FACE.

Families Advocating for Campus Equality

Comment on Proposed Title IX Rulemaking
Docket No. ED-2018-OCR-0064, RIN 1870-AA14
Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance
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I. Introduction

Families Advocating for Campus Equality (FACE) is a non-profit whose mission is is to support and advocate for equal treatment and due process for those affected by inequitable Title IX campus disciplinary processes, and influence campus culture through outreach and education. FACE does not advocate for the withdrawal of victim protections or civil rights under Title IX.

We agree wholeheartedly with Secretary DeVos' statement that "Every survivor of sexual misconduct must be taken seriously. Every student accused of sexual misconduct must know that guilt is not predetermined. These are non-negotiable principles."[1] The Department of Education's Office for Civil Rights' (Department) proposed amendments to part 106 of the Code of Federal Regulations (CFR) make significant progress toward achieving this goal by requiring that the rights of complainants and respondents in Title IX proceedings be equally respected.

The Department has proposed these regulations in an effort to counter discriminatory effects of prior guidance that instructed educational institutions to treat respondents' due process rights as subordinate to those of complainants, an instruction that brazenly demanded unequal equal treatment of parties in a Title IX dispute.

Most Americans are unaware that previous Department guidance denied these important protections created over centuries for the express purpose of ensuring decisions are accurate. Those protections, central to the equitable investigation and adjudication of any allegation of wrongdoing, include the right to be informed of the allegations against oneself, the opportunity to be informed of and have access to exculpatory and inculpatory evidence, representation by an advocate, the opportunity to tell one's story to unbiased decision-makers who do not also serve as investigators, and the opportunity to ask and observe one's accuser and other adverse witnesses respond to questions concerning the allegations.

Previous Department guidance caused educational institutions to tilt the scales of justice in favor of complainants by adopting victim-centered training programs such as those that instructed Title IX adjudicators to "believe the victim," implementing the lowest possible standard of evidence (more likely than not) and allowing complainants to appeal not responsible findings. The resulting, one-sided system has triggered a wave of lawsuits in both state and federal courts and earned criticism from countless experts.

Issues surrounding sexual assault are by their very nature emotional, but many criticisms have been directed at Department officials personally. We have also heard that the rules intend to prejudice survivors of sexual misconduct, though most critics, including congressional representatives who should know better, cannot identify the specific provisions that purportedly do so.

We commend the Department for its efforts in assuring neither complainants nor respondents are subjected to sex discrimination in violation of Title IX, and provide some suggestions in areas in which we believe the rules might be improved.

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

II. General Issues

A. *Remedial Action; Due Process Protections*

Section 106.3(a): *Remedial action; Due process protections*
[Fed. Reg. p. 61495, col. 3[2]]

***Comment*:** This proposed section allows the Department, upon finding a recipient has violated part 106 of Title 34 of the Code of Federal Regulations (CFR), to take remedial action on behalf of complainants against the school, but not to assess damages. This rule is well grounded in U.S. Supreme Court precedent and Title IX statutory interpretation. While the language added by the proposed rules disallows an assessment of damages on behalf of complainants, it does allow the Department to require a school to provide reimbursement to complainants for reasonable and documented expenses for services that the school was required but failed to provide.

The phrase "on the basis of sex" in existing section 106.3(a) would be replaced by "a violation of this part." The broadening of this language is appropriate, as changes proposed for part 106 include procedural and other requirements necessary to respond to and remedy potential sex discrimination against both complainants and respondents. Faced with female-male disputes, many adjudicators reflexively, and perhaps understandably, presume women are victims and men the perpetrators.[3] Consequently, male students accused of sexual misconduct have faced sex discrimination when their complaints were not taken seriously, even though men are almost as likely to be sexual misconduct victims as women.[4] In fact, an American Association of Universities survey at twenty-seven institutions of higher education, revealed that 40.9% of undergraduate heterosexual males had experienced sexual harassment, intimate partner violence, or stalking, compared to 60.5% of undergraduate heterosexual females.[5]

***Recommend*:** Proposed section 106.3(a) should be adopted as amended. The rules' newly-added due process protections will require thoroughness and objectivity on the part of colleges while giving respondents more tools to defend themselves. We believe these procedures will reduce sex-biased outcomes and replace gender stereotypical assumptions with facts and evidence.[6]

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[2] All Fed. Reg. references are page and column (col.) citations to the Federal Register, Vol. 83, No. 230, beginning at p. 61462, published Thursday, November 29, 2018, https://www.govinfo.gov/content/pkg/FR-2018-11-29/pdf/2018-25314.pdf .

[3] For further discussion of anti-male sex bias see section III. below for a definition of supportive measures which to which both parties are entitled, and section V. below discussing proposed section 106.45(a) regarding discrimination on the basis of sex in the application of Title IX policies and procedures.

[4] *National Intimate Partner and Sexual Violence Survey* (NISVS), *2010 Summary Report*, Tables 2.1 and 2.2. http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf According to the NISVS, similar percentages of men and women (Men: 5.3%; Women: 5.6%) experience sexual violence other than rape each year; see also National Alliance to End Sexual Violence website ("About 14% of reported rapes involve men or boys, 1 in 6 reported sexual assaults is against a boy, and 1 in 25 reported sexual assaults is against a man.")

[5] Cantor et. Al, *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct, 2015*, revised October 20, 2017, Table 5-3, p. 106, https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/AAU-Campus-Climate-Survey-FINAL-10-20-17.pdf

[6] For example, the regulation's requirement that schools provide an objective and thorough investigation, live hearing, cross-examination, and disclosure of evidence.

B. *Interaction with Other Laws and Constitutional Rights*

This section addresses the following proposed sections:

- Section 106.6(d): *Constitutional protections; the First and Fifth Amendments*
- Section 106.6(e): *Effect of GEPA/ FERPA*
- Section 106.6(f): *Title VII of the Civil Rights Act*

Section