassment as

a form of sex discrimination. As previously explained, the Department's definition of sexual harassment applies for the protection of any person who experiences sexual harassment, regardless of sexual orientation or gender identity.

Although these final regulations constitute the Department's first promulgation of regulations that address sexual harassment, these final regulations also make revisions to pre-existing regulations and regulations such as regulations in subpart A and subpart B of Part 106 that generally address sex discrimination but do not specifically address sexual harassment. For example, the Department revises § 106.8, which concerns the designation of a Title IX Coordinator who will address all forms of discrimination on the basis of sex and not just sexual harassment. The Department clarifies in § 106.8(c) that a recipient must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints, alleging any action that would be prohibited by Part 106 of Title 34 of the Code of Federal Regulations, and also a grievance process that complies with § 106.45 for formal complaints of sexual harassment as defined in § 106.30. Section 106.8(c) thus clarifies that a recipient does not need to apply or use the grievance process in § 106.45 for complaints alleging sex discrimination that does not constitute sexual harassment.

Changes: None.

Supportive Measures

Overall Support and Opposition

Comments: Many commenters supported the definition of "supportive measures" in § 106.30 because the provision states that supportive measures may be offered to complainants and respondents; commenters asserted that supportive measures should be offered on an equal basis to all parties, except to the extent public safety concerns would require different treatment,

stressing that respondents deal with their own strife as a result of going through the Title IX process. These commenters viewed the § 106.30 definition of supportive measures as appropriately requiring measures that do not disproportionately punish, discipline, or unreasonably burden either party. Many commenters appreciated that the § 106.30 definition of supportive measures included a list illustrating the range of services that could be offered to both parties, and several of these commenters specifically expressed strong support for mutual no-contact orders as opposed to one-way no-contact orders.

Many commenters opposed the § 106.30 definition of supportive measures because, while neither party should be presumed to be at fault before an investigation had been completed commenters argued that this provision will cause an overall decrease in the availability of support services and accommodations to victims. Commenters argued that the requirement that supportive measures be "non-disciplinary, non-punitive," "designed [but not required] to restore access," and not unreasonably burdensome to the non-requesting party, significantly limits the universe of supportive measures schools could offer to victims by prohibiting any measure reasonably construed as negative towards a respondent. These commenters believed the supportive measures definition was too respondent-focused and effectively prioritized the education of respondents over complainants. Several commenters identified the clause "designed to effectively restore or preserve" and questioned how OCR would review and determine whether a supportive measure met this requirement. One commenter asserted that supportive measures designed to restore "access," as opposed to *equal* access, contradicted the proposed definition of "sexual harassment" in § 106.30 as well as the Supreme Court's holding in *Davis* because restoring *some* access is an incomplete remedy for a denial of *equal* access.

Several commenters requested clarification that colleges and universities have flexibility and discretion to approve or disapprove requested supportive measures, including one-way no-contact orders, according to the unique considerations of each situation. Another commenter argued that § 106.30 should be modified to expressly state that schedule and housing adjustments, or removing a respondent from playing on a sports team, do not constitute an unreasonable burden on the respondent when those measures do not separate the respondent from academic pursuits. Commenters argued that § 106.30 should clarify what kind of burdens will be considered "unreasonable." Commenters urged the Department to modify the definition of supportive measures to require that all such measures be proportional to the alleged harm and the least burdensome measures that will protect safety, preserve equal educational access, and deter sexual harassment.

Many commenters suggested that the final regulations should require schools to implement a process through which the parties can seek and administrators can consider appropriate supportive measures, and at least one commenter suggested that a hearing similar to a preliminary injunction hearing under Federal Rule of Civil Procedure 65 should be used, particularly in cases where one party seeks the other party's removal from certain facilities, programs, or activities. At least one commenter asked the Department to specify that any interim measures must be lifted if the respondent is found not responsible.

Many commenters requested clarification as to what types of supportive measures are allowable in the elementary and secondary school context or requested that the Department expand the supportive measures safe harbor and definition to apply in the elementary and secondary school context. Other commenters asserted that there may be a greater need for supportive measures in cases involving international students, women in career preparatory

classes such as construction, manufacturing, and wielding, and lower-income students, for whom dropping out of school could have more drastic and long-lasting consequences.

Many commenters requested that the Department reconsider or clarify the requirement in § 106.30 that the Title IX Coordinator is responsible for effective implementation of supportive measures, arguing that Title IX Coordinators cannot fulfill all the duties assigned to them under the proposed rules (especially if a recipient has only designated one individual as a Title IX Coordinator) and asserting that the responsibility to implement supportive measures could be easily delegated to other offices on campus.

Discussion: The Department appreciates commenters' support for the § 106.30 definition of supportive measures, and we acknowledge commenters' arguments that the language employed in the proposed definition of the term "supportive measures" is too respondent-focused or lessens the availability of measures to assist victims. The Department disagrees that this provision prioritizes the needs of one party over the other. For example, the § 106.30 definition states that the individualized services can be offered "to the complainant or respondent"[800] free of charge, that the services shall not "unreasonably" burden either party, and may include services to protect the safety "of all parties" as well as the recipient's educational environment, or to deter sexual harassment. The Department disagrees that the requirements for supportive measures to be non-disciplinary, non-punitive, and not unreasonably burdensome to the other party indicate a preference for respondents over complainants or prioritize the education of respondents over that

[800] We emphasize that a "complainant" is any individual who has been alleged to be the victim of conduct that could constitute sexual harassment, and a "respondent" is any individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment, so a person may be a complainant or a respondent regardless of whether a formal complaint has been filed or a grievance process is pending (and irrespective of who reported the alleged sexual harassment – the alleged victim themselves, or a third party). *See* § 106.30 defining "complainant" and defining "respondent."

of complainants. These requirements protect complainants and respondents from the other party's request for supportive measures that would unreasonably interfere with either party's educational pursuits. The plain language of the § 106.30 definition does not state that a supportive measure provided to one party cannot impose *any* burden on the other party; rather, this provision specifies that the supportive measures cannot impose an *unreasonable* burden on the other party. Thus, the § 106.30 definition of supportive measures permits a wide range of individualized services intended to meet any of the purposes stated in that provision (restoring or preserving equal access to education, protecting safety, deterring sexual harassment).

We do not believe that it would be appropriate to specify, list, or describe which measures do or might constitute "unreasonable" burdens because that would detract from recipients' flexibility to make those determinations by taking into the account the specific facts and circumstances and unique needs of the parties in individual situations.[801] For similar reasons, we decline to require that supportive measures be "proportional to the harm alleged" and constitute the "least burdensome measures" possible, because we believe that the § 106.30 definition appropriately allows recipients to select and implement supportive measures that meet one or more of the stated purposes (e.g., restoring or preserving equal access; protecting safety; deterring sexual harassment) within the stated parameters (e.g., without being disciplinary or

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[801] The recipient must document the facts or circumstances that render certain supportive measures appropriate or inappropriate. Under § 106.45(b)(10)(ii), a recipient must create and maintain for a period of seven years records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment and must document the basis for its conclusion that its response was not deliberately indifferent. Specifically, that provision states that if a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. Thus, if a recipient determines that a particular supportive measure was not appropriate even though requested by a complainant, the recipient must document why the recipient's response to the complainant was not deliberately indifferent.

punitive, without unreasonably burdening the other party). The "alleged harm" in a situation alleging conduct constituting sexual harassment as defined in § 106.30 is serious harm and the definition of supportive measures already accounts for the seriousness of alleged sexual harassment while effectively ensuring that supportive measures are not unfair to a respondent; even if a supportive measure implemented by a recipient arguably was not the "least burdensome measure" possible, in order to qualify as a supportive measure under § 106.30 the measure cannot punish, discipline, or unreasonably burden the respondent.

To the extent that commenters are advocating for wider latitude for recipients to impose *interim* suspensions or expulsions of respondents, the Department believes that without a fair, reliable process the recipient cannot know whether it has interim-expelled a person who is actually responsible or not. Where a respondent poses an immediate threat to the physical health or safety of the complainant (or anyone else), § 106.44(c) allows emergency removals of respondents prior to the conclusion of a grievance process (or even where no grievance process is pending), thus protecting the safety of a recipient's community where an immediate threat exist. The Department believes that the § 106.30 definition of "supportive measures" in combination with other provisions in the final regulations results in effective options for a recipient to support and protect the safety of a complainant while ensuring that respondents are not prematurely punished.[802]

In response to commenters' concerns that omission of the word "equal" before "access" in the § 106.30 definition of supportive measures creates confusion about whether the purpose of

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[802] Section 106.44(c) (governing the emergency removal of a respondent who poses an immediate threat to any person's physical health or safety); § 106.44(d) (permitting the placement of non-student employees on administrative leave during a pending grievance process).

supportive measures is intended to remediate the same denial of "equal access" referenced in the § 106.30 definition of sexual harassment, we have added the word "equal" before "access" in the definition of supportive measures, and into § 106.45(b)(1)(i) where similar language is used to refer to remedies. The Department appreciates the opportunity to clarify that whether or not a recipient has implemented a supportive measure "designed to effectively restore or preserve" equal access is a fact-specific inquiry that depends on the particular circumstances surrounding a sexual harassment incident. Section 106.44(a) requires a recipient to offer supportive measures to every complainant irrespective of whether a formal complaint is filed, and if a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances under § 106.45(b)(10)(ii).[803]

In order to ensure that the definition of supportive measures in § 106.30 is read broadly we have also revised the wording of this provision to more clearly state that supportive measures must be designed to restore or preserve equal access to education without unreasonably burdening the other party, which may include measures designed to protect the safety of parties or the educational environment, or deter sexual harassment. The Department did not wish for the prior language to be understood restrictively to foreclose, for example, a supportive measure in the form of an extension of an exam deadline which helped preserve a complainant's equal access to education and did not unreasonably burden the respondent but could not necessarily be considered designed to protect safety or deter sexual harassment.

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[803] *See* discussion in the "Section 106.44(a) Deliberate Indifference Standard" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this preamble.

The Department was persuaded by the many commenters who requested that the Department expand provisions that incentivize and encourage supportive measures. As previously noted, we have revised § 106.44(a) to require recipients to offer supportive measures to complainants. As explained in the "Proposed § 106.44(b)(3) Supportive Measures Safe Harbor in Absence of a Formal Complaint [removed in final regulations]" subsection of the "Recipient's Response in Specific Circumstances" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this preamble, we have eliminated the proposed safe harbor regarding supportive measures altogether and, thus, we do not extend this safe harbor to elementary and secondary schools. As all recipients (including elementary and secondary school recipients) are now required to offer complainants supportive measures as part of their non-deliberately indifference response under § 106.44(a), the proposed safe harbor regarding supportive measures is unnecessary. The Department agrees that the need to offer supportive measures in the absence of, or during the pendency of, an investigation is equally as important in elementary and secondary schools as in postsecondary institutions. The final regulations revise the § 106.30 definition of supportive measures to use the word "recipient" instead of "institution" to clarify that this definition applies to all recipients, not only to postsecondary institutions.

To preserve discretion for recipients, the Department declines to impose additional suggested changes that would further restrict or prescribe the supportive measures a recipient may or must offer, including requiring supportive measures that "do" restore or preserve equal access rather than supportive measures "designed" to restore or preserve equal access. Requiring supportive measures to be "designed" for that purpose rather than insisting that such measures actually accomplish that purpose protects recipients against unfair imposition of liability where,

despite a recipient's implementation of measures intended to help a party retain equal access to education, underlying trauma from a sexual harassment incident still results in a party's inability to participate in an education program or activity. To the extent that commenters desire for the final regulations to specify that certain populations (such as international students) may have a greater need for supportive measures, the Department declines to revise this provision in that regard because the determination of appropriate supportive measures in a given situation must be based on the facts and circumstances of that situation. Supportive measures must be offered to every complainant as a part of a recipient's response obligations under § 106.44(a).

The Department declines to include an explicit statement that schedule and housing adjustments, or removals from sports teams or extracurricular activities, do not unreasonably burden the respondent as long as the respondent is not separated from the respondent's academic pursuits, because determinations about whether an action "unreasonably burdens" a party are fact-specific. The unreasonableness of a burden on a party must take into account the nature of the educational programs, activities, opportunities, and benefits in which the party is participating, not solely those educational programs that are "academic" in nature. On the other hand, the Department appreciates the opportunity to clarify that, contrary to some commenters' concerns, schedule and housing adjustments do not necessarily constitute an "unreasonable" burden on a respondent, and thus the § 106.30 definition of supportive measures continues to require that recipients consider each set of unique circumstances to determine what individualized services will meet the purposes, and conditions, set forth in the definition of

supportive measures.[804] Removal from sports teams (and similar exclusions from school-related activities) also require a fact-specific analysis, but whether the burden is "unreasonable" does not depend on whether the respondent still has access to academic programs; whether a supportive measure meets the § 106.30 definition also includes analyzing whether a respondent's access to the array of educational opportunities and benefits offered by the recipient is unreasonably burdened. Changing a class schedule, for example, may more often be deemed an acceptable, reasonable burden than restricting a respondent from participating on a sports team, holding a student government position, participating in an extracurricular activity, and so forth.

The final regulations require a recipient to refrain from imposing disciplinary sanctions or other actions that are not supportive measures, against a respondent, without following the § 106.45 grievance process, and also require the recipient's grievance process to describe the range, or list, the disciplinary sanctions that a recipient might impose following a determination of responsibility, and describe the range of supportive measures available to complainants and respondents.[805] The possible disciplinary sanctions described or listed by the recipient in its own grievance process therefore constitute actions that the recipient itself considers "disciplinary" and thus would not constitute "supportive measures" as defined in § 106.30. If a recipient has listed ineligibility to play on a sports team or hold a student government position, for example, as a possible disciplinary sanction that may be imposed following a determination of responsibility, then the recipient may not take that action against a respondent without first following the §

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[804] The 2001 Guidance at 16 takes a similar approach to the final regulations' approach to supportive measures, by stating that it "may be appropriate for a school to take interim measures during the investigation of a complaint" and for instance, "the school may decide to place the students immediately in separate classes or in different housing arrangements on a campus, pending the results of the school's investigation" or where the alleged harasser is a teacher "allowing the student to transfer to a different class may be appropriate."

[805] Section 106.44(a); § 106.45(b)(1)(i); § 106.45(b)(1)(vi); § 106.45(b)(1)(ix).

106.45 grievance process. If, on the other hand, the recipient's grievance process does not describe or list a specific action as a possible disciplinary sanction that the recipient may impose following a determination of responsibility, then whether such an action (for example, ineligibility to play on a sports team or hold a student government position) may be taken as a supportive measure for a complainant is determined by whether that the action is not disciplinary or punitive and does not unreasonably burden the respondent. Certain actions, such as suspension or expulsion from enrollment, or termination from employment, are inherently disciplinary, punitive, and/or unreasonably burdensome and so will not constitute a "supportive measure" whether or not the recipient has described or listed the action in its grievance process pursuant to § 106.45(b)(1)(vi).

The Department reiterates that a recipient may remove a respondent from all or part of a recipient's education program or activity in an emergency situation pursuant to § 106.44(c) (with or without a grievance process pending) and may place a non-student employee respondent on administrative leave during a grievance process, pursuant to § 106.44(d).[806] Further, a recipient is obligated to conclude a grievance process within a reasonably prompt time frame, thus limiting the duration of time for which supportive measures are serving to maintain a status quo balancing the rights of both parties to equal educational access in an interim period while a grievance process is pending.

With respect to supportive measures in the elementary and secondary school context, many common actions by school personnel designed to quickly intervene and correct behavior

[806] For further discussion see the "Additional Rules Governing Recipients' Responses to Sexual Harassment" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this preamble.

are not punitive or disciplinary and thus would not violate the § 106.30 definition of supportive measures or the provision in § 106.44(a) that prevents a recipient from taking disciplinary actions or other measures that are "not supportive measures" against a respondent without first following a grievance process that complies with § 106.45. For example, educational conversations, sending students to the principal's office, or changing student seating or class assignments do not inherently constitute punitive or disciplinary actions and the final regulations therefore do not preclude teachers or school officials from taking such actions to maintain order, protect student safety, and counsel students about inappropriate behavior. By contrast, as discussed above, expulsions and suspensions would constitute disciplinary sanctions (and/or constitute punitive or unreasonably burdensome actions) that could not be imposed without following a grievance process that complies with § 106.45. The Department emphasizes that these final regulations apply to conduct that constitutes sexual harassment as defined in § 106.30, and not to every instance of student misbehavior.

These final regulations do not expressly require a recipient to continue providing supportive measures upon a finding of non-responsibility, and the Department declines to require recipients to lift, remove, or cease supportive measures for complainants or respondents upon a finding of non-responsibility. Recipients retain discretion as to whether to continue supportive measures after a determination of non-responsibility. A determination of non-responsibility does not necessarily mean that the complainant's allegations were false or unfounded but rather could mean that there was not sufficient evidence to find the respondent responsible. A recipient may choose to continue providing supportive measures to a complainant or a respondent after a determination of non-responsibility. This is not unfair to either party because by definition, "supportive measures" do not punish or unreasonably burden the other party, whether the other

party is the complainant or respondent. There may be circumstances where the parties want supportive measures to remain in place or be altered rather than removed following a determination of non-responsibility, and the final regulations leave recipients flexibility to implement or continue supportive measures for one or both parties in such a situation.

The Department also declines to add an additional requirement that schools implement a process by which supportive measures are requested by the parties and granted by recipients, because we wish to leave recipients flexibility to develop processes consistent with each recipient's administrative structure rather than dictate to every recipient how to process requests for supportive measures. Although we do not dictate a particular process, these final regulations specify in § 106.44(a) that the Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. Complainants will know about the possible supportive measures available to them[807] and will have the opportunity to express what they would like in the form of supportive measures, and the Title IX Coordinator will take into account the complainant's wishes in determining which supportive measures to offer. The final regulations do prescribe that a recipient's Title IX Coordinator must remain responsible for coordinating the effective implementation of supportive measures, so that the burden of arranging and enforcing the supportive measures in a given circumstance remains on the

[807] Section 106.45(b)(1)(ix) requires the recipient's grievance process to describe the range of supportive measures available to complainants and respondents. Additionally, the Title IX Coordinator must contact an individual complainant to discuss the availability of supportive measures, under § 106.44(a).

recipient, not on any party. We acknowledge commenters' concerns that these final regulations place many responsibilities on a Title IX Coordinator, and a recipient has discretion to designate more than one employee as a Title IX Coordinator if needed in order to fulfill the recipient's Title IX obligations.[808]

With respect for a process to remove a respondent from a recipient's education program or activity, these final regulations provide an emergency removal process in § 106.44(c) if there is an immediate threat to the physical health or safety of any students or other individuals arising from the allegations of sexual harassment. A recipient must provide a respondent with notice and an opportunity to challenge the emergency removal decision immediately following the removal. Additionally, the grievance process in § 106.45 provides robust due process protections for both parties, and before imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent, a recipient must follow a grievance process that complies with § 106.45.

We acknowledge commenters' concerns regarding the provision in the § 106.30 definition supportive measures that the Title IX Coordinator must coordinate the effective implementation of supportive measures. However, we believe it is important that students know they can work with the Title IX Coordinator to select and implement supportive measures rather than leave the burden on students to work with various other school administrators or offices. The Department recognizes that many supportive measures involve implementation through various offices or departments within a school. When supportive measures are part of a school's

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[808] *See* discussion in the "Section 106.8(a) Designation of Coordinator" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble.

Title IX obligations, the Title IX Coordinator must serve as the point of contact for the affected students to ensure that the supportive measures are effectively implemented so that the burden of navigating paperwork or other administrative requirements within the recipient's own system does not fall on the student receiving the supportive measures. The Department recognizes that beyond coordinating and serving as the student's point of contact, the Title IX Coordinator will often rely on other campus offices to actually provide the supportive measures sought, and the Department encourages recipients to consider the variety of ways in which the recipient can best serve the affected student(s) through coordination with other offices while ensuring that the burden of effectively implementing supportive measures remains on the Title IX Coordinator and not on students.

Changes: We have revised the definition for supportive measures in § 106.30 to refer to "recipients" instead of "institutions" which clarifies that the definition of supportive measures is applicable in the context of elementary and secondary schools as well as in the context of postsecondary institutions. We have added "equal" before "access" in the description of supportive measures designed to restore or preserve equal access to the recipient's education program or activity. We have revised the second sentence of this provision to clarify that supportive measures must be designed to restore or preserve equal access and must not unreasonably burden the other party, which may include measures also designed to protect safety or the recipient's educational environment, or deter sexual harassment.

No-Contact Orders

Comments: Several commenters focused on the list of possible supportive measures included in the definition of supportive measures in § 106.30 and viewed the express inclusion of mutual no-contact orders as a general prohibition on one-way no-contact orders, and asked the Department

to clarify whether one-way no-contact orders were prohibited. Other commenters assumed one-way no-contact orders were prohibited, and expressed concern that by disallowing one-way no-contact orders, the onus would be placed on the victim to take extreme measures to provide for their own accommodations and prevent victims from getting the support they needed, or would discourage victims from reporting in the first place. Many commenters asserted that a victim would be forced to face or interact with their alleged harasser in class, in dorms, or elsewhere on campus if one-way no-contact orders were prohibited. Other commenters argued that a victim would have to win an administrative proceeding in order to be granted a one-way no-contact order. Many commenters called for the Department to remove the "mutual restrictions on contact" provision from the list entirely because it is not a victim-focused supportive measure. Additionally, some commenters expressed the belief that mutual no-contact orders are not enforceable because it is hard to determine which party has the burden to comply with the no-contact order if both parties are present in the same location. A few commenters believed that mutual no-contact orders would constitute unlawful retaliation against the victim since such an order would necessarily restrict the victim's own participation in programs or activities as well as the participation of the respondent. Some commenters argued that mutual no-contact orders were contrary to the public policies underlying VAWA and various State laws, and that mutual no-contact orders are analogous to reciprocal protective or restraining orders, which have been invalidated by at least one State Supreme Court.[809]

[809] Commenters cited: *Bays v. Bays*, 779 So.2d 754 (La. 2001).

Other commenters asked the Department to expand the list in the § 106.30 definition of supportive measures to include a greater variety of allowable supportive measures. Some commenters argued that the list of possible supportive measures only included prospective measures (that might preserve access going forward) as opposed to remedial measures (that might restore access that had already been lost), and argued that the Department should explicitly mention measures aimed at restoring equal access, such as opportunities to repeat a class or retake an exam or attaching an addendum to a transcript to explain a low grade.

Discussion: We acknowledge commenters' concerns related to the inclusion of mutual no-contact orders on the non-exhaustive list of possible supportive measures in § 106.30, but the Department declines to exclude this example from the list of supportive measures. The list of possible supportive measures included in the § 106.30 definition is illustrative, not exhaustive. The inclusion of "mutual restrictions on contact between the parties" on the illustrative list of possible supportive measures in § 106.30 does not mean that one-way no-contact orders are never appropriate. A fact-specific inquiry is required into whether a carefully crafted no-contact order restricting the actions of only one party would meet the § 106.30 definition of supportive measures. For example, if a recipient issues a one-way no-contact order to help enforce a restraining order, preliminary injunction, or other order of protection issued by a court, or if a one-way no-contact order does not unreasonably burden the other party, then a one-way no-contact order may be appropriate. The Department also reiterates that sexual harassment allegations presenting a risk to the physical health or safety of a person may justify emergency removal of a respondent in accordance with the § 106.44(c) emergency removal provision, which could include a no-trespass or other no-contact order issued against a respondent.

The inclusion of mutual no-contact orders on an illustrative list does not mean the final regulations require complainants to face their respondents on campus, in classrooms, or in dorms. Rather, the express inclusion of mutual no-contact orders suggests that recipients can offer measures – tempered by the requirements that they are not punitive, disciplinary, or unreasonably burdensome to the other party – to limit the interactions, communications, or contact, between the parties. The final regulations do not require recipients to initiate administrative proceedings (i.e., a grievance process) in order to determine and implement appropriate supportive measures. Contrary to the arguments of commenters, the Department believes that mutual no-contact may constitute reasonable restrictions imposed on both parties, because under certain circumstances such a measure serves the purposes of protecting each party's right to pursue educational opportunities, protecting the safety of all parties, and deterring sexual harassment. The Department believes that "mutual restrictions on contact between the parties" may in many circumstances provide benefits to the complainant, for example, where such a mutual no-contact order serves the interest of protecting safety or deterring sexual harassment by forbidding communication between the parties, which might not require either party to change dorm rooms or even re-arrange class schedules. Further restrictions, such as avoiding physical proximity between the parties, will require a fact-specific analysis to determine the scope of a no-contact order that may be appropriate under § 106.30; for example, where both parties are athletes and sometimes practice on the same field, consideration must be given to the scope of a no-contact order that deters sexual harassment, without unreasonably burdening the other party, with the goal of restricting contact between the parties without requiring either party to forgo educational activities. It may be unreasonably burdensome to prevent respondents from attending extra-curricular activities that a recipient offers as a result of

a one-way no contact order prior to being determined responsible; similarly, it may be unreasonably burdensome to restrict a complainant from accessing campus locations in order to prevent contact with the respondent. In some circumstances, for example, a complainant might be offered a supportive measure consisting of a mutual no-contact order restricting either party from *communicating* with the other (which measure likely would not unreasonably burden either party). If, however, the complainant wishes to avoid all physical sightings of a respondent and not only an order prohibiting communications, if appropriate the complainant may receive a supportive measure in the form of an alternate housing assignment (without fee or cost to the complainant). The Department does not view such a supportive measure in such a circumstance as unreasonably burdening the complainant, because alternate supportive measures also would have prevented sexual harassment (by prohibiting all communication between the parties). Under § 106.44(a), a Title IX Coordinator must consider a complainant's wishes with respect to supportive measures, and if a complainant would like a different housing arrangement as part of a supportive measure, then a Title IX Coordinator should consider offering such a supportive measure.

The Department does not believe that "mutual restrictions on contact between the parties" could constitute unlawful retaliation by restricting the complainant's own participation in certain programs or activities of the recipient as well as that of the respondent. Such a supportive measure would simply treat both parties equally, and "restrictions on contact" could be limited in scope to prohibiting communications between the parties, which may not affect the complainant's ability to participate in classes or activities. The Department notes that the § 106.30 definition's requirements that supportive measures be non-disciplinary and non-punitive apply equally to protect complainants against a recipient taking action that punishes or sanctions

a complainant. In response to commenters' concerns about complainants being unfairly punished in the wake of reporting sexual harassment, the Department added § 106.71 prohibiting retaliation. Actions taken by a recipient under the guise of "supportive measures" that actually have the purpose and effect of penalizing the complainant for the purpose of discouraging the complainant from exercising rights under Title IX would constitute unlawful retaliation.

We also acknowledge the various other suggested modifications to the list of supportive measures offered by commenters, but we decline to expand this list. The Department encourages recipients to broadly consider what measures they can reasonably offer to individual students to ensure continued equal access to a recipient's education program and activities for a complainant, irrespective of whether a complainant files a formal complaint, and for a respondent, when a formal complaint is filed. The Department has provided a list to illustrate the range of possible supportive measures, but the list of supportive measures is not intended to be exhaustive. Nothing in § 106.30 precludes recipients from considering and providing supportive measures not listed in the definition, including measures designed to retrospectively "restore" or prospectively "preserve" a complainant's equal educational access. We note that the § 106.30 already includes the example of "course-related adjustments" which could encompass several suggested measures identified by commenters, such as opportunities to retake classes or exams, or adjusting an academic transcript.

Changes: None.

Other Language/Terminology Comments

Comments: One commenter expressed concern that the terms "survivor" and "victim" used in the NPRM to describe a person who merely alleges something has happened to them are prejudicial and anti-male. Other commenters asserted that the Department's proposed regulations

are biased in favor of males partly due to the use of neutral terms such as "complainant" and "respondent" instead of "survivor" or "perpetrator." One commenter suggested that, instead of using the term "complainant," the final regulations should refer to "student survivors" or "those who face harassment." The commenter further recommended that the final regulations use the term "perpetrator" instead of "respondent," saying that the use of the term "respondent" is confusing, and fails to account for perpetrators who are never formally investigated, and therefore are never in a formal respondent role (i.e., because they have not responded to anything).

Discussion: The Department disagrees that the use of the term survivor or victim in the NPRM is biased, anti-male, or pro-male. The term "survivor" was used five times in the preamble to refer generally to individuals who have been victims of sexual harassment. The Department listened to advocates for these individuals, as we listened to other stakeholders. The use of the term survivor or victim in that context takes no position on the veracity of any particular complainant or respondent, or complainants or respondents in general. The final regulations are intended to be objective and do not use the term "survivor" or "victim" in the regulatory text, instead using the more neutral terms "complainant" and "respondent." The final regulations are intended to be fair, unbiased, and impartial toward both complainants and respondents. When a determination of responsibility is reached against a respondent, the Department's interest is in requiring remedies for the complainant, to further the goal of Title IX by providing remedies to victims of sexual harassment aiming to restore their equal educational access. Although the final regulations do not need to use the word "victim," once a reliable outcome has determined that a complainant was victimized by sexual harassment, the final regulations mandate that remedies be provided to that

complainant precisely because after such a determination has been made, that complainant has been fairly, reliably shown to have been the victim of sexual harassment.

Changes: None.

Comments: One commenter expressed concern that the terms used in the NPRM reveal a clear preference in protecting the interests of a school and effectively limiting a school's liability rather than protecting the equal right for all students to have access to higher education free from discrimination.

Discussion: The Department does not have, nor does the terminology in the final regulations reflect, any preference for protecting the interests of a school or effectively limiting a school's liability rather than protecting the equal right of all students to have access to higher education free from discrimination. Although the Department is not required to adopt the deliberate indifference standard articulated by the Supreme Court, we are persuaded by the policy rationales relied on by it and believes it is the best policy approach. As the Court reasoned in *Davis*, a recipient acts with deliberate indifference only when it responds to sexual harassment in a manner that is "clearly unreasonable in light of the known circumstances."[810] The Department believes this standard holds recipients accountable without depriving them of legitimate and necessary flexibility to make disciplinary decisions and to provide supportive measures that might be necessary in response to sexual harassment. Moreover, the Department believes that teachers and local school leaders with unique knowledge of the school climate and student body are best positioned to make disciplinary decisions; thus, unless the recipient's response to sexual harassment is clearly unreasonable in light of known circumstances, the Department will not

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[810] *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 648-49 (1999).

second guess such decisions. In addition, the final regulations impose obligations on recipients that go beyond the deliberate indifference standard as set forth in *Davis*; for example, by requiring that recipients' non-deliberately indifferent response must include offering supportive measures to a complainant under § 106.44(a). Additionally, as explained in more detail in the "Section 106.44(b) Proposed 'Safe Harbors,' generally" subsection in the "Recipient's Response in Specific Circumstances" section, these final regulations do not include any of the proposed safe harbors in the NPRM for recipients.

Changes: None.

Comments: One commenter opposed the use of criminal terms since many of the terms that relate to the findings have legal definitions in criminal law, for which due process protections already exist, and the use of such language suggests that colleges do not want the overall Title IX process to be an educational experience and not a criminal justice proceeding.

Discussion: The Department disagrees with the commenter's contention. The Department has in no way implied that these proceedings are criminal in nature and the final regulations use terms such as "complainant" and "respondent," "decision-maker" and "determination regarding responsibility" to describe features of the grievance process, language intentionally adopted to avoid reference to terms used in civil courts or criminal proceedings (e.g., plaintiff, defendant, prosecutor, judge, verdict). In this way, the final regulations acknowledge that the resolution of allegations of Title IX sexual harassment in an education program or activity serves a different purpose and occurs in a different context from a civil or criminal court. As explained in the "Role of Due Process in the Grievance Process" section of this preamble, the § 106.45 grievance process is rooted in principles of due process to create a process fair to all parties and likely to result in reliable outcomes, and while the Department believes that the grievance process is

consistent with constitutional due process, the § 106.45 grievance process is independent from constitutional due process because it is designed to effectuate the purposes of Title IX as a civil rights statute. The Department understands the concerns expressed by some commenters that colleges want the overall Title IX process to be an educational experience and that the outcome is administrative and believes the final regulations prescribe a consistent grievance process appropriate for administratively resolving allegations of sexual harassment in an education program or activity.

Changes: None.

Comments: One commenter suggested using the word "discrimination" instead of "harassment" in places where the NPRM describes actionable behavior because harassment does not have to occur for there to be discrimination.

Discussion: The Department declines to adopt the word "discrimination" instead of "harassment" in these final regulations. The Department's Title IX regulations already address sex discrimination, and these final regulations intend to address sexual harassment as a particular form of sex discrimination under Title IX. Complaints of sex discrimination that do not constitute sexual harassment may be made to a recipient for handling under the prompt and equitable grievance procedures that recipients must adopt under § 106.8(c). When the sex discrimination complained of constitutes sexual harassment as defined in § 106.30, these final regulations govern how recipients must respond to that form of sex discrimination.

Changes: None.

Comments: One commenter expressed concern that the NPRM used the term "guilt," which equates school conduct processes to the court system and seems contrary to the NPRM's goals of distinguishing between school conduct processes and the judicial system. The commenter argued

that instead, the final regulations should use the terms "found responsible" and "not responsible," and should only draw comparisons with civil, rather than criminal, case law.

Discussion: The Department disagrees with the concern that the NPRM inappropriately used the term "guilt." The word "guilt" appears only in two instances in the NPRM, and neither of those occurrences is in the text of the proposed regulations. In the first instance, the NPRM notes that "Secretary DeVos stated that in endeavoring to find a 'better way forward' that works for all students, 'non-negotiable principles' include the right of every survivor to be taken seriously and the right of every person accused to know that guilt is not predetermined."[811] Second, the NPRM states that "[a] fundamental notion of a fair proceeding is that a legal system does not prejudge a person's guilt or liability."[812] In both contexts, the NPRM was using the term guilt generally to refer to culpability for an offense. The Department also declines to revise the final regulations to use the terms "found responsible" and "not responsible" because it has already utilized similar language; for example, § 106.45(b)(1)(vi) uses "determination of responsibility" in the context of finding a respondent responsible and § 106.45(b)(7) employs the term "determination regarding responsibility" in the context of a determination that could either find the respondent responsible or non-responsible. The NPRM uses the same or similar terms.[813]

Changes: None.

Comments: Several commenters suggested that the term "equitable" should be used instead of "equal" because the two terms have different meanings, and Title IX focuses on educational

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[811] 83 FR 61464.
[812] 83 FR 61473.
[813] *See, e.g.*, 83 FR 61466, 61470.

equity. Without citing a specific provision, one commenter argued that "equal" would assume that if a translator were provided for one party, a translator must be provided for the other party.

Discussion: The Department understands commenters' concerns that "equal" and "equitable" have different implications, and the final regulations use both terms with such a distinction in mind. Where parties are given "equal" opportunity, for example, both parties must be treated the same. By contrast, where parties must be treated "equitably," the final regulations explain what equitable means for a complainant and for a respondent. The Department disagrees that the use of "equal" in these final regulations is inappropriate. The equal opportunity for both parties to receive a disability accommodation does not mean that both parties *must* receive a disability accommodation or that they must receive the *same* disability accommodation. Similarly, both parties may not need a translator, and a recipient need not provide a translator for a party who does not need one, even if it provides a translator for the party who needs one.

Changes: None.

Comments: One commenter suggested using the term "education program or activity" instead of "schools" to be more consistent with statute and case law. The commenter asserted that use of the word "schools" may limit the ability to investigate issues that arise during sporting activities, afterschool programs, on field trips, etc.

Discussion: Although the Department declines to remove reference to "schools," the Department provides a definition for "elementary and secondary schools" as well as "postsecondary institutions" in § 106.30. The Department believes that it is important to distinguish between these types of recipients as the type of hearing that a recipient must provide under § 106.45(b)(6) may be different if the recipient is an elementary or secondary school as opposed to a postsecondary institution.

To address the commenter's concerns, the Department notes that § 106.2(h) provides a definition of "program or activity" as all of the operations of elementary and secondary schools and postsecondary institutions. Additionally, the Department has revised § 106.44(a) to specify that for purposes of §§ 106.30, 106.44, and 106.45, an education program or activity includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs. This definition aligns with the Supreme Court's opinion in *Davis*[814] and clarifies when sporting activities, afterschool programs, or field trips constitute part of the recipient's education program or activity. The Department also revised § 106.44(a) to state that for purposes of §§ 106.30, 106.44, and 106.45, an "education program or activity" also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. The revisions to § 106.44(a) to help better define "education program or activity" are explained more fully in the "Section 106.44(a) 'education program or activity'" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section.

Changes: The Department has revised § 106.44(a) to specify that an education program or activity includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

Comments: One commenter expressed concern that the NPRM's use of the term "students" is too narrow in light of the language of Title IX and current Title IX regulations, as well as the

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[814] *Davis*, 526 U.S. at 645.

Supreme Court's repeated determinations that Title IX encompasses all individuals participating in education programs and activities. Another commenter suggested that the term "student" in the NPRM should be replaced with "person" consistent with statute and case law and because the term "student" may be restrictive because it does not encompass employees, volunteers, parents, and community members. One commenter expressed concern that the definition of "student" as a person who has gained admission is problematic because institutions of higher education, particularly those who do not have open enrollment, typically consider an applicant a student once they have submitted a deposit, indicating their acceptance of an admission offer and commitment to attend.

Discussion: The Department disagrees with the commenters who opposed the use of the term "students." Title IX provides that a recipient of Federal funding may not discriminate on the basis of sex in the education program or activity that it operates and extends protections to any "person." The final regulations similarly use "person" or "individual" to ensure that the Title IX non-discrimination mandate applies to anyone in a recipient's education program or activity. For example, § 106.30 defines sexual harassment as conduct that deprives "a person" of equal access; § 106.30 defines a "complainant" as an "individual" who is alleged to be the victim of sexual harassment. Where the final regulations use the phrase "students and employees" or "students," such terms are used not to narrow the application of Title IX's non-discrimination mandate but to require particular actions by the recipient reasonably intended to benefit students, employees, or both; for example, § 106.8(a) requires recipients to notify "students and employees" of contact information for the Title IX Coordinator. Where the final regulations intend to include "applicants for admission" in addition to "students" the phrase "applicants for admission" is used; for example, § 106.8(b)(2)(ii) precludes recipients from using publications

that state that the recipient treats applicants for admission (or employment), students, or employees differently on the basis of sex (unless permitted under Title IX). Both Title IX and existing Title IX regulations use the term "student" ubiquitously.[815] The existing Title IX regulations, in 34 CFR 106.2(r), define "student" as "a person who has gained admission." "Admission", as defined in34 CFR 106.2(q), "means selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by a recipient." The Department disagrees with the commenter's concern that the definition of "student" as a person who has gained admission is problematic. The Department does not believe the term "student" should be changed to reflect other persons who are not enrolled in the recipient's education program or activity. The term "student" as defined in 34 CFR 106.2(r) aligns with the definition of "formal complaint" in §106.30 that provides at the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.[816] A student who has applied for admission and has been admitted is attempting to participate in the education program or activity of the recipient.

Changes: None.

Comments: One commenter expressed concern that equating "trauma-informed" and "impartial" is a false equivalency that threatens to undermine the quality and efficacy of the Title IX process. The commenter argued that "trauma-informed" refers to a body of research, practice, and theory that teaches professionals who interact with victims to recognize that all individuals process

[815] *E.g.*, 20 U.S.C. 1681(a)(2); 34 CFR 106.36.
[816] *See* the "Formal Complaint" subsection in the "Section 106.30 Definitions" section of this preamble.

trauma differently, to understand different responses to trauma, and to recognize ways in which we can avoid further traumatization of involved parties through sensitive questioning, mindfulness-based practices, and avoiding potentially triggering situations such as unnecessarily repetitive questioning. Further, equating these two terms is dismissive of decades of research and best practices concerning gender and sexual-based violence and harassment prevention and response.

Discussion: The Department disagrees that the final regulations equate "trauma-informed" and "impartial" in a manner that undermines the quality and efficacy of the Title IX process. It appears that the commenter prefers the Department to adopt a trauma-informed approach as a best practice. The Department understands from personal anecdotes and research studies that sexual violence is a traumatic experience for survivors. The Department is aware that the neurobiology of trauma and the impact of trauma on a survivor's neurobiological functioning is a developing field of study with application to the way in which investigators of sexual violence offenses interact with victims in criminal justice systems and campus sexual misconduct proceedings.[817] The final regulations require impartiality on the part of Title IX personnel (i.e., Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolutions)[818] to reinforce the truth-seeking purpose of a grievance process. The Department wishes to emphasize that treating all parties with dignity, respect, and sensitivity without bias, prejudice, or stereotypes infecting interactions with parties fosters impartiality and truth-seeking.

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[817] *E.g.*, Jeffrey J. Nolan, *Fair, Equitable Trauma-Informed Investigation Training* (Holland & Knight updated July 19, 2019) (white paper summarizing trauma-informed approaches to sexual misconduct investigations, identifying scientific and media support and opposition to such approaches, and cautioning institutions to apply trauma-informed approaches carefully to ensure impartial investigations).

While the final regulations do not use the term "trauma-informed," nothing in the final regulations precludes a recipient from applying trauma-informed techniques, practices, or approaches so long as such practices are consistent with the requirements of § 106.45(b)(1)(iii) and other requirements in § 106.45.

Changes: None.

Comments: One commenter requested clarification of the numerous provisions of the proposed regulations that refer to specific time frames, such as ten "days." The commenter suggested that the Department clarify whether these are "calendar" days or "working" days.

Discussion: The Department appreciates the commenter's request for clarification as to how to calculate "days" with respect to various time frames referenced in the proposed regulations and appreciates the opportunity to clarify that because the Department does not require a specific method for calculating "days," recipients retain the flexibility to adopt the method that works best for the recipient's operations; for example, a recipient could use calendar days, school days, or business days, or a method the recipient already uses in other aspects of its operations.

Changes: None.

Comments: One commenter asserted that it is unclear whether § 106.6(d) intended to cover recipients that are not government actors. The commenter suggested adding "whether or not that recipient is a government actor" after "recipient."

Discussion: As explained in the "Role of Due Process in the Grievance Process" section of this preamble, the Department recognizes that some recipients are State actors with responsibilities to provide due process of law and other rights to students and employees under the U.S. Constitution, while other recipients are private institutions that do not have constitutional obligations to their students and employees. The final regulations apply to all recipients covered

by Title IX because fair, reliable procedures that best promote the purposes of Title IX are as important in public schools, colleges, and universities as in private ones. The grievance process prescribed in the final regulations is important for effective enforcement of Title IX and is thus consistent with, but independent of, constitutional due process. Where enforcement of Title IX's non-discrimination mandate is likely to present potential intersections with a public recipient's obligation to respect the constitutional rights of students and employees, the final regulations caution recipients that nothing in these final regulations requires a recipient to restrict constitutional rights.[819] Similarly, the Department, as an agency of the Federal government, cannot require private recipients to restrict constitutional rights. The Department will not require private recipients to abide by restrictions in the U.S. Constitution that do not apply to them. The Department, as a Federal agency, however, must interpret and enforce Title IX in a manner that does not require or cause any recipient, whether public or private, to restrict or otherwise abridge any person's constitutional rights.

Changes: None.

Comments: One commenter encouraged the Department to explicitly state that Title IX and the Title IX regulations do not apply to schools that do not receive Federal financial assistance to help protect their autonomy and Constitutional rights, which would promote diversity in education by protecting the autonomy and freedom of private and religious schools to thrive according to their stated mission and purpose. The commenter stated that their schools are committed to providing safe and equal learning opportunities for each student that they serve and

[819] *E.g.,* § 106.6(d); § 106.44(a) (stating that the Department may not deem a recipient to have satisfied the recipient's duty to not be deliberately indifferent based on the recipient's restriction of rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment).

noted that such language has been included in reauthorizations of the Elementary and Secondary Education Act (ESEA) and that the Every Student Succeeds Act, the most recent reauthorization passed in 2015, contains Section 8506 which specifically states, "Nothing in this Act shall be construed to affect any private school that does not receive funds or services under this Act" [20 U.S.C. 7886(a)]."

Discussion: The Department does not believe it is necessary to further explain in the final regulations that Title IX applies only to recipients of Federal financial assistance; the text of Title IX, 20 U.S.C. 1681, clearly states that the Title IX non-discrimination mandate applies to education programs or activities that receive Federal financial assistance, and expressly exempts educational institutions controlled by religious organizations from compliance with Title IX to the extent that compliance with Title IX is inconsistent with the religious tenets of the religious organization even if the educational institution does receive Federal financial assistance.[820] Existing Title IX regulations already sufficiently mirror that Title IX statutory language by defining "recipient"[821] and affirming the Title IX exemption for educational institutions controlled by religious organizations.[822]

Changes: None.

Comments: One commenter stated that the proposed regulations were not easy to understand because the "Summary" section of the NPRM contained too little information. The commenter asserted that although the proposed regulations were intended to protect young people, young people would not be able to understand them. Another commenter opposed the NPRM because,

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[820] 20 U.S.C. 1681(a); 20 U.S.C. 1681(a)(3).
[821] 34 CFR 106.2(i) (defining "recipient").
[822] 34 CFR 106.12(a).

the commenter asserted, the details were perplexing, vague, and did not tell in sufficient detail, how the proposed rules would be implemented in terms of the behavior, conditions, and situations involved. Another commenter expressed concern that the "sloppy and biased language" in the NPRM needed to be corrected, pointing specifically to the summary comments at 83 FR 61462 and elsewhere in the NPRM.

Discussion: The Department acknowledges the concern from the commenter that the proposed regulations are not easy enough to understand. However, the purpose of the NPRM is to provide a basic overview of the Department's proposed actions and reasons for the proposals. The Department believes that the NPRM accomplished this purpose by providing not only a summary section but also a background section and specific discussions of each proposed provision.

The Department acknowledges the concern of the commenter that opposed the NPRM because the commenter believed the language was too vague and does not provide sufficient detail as to how the proposed rules would be implemented in specific situations. The Department believes that both the NPRM, and now these final regulations, strike an appropriate balance between containing sufficient details as to a recipient's legal obligations without improperly purporting to specify outcomes for all scenarios and situations many of which will turn on particular facts and circumstances. The Department wishes to emphasize that when determining how to comply with these final regulations, recipients have flexibility to employ age-appropriate methods, exercise common sense and good judgment, and take into account the needs of the parties involved.

The Department disagrees that any of the language in the proposed rules or final regulations is biased, and notes that the Department's choice of language throughout the text of

the final regulations is neutral, impartial, and unbiased with respect to complainants and respondents.

Changes: None.

Comments: One commenter expressed concern that the final regulations should not emphasize the view that schools are in a unique position to make disciplinary decisions based on school climate because all decisions, including disciplinary decisions, should be made congruent with the intent and spirit of the proposed rules. Stating that schools are in a unique position regarding decision making invites many forms of prejudice and renders decisions less reliable.

Discussion: The Department disagrees with the position that the final regulations should not emphasize the view that schools are in a unique position to make disciplinary decisions based on school climate. The Department disagrees with the commenter's conclusory assertion that by acknowledging schools are in a unique position to make such decisions that the Department invites prejudice that renders decisions less reliable. As the Supreme Court reasoned in *Davis*, Title IX must be interpreted in a manner that leaves flexibility in schools' disciplinary decisions and that does not place courts in the position of second guessing the disciplinary decisions made by school administrators.[823] As a matter of policy, the Department believes that these same principles should govern administrative enforcement of Title IX.

Changes: None.

Comments: One commenter suggested including a full list of stakeholders who were interviewed and involved in the process of developing the NPRM to establish credibility (with aliases

[823] *Davis*, 626 U.S. at 648.

provided to protect the privacy of individual participants), as well as the meeting minutes included as an appendix.

Discussion: The Department does not believe it is necessary to publish a full list of stakeholders who were interviewed and involved in the process of developing the NPRM to establish credibility or publish meeting minutes included as an appendix. The Department noted in the NPRM that it conducted listening sessions and discussions with stakeholders expressing a variety of positions for and against the status quo, including advocates for survivors of sexual violence; advocates for accused students; organizations representing schools and colleges; scholars and experts in law, psychology, and neuroscience; and numerous individuals who have experienced school-level Title IX proceedings as a complainant or respondent; school and college administrators; child and sex abuse prosecutors.[824] The Department believes this level of detail is sufficient to support the Department's contention that the Department conducted wide outreach in developing the NPRM.

Changes: None.

Comments: One commenter suggested including an index of terms that define legal terminology, including "respondeat superior, "reasonableness standard," "deliberate indifference standard," "constructive notice," and so forth because the use of legal terminology throughout these regulations without accompanying layperson's commentary or clear definition of the terminology applied throughout the proposed revisions confuse and divert attention from the actual meaning of the proposed rules.

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[824] 83 FR 61463-64.

Discussion: The Department does not believe it is necessary to include an index of terms that define legal terminology. The Department has defined key terms as necessary in § 106.30, and § 106.2 also provides relevant definitions. The remainder of the language used in the final regulations should be interpreted both in the context of the final regulations and in accordance with its ordinary public meaning.

The Department agrees that the term "respondeat superior" is a legal term of art that may be confusing in light of the final regulations' frequent use of the word "respondent" which looks very similar to the word "respondeat" as used in the phrase "respondeat superior" in the § 106.30 definition of "actual knowledge." To address this concern, the Department has revised the definition of "actual knowledge" in § 106.30 to use the term "vicarious liability" instead of "respondeat superior." Although "vicarious liability" is a legal term, "vicarious liability" more readily conveys the concept of being liable for the actions or omissions of another, without causing unnecessary confusion with the word "respondent."

Changes: Partly in response to commenters' concerns that the phrase "respondeat superior" was not recognizable as a legal term or was too easily confused with use of the word "respondent" throughout the final regulations, we have revised the definition of "actual knowledge" in § 106.30 by replacing term "respondeat superior" with "vicarious liability."

Comments: One commenter suggested including support and context for the Department's contention in the NPRM that the proposed rules will give sexual harassment complainants greater confidence to report and expect their school to respond in a meaningful way by separating a recipient's obligation to respond to a report of sexual harassment from the recipient's obligation to investigate formal complaints of sexual harassment; the commenter argued that the NPRM thus implies that either complainants do not currently have a clear

understanding of their Title IX rights and a school's obligation to respond or that complainants are under the misconception that all complaints are considered formal complaints under the current Title IX guidance and regulations.

Discussion: The Department's past guidance required recipients to *always* investigate any report of sexual harassment, even when the complainant only wanted supportive measures and did not want an investigation, which necessarily results in some intrusion into the complainant's privacy.[825] This guidance combined a recipient's obligation to respond to a report of sexual harassment with the recipient's obligation to investigate formal complaints of sexual harassment. This guidance also did not distinguish between an investigation which resulted in the imposition of disciplinary sanctions and an inquiry into a report of sexual harassment.[826] The Department's past guidance did not specifically provide both parties the opportunity to know about an investigation and participate in such an investigation, when the investigation may lead to the imposition of disciplinary sanctions against the respondent and the provision of remedies. Through §§ 106.44 and 106.45, these final regulations clarify when a recipient has the affirmative obligation to conduct an investigation that may lead to the imposition of disciplinary sanctions, requires the recipient to notify both parties of such an investigation, and requires the recipient to provide both parties the opportunity to participate in the process. Irrespective of whether a recipient conducts an investigation under § 106.45, a recipient may inquire about a report of sexual harassment and must offer supportive measures in response to such a report under § 106.44(a). If a recipient does not provide a complainant with supportive measures, then

[825] 2001 Guidance at 13, 15, 18; 2011 Dear Colleague Letter at 4.
[826] 2001 Guidance at 13, 15, 18.

the recipient must document the reasons why such a response as not clearly unreasonable in light of the known circumstances under § 106.45(b)(10)(ii).

Under the Department's past guidance, some students did not know that reporting sexual harassment always would lead to an investigation, even when the student did not want the recipient to investigate. A rigid requirement such as an investigation in every circumstance may chill reporting of sexual harassment, which is in part why these final regulations separate the recipient's obligation to respond to a report of sexual harassment from the obligation to investigate a formal complaint of sexual harassment. Under these final regulations, a student may receive supportive measures irrespective of whether the student files a formal complaint, which results in an investigation. In this manner, these final regulations encourage students to report sexual harassment while allowing them to exercise some control over their report. If students would like supportive measures but do not wish to initiate an investigation under § 106.45, they may make a report of sexual harassment. If students would like supportive measures and also would like the recipient to initiate an investigation under § 106.45, they may file a formal complaint.

The Department disagrees with the premise that separating a recipient's obligation to respond to each known report of sexual harassment from the recipient's obligation to investigate formal complaints of sexual harassment implies that all complainants suffer misconceptions; rather, the Department believes that distinguishing between a recipient's obligation to respond to a report, on the one hand, and a recipient's obligation to investigate a formal complaint on the other hands, provides clarity that benefits complainants, respondents, and recipients.

Changes: None.

Comments: One commenter suggested adding prevention and community educational programming as a possible option schools can utilize as one of the remedies provided following a formal complaint, as well as adding a requirement of educational outreach and prevention programming elsewhere within the final regulations.

Discussion: The Department declines to list prevention and community educational programming as a possible option schools can utilize as a remedy after the conclusion of a grievance process, or to add a requirement of educational outreach and prevention programming elsewhere within the final regulations. The Department notes that nothing in the final regulations prevents recipients from undertaking such efforts. With respect to remedies, the final regulations require a recipient to provide remedies to a complainant where a respondent has been found responsible, and notes that such remedies may include the type of individualized services non-exhaustively listed in the § 106.30 definition of "supportive measures." Whether or not the commenter's understanding of prevention and community education programming would be part of an appropriate remedy for a complainant, designed to restore or preserve the complainant's equal access to education, is a fact-specific matter to be considered by the recipient. With respect to a general requirement that recipients provide prevention and community education programming, the final regulations are focused on governing a recipient's response to sexual harassment incidents, leaving additional education and prevention efforts within a recipient's discretion.

Changes: None.

Section 106.44 Recipient's Response to Sexual Harassment, Generally

Section 106.44(a) "actual knowledge"

The Recipient's Self-Interest

Comments: Many commenters expressed concerns about the actual knowledge requirement in § 106.44(a), citing examples of instances in which schools sought to avoid addressing sexual harassment and assault, including high-profile sexual abuse scandals at universities where some university employees failed to report abuse that was reported to them. One commenter asserted that schools discourage sexual harassment and assault reports because the number of reported instances of sexual violence at an institution is publicly available (which harms or is perceived to harm the recipient's reputation), and alleged perpetrators are often prominent members of college communities, including star athletes, fraternity members, leading actors, and promising filmmakers. Commenters argued that, by using an actual knowledge requirement that fails to make employees mandatory reporters, schools will continue to ignore cases of sexual violence and will investigate fewer harassment complaints, resulting in less justice and fewer services for victims of sexual harassment.

Discussion: The Department incorporates here its discussion under the "Actual Knowledge" subsection of the "Section 106.30 Definitions" section of this preamble. As discussed in that section, and in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, we believe that the final regulations appropriately hold recipients liable for responding to every allegation of sexual harassment of which the recipient is aware, ensure that elementary and secondary school students may report to any school employee, and respect the autonomy of complainants at postsecondary institutions to choose whether, and when, the complainant desires to report sexual harassment. No recipient

may yield to institutional self-interest by ignoring known allegations of sexual harassment without violating the recipient's obligation to promptly respond as set forth in § 106.44(a).

Changes: None.

Burdening the Complainant

Comments: Numerous commenters argued that § 106.44(a) will have the effect of shifting the burden of each report onto the complainant, who, in addition to dealing with the harm to their mental health from harassment or assault, must also bear the responsibility of locating and reporting to the correct administrator. Several commenters also voiced concern that § 106.44(a) makes it more difficult for victims to know how or to whom to report harassment. Other commenters argued that complainants would be at a loss in instances where the school has not educated students and staff as to who the Title IX Coordinator is, where that person can be found, and what that person's responsibilities are. Several commenters asked what a complainant should do if a complainant has had a negative experience previously with the Title IX Coordinator, because the complainant would have no one else to whom to turn in order to report or file a formal complaint.

Many commenters asserted that § 106.44(a) would chill reports of sexual harassment and assault. Several commenters stated that 59.3 percent of survivors in one study confided in informal support sources while across several studies, fewer than one-third of victims reported to formal sources.[827] One commenter asserted that research has consistently reflected that survivors of campus sexual assault are more likely to disclose to someone with whom they have an

[827] Commenters cited: Charlotte Pierce-Baker, *Surviving the silence: Black women's stories of rape* (W.W. Norton 1998); Patricia A. Washington, *Disclosure Patterns of Black Female Sexual Assault Survivors*, 7 VIOLENCE AGAINST WOMEN 11 (2001).

existing relationship rather than a campus administrator. Commenters argued that fewer reports would reach the Title IX Coordinator, since the Title IX Coordinator lacks a preexisting personal relationship with survivors. Several commenters asserted that most school personnel do not know who the Title IX Coordinator is, and that these employees will therefore be unable to help complainants find the Title IX Coordinator.

Discussion: The Department incorporates here its discussion under the "Actual Knowledge" subsection of the "Section 106.30 Definitions" section of this preamble. As discussed in that section, and in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, we believe that the definition of actual knowledge in these final regulations has been revised to appropriately trigger a recipient's response obligations by notice to any elementary and secondary school employee, to any recipient's Title IX Coordinator, and to any official with authority to institute corrective measures on the recipient's behalf. The Department believes that respecting a complainant's autonomy is an important, desirable goal and that allowing complainants to discuss or disclose a sexual harassment experience with employees of postsecondary institutions without such confidential conversations automatically triggering the involvement of the recipient's Title IX office will give complainants in postsecondary institutions greater control and autonomy over the reporting process. The final regulations place the burden on recipients to ensure that all students and employees (as well as parents of elementary and secondary school students, and others) are notified of contact information for the Title IX Coordinator, so that when a complainant chooses to report, the complainant may easily locate the Title IX Coordinator's office location, telephone number, and e-mail address, and report using any of those methods, or any other means resulting in the Title IX Coordinator receiving the person's verbal or written report. Nothing in the final

regulations precludes a recipient, including a postsecondary institution, from instructing any or all of its employees to report sexual harassment disclosures and reports to the Title IX Coordinator, if the recipient believes that such a universal mandatory reporting system best serves the recipient's student and employee population. However, universal mandatory reporting systems have led to the unintended consequence of reducing options for complainants at postsecondary institutions to discuss sexual harassment experiences confidentially with trusted employees,[828] and the final regulations therefore do not impose a universal mandatory reporting system in the postsecondary institution context.

Changes: None.

Elementary and Secondary Schools

Comments: Many commenters stated that the actual knowledge requirement is inappropriate for elementary and secondary school students because, from a young child's perspective, there is no distinction between a teacher, teacher's aide, bus driver, cafeteria worker, school resource officer, or maintenance staff person; to a young child, they are all grown-ups. Commenters asserted that this is particularly true for adults such as bus drivers and school resource officers, who can take corrective measures (kicking a student off the bus, for example) but not necessarily "on behalf of" the school. Several commenters stated that often a peer seeking help for a friend brings an issue of sexual harassment or assault to the attention of teachers or other school personnel, and commenters asserted that these allegations should be formally addressed by the school. Numerous commenters asserted that all school employees, not just teachers, should be

[828] *E.g.*, Carmel Deamicis, *Which Matters More: Reporting Assault or Respecting a Victim's Wishes?*, THE ATLANTIC (May 20, 2013); Allie Grasgreen, *Mandatory Reporting Perils*, INSIDE HIGHER ED (Aug. 30, 2013).

responsible employees. By ensuring that a student can confide in counselors, aides, and coaches, commenters believed that students would be more likely to speak up and receive benefits to which they are entitled under Title IX. Commenters asserted that the proposed rules would conflict with other mandatory reporting requirements; for example, State laws requiring all school staff to notify law enforcement or child welfare agencies of child abuse. Another commenter stated that, by limiting the definition of complainant to only "the victim," the proposed regulations would not allow for parents to file complaints on behalf of their children, and would not contemplate a witness to sexual harassment making a complaint. One commenter asserted that the actual knowledge requirement may be in tension with the Every Student Succeeds Act (ESSA); the commenter asserted that under ESSA, a school district with probable cause to believe a teacher engaged in sexual misconduct is prohibited from helping that teacher from getting a new job yet, the commenter argued, under the proposed rules the school district would not need to take any action to address the teacher's sexual misconduct absent a formal complaint.

Discussion: The Department incorporates here its discussion under the "Actual Knowledge" subsection of the "Section 106.30 Definitions" section of this preamble. As discussed in that section, and in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, we believe that the final regulations appropriately hold recipients liable for responding to every allegation of sexual harassment of which the recipient is aware, ensure that elementary and secondary school students may report to any school employee, and ensure that every recipient's educational community understands that *any person* may report sexual harassment (whether they are the victim, or a witness, or any other third party), triggering the recipient's obligation to promptly respond. As discussed in the

"Complainant" subsection of the "Section 106.30 Definitions" section of this preamble, we have revised the definition of "complainant" to remove the inference that the alleged victim themselves must be the same person who reports the sexual harassment. Upon notice that any person has allegedly been victimized by conduct that could constitute sexual harassment as defined in § 106.30, a recipient must respond, including by promptly offering supporting measures to the alleged victim (i.e., the complainant).

The final regulations do not contravene or alter any Federal, State, or local requirements regarding other mandatory reporting obligations that school employees have. Those obligations are distinct from the obligations in these final regulations.

The Department acknowledges that the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the Every Student Succeeds Act (ESSA), may require a recipient subject to ESEA to take certain steps with respect to an employee who has been accused of sexual misconduct when a recipient has probable cause to believe the employee engaged in sexual misconduct.[829] We do not believe that the actual knowledge requirement in these final regulations is in tension with ESSA. The final regulations define actual knowledge to include notice of *allegations* of sexual harassment; a recipient cannot wait to respond to sexual harassment allegations until the recipient has *probable cause* that the sexual harassment occurred. Under revised § 106.44(a) the recipient's prompt response to allegations of sexual harassment must include offering the complainant supportive measures irrespective of whether the complainant files, or the Title IX Coordinator signs, a formal complaint. A recipient's obligations under ESSA may factor into a Title IX Coordinator's decision to sign a formal

[829] *E.g.*, https://www2.ed.gov/policy/elsec/leg/essa/section8546dearcolleagueletter.pdf.

complaint initiating a grievance process against an employee-respondent, even when the complainant (i.e., the alleged victim) does not wish to file a formal complaint, if, for example, the recipient wishes to investigate allegations in order to determine whether the recipient has probable cause of employee sexual misconduct that affect the recipient's ESSA obligations.

Changes: None.

Confusion for Employees

Comments: Numerous commenters expressed concern that resident assistants or resident advisors, professors, and coaches may not know how to respond to complainants appropriately if the proposed rules allow postsecondary institution employees to have discretion over whether to report sexual harassment to the Title IX Coordinator. Several commenters asked the Department to specify that all schools should be responsible for educating all employees about a variety of procedures for handling sexual harassment and violence. Another commenter suggested that deans, directors, department heads, or any supervisory employees should be held individually liable for having actual knowledge of a report of sexual misconduct. One commenter asserted that a greater number of employees should be required to inform students of their right to file a formal complaint and to obtain supportive measures. One commenter stated that schools following the proposed rules might be sued for inadequate reporting policies, since a recipient's failure to tell its employees to respond appropriately to disclosures arguably amounts to an intentional decision not to respond to third-party discrimination.

Discussion: The Department incorporates here its discussion under the "Actual Knowledge" subsection of the "Section 106.30 Definitions" section of this preamble. As discussed in that section, and in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, the Department agrees with commenters' concerns

that a wider pool of trusted adults in elementary and secondary schools should trigger a recipient's obligations, and, thus, the final regulations expand the definition of actual knowledge to include notice to *any* employee of an elementary and secondary school. However, for reasons discussed in the aforementioned sections of this preamble, the Department disagrees that the pool of postsecondary institution employees to whom notice charges the recipient with actual knowledge needs to be expanded beyond the Title IX Coordinator and officials with authority to institute corrective measures on the recipient's behalf.

The Department disagrees that these final regulations increase liability for recipients with respect to inadequate reporting policies. These final regulations require recipients to respond to sexual harassment, or allegations of sexual harassment, when the recipient has actual knowledge, defined in part to include notice to an official with authority to institute corrective measures on behalf of the recipient. This requirement, and definition, are also used by Federal courts in applying the *Gebser/Davis* framework in private Title IX lawsuits.[830] These final regulations go beyond the *Gebser/Davis* framework by requiring recipients to have in place clear, accessible reporting options, and requiring recipients to notify its educational community of those reporting options. The recipient's educational community must be notified about how to report sexual harassment in person, by mail, telephone, or e-mail, and the final regulations specify that any person may report sexual harassment (whether the person reporting is the alleged victim themselves or any third party).

Changes: None.

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[830] *E.g.*, *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998).

Intersection Between Actual Knowledge and Deliberate Indifference

Comments: One commenter asked, if a recipient has actual knowledge that a student or employee has been subjected to unwelcome conduct on the basis of sex, but the recipient does not know whether the misconduct effectively denied the victim equal access to the recipient's education program or activity, whether the recipient must respond under §§ 106.44(a) and 106.44(b)(2), to at least seek out the missing information and if not, whether the respondent has an obligation to inform the complainant of the nature of the missing and needed additional information regarding denial of equal access.

Discussion: The Department acknowledges the commenter's question about how much detail is needed in order for the recipient to have actual knowledge triggering the recipient's obligation to provide a non-deliberately indifferent response, and whether a recipient with partial information about a sexual harassment allegation has a responsibility to notify the complainant that additional information is needed to further evaluate or respond to the allegation. In response, the Department notes that the definition of "complainant" under § 106.30 is an individual who is alleged to be the victim of *conduct that could constitute sexual harassment*; thus, the recipient need not have received notice of facts that definitively indicate whether a reasonable person would determine that the complainant's equal access has been effectively denied in order for the recipient to be required to respond promptly in a non-deliberately indifferent manner under § 106.44(a). The definition of "actual knowledge," in § 106.30, also reflects this concept as actual knowledge means notice of sexual harassment or *allegations* of sexual harassment.

These final regulations, and § 106.44(a) in particular, incorporate principles similar to the principles in the Department's 2001 Guidance with respect to a recipient's response to a student's or parent's report of sexual harassment or sexual harassment allegations, or a

recipient's response to direct observation by a responsible employee of conduct that could constitute sexual harassment. The Department's 2001 Guidance states:

> If a student or the parent of an elementary or secondary student provides information or complains about sexual harassment of the student, the school should initially discuss what actions the student or parent is seeking in response to the harassment. The school should explain the avenues for informal and formal action, including a description of the grievance procedure that is available for sexual harassment complaints and an explanation of how the procedure works. If a responsible school employee has directly observed sexual harassment of a student, the school should contact the student who was harassed (or the parent, depending upon the age of the student), explain that the school is responsible for taking steps to correct the harassment, and provide the same information described in the previous sentence.[831]

Like the 2001 Guidance, these final regulations in § 106.6(g) recognize that a parent or guardian may have the legal right to act on behalf of a "complainant," "respondent," "party," or other individual. Section 106.44(a) also requires that the Title IX Coordinator promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain the process for filing a formal complaint. Thus, if a parent or guardian has a legal right to act on behalf of a student, the parent or guardian has the right to act on behalf of a Title IX complainant, including with respect to discussing supportive measures, or deciding to file a formal complaint.

Changes: None.

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[831] 2001 Guidance at 15.

Modeling Reporting on the Military System

Comments: Commenters argued that the reporting system used in the U.S. military to address sexual assault should be modified for use in Title IX reporting systems in order to best serve civil rights purposes. Commenters described the military reporting system as providing sexual assault victims with a two-track reporting system, under which a victim can choose a "restricted" or "unrestricted" report. Commenters described the military system's "restricted" report option as allowing the victim to report confidentially, for the purpose of receiving services, and no investigation is commenced unless the victim chooses an "unrestricted" reporting path whereby the victim's identity is not confidential and charges are initiated against the alleged perpetrator. Commenters asserted that giving victims these options for reporting helps address the well-known and well-researched fact that sexual assault is underreported throughout society, including in military and school environments, and that many survivors of sexual violence exercise the "victim's veto" whereby no investigation takes place, and no services are given to a victim, because the victim chooses not to report their experience in any official manner. Commenters asserted that the withdrawn 2014 Q&A essentially created this two-track model,[832] which best serves the needs of complainants, and argued that it best fits the purpose of civil rights protections, especially as compared to the traditional law enforcement model, under which a victim's only option is to report to police, and then police officers and prosecutors have sole discretion whether to investigate and whether to prosecute, and the victim has little or no control

[832] Commenters cited: 2014 Q&A at 21, 22, 24.

over those decisions, leading many victims to exercise the "victim's veto" and never report at all.[833]

Commenters described the approach of the withdrawn 2014 Q&A as giving survivors two choices of how to report, so survivors essentially would make the decision whether to initiate an investigation. Commenters asserted that the withdrawn 2014 Q&A ensured that if a survivor made an official report to a responsible employee or to the Title IX Coordinator the school must investigate unless the survivor explicitly requested that there be no investigation and the Title IX Coordinator granted that request after weighing multiple factors. On the other hand, commenters asserted, under that guidance a survivor could choose a "confidential path" and access services and accommodations for healing, without initiating an investigation unless or until the survivor changed their mind and officially reported to a responsible employee or to the Title IX Coordinator (which, commenters stated, is the equivalent in the military system as turning a restricted report into an unrestricted report, which is commonplace). Commenters urged the Department to reinstate the withdrawn 2014 Q&A, rather than keep the provisions in the proposed rules, regarding how complainants must report and what happens after a complainant reports.

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[833] Commenters cited, *e.g.*: Tamara F. Lawson, *A Shift Towards Gender Equality in Prosecutions: Realizing Legitimate Enforcement of Crimes Committed Against Women in Municipal and International Criminal Law*, 33 S. ILL. UNIV. L. J. 181, 188-90 (2008) (in instances of sexual violence, police and prosecutors decide to advance very few cases through the criminal system); Kimberly A. Lonsway & Joanne Archambault, *The "Justice Gap" for Sexual Assault Cases: Future Directions for Research and Reform*, 18 VIOLENCE AGAINST WOMEN 145, 147 (2012) (finding that only five to 20 percent of victims will report a sexual assault to law enforcement); Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 306 (1999) (arguing that the "victim's veto" occurs when the victim does not even report the wrongdoing); Kimberly A. Lonsway & Joanne Archambault, *The "Justice Gap" for Sexual Assault Cases: Future Directions for Research and Reform*, 18 VIOLENCE AGAINST WOMEN 145, 159 (2012) (explaining that factors such as "poor evidence gathering by police (especially victim interviews), intimidating defense tactics, incompetent prosecutors, and inappropriate decision making by jurors" result in low sexual assault conviction rates). Commenters asserted this leads to more victims deciding not to report at all.

Discussion: The Department is aware of the two-track reporting system used in the U.S. military,[834] and agrees that giving victims control over whether to report for purposes of receiving supportive services only, or also for the purpose of launching an official investigation into the alleged sexual assault, is beneficial to sexual assault victims. These final regulations share similarities with the military's two-track reporting system; the Department desires to respect the autonomy of each alleged victim to report for the purpose of receiving supportive measures, and to decide whether or not to also request an investigation into the allegations of sexual harassment. As commenters observed, the withdrawn 2014 Q&A's approach to what happens when an alleged victim reports sexual harassment also shares similarities with the two-track reporting system used in the military. These final regulations, too, are similar in some ways to the approach taken in the withdrawn 2014 Q&A. However, the Department believes that the additional precision, and obligatory nature, of these final regulations results in an approach superior to simply reinstating prior guidance.

Under the final regulations, any person may report[835] that any individual has allegedly been victimized by conduct that could constitute sexual harassment,[836] and the recipient must

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[834] *E.g.*, U.S. Dep't. of Defense, Sexual Assault Prevention and Response, "Reporting Options," https://sapr.mil/reporting-options ("Sexual assault is the most underreported crime in our society and in the Military. While the Department of Defense [DoD] prefers that sexual assault incidents are reported to the command to activate both victims' services and law enforcement actions, it recognizes that some victims desire only healthcare and advocacy services and do not want command or law enforcement involvement. The Department believes its first priority is for victims to be treated with dignity and respect and to receive the medical treatment, mental health counseling, and the advocacy services that they deserve. Under DoD's Sexual Assault Prevention and Response (SAPR) Policy, Service members . . . have two reporting options - Restricted Reporting and Unrestricted Reporting. Under Unrestricted Reporting, both the command and law enforcement are notified. With Restricted (Confidential) Reporting, the adult sexual assault victim can access healthcare, advocacy services, and legal services without the notification to command or law enforcement.").

[835] Section 106.8(a) ("any person" may report sexual harassment regardless of whether the person reporting is the alleged victim themselves, or any third party).

[836] Section 106.30 (defining "complainant" to mean an individual who is alleged to be the victim of conduct that could constitute sexual harassment).

respond promptly, including by offering supportive measures to the complainant (i.e., the alleged victim) and telling the complainant about the *option* of also filing a formal complaint that starts an investigation.[837] The only persons who can initiate an investigation are the complainant themselves, or the Title IX Coordinator.[838] Thus, if a complainant wants a report to remain confidential (in the sense of the complainant's identity not being disclosed to the alleged perpetrator, and not launching an investigation), the complainant may receive supportive measures without an investigation being conducted – unless the Title IX Coordinator, after having considered the complainant's wishes, decides that it would be clearly unreasonable for the school *not* to investigate the complainant's allegations. On the other hand, if the complainant chooses to file a formal complaint, the school *must* initiate a grievance process and investigate the complainant's allegations.[839] These final regulations preserve the benefits of allowing third party *reporting* while still giving the complainant as much control as reasonably possible over whether the school investigates, because under the final regulations a third party can report – and trigger the Title IX Coordinator's obligation to reach out to the complainant and offer supportive measures – but the third party cannot trigger an investigation.[840] Further, the final regulations allow a complainant to initially report for the purpose of receiving supportive measures, and to later decide to file a formal complaint.

Changes: None.

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[837] Section 106.44(a).
[838] Section 106.30 (defining "formal complaint" as a document filed by a complainant or signed by a Title IX Coordinator).
[839] Section 106.44(b)(1).
[840] *Cf.* § 106.6(g) (If a parent or guardian has a legal right to act on a complainant's behalf, the parent or guardian may file a formal complaint on behalf of the complainant).

Section 106.44(a) "education program or activity"

General Support and Opposition for "Education Program or Activity" as a Jurisdictional Condition

Comments: Several commenters expressed support for the NPRM's approach to the "education program or activity" condition, stating that it is consistent with the Title IX statute and case law. Commenters asserted that the Department has appropriately recognized that whether misconduct occurs on campus or off campus is not dispositive, and that courts have similarly applied a multi-factor test to deciding whether conduct occurred in an education program or activity. One commenter cited Federal cases suggesting that sexually hostile conduct itself, and not just its consequences, must occur on campus or at a school-sponsored or supervised event for Title IX to apply.[841] One commenter expressed support for the NPRM's approach to education program or activity because it is consistent with the Department's past practice. The commenter cited Departmental determination letters involving institutions of higher education in 2004 and 2008 that stated recipients do not have a Title IX duty to address alleged misconduct that occurs off campus and that does not involve the recipient's programs or activities. A few commenters expressed support for the NPRM's approach to education program or activity, asserting that it imposes reasonable limits on recipient responsibility. One commenter asserted that schools are not the sex police and that expecting schools to have jurisdiction over activity in off-campus

[841] Commenters cited: *Doe v. Brown Univ*., 896 F.3d 127, 132 fn. 6 (1st Cir. 2018); *Yeasin v. Durham*, 719 F. App'x 844 (10th Cir. 2018); *Roe v. St. Louis Univ*., 746 F.3d 874 (8th Cir. 2014); *Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist*., 511 F.3d 1114, 1121 fn.1 (10th Cir. 2008); *Ostrander v. Duggan*, 341 F.3d 745 (8th Cir. 2003); *Farmer v. Kan. State Univ*., No. 16-CV-2256, 2017 WL 980460, at *8 (D. Kan. Mar. 14, 2017), *aff'd by Farmer v. Kan. State Univ*., 918 F.3d 1094 (10th Cir. 2019); Stephanie Ebert, THE BOSTON GLOBE (Dec. 8, 2018) (Harvard student suing Harvard University in Federal court for investigating the student for rape allegation by non-student far from campus).

apartments, at a parent's house, a local bar, or nearby hotel, is unrealistic. One commenter expressed support for the NPRM's approach to including "education program or activity" as a condition triggering a recipient's response obligations, but urged the Department to go further and explicitly exclude from Title IX allegations made by or against someone who has no relationship with the recipient, and allegations involving students but occurring in a time or place totally unrelated to school activities such as during summer vacation hundreds of miles away from campus.

Other commenters asserted that the NPRM's approach to education program or activity was unclear. Commenters stated that the NPRM's preamble mentioned several factors, such as recipient ownership of the premises, endorsement, oversight, supervision, and disciplinary power, but argued that this multi-factor test may be confusing and make it difficult for students and schools to understand their Title IX rights and obligations. One commenter argued that the practical application of the Department's approach to misconduct that has both on-campus and off-campus elements would be challenging; for example, the commenter stated, if a sexual misconduct complaint involved a series of actions occurring on campus and off campus then the recipient may have to sift through evidence to identify and ignore events not "in" a program or activity.

Many commenters expressed concern that the NPRM's approach to the education program or activity condition would increase danger to students and others. Commenters cited studies and scholarly articles suggesting that sexual assault can cause lasting psychological damage to victims, including increasing suicide rates and substantially impacting victims' academic career, retention, graduation, and grade point average, regardless of whether the sexual

assault occurred off campus or on campus.[842] Commenters argued that not addressing off-campus misconduct may chill reporting, make it harder for the community to know the nature of threats facing them, and even discourage young women from attending college. Commenters expressed concern that the NPRM would cause victims to leave school, asserting that over one-third of sexual harassment or assault victims drop out of school.[843] Commenters argued that because a significant number of sexual assaults occur off campus,[844] not requiring schools to respond to those assaults will only lead to more college students dropping out. Several commenters emphasized that the reality is that off-campus life is often an essential part of the educational experience, such as off-campus travel for conferences and networking events, and that off-campus living for students is quite common.[845] Commenters argued that the Department should not give a free pass to perpetrators whose abusive conduct occurs off campus. Commenters expressed concern that repeat offenders could systematically target victims, knowing they will get away with it.

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[842] *See* data cited by commenters in the "Impact Data" subsection of the "General Support and Opposition" section of this preamble.

[843] Commenters cited: Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18 JOURNAL OF COLL. STUDENT RETENTION: RESEARCH, THEORY & PRACTICE 2, 234, 244 (2015).

[844] Commenters cited: EduRisk by United Educators, *Confronting Campus Sexual Assault: An Examination of Higher Education Claims* at 6 (2015) ("In 41 percent of claims, the victim and perpetrator attended the same off-campus party before going back to campus, where the sexual assault occurred. These off-campus parties included institution-recognized sorority and fraternity houses, athletic team houses, and students' off-campus residences."); U.S. Dep't. of Justice, Bureau of Justice Statistics, *Rape and Sexual Assault Victimization Among College-Age Females, 1995-2013* at 6 (2014) (95 percent of sexual assaults of female students ages 18-24 occur outside of school).

[845] Commenters cited: American Association of University Women, *Crossing the Line: Sexual Harassment at School* (2011); Rochelle Sharp, *How Much Does Living Off Campus Cost? Who Knows?*, THE NEW YORK TIMES (Aug. 5, 2016) (87 percent of college students and even more elementary and secondary school students reside off campus).

Commenters raised concerns about off-campus Greek life as hotbeds of sexual misconduct not covered by the NPRM, arguing that students are more likely to experience sexual assault if in a fraternity or sorority, and that men in fraternities are more likely than other male students to be perpetrators of sexual misconduct.[846] Commenters expressed concern that recipients might interpret the NPRM as preventing them from addressing sexual misconduct in fraternities, sororities, and social clubs the recipient does not recognize,[847] or perversely encourage recipients not to recognize Greek letter associations, but that the Department should encourage such relationships because they often entail mandatory insurance, risk management standards, and training requirements to reduce incidents of sexual misconduct.

Commenters asserted that the NPRM especially increases risks to community college and vocational school students because such students generally live off campus, to students of color and other already marginalized students who may not be able to afford to live on campus, to elementary and secondary school students with disabilities who may be separated from their peers and removed to off-site services, and to LGBTQ students because it may be harder for them to find adequate outside support services. One commenter argued that the Department's exclusion of off-campus assaults will hinder Federal background check processes, potentially harming our national security and exposing co-workers to danger. Another commenter stated that the corporate world does not exclude out-of-office misconduct from company codes of conduct,

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[846] Commenters cited: Jacqueline Chevalier Minow & Christopher J. Einolf, *Sorority Participation and Sexual Assault Risk*, 15 VIOLENCE AGAINST WOMEN 7 (2009); Jennifer Fleck, *Sexual assault more prevalent in fraternities and sororities, study finds*, UWIRE.COM (Oct. 16, 2014); Claude A. Mellins *et al.*, *Sexual Assault Incidents Among College Undergraduates: Prevalence and Factors Associated with Risk*, 13 PLOS ONE 1 (2017).

[847] Commenters cited: Jacquelyn D. Weirsma-Mosely *et al., An Empirical Investigation of Campus Demographics and Reported Rapes*, 65 JOURNAL OF AM. COLL. HEALTH 4 (2017); Cortney A. Franklin, *Sorority Affiliation and Sexual Assault Victimization*, 22 VIOLENCE AGAINST WOMEN 8 (2016).

and so the Department should not set young people up to fail by not showing them early in life that misconduct is unacceptable and will lead to consequences.

Commenters argued that Federal courts have been supportive of universities applying student codes of conduct to misconduct occurring off campus and outside the school's programs or activities.[848] Commenters argued that courts have recognized that an assailant's mere presence on campus creates a hostile environment for sexual harassment victims, exposing recipients to Title IX liability under a deliberate indifference standard if the recipient fails to redress the hostile environment even where the underlying sexual harassment or assault occurred off campus and outside the recipient's education program or activity. Commenters asserted that the proposed rules would leave recipients vulnerable to private Title IX lawsuits because recipients would not need to address the continuing effects of sexual assault that occurred outside the recipient's program or activity under the Department's regulations yet a Federal court may hold otherwise.[849] Commenters argued that Federal courts have determined that regardless of where a sexual assault occurred, where both parties are in the same education program or activity a recipient should be held liable under a deliberate indifference standard based on the recipient's response to the alleged incident, even if the incident happened under circumstances outside the

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[848] Commenters cited: *Slaughter v. Brigham Young Univ.*, 514 F.2d 622 (10th Cir. 1975); *Due v. Fla. Agric. & Mech. Univ.* (N.D. Fla. 1963); *Hill v. Bd. of Trustees of Mich. State Univ.*, 182 F. Supp. 2d 621 (W.D. Mich. 2001); *Gomes v. Univ. of Me. Sys.*, 304 F.Supp. 2d 117 (D. Me. 2004).

[849] Commenters cited: *Lapka v. Chertoff*, 517 F.3d 974 (7th Cir. 2008); 477 F.3d 1282, 1298 (11th Cir. 2007); *Doe v. East Haven Bd. of Educ.*, 200 F. App'x 46 (2d Cir. 2006); *Butters v. James Madison Univ.*, 145 F. Supp. 3d 610 (W.D. Va. 2015), *dismissed on summary judgment in Butters v. James Madison Univ.*, 208 F. Supp. 3d 745 (W.D. Va. 2016); *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, *Doe ex rel. Doe v. Derby Bd. of Educ.*, 451 F. Supp. 2d 438 (D. Conn. 2006); *Crandell v. New York Coll. of Osteopathic Med.*, 87 F. Supp. 2d 304, 316 (S.D.N.Y. 2000); *Kinsman v. Fla. State Univ. Bd. of Trustees*, No. 4:15-CV-235, 2015 WL 11110848 (N.D. Fla. Aug. 12, 2015); *McGinnis v. Muncie Cmty. Sch. Corp.*, 1:11-CV-1125, 2013 WL 2456067 (S.D. Ind. June 5, 2013); *C.S. v. S. Columbia Sch. Dist.*, No. 4:1-CV-1013, WL 2371413 (M.D. Pa. May 21, 2013); *Kelly v. Yale Univ.*, No. 3:01-CV-1591, 2003 WL 1563424 (D. Conn. Mar. 26, 2003).

recipient's control.[850] Commenters argued that courts have allowed Title IX private causes of action for sexual misconduct to proceed even where some or all of alleged misconduct occurred in a location outside the recipient's control so long as there was "some nexus between the out-of-school conduct and the school"[851] and that the proposed rules should take the same approach. Commenters argued that the Supreme Court's *Gebser* decision involved sexual activity between a teacher and student where the sexual activity did not take place on school grounds, yet the Supreme Court did not consider that sexual harassment to be outside the purview of Title IX.[852]

Commenters argued that the 2001 Guidance and 2017 Q&A require recipients to address sexual harassment that occurs off campus where the underlying sexual harassment or assault causes the complainant to experience a hostile environment on campus, and urged the Department to ensure that the final regulations impose similar obligations for recipients to address the continuing effects of sexual harassment that occurs off campus.

Another commenter contended that the NPRM conflicts with recent Department actions under the Trump Administration, such as cutting off partial funding to the Chicago Public School system for failing to address two reports of off-campus sexual assault.

Discussion: The Department appreciates the general support for our approach to including the concept of a recipient's "education program or activity" in these final regulations. The "education program or activity" language in the Title IX statute[853] provides context for the scope

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[850] Commenters cited: *Spencer v. Univ. of N.M. Bd. of Regents*, No. 15-CV-141, 2016 WL 10592223 (D. N.M. Jan. 11, 2016).
[851] Commenters cited: *Weckhorst v. Kan. State Univ.*, 241 F. Supp. 3d 1154, 1168-69 (D. Kan. 2017); *Rost ex rel. KC v. Steamboat Springs RE -2 School Dist.*, 511 F.3d 1114, 1121 fn.1 (10th Cir. 2008).
[852] Commenters cited: *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 278 (1998).
[853] 20 U.S.C. 1681(a).

of Title IX's non-discrimination mandate, which ensures that Federal funds are not used to support discriminatory practices in education programs or activities.[854]

In *Davis*, the Supreme Court framed the question in that case as whether a recipient of Federal financial assistance may be liable for damages under Title IX, for failure to respond to peer-on-peer sexual harassment in the recipient's program or activity.[855] The Supreme Court in *Davis* continued to reference the statutory "program or activity" language throughout its decision[856] and refuted dissenting justices' arguments that the majority's approach permitted too much liability against recipients in part by reasoning: "Moreover, because the harassment must occur 'under' 'the operations of' a funding recipient, *see* 20 U.S.C. § 1681(a); § 1687 (defining 'program or activity'), the harassment must take place in a context subject to the school district's control. . . . These factors combine to limit a recipient's damages liability to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs."[857]

The Department's regulatory authority must emanate from Federal law.[858] Congress, in enacting Title IX, has conferred on the Department the authority to regulate under Federal law. The appropriate place to start is the statutory text of Title IX, for "[u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning."[859] Title

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[854] *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979) (the objectives of Title IX are two-fold: first, to "avoid the use of Federal resources to support discriminatory practices" and second, to "provide individual citizens effective protection against those practices").
[855] *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 639 (1999).
[856] *Id.* at 652 ("Moreover, the provision that the discrimination occur 'under any education program or activity' suggests that the behavior be serious enough to have the systemic effect of denying the victim equal access to an educational program or activity").
[857] *Id.* at 645.
[858] *See Stark v. Wickard*, 321 U.S. 288, 309 (1944).
[859] *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006) (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

IX's text, 20 U.S.C. 1681(a) (emphasis added), states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under *any education program or activity* receiving Federal financial assistance[.]" The Department's authority to regulate sexual harassment as a form of sex discrimination pursuant to Title IX is clear; the Supreme Court has held that sexual harassment is a form of sex discrimination, and has confirmed that Congress has directed the Department, as a Federal agency that disburses funding to education programs or activities, to establish requirements to effectuate Title IX's non-discrimination mandate.[860] The Department's authority to regulate sexual harassment depends on whether sexual harassment occurs in "any education program or activity" because the Department's regulatory authority is co-extensive with the scope of the Title IX statute. Title IX does not authorize the Department to regulate sex discrimination occurring *anywhere* but only to regulate sex discrimination in education programs or activities.[861] Congress, in the Title IX statute, provided definitions of "program or activity" that are reflected in the Department's current Title IX regulations.[862]

The Supreme Court has applied the "program or activity" language in the Title IX statute in the context of judicial enforcement of Title IX. The Department does not believe that the Supreme Court's application of "program or activity" in the context of sexual harassment as a form of sex discrimination is an unreasonable interpretation of the Title IX statute, because the Supreme Court applied the language of the statute including the definitions of "program or

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[860] *Gebser v. Lago Vista Ind. Sch. Dist*., 524 U.S. 274, 280-81 (1998) (quoting 20 U.S.C. 1682).
[861] *See* the "Section 106.44(a) 'against a person in the U.S.'" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section this preamble, for discussion of the other jurisdictional limitation on the scope of Title IX – that the statute protects any person "in the United States."
[862] 20 U.S.C. 1687; 34 CFR 106.2(h).

activity" provided in the statute. The Department thus concludes that we should align these final regulations with the Supreme Court's approach to "education program or activity" in the context of Title IX sexual harassment.[863] By contrast, as explained in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment," the three parts of the *Gebser/Davis* framework (i.e., definition of sexual harassment, actual knowledge, deliberate indifference) do *not* appear in the text of the Title IX statute, and the Department believes that it may promulgate regulatory requirements that differ in significant ways from the *Gebser/Davis* framework, to best effectuate the purposes of Title IX's non-discrimination mandate in the context of administrative enforcement, and we have done so in these final regulations.

The Department acknowledges the concerns of many commenters who argued that with respect to sexual harassment, whether the alleged conduct occurred in the recipient's education program or activity might have been understood too narrowly under the NPRM (e.g., to exclude all off-campus conduct) or at least created potential confusion for complainants and recipients. In response to commenters' concerns, the Department believes that providing additional clarification as to the scope of a recipient's education program or activity for purposes of Title IX sexual harassment is necessary, and, therefore, adds to § 106.44(a) in the final regulations language similar to language used by the Court in *Davis*: For purposes of § 106.30, § 106.44, and

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[863] The Supreme Court's analysis of the "program or activity" statutory language was in the context of judicial enforcement, but the Department does not believe a different analysis is necessary or advisable for administrative enforcement, where the Department – like the Supreme Court – is constrained to interpret and apply the text of the statute including the definitions of "program or activity" provided in the statute. Consistent with this position, and as discussed throughout this preamble, we have revised § 106.44(a) to clarify that "education program or activity" for purposes of these sexual harassment regulations includes circumstances wherein the recipient exercises substantial control over both the harasser and the context of the harassment – the same conclusion reached by the *Davis* Court when it applied the "program or activity" statutory language to the context of a school's response to sexual harassment. *Davis*, 526 U.S. at 645.

§ 106.45, the phrase "education program or activity" includes "locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs" and also includes "any building owned or controlled by a student organization that is officially recognized by a postsecondary institution." The Title IX statute[864] and existing Title IX regulations,[865] already contain detailed definitions of "program or activity" that, among other aspects of such definitions, include "all of the operations of" a postsecondary institution or local education agency. The Department will interpret "program or activity" in these final regulations in accordance with the Title IX statutory (20 U.S.C. 1687) and regulatory definitions (34 CFR 106.2(h)), guided by the Supreme Court's language applied specifically for use in sexual harassment situations under Title IX regarding circumstances over which a recipient has control and (for postsecondary institutions) buildings owned or controlled by student organizations if the student organization is officially recognized by the postsecondary institution. [866]

While "all of the operations of" a recipient (per existing statutory and regulatory provisions), and the additional "substantial control" language in these final regulations, clearly include all incidents of sexual harassment occurring on a recipient's campus, the statutory and regulatory definitions of program or activity along with the revised language in § 106.44(a) clarify that a recipient's Title IX obligations extend to sexual harassment incidents that occur off

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[864] 20 U.S.C. 1687.
[865] 34 CFR 106.2(h); 34 CFR 106.2(i) (defining "recipient"); 34 CFR 106.31(a) (referring to "any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance").
[866] Section 106.44(a) (adding "For purposes of this section, § 106.30, and § 106.45, 'education program or activity' includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.").

campus if any of three conditions are met: if the off-campus incident occurs as part of the recipient's "operations" pursuant to 20 U.S.C. 1687 and 34 CFR 106.2(h); if the recipient exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus pursuant to § 106.44(a); or if a sexual harassment incident occurs at an off-campus building owned or controlled by a student organization officially recognized by a postsecondary institution pursuant to §106.44(a).

The NPRM cited to Federal court opinions that have considered whether sexual harassment occurred in a recipient's education program or activity by examining factors such as whether the recipient funded, promoted, or sponsored the event or circumstance where the alleged harassment occurred. While it may be helpful or useful for recipients to consider factors applied by Federal courts to determine the scope of a recipient's program or activity, no single factor is determinative to conclude whether a recipient exercised substantial control over the respondent and the context in which the harassment occurred, or whether an incident occurred as part of "all of the operations of" a school, college, or university.

The revised language in § 106.44(a) also specifically addresses commenters' concerns about recognized student organizations that own and control buildings such as some fraternities and sororities operating from off-campus locations where sexual harassment and assault may occur with frequency. The revised language further addresses commenters' questions regarding whether postsecondary institutions' Title IX obligations are triggered when sexual harassment occurs in an off-campus location not owned by the postsecondary institution but that is in use by a student organization that the institution chooses to officially recognize such as a fraternity or sorority. The revisions to § 106.44(a) clarify that where a postsecondary institution has officially recognized a student organization, the recipient's Title IX obligations apply to sexual harassment

that occurs in buildings owned or controlled by such a student organization, irrespective of whether the building is on campus or off campus, and irrespective of whether the recipient exercised substantial control over the respondent and the context of the harassment outside the fact of officially recognizing the fraternity or sorority that owns or controls the building. The Department makes this revision to promulgate a bright line rule that decisively responds to commenters and provides clarity with respect to recipient-recognized student organizations that own or control off-campus buildings. Official recognition of a student organization, alone, does not conclusively determine whether all the events and actions of the students in the organization become a part of a recipient's education program or activity; however, the Department believes that a reasonable, bright line rule is that official recognition of a student organization brings buildings owned or controlled by the organization under the auspices of the postsecondary institution recipient and thus within the scope of the recipient's Title IX obligations. As part of the process for official recognition, a postsecondary institution may require a student organization that owns or controls a building to agree to abide by the recipient's Title IX policy and procedures under these final regulations, including as to any misconduct that occurs in the building owned or controlled by a student organization. Accordingly, postsecondary institutions may not ignore sexual harassment that occurs in buildings owned or controlled by recognized student organizations. The Department acknowledges that even though postsecondary institutions may not always control what occurs in an off campus building owned or controlled by a recognized student organization, such student organizations and the events in their buildings often become an integral part of campus life. The Department also acknowledges that a postsecondary institution may be limited in its ability to gather evidence during an investigation if the incident occurs off campus on private property that a student organization (but not the

institution) owns or controls. A postsecondary institution, however, may still investigate a formal complaint arising from sexual harassment occurring in a building owned or controlled by a recognized student organization (whether the building is on campus or off campus), for instance by interviewing students who were allegedly involved in the incident and who are a part of the officially recognized student organization. Thus, under the final regulations (e.g., § 106.44(b)(1)) a postsecondary institution must investigate formal complaints alleging sexual harassment that occurred in a fraternity or sorority building (located on campus, or off campus) owned by the fraternity or sorority, if the postsecondary institution has officially recognized that Greek life organization. Further, under § 106.44(a) the recipient must offer supportive measures to a complainant alleged to be the victim of sexual harassment occurring at a building owned or controlled by an officially recognized student organization. Where a postsecondary institution has officially recognized a student organization, and sexual harassment occurs in an off campus location *not* owned or controlled by the student organization yet involving members of the officially recognized student organization, the recipient's Title IX obligations will depend on whether the recipient exercised substantial control over the respondent and the context of the harassment, or whether the circumstances may otherwise be determined to have been part of the "operations of" the recipient.

We note that the revision in § 106.44(a) referencing a "building owned or controlled by a student organization that is officially recognized by a postsecondary institution" is not the same as, and should not be confused with, the Clery Act's use of the term "noncampus building or property," even though that phrase is defined under the Clery Act in part by reference to student

organizations officially recognized by an institution.[867] For example, "education program or activity" in these final regulations includes buildings within the confines of the campus on land owned by the institution that the institution may rent to a recognized student organization.[868] As discussed in the "Clery Act" subsection of the "Miscellaneous" section of this preamble, the Clery Act and Title IX serve distinct purposes, and Clery Act geography is not co-extensive with the scope of a recipient's education program or activity under Title IX.

With respect to commenters who suggested that the final regulations should not apply to sexual misconduct by or against an individual with no relationship to the recipient, the Department believes that the framework adopted in the final regulations appropriately effectuates the broad non-discrimination mandate of Title IX (which protects any "person" from discrimination in an education program or activity) while also ensuring that recipients are responsible for addressing sexual harassment occurring in an educational institution's "operations," or when the recipient has control over the situation, or where a postsecondary institution has recognized a student organization thereby lending the recipient's implicit extension of responsibility over circumstances involving sexual harassment that occurs in buildings owned or controlled by such a student organization. Like the "no person" language in the Title IX statute, the final regulations place no restriction on the identity of a complainant (§

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[867] *See* 20 U.S.C. 1092(f)(6)(iii) (defining "noncampus building or property" in part as "any building or property owned or controlled by a student organization recognized by the institution"). The Clery Act regulations, 34 CFR 668.46(a), include "noncampus building or property" as part of an institution's Clery geography and define "noncampus building or property" as "[a]ny building or property owned or controlled by a student organization that is officially recognized by the institution; or [a]ny building or property owned or controlled by an institution that is used in direct support of, or in relation to, the institution's educational purposes, is frequently used by students, and is not within the same reasonably contiguous geographic area of the institution.").

[868] *But see* U.S. Dep't. of Education, Office of Postsecondary Education, *The Handbook for Campus Safety and Security Reporting*, 2-18 to 2-19 (2016), https://www2.ed.gov/admins/lead/safety/handbook.pdf.

106.30 defines complainant to mean "an individual who is alleged to be the victim of conduct that could constitute sexual harassment"), obligating a recipient to respond to such a complainant regardless of the complainant's relationship to the recipient. Similarly, reflecting that the Title IX statute does not limit commission of prohibited discrimination only to certain individuals affiliated with a recipient, the final regulations define a respondent to mean "an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment" without restricting a respondent to being a person enrolled or employed by the recipient or who has any other affiliation or connection with the recipient.

However, the final regulations do require that in order to file a formal complaint, the complainant must be "participating in or attempting to participate in" the recipient's education program or activity at the time the formal complaint is filed.[869] This prevents recipients from being legally obligated to investigate allegations made by complainants who have no relationship with the recipient, yet still protects those complainants by requiring the recipient to respond promptly in a non-deliberately indifferent manner. For similar reasons, the final regulations provide in § 106.45(b)(3)(ii) that a recipient *may* in its discretion dismiss a formal complaint if the respondent is no longer enrolled or employed by the recipient, recognizing that a recipient's general obligation to provide a complainant with a prompt, non-deliberately indifferent response might not include completing a grievance process in a situation where the recipient lacks any disciplinary authority over the respondent.

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[869] A complainant may be "attempting to participate" in the recipient's education program or activity, for example, where the complainant has applied for admission, or where the complainant has withdrawn but indicates a desire to re-enroll if the recipient appropriately responds to sexual harassment allegations.

In response to commenters' concerns that practical application of the "education program or activity" condition might be challenging in situations that, for example, involve some conduct occurring in the recipient's education program or activity and some conduct occurring outside the recipient's education program or activity, the Department reiterates that "off campus" does not automatically mean that the incident occurred outside the recipient's education program or activity. The Department agrees that recipients are obliged to think through the scope of each recipient's own education program or activity in light of the statutory and regulatory definitions of "program or activity" (20 U.S.C. 1687 and 34 CFR 106.2(h)) and the statement in § 106.44(a) that "education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs as well as buildings owned or controlled by student organizations officially recognized by a postsecondary institution.

To ensure that recipients adequately consider the resulting coverage of Title IX to each recipient's particular circumstances, the final regulations require that every Title IX Coordinator, investigator, decision-maker, and person who facilitates an informal resolution process, must be trained on (among other things) "the scope of the recipient's education program or activity."[870] We have also revised § 106.45(b)(10)(i)(D) so that materials used to train Title IX personnel must be posted on a recipient's website. These revisions ensure that a recipient's students and employees, and the public, understand the scope of the recipient's education program or activity for purposes of Title IX. Under Title IX, recipients must operate education programs or activities free from sex discrimination, and the Department will enforce these final regulations vigorously

[870] Section 106.45(b)(1)(iii).

with respect to a recipient's obligation to respond to sexual harassment that occurs in the recipient's education program or activity.

In situations involving some allegations of conduct that occurred in an education program or activity, and some allegations of conduct that did not, the recipient must investigate the allegations of conduct that occurred in the recipient's education program or activity, and nothing in the final regulations precludes the recipient from choosing to also address allegations of conduct outside the recipient's education program or activity.[871] For example, if a student is sexually assaulted outside of an education program or activity but subsequently suffers Title IX sexual harassment in an education program or activity, then these final regulations apply to the latter act of sexual harassment, and the recipient may choose to address the prior assault through its own code of conduct. Nothing in the final regulations prohibits a recipient from resolving allegations of conduct outside the recipient's education program or activity by applying the same grievance process required under § 106.45 for formal complaints of Title IX sexual harassment, even though such a process would not be required under Title IX or these final regulations. Thus, a recipient is not required by these final regulations to inefficiently extricate conduct occurring outside an education program or activity from conduct occurring in an education program or activity arising from the same facts or circumstances in order to meet the recipient's obligations with respect to the latter.

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[871] Section 106.45(b)(3) (revised in the final regulations to expressly state that although a recipient must dismiss allegations about conduct that did not occur in the recipient's education program or activity, such a mandatory dismissal is "for purposes of sexual harassment under title IX or this part; such a dismissal does not preclude action under another provision of the recipient's code of conduct.").

The Department appreciates the various concerns raised by many commenters regarding the extent to which students reside or spend time off campus and how the application of the "education program or activity" condition may affect students who experience sexual harassment and sexual assault in off-campus situations, including community college students, vocational school students, and students who belong to marginalized demographic groups. The Department reiterates that the final regulations do not impose a geographic test or draw a distinction between on-campus misconduct and off-campus misconduct. As discussed above, whether conduct occurs in a recipient's education program or activity does not necessarily depend on the geographic location of the incident. Instead, "education program or activity" relies on statutory and regulatory definitions of "program or activity,"[872] on the statement adapted from the Supreme Court's language in *Davis* added to § 106.44(a) that education program or activity includes locations, events, or circumstances over which the recipient exercised substantial control over the respondent and over the context in which the sexual harassment occurred, and includes on-campus and off-campus buildings owned or controlled by a student organization officially recognized by a postsecondary institution. If a sexual assault occurs against a student outside of an education program or activity, and the student later experiences Title IX sexual harassment in an education program or activity, then a recipient with actual knowledge of such sexual harassment in the recipient's education program or activity must respond pursuant to § 106.44(a).

The final regulations' approach reduces confusion for recipients and students as to the scope of Title IX's protective coverage and recognizes the Department's administrative role in

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[872] *E.g.*, 20 U.S.C. 1687; 34 CFR 106.2(h).

enforcing this important civil rights law according to the statute's plain terms. Furthermore, as noted previously, nothing in the final regulations prevents recipients from initiating a student conduct proceeding or offering supportive measures to students affected by sexual harassment that occurs outside the recipient's education program or activity. Title IX is not the exclusive remedy for sexual misconduct or traumatic events that affect students. As to misconduct that falls outside the ambit of Title IX, nothing in the final regulations precludes recipients from vigorously addressing misconduct (sexual or otherwise) that occurs outside the scope of Title IX or from offering supportive measures to students and individuals impacted by misconduct or trauma even when Title IX and its implementing regulations do not require such actions.[873] The Department emphasizes that sexual misconduct is unacceptable regardless of the circumstances in which it occurs, and recognizing jurisdictional limitations on the purview of a statute does not equate to condoning any form of sexual misconduct.

The Department believes a commenter's concern regarding the negative effect of the final regulations on the Federal background check process and our national security to be speculative. The final regulations would not categorically exclude off-campus assaults. As discussed previously, the final regulations applies to off-campus sexual harassment that occurs under "the operations of" the recipient, or where the recipient exercised substantial control over the respondent and the context in which the sexual harassment occurred, or in a building owned or

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[873] As discussed in the "Directed Question 5: Individuals with Disabilities" subsection of the "Directed Questions" section of this preamble, nothing in these final regulations affects a recipient's obligations to comply with all applicable disability laws, such as the ADA. Thus, for example, if a recipient's student (or employee) has a disability caused or exacerbated by, or arising from, sexual harassment, a recipient must comply with applicable disability laws (including with respect to providing reasonable accommodations) irrespective of whether the sexual harassment that caused or exacerbated the individual's disability constitutes Title IX sexual harassment to which the recipient must respond under these final regulations.

controlled by a student organization officially recognized by a postsecondary institution. This commenter appears to have made a series of assumptions that may not be true, including that a significant number of off-campus assaults not covered by the final regulations would involve perpetrators subjected to a Federal background check in the future, and that a significant number of background checks would fail to uncover relevant information about sexual misconduct solely because the perpetrator's misconduct was not covered under Title IX. Again, the Department emphasizes that nothing in the final regulations prevents recipients from addressing sexual misconduct that occurs outside their education programs or activities, nor do the final regulations discourage or prevent a victim from reporting sexual misconduct to law enforcement or from filing a civil lawsuit; therefore, numerous avenues exist through which misconduct not covered under Title IX would be revealed during a Federal background check of the perpetrator.

With respect to a commenter's assertion that the final regulations may perversely incentivize recipients to not recognize fraternities and sororities, the Department believes this conclusion would require assuming that recipients will make decisions affecting the quality of life of their students based solely on whether or not recipient recognition of a student organization such as a fraternity or sorority would result in sexual harassment that occurs at locations affiliated with that organization falling under Title IX's scope. The Department does not make such an assumption, believing instead that recipients take many factors into account in deciding whether, and under what conditions, a recipient wishes to officially recognize a student organization. Whether or not these final regulations alter postsecondary institutions' decisions about recognizing Greek life organizations, the Department has determined that the scope of Title IX extends to the entirety of a recipient's education program and activity, and with respect to postsecondary institutions, the Department is persuaded by commenters' contentions that

when a postsecondary institution chooses to officially recognize a student organization, the recipient has implied to its students and employees that locations owned by such a student organization are under the imprimatur of the recipient, whether or not the recipient otherwise exercises substantial control over such a location.

The Department believes there is a fundamental distinction between Title IX, and workplace policies that may exist in the corporate world. Title IX has clear jurisdictional application to education programs or activities, and the Department does not have authority to extend Title IX's application. By contrast, corporations may have more flexibility in crafting their own rules and policies to reflect their values and the needs of their employees and customers. Further, Title VII does not necessarily deem actionable all sexual harassment committed by employees regardless of the location or context of the harassment.[874] These final regulations tether sexual harassment to a recipient's education program or activity in a similar manner to the way courts tether sexual harassment to a workplace under an employer's control.[875] Regardless of any differences between analyses under Title VII and Title IX, we emphasize that recipients retain discretion under the final regulations to address sexual misconduct that falls outside the recipient's education program or activity through their own

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[874] *See, e.g.*, *Lapka v. Chertoff*, 517 F.3d 974, 982-83 (7th Cir. 2008).

[875] The Department adds to § 106.44(a) the statement that "education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs. This helps clarify that even if a situation arises off campus, it may still be part of the recipient's education program or activity if the recipient exercised substantial control over the context and the alleged harasser. While such situations may be fact specific, recipients must consider whether, for example, a sexual harassment incident between two students that occurs in an off-campus apartment (i.e., not a dorm room provided by the recipient) is a situation over which the recipient exercised substantial control; if so, the recipient must respond when it has actual knowledge of sexual harassment or allegations of sexual harassment that occurred there. At the same time, the Title IX statute and existing regulations broadly define a recipient's "program or activity" to include (as to schools) "all of the operations" of the school, such that situations that arise on campus are already part of a school's education program or activity. 20 U.S.C. 1687.

disciplinary system and by offering supportive measures to complainants reporting such misconduct.

The Department acknowledges commenters' citations to Federal court opinions for the proposition that a recipient may be deliberately indifferent to sexual harassment that occurred outside the recipient's control where the complainant has to interact with the respondent in the recipient's education program or activity, or where the effects of the underlying sexual assault create a hostile environment in the complainant's workplace or educational environment. However, with the changes to the final regulations made in response to commenters' concerns, the Department believes that we have clarified that sexual harassment incidents occurring off campus may fall under Title IX. The statutory and regulatory definitions of "program or activity" and the statements regarding "substantial control" and "buildings owned or controlled by" student organizations officially recognized by postsecondary institutions in § 106.44(a) do not state or imply that off-campus incidents necessarily fall outside a recipient's education program or activity. Moreover, complainants can request supportive measures or an investigation into allegations of conduct that do not meet Title IX jurisdictional conditions, under a recipient's own code of conduct.[876]

Some of the situations in Federal cases cited to by commenters may have reached similar outcomes under the final regulations. For example, in *Doe v. East Haven Board of Education*,[877]

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[876] The Department also notes that § 106.45(b)(8) in the final regulations permits complainants and respondents equally to appeal a recipient's determination that allegations were subject to mandatory dismissal under § 106.45(b)(3)(i).

[877] 200 F. App'x 46, 48 (2d Cir. 2006); *Lapka v. Chertoff*, 517 F.3d 974, 982-83 (7th Cir. 2008) (the Seventh Circuit reasoned that the plaintiff sufficiently alleged workplace harassment even though the alleged rape occurred while the

the Second Circuit held that the plaintiff sufficiently alleged sexual harassment to which the school was deliberately indifferent where the harassment consisted of on-campus taunts and name-calling directed at the plaintiff after she had reported being raped off campus by two high-school boys. The final regulations would similarly analyze whether sexual harassment (i.e., unwelcome conduct on the basis of sex so severe, pervasive, and objectively offensive that it effectively deprives a complainant of equal access to education) *in the recipient's program or activity* triggered a recipient's response obligations regardless of whether such sexual harassment stemmed from the complainant's allegations of having suffered sexual assault (e.g., rape) *outside* the recipient's program or activity. Further, whether or not the off-campus rape in that case was in, or outside, the school's education program or activity, would depend on the factual circumstances, because as explained above, not all off-campus sexual harassment is excluded from Title IX coverage.

Contrary to commenters' assertions, the Supreme Court in *Gebser* did not dispense with the program or activity limitation or declare that where the harassment occurred did not matter. The facts at issue in the *Gebser* case involved teacher-on-student harassment that consisted of both in-class sexual comments directed at the plaintiff as well as a sexual relationship that began

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plaintiff and assailant were socializing after hours in a private hotel room, because the bar was part of the training facility where the plaintiff and assailant were required to attend work-related training sessions and thus were on "official duty" while at that facility, including the bar located in the facility, "so the event could be said to have grown out of the workplace environment" and the plaintiff and assailant were trainees expected to eat and drink at the facility and "return to dormitories and hotel rooms provided by" the employer such that "[e]mployees in these situations can be expected to band together for society and socialize as a matter of course" justifying the Court's conclusion that the plaintiff had alleged sexual harassment (rape) that arose in the context of a workplace environment and to which the employer had an obligation to respond). Although *Lapka* was a case under Title VII, the final regulations would similarly analyze whether sexual harassment occurred in the school's program or activity by inquiring whether the school exercised substantial control over the context of the harassment and the alleged harasser.

when the respondent-teacher visited the plaintiff's home ostensibly to give her a book.[878] The Supreme Court in *Gebser* emphasized that a school district needs to be aware of discrimination (in the form of sexual harassment) "in its programs" and emphasized that a *teacher's* sexual abuse of a student "undermines the basic purposes of the educational system"[879] thereby implicitly recognizing that a teacher's sexual harassment of a student is likely to constitute sexual harassment "in the program" of the school even if the harassment occurs off campus. Nothing in the final regulations contradicts this premise or conclusion; § 106.44(a) clarifies that a recipient's education program or activity includes circumstances over which a recipient has substantial control over the context of the harassment and the respondent, and a teacher employed by a recipient who visits a student's home ostensibly to give the student a book but in reality to instigate sexual activity with the student could constitute sexual harassment "in the program" of the recipient such that a recipient with actual knowledge of that harassment would be obligated under the final regulations to respond. Similarly, the Supreme Court in *Davis* viewed the perpetrator's status as a teacher in *Gebser* as relevant to concluding that the sexual

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[878] *Gebser*, 524 U.S. at 277-78.

[879] *Gebser*, 524 U.S. at 286 ("As a general matter, it does not appear that Congress contemplated unlimited recovery in damages against a funding recipient where the recipient is unaware of *discrimination in its programs*.") (emphasis added); *id.* at 289 (reasoning that a school's liability in a private lawsuit should give the school opportunity to know of the violation and correct it voluntarily similarly to the way the Title IX statute directs administrative agencies to give a school that opportunity to voluntarily correct violations, and the Court stated "Presumably, a central purpose of requiring notice of the violation 'to the appropriate person' and an opportunity for voluntary compliance before administrative enforcement proceedings can commence is to avoid diverting education funding from beneficial uses where a recipient was unaware of *discrimination in its programs* and is willing to institute prompt corrective measures.") (emphasis added); *id.* at 290 ("we hold that a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of *discrimination in the recipient's programs* and fails adequately to respond.") (emphasis added); *id.* at 292 ("No one questions that a student suffers extraordinary harm *when subjected to sexual harassment and abuse by a teacher*, and that *the teacher's conduct is reprehensible and undermines the basic purposes of the educational system*.") (emphasis added).

harassment was happening "under" the recipient's education program or activity.[880] We reiterate that the final regulations do not distinguish between sexual harassment occurring "on campus" versus "off campus" but rather state that Title IX covers sexual harassment that occurs in a recipient's education program or activity. The final regulations follow the *Gebser/Davis* approach to Title IX's statutory reference to discrimination in an education program or activity; sexual harassment by a teacher as opposed to harassment by a fellow student may, as indicated in *Gebser* and *Davis*, affect whether the sexual harassment occurred "under any education program or activity."[881] This is a matter that recipients must consider when training Title IX personnel on the "scope of the recipient's education program or activity" pursuant to § 106.45(b)(1)(iii).

Both the 2001 Guidance and 2017 Q&A recognize the statutory language of "education program or activity" as a limitation on sexual harassment to which a recipient must respond. For example, the 2001 Guidance notes that "Title IX applies to all public and private educational institutions that receive Federal funds" and states that the "education program or activity of a school includes all of the school's operations" which means "that Title IX protects students in connection with all of the academic, educational, extra-curricular, athletic, and other programs of the school, whether they take place in the facilities of the school, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere."[882] Similarly, the

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[880] *Davis*, 526 U.S. at 652-53 ("Moreover, the provision that the discrimination occur 'under any education program or activity' suggests that the behavior be serious enough to have the systemic effect of denying the victim equal access to an educational program or activity. . . . The fact that it was a teacher who engaged in harassment in *Franklin* and *Gebser* is relevant. The relationship between the harasser and the victim necessarily affects the extent to which the misconduct can be said to breach Title IX's guarantee of equal access to educational benefits and to have a systemic effect on a program or activity.").
[881] *Id.* at 652.
[882] 2001 Guidance at 2-3 (internal quotation marks omitted) (citing to 20 U.S.C. 1687, codification of the amendment to Title IX regarding scope of jurisdiction, enacted by the Civil Rights Restoration Act of 1987, and to 65 FR 68049 (November 13, 2000), the Department's amendment of the Title IX regulations to incorporate the statutory definition of "program or activity.").

2017 Q&A expressly acknowledges that a recipient's obligation to respond to sexual harassment is confined to harassment that occurs in the recipient's education program or activity, citing statutory and regulatory definitions of "recipient," "operations," and "program or activity."[883] The final regulations similarly rely on preexisting statutory and regulatory definitions of a recipient's "program or activity" and add a statement that "education program or activity" includes circumstances over which the recipient exercised substantial control. The withdrawn 2011 Dear Colleague Letter departed from the Department's longstanding acknowledgement that a recipient's response obligations are conditioned on sexual harassment that occurs in the recipient's education program or activity;[884] these final regulations return to the Department's approach in the 2001 Guidance, which mirrors the Supreme Court's approach to "education program or activity" as a jurisdictional condition that promotes a recipient's obligation under Title IX to provide education programs or activities free from sex discrimination. Like the 2001 Guidance, the final regulations approach the "education program or activity" condition as extending to circumstances over which recipients have substantial control, and not only to incidents that occur "on campus." We reiterate that nothing in the final regulations precludes a recipient from offering supportive measures to a complainant who reports sexual harassment that

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[883] 2017 Q&A at 1, fn. 3.

[884] 2011 Dear Colleague Letter at 4 ("Schools may have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds, outside a school's education program or activity. If a student files a complaint with the school, *regardless of where the conduct occurred*, the school must process the complaint in accordance with its established procedures. Because students often experience the continuing effects of off-campus sexual harassment in the educational setting, schools should consider the effects of the off-campus conduct when evaluating whether there is a hostile environment on campus. For example, if a student alleges that he or she was sexually assaulted by another student off school grounds, and that upon returning to school he or she was taunted and harassed by other students who are the alleged perpetrator's friends, the school should take the earlier sexual assault into account in determining whether there is a sexually hostile environment. The school also should take steps to protect a student who was assaulted off campus from further sexual harassment or retaliation from the perpetrator and his or her associates.") (emphasis added); *see also* the withdrawn 2014 Q&A at 29-30.

occurred outside the recipient's education program or activity, and any sexual harassment that does occur in an education program or activity must be responded to even if it relates to, or happens subsequent to, sexual harassment that occurred outside the education program or activity.

Although the 2001 Guidance and 2017 Q&A frame actionable sexual harassment as harassment that creates a "hostile environment,"[885] the final regulations utilize the more precise interpretation of Title IX's scope articulated by the Supreme Court in *Davis*: that a recipient must respond to sexual harassment that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to education.[886] The use of the phrase "hostile environment" in the 2001 Guidance and 2017 Q&A does not mean that those guidance documents ignored the "education program or activity" limitation referenced in the Title IX statute; whether framed as a "hostile environment" (as in Department guidance) or as "effective denial of a person's equal access" to education (as in these final regulations), sexual harassment is a form of sex discrimination actionable under Title IX when it occurs in an education program or activity.

Because the final regulations do not exclude "off campus" sexual harassment from coverage under Title IX and instead take the approach utilized in the 2001 Guidance and applied

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[885] 2001 Guidance at 3; 2017 Q&A at 1. Although footnote 3 of the 2017 Q&A states that "[s]chools are responsible for redressing a hostile environment that occurs on campus even if it relates to off-campus activities," this statement was intended to convey that a recipient may not ignore sexual harassment that occurs *in its program or activity* just because the parties involved may also have experienced an incident of sexual harassment *outside its program or activity*. *See also Doe v. East Haven Bd. of Educ.*, 200 F. App'x 46, 48 (2d Cir. 2006) (holding that plaintiff sufficiently alleged sexual harassment to which the school was deliberately indifferent where the harassment consisted of on-campus, sexualized taunts and name-calling directed at the plaintiff after she had reported being raped by two high-school boys outside the school's program or activity).

[886] *See also* the "Sexual Harassment" subsection of the "Section 106.30 Definitions" section of this preamble for further discussion of the "effective denial of equal access" element in the final regulations' definition of sexual harassment and the relationship between that element and the concept of hostile environment.

by the Supreme Court in *Davis*, under which off campus sexual harassment may be in the scope of a recipient's education program or activity, the Department disagrees that these final regulations conflict with the Department's recent enforcement action with respect to holding Chicago Public Schools accountable for failure to appropriately respond to certain off-campus sexual assaults.

Changes: Section 106.44(a) is revised to state that "education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. Section 106.45(b)(1)(iii) is revised to include training for Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolutions on "the scope of the recipient's education program or activity." Section 106.45(b)(3)(i) is revised to expressly provide that a mandatory dismissal of allegations in a formal complaint about conduct not occurring in the recipient's education program or activity is "for purposes of title IX or [34 CFR part 106]; such a dismissal does not preclude action under another provision of the recipient's code of conduct." Section 106.45(b)(10)(i)(D) is revised to require recipients to post materials used to train Title IX personnel on the recipient's website, or if the recipient does not have a website, to make such materials available for inspection and review by members of the public.

Online Sexual Harassment

Comments: One commenter cited case law for the proposition that Title IX does not cover online or digital conduct.[887] Other commenters cited cases holding that recipients may be liable under Title IX for failing to adequately address online harassment.[888] A few commenters argued that the NPRM's approach to education program or activity is inconsistent with the Department's past practice and guidance documents, such as guidance issued in 2010 which acknowledged that cell phone and internet communications may constitute actionable harassment. Many commenters were concerned the NPRM would exclude online sexual harassment due to the education program or activity condition in § 106.44(a), and cited studies showing the prevalence and effects of online harassment and cyber-bullying on victims.[889] Commenters argued that it was unclear to what extent the NPRM would cover online harassment and suggested that the Department more broadly define "program or activity" to include student interactions that are enabled by recipients, such as online harassment between students using internet access provided by the recipient. Commenters argued that the final regulations should explicitly address cyber-bullying and electronic speech. Some commenters suggested that excluding online misconduct may conflict with State law; for example, commenters stated that New Jersey law includes harassment occurring online.

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[887] Commenters cited, *e.g.*: *Yeasin v. Durham*, 719 F. App'x 844 (10th Cir. 2018); *Gordon v. Traverse City Area Pub. Sch.*, 686 F. App'x 315, 324 (6th Cir. 2017).
[888] Commenters cited: *Feminist Majority Found. v. Hurley*, 911 F.3d 674 (4th Cir. 2018); *S.J.W. v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 777 (8th Cir. 2012); *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 220-221 (3d Cir. 2011); *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565, 573 (4th Cir. 2011); *Sypniewski v. Warren Hill Reg'l Bd. of Educ.*, 307 F.3d 243, 257 (3d Cir. 2002).
[889] Commenters cited, *e.g.*: American Association of University Women, *Crossing the Line: Sexual Harassment at School* (2011).

Discussion: The Department appreciates commenters' concerns about whether Title IX applies to sexual harassment that occurs electronically or online. We emphasize that the education program or activity jurisdictional condition is a fact-specific inquiry applying existing statutory and regulatory definitions of "program or activity" to the situation; however, for recipients who are postsecondary institutions or elementary and secondary schools as those terms are used in the final regulations, the statutory and regulatory definitions of "program or activity" encompass "all of the operations of" such recipients, and such "operations" may certainly include computer and internet networks, digital platforms, and computer hardware or software owned or operated by, or used in the operations of, the recipient.[890] Furthermore, the final regulations revise § 106.44(a) to specify that an education program or activity includes circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurred, such that the factual circumstances of online harassment must be analyzed to determine if it occurred in an education program or activity. For example, a student using a personal device to perpetrate online sexual harassment during class time may constitute a circumstance over which the recipient exercises substantial control.

Contrary to the claims made by some commenters, the approach to "education program or activity" contained in the final regulations, and in particular its potential application to online harassment, would not necessarily conflict with the Department's previous 2010 Dear Colleague Letter addressing bullying and harassment. The Department's 2010 guidance made a passing reference that harassing conduct may include "use of cell phones or the internet," and the

[890] 20 U.S.C. 1687; 34 CFR 106.2(h).

Department's position has not changed in this regard.[891] These final regulations apply to sexual harassment perpetrated through use of cell phones or the internet if sexual harassment occurred in the recipient's education program or activity. As explained in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, these final regulations adopt and adapt the *Gebser/Davis* framework of actual knowledge and deliberate indifference, in contrast to the rubric in the 2010 Dear Colleague Letter on bullying and harassment; however, these final regulations appropriately address electronic, digital, or online sexual harassment by not making sexually harassing conduct contingent on the *method* by which the conduct is perpetrated. Additionally, even if a recipient is not required to address certain misconduct under these final regulations, these final regulations expressly allow a recipient to address such misconduct under its own code of conduct.[892] Accordingly, there may not be any conflict between these final regulations with respect to State laws that explicitly cover online harassment.

Changes: None.

Consistency with Title IX Statutory Text

Comments: Some commenters opposed the NPRM's approach to "education program or activity" by arguing that it conflicts with Title IX's statutory text. Commenters contended that the NPRM is an unambiguously incorrect interpretation of Title IX under the deference doctrine articulated by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council,*

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[891] U.S. Dep't. of Education, Office for Civil Rights, *Dear Colleague Letter: Harassment and Bullying* at 2 (Oct. 26, 2010), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf.
[892] *E.g.*, § 106.45(b)(3)(i).

Inc.,[893] and will thus be given no judicial deference. One such commenter asserted that the Title IX statute has three distinctive protective categories, such that no person on the basis of sex can be: (1) excluded from participation in; (2) denied the benefits of; or (3) subjected to discrimination under any education program or activity. The commenter argued that the first clause includes off-campus conduct, such as male students on a public street blocking female students from accessing campus. This commenter argued that the third clause prohibits discrimination "under," and not "in" or "within," a recipient's education program or activity and is violated whenever women or girls are subjected to more adverse conditions than males. This commenter asserted that the Title IX statutory text does not depend on where the underlying conduct occurs, but rather focuses on the subsequent hostile educational environment that such misconduct can cause.

Another commenter argued that requiring recipients to treat off-campus sexual misconduct differently from on-campus sexual misconduct can itself violate Title IX.

Discussion: The Department acknowledges the analysis offered by at least one commenter that the Title IX statute, by its own text, has three distinct protective categories and the commenter's argument that the "subjected to discrimination" prong is violated whenever females are subjected to more adverse conditions than males. As explained below, the Department elects to adopt the analysis applied by the Supreme Court rather than the analysis provided by the commenter.

In *Davis*, the Supreme Court acknowledged that Title IX protects students from "discrimination" and from being "excluded from participation in" or "denied the benefits of" any

[893] 467 U.S. 837 (1984).

education program or activity receiving Federal financial assistance.[894] The *Davis* Court characterized sexual harassment as a form of sex *discrimination* under Title IX,[895] and reasoned that whether a recipient is liable for sexual harassment thus turns on whether the recipient can be said to have "subjected" students to sex discrimination in the form of sexual harassment.[896] The *Davis* Court further reasoned, "Moreover, because the harassment must occur 'under' 'the operations of' a funding recipient, *see* 20 U.S.C. § 1681(a); § 1687 (defining 'program or activity'), the harassment must take place in a context subject to the school district's control. . . . These factors combine to limit a recipient's damages liability to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs."[897]

Adopting the Supreme Court's analysis of the appropriate application of the Title IX statute's "program or activity" language in the context of sexual harassment, the final regulations treat sexual harassment as a form of sex discrimination under Title IX and hold recipients accountable for responding to sexual harassment that took place in a context under the recipient's control. In interpreting "education program or activity" in the final regulations, the Department will look to the definitions of "program or activity" provided by Title IX[898] and existing Title IX

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[894] *Davis*, 526 U.S. at 650.
[895] *Id.* ("Having previously determined that 'sexual harassment' is 'discrimination' in the school context under Title IX, we are constrained to conclude that student-on-student sexual harassment, if sufficiently severe, can likewise rise to the level of discrimination actionable under the statute.").
[896] *Id.* ("The statute's plain language confirms the scope of prohibited conduct based on the recipient's degree of control over the harasser and the environment in which the harassment occurs. If a funding recipient does not engage in harassment directly, it may not be liable for damages unless its deliberate indifference 'subjects' its students to harassment. That is, the deliberate indifference must, at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it.") (internal citations to dictionary references omitted).
[897] *Id.* at 644-45.
[898] 20 U.S.C. 1687 (defining "program or activity").

regulations,[899] and has revised § 106.44(a) of the final regulations to clarify that "education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs, as well as on-campus and off-campus buildings owned or controlled by student organizations officially recognized by postsecondary institutions. The Department notes that the commenter's hypothetical, concerning male students on a public street blocking female students from accessing campus, would require a fact-specific analysis but could constitute sexual harassment in the recipient's education program or activity if such an incident occurred in a location, event, or circumstance over which the recipient exercised substantial control.

Contrary to the claims made by some commenters, and as discussed above, the final regulations would not necessarily require recipients to treat off-campus misconduct differently from on-campus misconduct. Title IX does not create, nor did Congress intend for it to create, open-ended liability for recipients in addressing sexual harassment. Rather, the statute imposed an important jurisdictional limitation through its reference to education programs or activities. Recipients are responsible under Title IX for addressing sex discrimination, including sexual harassment, in their "education program or activity," but a recipient's education program or activity may extend to locations, events, and circumstances "off campus."

Changes: We have revised § 106.44(a) to state that for purposes of §§ 106.30, 106.44, and 106.45, "education program or activity" includes locations, events, or circumstances over which

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[899] 34 CFR 106.2(h) (defining "program or activity"); 34 CFR 106.2(i) (defining "recipient"); 34 CFR 106.31(a) (referring to "any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance").

the respondent had substantial control over both the respondent and the context in which the sexual harassment occurred, and also includes buildings owned or controlled by student organizations that are officially recognized by a postsecondary institution.

Constitutional Equal Protection

Comments: One commenter contended that the NPRM's approach to "education program or activity" may violate the Fourteenth Amendment because experiencing off-campus or online sexual victimization detrimentally affects student-survivors' education, and the Fourteenth Amendment guarantees these students equal protection, yet, the commenter argued, the NPRM would leave these students outside Title IX's reach and deprived of equal protection.

Discussion: We disagree with the contention that the application in the final regulations of "education program or activity" as a jurisdictional condition may violate the Equal Protection Clause of the Fourteenth Amendment. The Department reiterates that the "education program or activity" limitation in the final regulations does not create or apply a geographic test, does not draw a line between "off campus" and "on campus," and does not create a distinction between sexual harassment occurring in person versus online. Moreover, under these final regulations, any individual alleged to be a victim of conduct that could constitute sexual harassment is a "complainant"[900] to whom the recipient must respond in a prompt, non-deliberately indifferent manner; in that manner, all students are treated equally without distinction under the final regulations based on, for example, where a student resides or spends time. The distinction of which some commenters are critical, then, is not a distinction drawn among groups or types of

[900] Section 106.30 (defining a "complainant" as any individual who is alleged to be the victim of conduct that could constitute sexual harassment).

students, but rather is a distinction drawn (for reasons explained previously) between incidents that are, or are not, under the control of the recipient. The Department further notes that even if commenters correctly characterize the distinction as being made between some students (who suffer harassment in an education program or activity) and other students (who suffer harassment outside an education program or activity), the applicable level of scrutiny under the Equal Protection Clause to any differential treatment under such circumstances would be the rational basis test.[901] A heightened level of scrutiny would apply where a suspect or quasi-suspect classification is involved, such as race or sex.[902] But, as here, where no such suspect or quasi-suspect classification is involved, the final regulations may treat students differently due to the circumstances in which the misconduct occurred, and the rational basis test applies. Under the rational basis test, a law or governmental action is valid under the Equal Protection Clause so long as it is rationally related to a legitimate government interest.[903] With Title IX, Congress made a rational determination that recipients should be held liable for misconduct over which they had some level of control. The statute's reference to "education program or activity" reflects this important limitation. To expose recipients to liability for misconduct wholly unrelated to circumstances over which they have control would contravene congressional intent and lead to potentially unlimited exposure to loss of Federal funds. The Department believes that the use of "education program or activity" in § 106.44(a) appropriately reflects both statutory text and

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[901] *See F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993).
[902] *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (applying strict scrutiny under the Equal Protection Clause to assess classifications based on race); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (applying intermediate scrutiny under the Equal Protection Clause to assess classifications based on sex).
[903] *See Beach Commc'ns, Inc.*, 508 U.S. at 313 (holding that in areas of social and economic policy, statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide rational basis for classification).

congressional intent, and furthers the legitimate government interest of ensuring liability is not open-ended and has reasonable jurisdictional limitations.

Changes: None.

Institutional Autonomy and Litigation Risk

Comments: A number of commenters stated that the Department's approach to "education program or activity" would undermine recipient autonomy and expose recipients to litigation risk. Commenters argued that recipients should have the right to determine the standards of behavior to which their students must adhere, both on campus and off campus, and that the NPRM would infringe on institutional academic prerogatives and independence. Commenters expressed concern that the NPRM would make recipients vulnerable to litigation from students seeking damages for off-campus assaults, including because recipients could be accused of arbitrarily deciding which cases to investigate and which cases to declare outside their jurisdiction.

Discussion: We acknowledge the importance of recipient discretion and flexibility to determine the recipient's own standards of conduct. However, Congress created a clear mandate in Title IX and vested the Department with the authority to administratively enforce Title IX to effectuate the statute's twin purposes: to "avoid the use of Federal resources to support discriminatory practices" and to "provide individual citizens effective protection against those practices."[904] Importantly, nothing in the final regulations prohibits recipients from using their own disciplinary processes to address misconduct occurring outside their education program or

[904] *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979).

activity.[905] Indeed, this flexibility for recipients to address sexual misconduct that falls outside the scope of Title IX, including sexual misconduct that is outside the recipient's education program or activity, permits recipients to reduce the litigation risk perceived by some commenters. As discussed above, and contrary to the claims made by many commenters, the final regulations do not distinguish between on-campus misconduct and off-campus misconduct. Off-campus sexual harassment is not categorically excluded from Title IX coverage. Recipients' decisions to investigate formal complaints regarding allegations of sexual harassment cannot be arbitrary under the final regulations; rather, a recipient *must* investigate a formal complaint where the alleged sexual harassment (meeting the definition in § 106.30) occurred in the recipient's education program or activity, against a person in the United States.

Changes: None.

Requests for Clarification

Comments: Commenters raised questions regarding the Department's approach to the "education program or activity" condition. Commenters requested clarity as to events that begin off campus but have effects on campus, such as interaction among students, faculty, and staff outside formal professional or academic activities. These commenters were concerned that, in such circumstances, it may be challenging for an institution to clearly and consistently identify what conduct has occurred strictly within its education program and which conduct is beyond its educational program. One commenter sought clarification as to what, if any, are the

[905] In response to many commenters' concerns that § 106.45(b)(3) was understood to prevent recipients from addressing misconduct that occurred outside an education program or activity, the Department has revised § 106.45(b)(3)(i) in the final regulations to expressly state that mandatory dismissal due to the alleged conduct occurring outside an education program or activity is only a dismissal for purposes of Title IX and does not preclude the recipient from addressing the conduct through other codes of conduct.

Department's expectations for a recipient's conduct processes that address off-campus sexual misconduct. This commenter asserted that Title IX prohibits discrimination "under" an education program or activity, but that § 106.44(a) and proposed § 106.44(b)(4) referred to sexual harassment "in" an education program or activity, while proposed § 106.45(b)(3) referred to sexual harassment "within" a program or activity. The commenter inquired as to whether "in" differs from "within" in those proposed sections, and whether those terms mean something different than "under" used in the Title IX statute, and if so what are the differences in meaning. The commenter asserted that Title IX prohibits "discrimination" under an education program or activity and that § 106.44(a) and proposed § 106.44(b)(2) refer to "sexual harassment" in an education program or activity, and asked if recipients would be required to respond where sexual harassment occurred outside an education program or activity but resulted in discrimination under the education program or activity. This commenter stated that under Title IX an individual may not be "excluded" from a federally-assisted program or activity on the basis of sex, and asked whether recipients must address sexual harassment that did not occur "in" its education program or activity but nevertheless effectively excluded the victim from equal access to it.

Discussion: The Department appreciates the questions raised by commenters regarding the application of "education program or activity" in § 106.44(a) of the final regulations. The final regulations do not impose requirements on a recipient's code of conduct processes addressing misconduct occurring outside the recipient's education program or activity, and do not govern the recipient's decisions to address or not address such misconduct. The Department's regulatory authority is limited to the scope of Title IX: ensuring that recipients of Federal funding operate education programs or activities free from sex discrimination. For the final regulations to apply, sexual harassment (a form of sex discrimination) must occur in the recipient's education program

or activity. As explained previously, nothing in the final regulations precludes a recipient from offering supportive measures to a complainant who reports sexual harassment that occurred outside the recipient's education program or activity, and any sexual harassment or sex discrimination that does occur in an education program or activity must be responded to even if it relates to, or happens subsequent to, sexual harassment that occurred outside the education program or activity.

Whether sexual harassment occurs in a recipient's education program or activity is a fact-specific inquiry. The key questions are whether the recipient exercised substantial control over the respondent and the context in which the incident occurred. There is no bright-line geographic test, and off-campus sexual misconduct is not categorically excluded from Title IX protection under the final regulations.[906] Recognizing that recipients need to carefully consider this matter, the Department revised § 106.45(b)(1)(iii) to require training for Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolution processes on "the scope of the recipient's education program or activity."

In response to a commenter's question regarding the NPRM's use of the terms "in," "within," and "under" an education program or activity, and whether those terms are intended to have different meanings, the Department has replaced "within" with "in" throughout the final regulations, thus making all provisions consistent with the reference to "in" contained in § 106.44(a). We also wish to clarify that the final regulations' use of the term "in" is meant to be

[906] *See* the "Clery Act" subsection of the "Miscellaneous" section of this preamble for discussion regarding the distinctive purposes of Clery Act geography versus Title IX coverage of education programs or activities; *see also* revised § 106.44(a) including in an "education program or activity" any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

interchangeable with the Title IX statute's use of "under"; the Department gives the same meaning to these prepositions, and notes that the Supreme Court in *Davis* referenced harassment "under" the operations of (i.e., the program or activity of) a recipient and harassment that occurred "in" a context subject to the recipient's control seemingly interchangeably.[907]

Changes: The final regulations consistently use "in" an education program or activity rather than "within."

Section 106.44(a) "against a person in the U.S."

Impact on Study Abroad Participants

Comments: Several commenters asserted that the NPRM would endanger students studying abroad, because the final regulations apply only to sexual harassment that occurs against a person in the United States. Commenters argued that when recipients offer students study abroad opportunities, recipients should still have responsibility to ensure student safety and well-being. Commenters acknowledged that Congress may not have contemplated studying abroad or recipients having satellite campuses across the globe when drafting Title IX in the 1970s. However, commenters argued that international experiences are increasingly common and critical components of education today, particularly in higher education, and that some schools require students in certain academic programs to study abroad. Commenters noted that even the Federal government, on the U.S. State Department website, encourages students to have international exposure to compete in a globalized society. Commenters argued that it would be absurd for the Federal government to encourage international exposure for students and not

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[907] *Davis*, 526 U.S. at 645 ("Moreover, because the harassment must occur *under* the operations of' a funding recipient . . . the harassment must take place *in* a context subject to the school district's control") (internal quotation marks and citations omitted; emphasis added).

protect them in the process because studying abroad is necessary for some majors and to prepare for certain careers. Commenters cited studies suggesting study abroad increases the risk for sexual misconduct against female students and showing how students had to alter their career paths in the aftermath of sexual misconduct experienced abroad.[908] One commenter stated that harassment abroad, such as by institution-employed chaperones, can derail victims' ability to complete their education at their home institution in the United States. This commenter stated that for the Department to interpret Title IX as providing no recourse for such students is impossible to imagine. Commenters asserted that the NPRM tells bad actors they can get away with sexual misconduct in foreign programs. Commenters asserted that study abroad students are already uniquely vulnerable and less likely to report to foreign local authorities because, for example, they may be unfamiliar with the foreign legal system, they share housing with the perpetrators, and there may be language barriers, fear of retaliation or social isolation, and fewer available support services. Commenters further argued that because crime occurring overseas cannot be prosecuted in the U.S, filing a Title IX report with the recipient might be the survivor's only option. Commenters contended that the NPRM may have the effect of discouraging students from studying abroad and learning about foreign cultures and languages which would run contrary to the fundamental purpose of education to foster curiosity and discovery.

Discussion: We acknowledge the concerns raised by many commenters that the final regulations would not extend Title IX protections to incidents of sexual misconduct occurring against persons outside the United States, and the impact that this jurisdictional limitation might have on

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[908] Commenters cited, *e.g.*: Matthew Kimble, *et al.*, *Study Abroad Increases Risk for Sexual Assault in Female Undergraduates: A Preliminary Report*, 5 PSYCHOL. TRAUMA: THEORY, RESEARCH, PRACTICE, & POL'Y 5 (2013).

the safety of students participating in study abroad programs. However, by its plain text, the Title IX statute does not have extraterritorial application. Indeed, Title IX states that "*[n]o person in the United States* shall, on the basis of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]"[909] The Department believes a plain meaning interpretation of a statute is most consistent with fundamental rule of law principles, ensures predictability, and gives effect to the intent of Congress. Courts have recognized a canon of statutory construction that "Congress ordinarily intends its statutes to have domestic, not extraterritorial, application."[910] This canon rests on presumptions that Congress is mainly concerned with domestic conditions and seeks to avoid unintended conflicts between our laws and the laws of other nations.[911] If Congress intended Title IX to have extraterritorial application, then it could have made that intention explicit in the text when it was passed in 1972, and Congress could amend Title IX to apply to a recipient's education programs or activities located outside the United States if Congress so chooses. The Federal government's encouragement of international experiences, such as study abroad, is not determinative of Title IX's intended scope. The U.S. Supreme Court most recently acknowledged the presumption against extraterritoriality in *Kiobel v. Royal Dutch Petroleum*[912] and *Morrison v. National Australian Bank*.[913] In *Morrison*, the Court reiterated the "longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United

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[909] 20 U.S.C. 1681(a) (emphasis added).
[910] *Small v. United States*, 544 U.S. 385, 388-89 (2005).
[911] *Smith v. United States*, 507 U.S. 197, 204 (1993).
[912] 133 S. Ct. 1659 (2013).
[913] 561 U.S. 247 (2010).

States."[914] The Court concluded that "[w]hen a statute gives no clear indication of extraterritorial application, it has none."[915]

Very few Federal cases have addressed whether Title IX applies extraterritorially to allegations of sex discrimination occurring abroad, and Federal district courts have reached different results in these cases.[916] To date, no Federal circuit has addressed this issue. Commenters noted that the court in *King v. Board of Control of Eastern Michigan University*[917] applied Title IX to a claim of sexual harassment occurring overseas during a study abroad program; the Federal district court reasoned that study abroad programs are educational operations of the recipient that "are explicitly covered by Title IX and which necessarily require students to leave U.S. territory in order to pursue their education." The court emphasized that Title IX's scope extends to "any education program or activity" of a recipient, which presumably would include the recipient's study abroad programs. While the Department agrees that a recipient's study abroad programs may constitute education programs or activities of the recipient, the Department agrees with the rationale applied by a Federal district court in *Phillips v. St. George's University*[918] that regardless of whether a study abroad program is part of a recipient's education program or activity, Title IX does not have extraterritorial application. The court in *Phillips* noted that nothing in the Title IX statute's plain language indicates that Congress intended it to apply outside the U.S. and that the plain meaning of "person in the United States" suggests that Title IX only applies to persons located in the United States, even

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[914] *Id.* at 255.
[915] *Id.*
[916] *See* Robert J. Aalberts *et al.*, *Studying is Dangerous? Possible Federal Remedies for Study Abroad Liability*, 41 JOURNAL OF COLL. & UNIV. L. 189, 210-13 (2015).
[917] 221 F. Supp. 2d 783 (E.D. Mich. 2002).
[918] No. 07-CV-1555, 2007 WL 3407728 (E.D.N.Y. Nov. 15, 2007).

when that person is participating in a recipient's education program or activity outside the United States.

Both *Phillips* and *King* were decided before the Supreme Court's *Morrison* and *Kiobel* opinions, and the Department doubts that the rationale applied by the court in *King* would survive analysis under those Supreme Court decisions, which emphasized the importance of the presumption against extraterritoriality of statutes passed by Congress. We find the *Phillips* Court's reasoning to be well-founded, especially in light of the later-decided Supreme Court cases regarding extraterritoriality, and we believe the jurisdictional limitation on extraterritoriality contained in the final regulations is wholly consistent with the text of the Title IX statute and with the presumption against extraterritoriality recognized numerous times by the Supreme Court. We further note that the Supreme Court acknowledges that where Congress intends for its statutes to apply outside the United States, Congress knows how to codify that intent.[919] When Congress has codified such intent in other Federal civil rights laws, Congress has addressed issues that arise with extraterritorial application such as potential conflicts with foreign laws and procedures.[920] Based on the presumption against extraterritoriality reinforced by Supreme Court decisions and the plain language in the Title IX statute limiting protections to persons "in the United States," the Department believes that the Department does not have authority to declare that the presumption against extraterritoriality has been overcome, absent further congressional or Supreme Court direction on this issue.

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[919] *E.g.*, *Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co.* (*Aramco*), 499 U.S. 244, 258 (1991) ("Congress's awareness of the need to make a clear statement that a statute applies overseas is amply demonstrated by the numerous occasions on which it has expressly legislated the extraterritorial application of a statute.").
[920] *E.g.*, Older Americans Act Amendments of 1984, Pub. L. No. 98-459, § 802, 98 Stat. 1767, 1792 (codified at 29 U.S.C. 623, 630 (amending the Age Discrimination Employment Act of 1967 to apply outside the United States)); 29 U.S.C. 623(f) (addressing potential conflicts of laws issues).

As a practical matter, we also note that schools may face difficulties interviewing witnesses and gathering evidence in foreign locations where sexual misconduct may have occurred. Recipients may not be in the best position to effectively investigate alleged sexual misconduct in other countries. Such practical considerations weigh in favor of the Department looking to Congress to expressly state whether Congress intends for Title IX to apply in foreign locations.

We emphasize that nothing in these final regulations prevents recipients from initiating a student conduct proceeding or offering supportive measures to address sexual misconduct against a person outside the United States. We have revised § 106.45(b)(3) to explicitly state that even if a recipient must dismiss a formal complaint for Title IX purposes because the alleged sexual harassment did not occur against a person in the U.S., such a dismissal is only for purposes of Title IX, and nothing precludes the recipient from addressing the alleged misconduct through the recipient's own code of conduct. Contrary to claims made by some commenters, it is not true that the final regulations leave students studying abroad with no recourse in the event of sexual harassment or sexual assault. Recipients remain free to adopt disciplinary systems to address sexual misconduct committed outside the United States, to protect their students from such harm, and to offer supportive measures such as mental health counseling or academic adjustments for students impacted by misconduct committed abroad. As such, we believe the final regulations will not discourage students from participating in study abroad programs that may enrich their educational experience.

Changes: None.

Consistency with Federal Law and Departmental Practice

Comments: Some commenters asserted that excluding extraterritorial application of Title IX would conflict with other Federal laws and past practice of the Department. One commenter stated that the NPRM is inconsistent with the Department's own interpretation of the VAWA amendments to the Clery Act, and argued that carving out conduct occurring abroad conflicts with Clery Act language regarding geographical jurisdiction. This commenter argued that if a postsecondary institution has a separate campus abroad or owns or controls a building or property abroad that is used for educational purposes and used by students, the postsecondary institution must disclose the Clery Act crimes that occur there. The commenter suggested it would be illogical to require recipients to make such disclosures and yet not address the same underlying misconduct and that this puts recipients in a precarious position. Other commenters argued that the Department should interpret Title IX as protecting persons enrolled in education programs or activities the recipient conducts or sponsors abroad, as this interpretation would be consistent with application of other Federal civil rights laws, such as Title VI, and that the proposed rules' approach conflicts with the Department's past approach of requiring recipients to address sexual misconduct that could limit participation in education programs or activities overseas.

Discussion: We disagree with the commenters who contended that excluding application of Title IX to sexual misconduct committed outside the United States raises untenable conflict with the past practice of the Department and other Federal laws. With respect to past practice of the Department, OCR has never explicitly addressed in any of its guidance whether Title IX has extraterritorial application. For example, though the withdrawn 2014 Q&A stated that "[u]nder Title IX, a school must process all complaints of sexual violence, *regardless of where the*

conduct occurred, to determine whether the conduct occurred in the context of an education program or activity,"[921] it included an illustrative list of covered "[o]ff-campus education programs and activities" such as activities occurring at fraternity or sorority houses and school-sponsored field trips; none of these examples involved an education program or activity outside the United States.[922] However, to the extent that application of the "person in the United States" language in the final regulations departs from past Department guidance or practice, the Department believes that the jurisdictional limitation on extraterritoriality contained in the final regulations is reasonable and wholly consistent with the plain text of the Title IX statute and with the presumption against extraterritoriality recognized numerous times by the U.S. Supreme Court.

With respect to other Federal law, we acknowledge that certain misconduct committed overseas is reportable under the Clery Act where, for example, the misconduct occurs in a foreign location that a U.S. institution owns and controls. However, the two laws (Title IX and the Clery Act) do not have the same scope or purpose,[923] even though the two laws often intersect for postsecondary institution recipients who are also subject to the Clery Act. The Department does not perceive a conflict between a recipient's obligation to comply with reporting obligations under the Clery Act and response obligations under Title IX. As discussed above, both the text of the Title IX statute and case law on the topic of extraterritoriality make it clear that Title IX does not apply to sex discrimination against a person outside the United States.

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[921] *See* 2014 Q&A at 29.
[922] *Id.*
[923] *See* "Background" subsection in "Clery Act" subsection of the "Miscellaneous" section of this preamble.

With respect to Title VI, this statute, like Title IX, expressly limits its application to domestic discrimination with its opening words "No person in the United States . . ." and commenters provided no example of a Federal court or Department application of Title VI to conduct occurring outside the United States. Nonetheless, the final regulations are focused on administrative enforcement of Title IX, and for reasons discussed previously, the Department does not believe that the statutory text or judicial interpretations of Title IX overcome the presumption against extraterritoriality that applies to statutes passed by Congress.

Changes: None.

Constitutional Equal Protection

Comments: One commenter asserted that excluding extraterritorial application of Title IX may raise Constitutional issues under the Fourteenth Amendment Equal Protection Clause. This commenter argued that experiencing sexual victimization in study abroad programs detrimentally affects the student-survivor's education, and the Fourteenth Amendment guarantees these students equal protection, yet the NPRM would leave these students outside the scope of Title IX protection and deprive them of equal protection.

Discussion: We disagree with the contention that excluding extraterritorial application of Title IX may violate the Fourteenth Amendment Equal Protection Clause. As an initial matter, the applicable level of scrutiny under the Equal Protection Clause to any differential treatment of students under the § 106.44(a) "against a person in the United States" limitation would be the rational basis test. A heightened level of scrutiny would apply where a suspect or quasi-suspect classification is involved, such as race or sex. But, as here, where no such suspect or quasi-suspect classification is involved and the final regulations may treat students differently due to the geographic location of misconduct occurring outside the United States, the rational basis test

applies. Under the rational basis test, a law or governmental action is valid under the Equal Protection Clause so long as it is rationally related to a legitimate government interest.[924] With respect to Title IX, Congress made a rational determination that recipients should only be held liable for misconduct that occurs within the United States. The statute's explicit reference to "[n]o person in the United States" in 20 U.S.C. 1681(a) reflects this jurisdictional limitation. To hold recipient responsible for misconduct that took place outside the country could be unrealistically demanding and lead to open-ended liability, and if Congress intended that result, then Congress could have expressly stated its intent for Title IX to apply overseas when enacting Title IX, and can amend Title IX to so state. The Department believes that the reference to "against a person in the United States," in § 106.44(a), appropriately reflects both the plain meaning of the statutory text and congressional intent that Title IX is focused on eradicating sex discrimination in domestic education programs or activities. The Department reiterates that recipients remain free under the final regulations to use their own disciplinary codes to address sexual harassment committed abroad and to extend supportive measures to students affected by sexual misconduct outside the United States.

Changes: None.

Impact on International or Foreign Exchange Students in the U.S.

Comments: A few commenters asserted the proposed rules' limitation with respect to persons "in the United States" may be detrimental to survivors who are international students whose visa

[924] *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) (holding that in areas of social and economic policy, statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide rational basis for classification).

status depends on academic performance. One commenter expressed concern that § 106.44(a) would exclude foreign exchange students in the U.S. from Title IX coverage, arguing that the Department should not treat foreign exchange students as undeserving of the same protection as students born in the United States.

Discussion: The jurisdictional limitation that sexual harassment occurred against "a person in the United States" is not a limitation that protects only U.S. citizens; international students or foreign students studying in the United States are entitled to the same protections under Title IX as any other individuals. Title IX states that "[n]o person in the United States" shall be subject to discrimination based on sex. It is well-settled that the word "person" in this context includes citizens and non-citizens alike. Title IX protects every individual in the U.S. against discrimination on the basis of sex in education programs or activities receiving Federal financial assistance, regardless of citizenship or legal residency.

Changes: None.

Section 106.44(a) Deliberate Indifference Standard

Comments: Many commenters were supportive of the deliberate indifference standard and several argued that it is a sufficient standard to hold institutions accountable for failing to address allegations of sexual misconduct in an appropriate manner. Many commenters favored the deliberate indifference standard because it affords institutions greater discretion to handle Title IX cases in a manner that is most consistent with the institution's educational mission and level of resources.

In contrast, other commenters advocated for the Department to return to the "reasonableness" standard because it affords recipients less discretion in their handling of Title IX complaints. These commenters argued that the reasonableness standard strikes the necessary

balance between forcing schools to make certain policy changes, such as adopting due process protections in their grievance procedures, and granting deference. Other commenters argued that because the deliberate indifference standard is couched in terms of a safe harbor and coupled with "highly prescriptive mechanism[s]" under § 106.44 and § 106.45 it actually provides recipients with very little to no discretion in practice.

Many commenters expressed the general concern that lowering the "reasonableness" standard to the "deliberate indifference" standard allows schools to investigate fewer allegations, punish fewer bad actors, and would shield schools from administrative accountability even in cases where schools mishandle complaints, fail to provide effective support, and wrongly determine against the weight of the evidence that the accused was not responsible for the misconduct. One commenter compared the deliberate indifference standard in the proposed rules to the application of the deliberate indifference standard in the prison context under the Eighth Amendment,[925] arguing that if finalized the deliberate indifference standard would apply more stringently in the Title IX context and provide greater institutional protection to schools because it would be difficult to imagine any scenario where an institution could be found deliberately indifferent.

Some commenters argued that the deliberate indifference standard is only appropriate in actions for private remedies rather than public remedies, and asserted that the 2001 Guidance acknowledged this difference. Some commenters contended that the deliberate indifference standard is wholly inappropriate in the context of administrative enforcement, arguing that because the Department only demands equitable remedies of schools, in the form of policy

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[925] Commenter cited: *Farmer v. Brennan*, 511 U.S. 825 (1994).

changes, schools do not require the additional protection afforded by the deliberate indifference standard that applies in private lawsuits for money damages against schools. Other commenters noted that the deliberate indifference standard has not been adopted in the context of any of the other civil rights statutes OCR is charged with enforcing.

Various commenters indicated that more clarity is needed with respect to what the deliberate indifference standard requires of recipients in the absence of a formal complaint of sexual harassment. Some commenters requested that the Department include a definition for deliberate indifference. Many commenters critiqued the language used to convey the standard, expressing the concern that a school's response could be indifferent or unreasonable and not be in violation of Title IX so long as they were not *deliberately* indifferent or *clearly* unreasonable. Some commenters expressed the concern that the word "deliberate" implies an intentionality element, asserting that intent is difficult to prove. Other commenters believed the standard was too vaguely worded, provided too much deference to the institutions, and would always be interpreted in favor of the schools. Some commenters argued that the deliberate indifference standard would effectively deny the complainant any meaningful process because an institution could dismiss a complaint after determining that the alleged conduct does not fall within its interpretation of the sexual harassment definition.

Some suggested the Department revise the proposed rules to impose a different standard on schools in circumstances where the schools are responding to allegations against someone in a position of authority, pointing to the misconduct of Larry Nassar at Michigan State University.

Discussion: The Department appreciates the commenters' support of the deliberate indifference standard and agrees that the deliberate indifference standard affords recipients an appropriate amount of discretion to address sexual misconduct in our Nation's schools while holding

recipients accountable if their response is clearly unreasonable in light of the known circumstances. The Department, however, also recognizes that too much discretion can result in unintended confusion and uncertainty for both complainants who deserve a meaningful response and careful consideration of their reports, and for respondents who should be punished only after they are determined to be responsible through a fair process. Since the implementing regulations were first issued in 1975, the Department has observed, and many stakeholders, including complainants and respondents, have informed the Department through public comment, that complainants and respondents have experienced various pitfalls and implementation problems from a lack of clarity with respect to recipients' obligations under Title IX. As stated in the proposed regulations, the lack of clear regulatory standards has contributed to processes that have not been fair to the parties involved, have lacked appropriate procedural protections, and have undermined confidence in the reliability of the outcomes of investigations of sexual harassment complaints. For the reasons stated in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, the Department will maintain the deliberate indifference standard in the final regulations, with revisions to § 106.44(a) that specify certain actions a recipient must take in order to not be deliberately indifferent.

In response to commenters' concerns that the deliberate indifference standard leaves recipients too much leeway to decide on an appropriate response, the Department revises § 106.44(a) to include specific actions that a recipient must take as part of its non-deliberately indifferent response. Section 106.44(a) requires that a recipient's response treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the

imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent.[926] As commenters have stated, many complainants would like supportive measures and do not necessarily wish to pursue a formal complaint and grievance process, although they should be informed of the process for filing a formal complaint. The Department wishes to respect the autonomy and wishes of a complainant throughout these final regulations, and recipients should also respect a complainant's wishes to the degree possible. Respondents also should not be punished for allegations of sexual harassment until after a grievance process that complies with § 106.45, as such a grievance process provides notice of the allegations to both complainants and respondents as well as a meaningful opportunity for both complainants and respondents to be heard. Additionally, the Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. A recipient should engage in a meaningful dialogue with the complainant to determine which supportive measures may restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment. A recipient must offer each complainant supportive measures, and a

[926] For discussion of what is intended by refraining from imposing disciplinary sanctions and other actions that are "not supportive measures" against a respondent, see the "Supportive Measures" subsection of the "Section 106.30 Definitions" section of this preamble. We use the same language to describe refraining from punishing a respondent with following the § 106.45 grievance process, in § 106.45(b)(1)(i).

recipient will have sufficiently fulfilled its obligation to offer supportive measures as long as the offer is not clearly unreasonable in light of the known circumstances, and so long as the Title IX Coordinator has contacted the complainant to engage in the interactive process also described in revised § 106.44(a). The Department acknowledges that there may be specific instances in which it is impossible or impractical to provide supportive measures. For example, the recipient may have received an anonymous report or a report from a third party and cannot reasonably determine the identity of the complainant to promptly contact the complainant. Similarly, if a complainant refuses the supportive measures that a recipient offers (and the supportive measures offered are not clearly unreasonable in light of the known circumstances) and instead insists that the recipient take punitive action against the respondent without a formal complaint and grievance process under § 106.45, the Department will not deem the recipient's response to be clearly unreasonable in light of the known circumstances. If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response is not clearly unreasonable in light of the known circumstances, pursuant to revised § 106.45(b)(10)(ii). Offering supportive measures to every complainant and documenting why *not* providing supportive measures is *not* clearly unreasonable in light of the known circumstances are some of the actions required under these final regulations but not expressly required under case law describing the deliberate indifference standard. These actions are required as part of the Department's administrative enforcement of the deliberate indifference standard.

Although we acknowledge the concerns of commenters urging the Department to abandon the deliberate indifference standard and return to the reasonableness standard, the Department disagrees for various reasons. As more fully explained in the "Deliberate Indifference" subsection of the "Adoption and Adaption of the Supreme Court's Framework to

Address Sexual Harassment" section, the Department departs from its prior guidance that set forth a standard more like reasonableness, or even strict liability, instead of deliberate indifference. The Department's past guidance and enforcement practices have taken the position that a recipient's response to sexual harassment should be judged under a standard that expected the recipient's response to effectively stop harassment and prevent its recurrence.[927] This approach did not provide recipients adequate flexibility to make decisions affecting their students. For example, the Department's guidance required recipients to always investigate any report of sexual harassment, even when the complainant only wanted supportive measures and did not want an investigation.[928] Such a rigid requirement to investigate every report of sexual harassment in every circumstance intrudes into complainants' privacy without concern for complainants' autonomy and wishes and, thus, may chill reporting of sexual harassment. Additionally, the Department's past guidance did not distinguish between an investigation that leads to the imposition of discipline and an inquiry to learn more about a report of sexual harassment.[929] Deliberate indifference provides appropriate flexibility for recipients while holding recipients accountable for meaningful responses to sexual harassment that prioritize complainants' wishes.[930]

The Department disagrees that these final regulations are highly or overly prescriptive such that recipients have no discretion. Recipients retain discretion to determine which supportive measures to offer and must document why providing supportive measures is not

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[927] 2001 Guidance at iv, vi.
[928] 2001 Guidance at 13, 15, 18; 2011 Dear Colleague Letter at 4.
[929] 2001 Guidance at 13, 15, 18; 2011 Dear Colleague Letter at 4.
[930] The final regulations specify that a recipient's non-deliberately indifferent response must include investigating and adjudicating sexual harassment allegations, when a formal complaint is filed by a complainant or signed by the recipient's Title IX Coordinator. § 106.44(b)(1); § 106.30 (defining "formal complaint"); § 106.45(b)(3)(i).

clearly unreasonably in light of the known circumstances, if the recipient does not provide any supportive measures. The Department will not second guess the supportive measures that a recipient offers as long as these supportive measures are not clearly unreasonable in light of the known circumstances. Similarly, the Department believes that the grievance process prescribed by § 106.45 creates a standardized framework for resolving formal complaints of sexual harassment under Title IX while leaving recipients discretion to adopt rules and practices not required under § 106.45.[931] The Department notes that these final regulations do not include the safe harbor provisions proposed in the NPRM, and the Department explains its decision for not including these safe harbors in the "Recipient's Response in Specific Circumstances" section of this preamble.

Contrary to some commenters' concerns, the deliberate indifference standard does not relieve recipients of their obligation to respond to every known allegation of sexual harassment. The deliberate indifference standard would also not allow recipients to investigate fewer allegations of sexual harassment or punish fewer respondents after a finding of responsibility. Rather, under these final regulations, recipients are specifically required to investigate allegations in a formal complaint (and must explain to each complainant the option of filing a formal complaint), and must provide a complainant with remedies any time a respondent is

[931] The revised introductory sentence in § 106.45(b) provides that any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in § 106.30, must apply equally to both parties. The final regulations grant flexibility to recipients in other respects; *see* the discussion in the "Other Language/Terminology Comments" subsection of the "Section 106.30 Definitions" section of this preamble (noting that recipients may decide whether to calculate time frames using calendar days, school days, or other method); § 106.45(b)(6)(i) (allowing, but not requiring, live hearings to be held virtually through use of technology); § 106.45(b)(5)(vi) (removing the requirement that evidence gathered in the investigation be provided to the parties using a file-sharing platform); §§ 106.45(b)(1)(vii), 106.45(b)(7)(i) (giving recipients a choice between using the preponderance of the evidence standard or the clear and convincing evidence standard).

found responsible for sexual harassment pursuant to § 106.45(b)(1)(i). Even where a formal investigation is not required (because neither the complainant nor the Title IX Coordinator has filed or signed a formal complaint, or because a complainant is not participating in or attempting to participate in the recipient's education program or activity at the time of filing), the deliberate indifference standard requires that a recipient's response is not clearly unreasonable in light of known circumstances. Contrary to commenters' arguments, this standard requires more than for a recipient to respond in some minimal or ineffective way because minimal and ineffective responses would inevitably qualify as "clearly unreasonable" and because as revised, § 106.44(a) imposes specific, mandatory obligations on a recipient with respect to a recipient's response to each complainant. Given that the deliberate indifference standard involves an analysis of whether a response was clearly unreasonable in light of the known circumstances, there are many different factual circumstances under which a recipient's response may be deemed deliberately indifferent.

Section 106.44(a) requires a recipient to respond promptly where the recipient has actual knowledge of sexual harassment; a recipient may have actual knowledge of sexual harassment even where no person has reported or filed a formal complaint about the sexual harassment. For example, employees in an elementary or secondary school may observe sexualized insults scrawled on school hallways, and even where no student has reported the incident, the school employees' notice of conduct that could constitute sexual harassment as defined in § 106.30 (i.e., unwelcome conduct that a reasonable person would conclude is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to education) charges the recipient with actual knowledge, and the recipient must respond in a manner that is not clearly unreasonable in light of the known circumstances, which could include the recipient removing

the sexually harassing insults and communicating to the student body that sexual harassment is unacceptable. By way of further example, if a Title IX Coordinator were to receive multiple reports of sexual harassment against the same respondent, as part of a non-deliberately indifferent response the Title IX Coordinator may sign a formal complaint to initiate a grievance process against the respondent, even where no person who alleges to be the victim wishes to file a formal complaint. The deliberate indifference standard does not permit recipients to ignore or respond inadequately to sexual harassment of which the recipient has become aware, but the deliberate indifference standard appropriately recognizes that a recipient's prompt response will differ based on the unique factual circumstances presented in each instance of sexual harassment.

In response to comments that the *Gebser/Davis* liability standard (i.e., deliberate indifference) is and should be used only for monetary damages in private litigation, the Department notes that courts have used the *Gebser/Davis* standard in considering and awarding injunctive relief.[932] Additionally, in *Gebser*, the Supreme Court acknowledged that the Department of Education has the authority to "promulgate and enforce requirements that effectuate [Title IX's] non-discrimination mandate."[933] In promulgating these final regulations, the Department is choosing to do just that. The Department is not required to adopt identical

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[932] *Fitzgerald v. Barnstable Sch. Dist.*, 555 U.S. 246, 255 (2009) ("In addition, this Court has recognized an implied private right of action . . . In a suit brought pursuant to this private right, *both injunctive relief and damages are available*.") (internal citations omitted; emphasis added); *Hill v. Cundiff*, 797 F.3d 948, 972-73 (11th Cir. 2015) (reversing summary judgment against plaintiff's claims for injunctive relief because a jury could find that the alleged conduct was "severe, pervasive, and objectively offensive" under *Davis*); *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 322-23 (3d Cir. 2013) (upholding preliminary injunction against school for banning students from wearing bracelets because the school failed to show that the "bracelets would breed an environment of pervasive and severe harassment" under *Davis*); *Haidak v. Univ. of Mass. at Amherst*, 299 F. Supp. 3d 242, 270 (D. Mass. 2018) (denying plaintiff's request for a preliminary injunction because he failed to show that the school was deliberately indifferent to an environment of severe and pervasive discriminatory conduct under *Davis*), *aff'd in part, vacated in part, remanded by Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56 (1st Cir. 2019).
[933] *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998).

standards for all civil rights laws under the Department's enforcement authority, and after carefully considering the rationale relied upon by the Supreme Court in the context of sexual harassment under Title IX, the Department adopts the deliberate indifference standard articulated by the Supreme Court, tailored for administrative enforcement of recipients' responses to sexual harassment. The Department believes it would be beneficial for recipients and students alike if the administrative standards governing recipients' responses to sexual harassment were aligned with the standards developed by the Supreme Court in private actions, while ensuring that through administrative enforcement the Department holds recipients accountable for taking specific actions that the *Gebser/Davis* framework does not require.[934]

The Department also believes that the language used to describe the deliberate indifference standard is sufficiently clear. The Department defines the standard according to the conventional understanding of the standard, that is, to be deliberately indifferent means to have acted in a way that is "clearly unreasonable in light of the known circumstances" consistent with the formulation of the deliberate indifference standard offered by the Supreme Court in *Davis.*[935] The Department appreciates the opportunity to clarify that the term "deliberate" as used in the standard does not require an element of subjective intent to harm, or bad faith, or similar mental state, on the part of a recipient's officials, administrators, or employees. Rather, the final regulations clearly state in § 106.44(a) that a recipient with actual knowledge of sexual harassment against a person in the United States occurring in its education program or activity

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[934] *E.g.*, § 106.44(a) specifically requires that a recipient's mandatory response to each report of sexual harassment must include promptly offering supportive measures to the complainant, and must avoid imposing disciplinary sanctions against a respondent without following the § 106.45 grievance process; § 106.44(b)(1) requires a recipient to investigate sexual harassment allegations made in a formal complaint; § 106.45 prescribes specific procedural protections for complainants, and respondents, when a recipient investigates and adjudicates formal complaints.
[935] *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 648-49 (1999); § 106.44(a).

must respond in a manner that is "not clearly unreasonable," including by taking certain specific steps such as offering supportive measures to a complainant. Accordingly, the Department will hold a recipient responsible for compliance regardless of whether acting in a clearly unreasonable way, in light of the known circumstances, is the result of malice, incompetence, ignorance, or other mental state of the recipient's officials, administrators, or employees. As adapted for administrative enforcement, the deliberate indifference standard sufficiently ensures that a recipient takes steps to address student safety and provides equal access to the recipient's education program or activity while preserving a recipient's discretion to address the unique facts and circumstances presented by any particular situation (for example, a recipient's offer of supportive measures as required in § 106.44(a) will be evaluated based on whether the recipient offered supportive measures to the complainant that, under the facts and circumstances presented in an individual complainant's situation, were in fact designed to restore or preserve the complainant's equal educational access).

The Department is persuaded by commenters' suggestions that the Department should impose stricter, more specific obligations on recipients' responses to sexual harassment or sexual harassment allegations, including allegations against employees in positions of authority. Rather than abandoning the deliberate indifference liability standard, the Department adapts that standard for administrative enforcement in ways that preserve the benefits of aligning judicial and administrative enforcement rubrics, preserve the benefit of the "not clearly unreasonable in light of the known circumstances" standard's deference to unique factual circumstances, yet imposes mandatory obligations on every recipient to respond in specific ways to each complainant alleged to be victimized by sexual harassment. Adopting the Supreme Court's formulation of the deliberate indifference standard, while adapting that standard to specify what

a recipient *must* do every time the recipient knows of sexual harassment (or allegations of sexual harassment), addresses commenters' concerns that the deliberate indifference standard as presented in the NPRM did not impose strict enough requirements on a recipient to ensure the recipient responds supportively and fairly to sexual harassment in its education programs or activities.

In the interest of providing greater clarity, consistency, and transparency as to a recipient's obligations under Title IX and what students can expect, the Department does not want to overcomplicate the regulatory scheme in the final regulations by establishing separate standards for when a recipient is handling complaints involving different classes of respondents (for example, allegations against students, versus allegations against employees). The Department believes that expecting a recipient to respond in a manner that is not clearly unreasonable in light of the known circumstances appropriately requires a recipient to take into account whether the respondent holds a position of authority.

Changes: The Department revised § 106.44(a) to provide that a recipient's response must be prompt, and must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. Section § 106.44(a) is also revised to provide that the Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.

Recipient's Response in Specific Circumstances

Section 106.44(b) Proposed "Safe harbors," generally

Comments: Some commenters praised the safe harbor provisions generally for giving colleges and universities the discretion to respond to sexual harassment complaints outside the formal grievance process. Some commenters also praised the safe harbor provisions for identifying specific circumstances under which a recipient can conform its response to legal requirements and avoid a finding of deliberate indifference.

Some commenters, although supportive of the safe harbors generally, requested that the Department clarify how the safe harbors would work.

Many commenters disagreed with the Department's use of the term "safe harbor" in the NPRM, because the provisions that provided a "safe harbor" also include mandatory requirements. These commenters argued that a safe harbor is conventionally understood as a provision that a regulated party can take advantage of to shield itself from administrative action, as opposed to something a regulated party is required to do. Commenters asserted that "safe harbors" are options rather than obligations and pointed to the mandatory language contained in proposed § 106.44(b)(2) under which the Title IX Coordinator would have been required to file a formal complaint upon receiving multiple reports against a respondent,[936] as fundamentally inconsistent with the idea of a safe harbor.

[936] Proposed § 106.44(b)(2) has been removed in the final regulations; see discussion under the "§ Proposed 106.44(b)(2) Reports by Multiple Complainants of Conduct by Same Respondent [removed in final regulations]" subsection of the "Recipient's Response in Specific Circumstances" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this preamble.

Some commenters criticized the safe harbor provisions as rules intended to immunize recipients from a finding of deliberate indifference but requiring no more than a minimal response to allegations of sexual harassment, contrary to Title IX's express intent. Commenters argued that the safe harbor provisions, combined with the deliberate indifference standard, curtail the Department's ability to independently and comprehensively review a recipient's response to sexual harassment allegations, amounting to an abdication of the Department's role to enforce Title IX.

Discussion: The Department appreciates comments in support of the two proposed safe harbors. Upon further consideration, the Department decided not to include the two proposed safe harbors in these final regulations.

One of the proposed safe harbor provisions provided that if the recipient followed a grievance process (including implementing any appropriate remedy as required) that complies with § 106.45 in response to a formal complaint, the recipient's response to the formal complaint would not be deliberately indifferent and would not otherwise constitute discrimination under Title IX. The proposed provision was meant to provide an assurance that the recipient's response (only as to the formal complaint) would not be deemed deliberately indifferent as long as a recipient complies with § 106.45. This proposed safe harbor left open the possibility that other aspects of the recipient's response may be deliberately indifferent. The Department understands commenters' concerns that this safe harbor provision may have been confusing or misleading by somehow suggesting that compliance with § 106.45 is not required, or by suggesting that compliance with § 106.45 would have excused a recipient from providing a non-deliberately indifferent response with respect to matters other than conducting a grievance process. The Department is not including this proposed safe harbor provision in the final regulations to make

it clear that recipients are always required to comply with § 106.45 in response to a formal complaint, and are always required to comply with all the obligations specified in § 106.44(a), with or without a formal complaint being filed. Indeed, the Department retains the mandate in § 106.45(b)(1) and revises this mandate for clarity to state: "In response to a formal complaint, a recipient must follow a grievance process that complies with § 106.45." The Department did not intend to leave the impression that it was immunizing recipients with respect to their obligations to address sexual harassment. These final regulations require a meaningful response to allegations of sexual harassment of which a recipient has notice, when the sexual harassment occurs in a recipient's education program or activity against a person in the United States.

The second proposed safe harbor provided that a recipient would not be deliberately indifferent when in the absence of a formal complaint the recipient offers and implements supportive measures designed to effectively restore or preserve the complainant's access to the recipient's education program or activity, and the recipient also informs the complainant in writing of the right to file a formal complaint. This safe harbor is now unworkable and unnecessary in light of other revisions made to the proposed regulations, specifically a recipient's obligations in § 106.44(a) and § 106.45(b)(10)(ii). Under § 106.44(a), a recipient's response must treat complainants and respondents equitably by offering the complainant supportive measures as defined in § 106.30, and a Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. The Department revised § 106.45(b)(1) to add a mandate that with or without a formal complaint, a recipient must comply with §

106.44(a), emphasizing that recipients must offer supportive measures to a complainant regardless of whether a complainant chooses to file a formal complaint, and recipients must investigate any formal complaint that a complaint does choose to file. Additionally, under § 106.45(b)(10)(ii), if a recipient does not provide a complainant with supportive measures, then the recipient must document why such a response was not clearly unreasonable in light of the known circumstances. As recipients are now required to offer supportive measures to a complainant (not only incentivized to do so by the proposed safe harbor) and to document why not providing a complainant with supportive measures was not clearly unreasonable in light of the known circumstances, the final regulations removes safe harbors and instead, the Department will enforce the mandates and requirements in the final regulations, including those specified in §§ 106.44(a) and 106.44(b).

Despite the absence of these safe harbor provisions, recipients still have discretion with respect to how to respond to sexual harassment allegations in a way that takes into account factual circumstances. The final regulations, like the proposed regulations, require a recipient to begin the § 106.45 grievance process in response to a formal complaint. A recipient retains significant discretion under these final regulations, yet must meet specific, mandatory obligations that ensure a recipient responds supportively and fairly to every allegation of Title IX sexual harassment. For example, a recipient may decide which supportive measures to offer a complainant, whether to offer an informal resolution process under § 106.45(b)(9), whether to allow all parties, witnesses, and other participants to appear at the live hearing virtually under § 106.45(b)(6)(i), and whether to take action under another provision of the recipient's code of conduct even if the recipient must dismiss allegations in a formal complaint under § 106.45(b)(3)(i), among other areas of discretion.

These final regulations also provide sufficient clarity as to how a recipient must respond to sexual harassment, rendering the proposed safe harbors unnecessary. For example, § 106.44(a) specifically addresses how a recipient's response must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures against a respondent. Section § 106.44(b)(1) also clearly mandates that in response to a formal complaint a recipient must follow a grievance process that complies with § 106.45, and with or without a formal complaint, a recipient must comply with § 106.44(a). The Department clearly addresses specific circumstances throughout these final regulations. For example, the Department addresses when a recipient must or may dismiss a formal complaint under §106.45(b)(3) for purposes of sexual harassment under Title IX or this part, when a recipient may consolidate formal complaints as to allegations of sexual harassment under § 106.45(b)(4), and when an informal resolution process may be offered under § 106.45(b)(9), among other matters.

The elimination of the safe harbor provisions proposed in the NPRM alleviates and addresses the concerns of commenters who opposed these safe harbor provisions.

Changes: The Department does not include the two safe harbor provisions from the NPRM, in proposed § 106.44(b)(1) and proposed § 106.44(b)(3).

Section 106.44(b)(1) Mandate to Investigate Formal Complaints and Safe Harbor

Comments: Several commenters supported § 106.44(b)(1), asserting that this provision places control in the hands of the victims, and prevents victims from having to participate in a grievance process against their will. Other commenters opposed this provision, arguing that it relieves institutions of the obligation to address sexual harassment claims of which they have actual

knowledge by discouraging institutions from investigating allegations in the absence of a formal complaint.

Many commenters expressed concern that institutions will merely "check" the procedural "boxes" outlined in § 106.45 without regard for the substantive outcomes of formal grievance processes. Many commenters asserted that this proposed safe harbor would only benefits respondents, and would provide no benefit to complainants. Other commenters asserted that if a recipient fails to follow procedural requirements in § 106.45, the safe harbor in § 106.44(b)(1) would only hold recipients to the standard of deliberate indifference, which commenters argued was too low a standard to ensure that recipients comply with the § 106.45 grievance process.

Many commenters argued that the safe harbor in § 106.44(b)(1) provided too little flexibility for institutions to develop their own grievance process. Some commenters expressed concern that a recipient would not have the flexibility to forgo a grievance process in a situation where the recipient determined that the allegations contained in a formal complaint were without merit, frivolous, or that the allegations had already been investigated. Some commenters asked the Department to clarify whether satisfying § 106.45 is the only way, or one of many ways, to comply with the proposed rules and receive the safe harbor protections of § 106.44(b)(1).

Another commenter suggested that the Department add a timeliness requirement to § 106.44(b)(1) so that a formal complaint must be filed within a certain time frame, in order to avoid prejudice or bias against a respondent.

Discussion: As explained in the "Section 106.44(b) Proposed 'Safe harbors,' generally," subsection of the "Recipient's Response in Specific Circumstances" section of this preamble, these final regulations do not include the safe harbor provision that if the recipient follows a grievance process (including implementing any appropriate remedy as required) that complies

with § 106.45 in response to a formal complaint, the recipient's response to the formal complaint is not deliberately indifferent and does not otherwise constitute discrimination under Title IX. The Department understands commenters' concerns that this safe harbor provision may have been confusing or misleading by somehow suggesting that full compliance with § 106.45 is not required – that is, by suggesting that a recipient must only follow § 106.45 in a way that is not deliberately indifferent. The Department is not including this proposed safe harbor provision in the final regulations to make it clear that recipients are always required to fully comply with § 106.45 in response to a formal complaint. Indeed, the Department retains the mandate in § 106.45(b)(1) and revises this mandate for clarity to state: "In response to a formal complaint, a recipient must follow a grievance process that complies with § 106.45." The Department also recognizes, as many commenters stated, that a complainant may not wish to initiate or participate in a grievance process for a variety of reasons, including fear of re-traumatization, and the Department affirms the autonomy of complainants by making it clear that a recipient *must* investigate and adjudicate when a complainant has filed a formal complaint. At the same time, the final regulations ensure that complainants must be offered supportive measures with or without filing a formal complaint, thus respecting the autonomy of complainants who do not wish to initiate or participate in a grievance process by ensuring that such complainants receive a supportive response from the recipient regardless of also choosing to file a formal complaint. For this reason, the Department revised § 106.44(b)(1) to expressly state: "With or without a formal complaint, a recipient must comply with § 106.44(a)." Section 106.44(a) requires a recipient to offer a complainant supportive measures as part of its prompt, non-deliberately indifferent response, whether or not the complainant chooses to file a formal complaint.

The Department disagrees that these final regulations discourage recipients from investigating allegations. As explained previously, a recipient *must* investigate a complainant's allegations when the complainant chooses to file a formal complaint, and a recipient *may* choose to initiate a grievance process to investigate the complainant's allegations even when the complainant chooses not to file a formal complaint, if the Title IX Coordinator signs a formal complaint, after having considered the complainant's wishes and evaluated whether an investigation is not clearly unreasonable in light of the specific circumstances. A recipient, however, cannot impose any disciplinary sanctions or other actions that are not supportive measures against a respondent until after the recipient follows a grievance process that complies with § 106.45. The recipient's Title IX Coordinator may always sign a formal complaint, as defined in § 106.30, to initiate an investigation. The formal complaint triggers the grievance process in § 106.45, which provides notice to both parties of the investigation and provides them an equal opportunity to participate and respond to the allegations of sexual harassment. These final regulations protect both complainants and respondents from the repercussions of an investigation that they do not know about and cannot participate in, and the complainant as well as the respondent may choose whether to participate in the grievance process.[937]

By eliminating § 106.44(b)(1), the Department makes it clear that recipients will not be able to merely "check boxes" or escape liability just for having a process that appears "on paper" to comply with § 106.45. We appreciate the opportunity to clarify that the Department will evaluate a recipient's compliance with § 106.45 without regard to whether the recipient was

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[937] Section 106.71 (added in the final regulations, prohibiting retaliation against any individual for exercising rights under Title IX, including an individual's right to participate, or to choose not to participate, in a Title IX grievance process). *See* the "Retaliation" section of this preamble for further discussion.

"deliberately indifferent" in failing to comply with those provisions. In other words, the Department may find that the recipient violated any of the requirements in § 106.45, whether or not the recipient believes that failure to comply was "not clearly unreasonable." As explained throughout this preamble, including in the "Role of Due Process in the Grievance Process" section of this preamble, the Department has selected all the provisions of the § 106.45 grievance process as those provisions needed to improve the fairness, reliability, predictability, and legitimacy of Title IX grievance processes, and expects recipients to comply with the entirety of § 106.45. For example, the Department may find that a recipient violated § 106.45(b)(2) if the recipient did not provide the requisite written notice of allegations to both parties, even if the recipient believes that the recipient had a good reason for refusing to send that initial written notice. Similarly, a recipient may violate § 106.45(b)(5)(ii) if the recipient does not provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence as part of the investigation, even if the recipient believes that refusing to do so was not clearly unreasonable.

The Department disagrees that the grievance process prescribed by § 106.45 favors respondents or provides no benefits to complainants. For reasons explained throughout this preamble, including in the "Role of Due Process in the Grievance Process" section and the "General Support and Opposition to the § 106.45 Grievance Process" section of this preamble, the Department believes that the § 106.45 grievance process gives complainants and respondents clear, strong procedural rights and protections that foster a fair process leading to reliable outcomes. For example, a complainant whose allegations of sexual harassment in a formal complaint are dismissed may appeal such a dismissal on specific grounds under § 106.45(b)(8)(i). The grievance process in § 106.45 provides consistency, predictability, and

transparency as to a recipient's obligations and what students can expect when a formal complaint is filed. As many commenters appreciated, under the final regulations, if the complainant decides to file a formal complaint, this will trigger a grievance process that includes the procedural safeguards set forth in § 106.45.

The Department understands commenters' arguments that § 106.44b)(1) does not afford recipients flexibility to select a grievance process that the recipient prefers over the process prescribed in § 106.45. For reasons described in the "Role of Due Process in the Grievance Process" section of this preamble, and in the "General Support and Opposition to the § 106.45 Grievance Process" section of this preamble, the Department believes that the grievance process prescribed by § 106.45 creates a standardized framework for resolving formal complaints of sexual harassment under Title IX while leaving recipients discretion to adopt rules and practices not required under § 106.45.[938] We reiterate that the § 106.45 grievance process applies only to formal complaints alleging sexual harassment as defined in § 106.30, that occurred in the recipient's education program or activity against a person in the United States. These final regulations do not dictate what kind of process a recipient should or must use to resolve allegations of other types of misconduct. Because a recipient's response to Title IX sexual harassment is part of a recipient's obligation to protect every student's Federal civil right to

[938] The revised introductory sentence in § 106.45(b) provides that any provisions, rules, or practices other than those required by § 106.45 that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in § 106.30, must apply equally to both parties. The final regulations grant flexibility to recipients in other respects. The discussion in the "Other Language/Terminology Comments" subsection of the "Section 106.30 Definitions" section of this preamble notes that recipients may decide whether to calculate time frames using calendar days, school days, or other method. *See also* § 106.45(b)(6)(i) (allowing, but not requiring, live hearings to be held virtually through use of technology); § 106.45(b)(5)(vi) (removing the requirement that evidence in the investigation be provided to the parties using a file-sharing platform); § 106.45(b)(7)(i) (giving recipients a choice between using the preponderance of the evidence standard or the clear and convincing evidence standard).

participate in education programs and activities free from sex discrimination a recipient's response is not simply a matter of the recipient's own codes of conduct or policies; a recipient's response is a matter of fulfilling obligations under a Federal civil rights law. The Department has carefully crafted a standardized grievance process for resolving allegations of Title IX sexual harassment so that every student (and employee) receives the benefit of transparent, predictable, consistent resolution of formal complaints that allege sex discrimination in the form of sexual harassment under Title IX.

The Department acknowledges commenters' concerns that recipients do not have the discretion to forgo a formal grievance process in a situation where the recipient determined the allegations were without merit, frivolous, or had already been investigated, but we decline to grant that kind of discretion because the Department believes that, where a complainant chooses to file a formal complaint and initiate a recipient's formal grievance process, that formal complaint should be taken seriously and not prejudged or subjected to cursory or conclusory evaluation by a recipient's administrators. The purpose of the § 106.45 grievance process is to resolve allegations of sexual harassment impartially, without conflicts of interest or bias, and to objectively examine relevant evidence before reaching a determination regarding responsibility. Permitting a recipient to deem allegations meritless or frivolous without following the § 106.45 grievance process would defeat the Department's purpose in providing both parties with a consistent, transparent, fair process, would not increase the reliability of outcomes, and would increase the risk that victims of sexual harassment will not be provided remedies. The Department notes that the final regulations give recipients discretion to offer informal resolution processes to resolve formal complaints (§ 106.45(b)(9)) and permit discretionary dismissal of a

formal complaint (or allegations therein) by a recipient under limited circumstances (§ 106.45(b)(3)(ii)).[939]

We have also considered commenters' suggestion that the Department add a requirement limiting the amount of time a complainant has for filing a formal complaint, but the Department declines to revise the final regulations to include a statute of limitations or similar time limit.[940] However, we have revised § 106.30 defining "formal complaint" to specify that at the time of filing a formal complaint, the complainant must be participating in or attempting to participate in the recipient's education program or activity. In addition, § 106.45(b)(3)(ii) allows a discretionary dismissal of a formal complaint where the complainant wishes to withdraw the formal complaint (if the complainant notifies the Title IX Coordinator, in writing, of this wish), where the respondent is no longer enrolled or employed by the recipient, or where specific circumstances prevent the recipient from meeting the recipient's burden of collecting evidence sufficient to reach a determination regarding responsibility. The length of time elapsed between an incident of alleged sexual harassment, and the filing of a formal complaint, may, in specific circumstances, prevent a recipient from collecting enough evidence to reach a determination, justifying a discretionary dismissal under § 106.45(b)(3)(ii).

Changes: The Department does not include the safe harbor provision regarding the § 106.45 grievance process that was proposed in § 106.44(b)(1) in the NPRM. Section 106.44(b)(1) in the

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[939] *See* the "Dismissal and Consolidation of Formal Complaints" section of this preamble. We note that one of the bases for discretionary dismissal of a formal complaint (or allegations therein) is where specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination. When a formal complaint contains allegations that are precisely the same as allegations the recipient has already investigated and adjudicated, that circumstance could justify the recipient exercising discretion to dismiss those allegations, under § 106.45(b)(3)(ii).
[940] For further discussion, see the "Formal Complaint" subsection of the "Section 106.30 Definitions" section of this preamble.

final regulations retains the mandate to follow a grievance process that complies with § 106.45 in response to a formal complaint, and adds a mandate that the recipient must comply with § 106.44(a) with or without a formal complaint.

Proposed § 106.44(b)(2) Reports by Multiple Complainants of Conduct by Same Respondent [removed in final regulations]

Comments: A number of commenters expressed opposition to proposed § 106.44(b)(2), which would have required Title IX Coordinators to file a formal complaint upon receiving reports from multiple complainants that a respondent engaged in conduct that could constitute sexual harassment. Commenters opposed this proposed provision due to concerns that the provision could place the safety of victims at risk by requiring a grievance process against a respondent over the wishes of the complainant and could place victims in harm's way without the victim's knowledge or input because nothing in the proposed provision required the Title IX Coordinator to first alert or warn the victim that the Title IX Coordinator would file a formal complaint. Commenters argued that this proposed provision implied that Title IX Coordinators could not file a formal complaint unless a respondent was a repeat offender.

A number of commenters expressed concern that the proposed provision would pose a particular risk in cases dealing with dating violence, domestic violence, or stalking. Commenters argued that survivors often choose not to report intimate partner violence or stalking to authorities for a multitude of reasons, one of which is fear that the perpetrator will retaliate or escalate the violence.

A number of commenters expressed concern that the mandatory filing requirement in proposed § 106.44(b)(2) would violate survivor autonomy. Commenters argued that the proposed provision would violate autonomy principles embedded elsewhere in the proposed

rules. Commenters argued the Department's contradictory statements regarding the importance of survivor autonomy were arbitrary and capricious. Commenters argued that requiring schools to trigger formal grievance procedures when the school has received multiple reports of harassment by the same perpetrator would violate survivor autonomy and discourage reporting. One commenter asserted that the proposed provision would retraumatize victims by forcing an investigation when no victim wants to testify against the perpetrator. One commenter asserted that this provision would exacerbate survivors' feelings of powerlessness. Commenters asserted that students should be able to discuss a situation without the Title IX office initiating a formal process without the complainant's permission. Commenters stated that sometimes a student may want advice, or want supportive measures, without desiring a formal process.

A number of commenters expressed concern that requiring Title IX Coordinators to file formal complaints against the wishes of complainants will lead to violations of confidentiality of survivors who already do not want to come forward, and may not come forward at all if there is a risk that the school will violate their wishes by investigating. Commenters argued that victims who report but do not wish to pursue a formal complaint would be forced into potentially dangerous situations unknowingly, since nothing in the proposed rules imposed a duty on the institution to offer safety measures or accommodations. Other commenters asserted that litigation arising out of Title IX proceedings is common, and that requiring a recipient to pursue a grievance proceeding against a respondent invites the respondent to then name the complainant as a party to subsequent litigation even when the complainant did not want to initiate an investigation in the first place.

A number of commenters expressed concern that deeming the Title IX Coordinator as a complainant (by requiring them to file a formal complaint) creates a significant conflict of

interest by placing the Title IX Coordinator in an adversarial position against the respondent. Other commenters argued that asking the Title IX Coordinator to sign and file a formal complaint in cases where complainants are unwilling to participate would make it impossible for the Title IX Coordinator to maintain the appearance of neutrality, even if they are in fact unbiased in all other ways. Other commenters expressed concern that if the person who reported the incident is reluctant to come forward, it would place the Title IX Coordinator, who should be an impartial resource, into a role of advocating for a specific person's report.

A number of commenters argued that the proposed provision would chill reporting of sexual harassment because victims would fear being drawn involuntarily into a formal process. Commenters suggested that, if institutions file formal complaints without the willing, informed participation of the victim, some requirements, including the cross-examination requirement, should be adjusted, to protect victims who did not consent to participate in a grievance process from negative consequences that commenters argued may possibly result from participating in a grievance process, especially a live hearing. Commenters argued that these consequences might include fear of re-traumatization from being cross-examined, questions perceived as invasions of privacy, and lawsuits filed by respondents based on testimony given during a Title IX hearing.

Commenters argued that this provision would depart from best practices for helping victims. Commenters asserted that in order to effectively address sex discrimination, educational institutions must be able to cultivate relationships of trust with community members with regard to reporting systems, and that this proposed provision would mean that recipients would violate the wishes of reporting parties, thereby betraying and violating their trust. Commenters asserted that the ability of a complainant to seek supportive measures without risking public exposure is foundational to creating conditions under which community members are more willing to avail

themselves of institutional support, including formal grievance proceedings. Commenters expressed concern that, in the absence of supportive measures, many survivors cannot keep up with the demands of rigorous schoolwork while dealing with the impacts of trauma, and this proposed provision would leave complainants in a position of never knowing whether the complainant's report of sexual harassment would result in a formal process, because the complainant would have no way of knowing whether another complainant's report would trigger proposed § 106.44(b)(2).

Commenters expressed concern that proposed § 106.44(b)(2) would conflict with or be in tension with the requirement in § 106.45(b)(6)(i) that schools disregard statements provided by witnesses or parties who do not submit to cross-examination at a hearing, because if alleged victims are unwilling to participate in the process and be subject to cross-examination, then the adjudicator is not permitted to consider the complainant's statements, rendering the filing of a formal complaint by a Title IX Coordinator potentially futile. Commenters argued that there was a conflict between proposed § 106.44(b)(2) and the proposed requirement in § 106.45(b)(3) that a recipient must dismiss a complaint if the alleged harassment did not occur within the recipient's education program or activity; commenters questioned how the recipient should respond when multiple reports are made against the same respondent, but one or more of the reported incidents did not take place within the education program or activity of the school and suggested that to solve this conflict, recipients should make a good faith investigation into all reports of sexual harassment, regardless of the location of the incident, when one or more parties involved in the report are under the "purview" of the recipient.

A number of commenters argued that proposed § 106.44(b)(2) would not meet its stated goal of protecting students because the provision would not be limited only to stopping serial

predators. Commenters argued that the proposed provision would incentivize schools to bring weak cases against serial perpetrators that may allow the predators to escape responsibility. Commenters expressed concern if schools are forced to move forward without the participation of complainants in every case where there are multiple reports of sexual harassment against the same respondent, then this may lead to dismissals or inaccurate findings of non-responsibility. Other commenters expressed concern that this proposed provision was designed to help recipients, not protect victims. Commenters argued the proposed provision was a designed-to-fail framework that would protect a recipient from a claim by another victim who is attacked by the same perpetrator, since all the recipient would be required to do is show that it made a *pro forma* attempt to comply with its obligations, to qualify for the safe harbor. Other commenters expressed concern that a recipient impermissibly motivated by sex stereotypes could exploit this proposed provision to engage in discriminatory practices that would otherwise constitute a violation of Title IX.

Commenters argued that this proposed provision could put a recipient in the untenable situation of being required to apply the formal grievance processes to a situation the recipient does not believe it can adequately investigate or that the recipient reasonably believes can be addressed through other appropriate means. A number of commenters expressed concern that this proposed provision would remove the Title IX Coordinator's discretion; commenters asserted that instead, Title IX Coordinators should evaluate what the appropriate response is, whether it be a formal investigation or putting the respondent on notice of the behavior complained about. Commenters argued that, consistent with the 2001 Guidance, recipients should continue to have discretion in determining whether or how to address multiple reports

involving a single respondent in cases where complainants wish to remain anonymous or for other reasons are unwilling to participate in formal proceedings.

A number of commenters argued that proposed § 106.44(b)(2) would alter and harm the valuable function of the Title IX Coordinator. Other commenters expressed concern that this proposed provision would complicate the role of the Title IX Coordinator because if the Title IX Coordinator receives a report from a resident advisor or faculty member (rather than from the victim themselves), and then subsequently receives a report from a victim alleging a similar incident involving the same perpetrator, the Title IX Coordinator might be confused about whether or not the proposed provision requires the Title IX Coordinator to file a formal complaint.

One commenter asserted that proposed § 106.44(b)(2) would put schools at risk for liability for monetary damages in private Title IX lawsuits, as well as other State tort actions.

Commenters asserted that sometimes a third party reports an alleged sexual harassment situation, but the alleged victim insists that there was no violation and in cases like that, the recipient should be required to make a report that is not attached to either party's transcript, but that can be referenced if the alleged victim later wishes to file a formal complaint.

Discussion: Despite the intended benefits of proposed § 106.44(b)(2) described in the NPRM, the Department is persuaded by the many commenters who expressed a variety of concerns about requiring the Title IX Coordinator to file a formal complaint after receiving multiple reports about the same respondent. In addition to raising serious concerns about the potential effects on complainants, commenters also described practical problems with proposed § 106.44(b)(2) in

relation to the rest of the final regulations. As a result, the Department is removing proposed § 106.44(b)(2) entirely.[941]

The Department is persuaded by commenters who argued that this proposed provision would have removed the Title IX Coordinator's discretion without necessary or sufficient reason to do so. The Department agrees that the Title IX Coordinator should have the flexibility to evaluate and determine an appropriate response under pertinent facts and circumstances. The Department agrees with commenters who argued that institutions should continue to have discretion in determining whether or how to address multiple reports involving a single respondent in cases where complainants wish to remain anonymous or otherwise are unwilling to participate in a formal process. Removing this proposed provision means that Title IX Coordinators retain discretion, but are not required, to sign formal complaints after receiving multiple reports of potential sexual harassment against the same respondent. We believe that this approach properly balances complainant autonomy, campus safety, and recipients' use of resources that would otherwise be required to be used to institute a potentially futile grievance process. The Department was persuaded by commenters' concerns that under the proposed rules, filing a formal complaint might have resulted in a Title IX Coordinator becoming a "complainant" during the grievance process, or creating a conflict of interest or lack of neutrality. We have revised the definitions of "complainant" and "formal complaint" in § 106.30 to clarify that when a Title IX Coordinator chooses to sign a formal complaint, that action is not taken "on behalf of" the complainant; the "complainant" is the person who is alleged to be the

[941] The section number, 106.44(b)(2), now refers to the provision discussed in the "Section 106.44(b)(2) OCR Will Not Re-weigh the Evidence" subsection of the "Recipient's Response in Specific Circumstances" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this preamble.

victim of conduct that could constitute sexual harassment. Those revisions further clarify that when a Title IX Coordinator signs a formal complaint, the Title IX Coordinator does not become a complainant or otherwise a party to the grievance process, and must abide by § 106.45(b)(1)(iii), which requires Title IX personnel to be free from conflicts of interest and bias, and serve impartially. We do not believe that signing a formal complaint that initiates a grievance process inherently creates a conflict of interest between the Title IX Coordinator and the respondent; in such a situation, the Title IX Coordinator is not advocating for or against the complainant or respondent, and is not subscribing to the truth of the allegations, but is rather instituting a grievance process (on behalf of the recipient, not on behalf of the complainant) based on reported sexual harassment so that the recipient may factually determine, through a fair and impartial grievance process, whether or not sexual harassment occurred in the recipient's education program or activity.

The Department is persuaded by commenters' concerns that the proposed provision would have created tension with § 106.45(b)(6)(i), which mandates that if a party or witness does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility. The Department is persuaded by commenters' arguments that the proposed provision would have incentivized or forced recipients to file futile complaints against respondents with no complaining witness willing to testify at a live hearing. Whether or not proposed § 106.44(b)(2) would have conflicted with § 106.45(b)(3), the proposed provision § 106.44(b)(2) has been removed from the final regulations, and we have revised § 106.45(b)(3) to clarify that a recipient may choose to address allegations of sexual harassment that occurred outside the recipient's education program or activity, through non-Title IX codes of conduct. Where a complainant does

not wish to participate in a grievance process, including being cross-examined at a live hearing, the recipient is not permitted to threaten, coerce, intimidate, or discriminate against the complainant in an attempt to secure the complainant's participation.[942] Thus, even if a Title IX Coordinator has signed a formal complaint, the complainant is not obligated to participate in the ensuing grievance process and need not appear at a live hearing or be cross-examined. We have added § 106.71 prohibiting retaliation and expressly protecting any person's right *not* to participate in a Title IX proceeding.

The Department is also persuaded that a chilling effect on victim reporting can be avoided by eliminating this proposed provision. The Department is persuaded by commenters' concerns that complainants who are unwilling to file a formal complaint should be able to confidentially seek supportive measures without fear of being drawn into a formal complaint process whenever the Title IX Coordinator receives a second report from another complainant about the same respondent. The Department is persuaded by commenters' arguments that students should be able to discuss a situation with a Title IX Coordinator without the Title IX Coordinator being required to initiate a grievance process against the complainant's wishes, and by commenters' assertions that it is not uncommon for respondents filing private lawsuits against the recipient to include the complainant as a party to such lawsuits, so dragging a complainant into a grievance process against the complainant's wishes exposes the complainant to potential involvement in private litigation as well.

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[942] Section 106.71(a).

The Department appreciates commenters' suggestions for specific changes and clarifications to proposed § 106.44(b)(2); however, there is no need to consider such changes or clarifications because we are removing this proposed provision from the final regulations.

Changes: The Department has not included proposed § 106.44(b)(2) in the final regulations.

Comments: Some commenters expressed support for proposed § 106.44(b)(2), asserting that it would be valuable for the protection of sexual assault victims on university campuses. Other commenters argued that it is common sense for the Title IX Coordinator to be able to file complaints against bad actors. Some commenters argued that the provision would improve the responsiveness of university Title IX Coordinators to sexual assault or harassment allegations at institutions around the country. Other commenters supported this proposed provision so that Title IX Coordinators would file a complaint against repeat sexual offenders even when no victim was willing to file a formal complaint because this would protect a complainant's confidentiality.

Discussion: For the reasons discussed above, the Department is persuaded that eliminating proposed § 106.44(b)(2) better serves the Department's goals of ensuring that recipients respond adequately to reports of sexual harassment without infringing on complainant autonomy. Elimination of this proposed provision leaves Title IX Coordinators discretion to sign a formal complaint initiating a grievance process, when doing so is not clearly unreasonable in light of the known circumstances, without mandating such a response every time multiple reports against a respondent are received. We note that contrary to some commenters' belief, the proposed provision would not have protected complainants' confidentiality by requiring Title IX Coordinators to file formal complaints, because the recipient would still have been required

under § 106.45(b)(2) to send written notice of the allegations to both parties, and the written notice must include the complainant's identity, if known.

Changes: The Department has not included proposed § 106.44(b)(2) in the final regulations.

Comments: Some commenters suggested expanding or modifying proposed § 106.44(b)(2), for example by specifying factors to consider as to whether a pattern of behavior might present a potential threat to the recipient's community. Some commenters suggested specifying that a formal complaint must be filed where threats, serial predation, violence, or weapons were allegedly involved.

Commenters recommended adding a credibility threshold to proposed § 106.44(b)(2) specifying that a Title IX Coordinator would only be required to file a formal complaint upon receiving multiple *credible* reports against the same respondent, so that the Title IX Coordinator would not need to file a formal complaint where reports appeared frivolous or unfounded.

Commenters suggested that the Department adopt the model used by Harvard Law School for its Title IX compliance, which as described by commenters provides that (1) that there be a complainant willing to participate before the recipient will initiate a formal investigation and (2) the only time an action should be pursued without a willing complainant is if there is a serious risk to campus-wide safety and security. Several commenters suggested that, in instances where there are reports by multiple complainants but none are willing to participate in the proceedings, the Department could ensure accountability by requiring the recipient to document its reason for not initiating a formal complaint rather than requiring the recipient to file a formal complaint in every such situation.

Discussion: The Department appreciates commenters' suggestions for specific changes to proposed § 106.44(b)(2); however, we decline to make such changes because we are removing

this proposed provision from the final regulations for the reasons described above. The Department declines to adopt in these final regulations the suggestion that patterns of behavior be considered as a factor to determine whether possible future threats to the community warrant filing a formal complaint even where a complainant does not wish to file; however, as discussed above, elimination of proposed § 106.44(b)(2) leaves the Title IX Coordinator discretion to sign a formal complaint where doing so is not clearly unreasonable in light of the known circumstances. The Title IX Coordinator may consider a variety of factors, including a pattern of alleged misconduct by a particular respondent, in deciding whether to sign a formal complaint. By giving the recipient's Title IX Coordinator the discretion to sign a formal complaint in light of the specific facts and circumstances, the Department believes it has reached the appropriate balance between campus safety, survivor autonomy, and respect for the most efficient use of recipients' resources. We also note that under the final regulations, including revised § 106.44(a), a Title IX Coordinator's decision to sign a formal complaint may occur only after the Title IX Coordinator has promptly contacted the complainant (i.e., the person alleged to have been victimized by sexual harassment) to discuss availability of supportive measures, consider the complainant's wishes with respect to supportive measures, and explain to the complainant the process for filing a formal complaint. Thus, the Title IX Coordinator's decision to sign a formal complaint includes taking into account the complainant's wishes regarding how the recipient should respond to the complainant's allegations.

The Department disagrees with the suggestion to expand the proposed provision to cover other circumstances such as alleged use of threats, violence, or weapons, because we are persuaded by commenters that leaving the Title IX Coordinator discretion to sign a formal complaint is preferable to mandating circumstances under which a Title IX Coordinator must

sign a formal complaint. The final regulations give the Title IX Coordinator discretion to sign a formal complaint, and the Title IX Coordinator may take circumstances into account such as whether a complainant's allegations involved violence, use of weapons, or similar factors. The Department eliminated proposed § 106.44(b)(2) in part due to concerns expressed by commenters about survivor autonomy and safety; in some situations, the Title IX Coordinator may believe that signing a formal complaint is not in the best interest of the complainant and is not otherwise necessary for the recipient to respond in a non-deliberately indifferent manner. With the elimination of this provision, however, the Title IX Coordinator still possesses the discretion to sign formal complaints in situations involving threats, serial predation, violence, or weapons. Even in the absence of a formal complaint being filed, a recipient has authority under § 106.44(c) to order emergency removal of a respondent where the situation arising from sexual harassment allegations presents a risk to the physical health or safety of any person. Nothing in the final regulations prevents recipients, Title IX Coordinators, or complainants from contacting law enforcement to address imminent safety concerns.

Because the final regulations do not include this proposed provision, the Department does not further consider the commenter's suggestion to revise the eliminated provision by adding the word "credible" before "reports." As discussed previously, the Department has removed this provision to respect complainant autonomy and avoid chilling reporting by mandating that a Title IX Coordinator sign a formal complaint over a complainant's wishes; the commenter's suggestion for modifying this proposed § 106.44(b)(2) would not change the Department's belief that the proposed provision should be removed in its entirety, because narrowing the circumstances under which the Title IX Coordinator would be required to sign a formal complaint over the complainant's wishes would not address the concerns raised by many

commenters that persuaded the Department of the need to respect survivor autonomy by giving a Title IX Coordinator discretion (without making it mandatory) to sign a formal complaint. The Department further notes that one of the purposes of the § 106.45 grievance process is to ensure that determinations are reached only after objective evaluation of relevant evidence by impartial decision-makers, and therefore permitting or requiring a Title IX Coordinator to only respond to reports or formal complaints that the Title IX Coordinator deems "credible" would defeat the goal of following a grievance process to reach reliable outcomes. Similarly, the commenter's suggestion to require the recipient to document its reason for not initiating a formal complaint following reports by multiple complainants does not alter the Department's conclusion that the better way to respect survivor autonomy and the discretion of a Title IX Coordinator is to remove proposed § 106.44(b)(2) from the final regulations, so that a Title IX Coordinator retains the discretion to sign a formal complaint, but is not mandated to do so. We note that § 106.45(b)(10) does require a recipient to document the reasons for its conclusion that its response to any reported sexual harassment was not deliberately indifferent.

The Department declines to adopt the Harvard Law School model because we believe the final regulations provide the same or similar benefits with respect to requiring a grievance process only where a formal complaint has been filed by a complainant or signed by a Title IX Coordinator. For reasons discussed in the "Formal Complaint" subsection of the "Section 106.30 Definitions" section of this preamble, third parties are not allowed to file formal complaints.

Changes: None.

Proposed § 106.44(b)(3) Supportive Measures Safe Harbor in Absence of a Formal Complaint [removed in final regulations]

Comments: Many commenters appreciated that the proposed safe harbor regarding supportive measures would provide an incentive for institutions to offer supportive measures for both parties. Several commenters recounted personal stories of accused individuals being removed from classes and dorms before a determination had been made about pending allegations. Many commenters supported § 106.44(b)(2) for not requiring an individual to file a formal complaint in order to obtain supportive measures and for expressly including the requirement that, when offering supportive measures, recipients must notify a complainant of the right to file a formal complaint at a later date if they wish. Many commenters asserted that often, supportive measures are sufficient for both parties to deal with a situation without causing additional trauma to either party.

Some commenters expressed concern that the proposed safe harbor regarding supportive measures would effectively relieve institutions of the responsibility to hold respondents accountable and address sexual harassment on campuses. Many commenters argued that offering "meager" supportive measures to a student in lieu of investigating allegations would not satisfy a recipient's obligations under Title IX and asked the Department to clarify that the provision of supportive measures is not always adequate to satisfy the deliberate indifference standard.

Many commenters argued that the proposed safe harbor regarding supportive measures actually created a barrier to providing supportive measures for elementary and secondary school victims because the provision applied only to institutions of higher education, and asked the Department to modify the proposed rules to extend this supportive measures safe harbor to the elementary and secondary school context either by creating a separate safe harbor with nearly

identical language or by deleting the phrase "for institutions of higher education" in the proposed regulatory text. One commenter asserted that § 106.44(b)(3) is redundant because it merely repeats the standard of § 106.44(a). One commenter argued that, when combined with the Department's proposed definition of sexual harassment, this proposed provision would create a safe harbor for educational institutions to avoid liability.

Other commenters suggested that the Department modify the proposed safe harbor regarding supportive measures to expressly prohibit institutions from coercing a complainant into accepting supportive measures in lieu of filing a formal complaint. At least one commenter suggested adding an outer time limit to a party's right to file a formal complaint "at a later time," asserting that this proposed provision was inconsistent with the recordkeeping requirement in the proposed regulations, which would have allowed a record to be destroyed in three years (this retention period has been revised to seven years in § 106.45(b)(10) of the final regulations).

Discussion: As explained in the "Section 106.44(b) Proposed 'Safe harbors,' generally," subsection of the "Recipient's Response in Specific Circumstances" section of this preamble, these final regulations do not include the safe harbor provision that a recipient is not deliberately indifferent when in the absence of a formal complaint the recipient offers and implements supportive measures designed to effectively restore or preserve the complainant's access to the recipient's education program or activity, and the recipient also informs the complainant in writing of the right to file a formal complaint. This safe harbor is now unworkable and unnecessary in light of other revisions made to the proposed regulations, specifically a recipient's obligations in § 106.44(a) and § 106.45(b)(10)(ii). Under § 106.44(a), a recipient's response must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30, and a Title IX Coordinator must promptly contact the complainant to

discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. As previously explained, § 106.45(b)(1) now contains an additional mandate that with or without a formal complaint, a recipient must comply with § 106.44(a), which places recipients on notice that it must offer supportive measures to a complainant. Additionally, under § 106.45(b)(10)(ii), if a recipient does not provide a complainant with supportive measures, then the recipient must document why such a response was not clearly unreasonable in light of the known circumstances. As recipients are now required to offer supportive measures to a complainant and to document why not providing a complainant with supportive measures was not clearly unreasonable in light of the known circumstances, the final regulations no longer provides a safe harbor. Recipients cannot receive a safe harbor for offering supportive measures because recipients are now required to offer supportive measures under these final regulations. Accordingly, the Department does not include the proposed safe harbor regarding supportive measures in these final regulations.

With respect to concerns that respondents may suffer disciplinary sanctions or punitive action stemming from pending allegations, the Department notes that § 106.44(a) expressly provides that a recipient's response must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. Additionally, supportive measures in § 106.30 are expressly defined as non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available,

and without fee or charge to the complainant or the respondent. Supportive measures must not have a punitive or disciplinary consequence for either complainants or respondents.

Even without the proposed safe harbor provision regarding supportive measures, the Department believes that these final regulations appropriately draw recipients' attention to the importance of offering supportive measures to all students, including students who do not wish to initiate a recipient's formal grievance process, and thus give complainants greater autonomy to decide if supportive measures, alone, represent the kind of school-level response that will best help the complainant heal after any trauma. The Department in part requires a recipient to offer supportive measures to all complainants under § 106.44(a) because the Department recognizes that, in many cases, a complainant's equal access to education can be effectively restored or preserved through the school's provision of supportive measures. Accordingly, the Department provides an additional mandate in § 106.44(b)(1), that with or without a formal complaint, a recipient must comply with § 106.44(a) (e.g., by offering the complainant supportive measures).

We are persuaded by commenters' assertions that providing supportive measures to a complainant does not always satisfy a recipient's obligation to respond in a non-deliberately indifferent manner to known sexual harassment. In some circumstances and depending on the unique facts, a non-deliberately indifferent response may require the recipient's Title IX Coordinator to sign a formal complaint as defined in § 106.30 so that the recipient initiates the grievance process in § 106.45. The Department acknowledges that a recipient should respect the complainant's autonomy and wishes with respect to a formal complaint and grievance process to the extent possible.

As the proposed safe harbor regarding supportive measures is no longer included in these final regulations, we do not revisit whether excluding elementary and secondary school

recipients from this safe harbor was preferable to modifying the proposed safe harbor to also apply to elementary and secondary schools. Revised § 106.44(a) requires every recipient (including elementary and secondary schools) to offer supportive measures to complainants.

The Department understands the concern that a recipient may coerce potential complainants into accepting supportive measures in lieu of a formal grievance process. Partly in response to these concerns, the Department revised § 106.44(a) to require that a Title IX Coordinator promptly contact a complainant not only to discuss supportive measures but also to explain to the complainant the process for filing a formal complaint. Accordingly, a complainant will know how to file a formal complaint, if the complainant wishes to do so. We have also added § 106.71 to expressly forbid a recipient from threatening, intimidating, coercing, or discriminating against any complainant for the purpose of chilling the complainant's exercise of any rights under Title IX, which includes the right to file a formal complaint, and to receive supportive measures even if the complainant chooses not to file a formal complaint.

The Department agrees that the safe harbor, as proposed, is redundant, especially in light of the revisions to § 106.44(a), requiring a recipient to offer supportive measures to a complainant. As this safe harbor is not included in these final regulations, this safe harbor does not provide a way for a recipient to avoid responsibility.

For reasons discussed above, the Department declines to revise the final regulations to include a statute of limitations or similar time limit on filing a formal complaint but as discussed in the "Formal Complaint" subsection of the "Section 106.30 Definitions" section of this preamble, the Department has revised the final regulations to provide that at the time of filing a formal complaint, the complainant must be participating in or attempting to participate in the recipient's education program or activity. This provides a reasonable condition on a

complainant's ability to require a recipient to investigate, based on the complainant's connection to the recipient's education program or activity rather than by imposing a statute of limitations or similar time-based deadline. A complainant may be "attempting to participate" in the recipient's education program or activity in a broad variety of circumstances that do not depend on a complainant being, for instance, enrolled as a student or employed as an employee. A complainant may be "attempting to participate," for example, where the complainant has withdrawn from the school due to alleged sexual harassment and expresses a desire to re-enroll if the recipient responds appropriately to the sexual harassment allegations, or if the complainant has graduated but would like to participate in alumni events at the school, or if the complainant is on a leave of absence to seek counseling to recover from trauma. In addition, the Department has also revised the final regulations to provide in § 106.45(b)(3)(ii) that a recipient has the discretion to dismiss a formal complaint against a respondent who is no longer enrolled or employed by the recipient. While these provisions are not an express limit on the amount of time a complainant has to file a formal complaint, the Department believes these provisions help address commenters' concerns about being forced to expend resources investigating situations where one or both parties have no affiliation with the recipient, without arbitrarily or unreasonably imposing a deadline on complainants, in recognition that complainants sometimes do not report or desire to pursue a formal process in the immediate aftermath of a sexual harassment incident.

Changes: The Department does not include the safe harbor provision proposed in the NPRM as § 106.44(b)(3). The Department adds a mandate to § 106.44(b)(1) that the recipient must comply with § 106.44(a), with or without a formal complaint.

Section 106.44(b)(2) OCR Will Not Re-weigh the Evidence

Comments: Some commenters appreciated that the proposed rules contained an express guarantee that an institution will not be deemed deliberately indifferent solely because the Assistant Secretary would have reached a different determination regarding responsibility based on an independent weighing of the evidence. Some commenters expressed concerns that § 106.44(b)(2) would result in a lack of accountability or oversight for how schools or colleges handle sexual harassment complaints. Other commenters contended that this provision would unjustifiably reduce the Department's oversight unless a school's actions are clearly unreasonable. Some commenters asserted that the provision would improperly defer to a school district's determination, which commenters argued is not always the appropriate way to ensure Title IX accountability. A number of commenters felt that § 106.44(b)(2) would spur more civil lawsuits to hold schools accountable, because the Department would no longer be holding schools accountable.

Several commenters argued that the proposed provision would negatively impact OCR's ability to investigate non-compliance under Title IX, which would dangerously lower the bar of compliance and signal that a bare, minimal response to sexual harassment would suffice. Other commenters warned that the provision would limit OCR's ability to evaluate a school's response to sexual harassment, which would effectively narrow over 20 years of Title IX enforcement standards. Several commenters expressed their belief that OCR plays a key role as an independent, impartial investigator. For example, one commenter argued that OCR, as an independent entity, is more qualified than a school to perform an impartial investigation because the school has its own financial interests at stake and is thus less likely to identify inaccuracies in its own procedures. Another commenter asserted that OCR's independent weighing of evidence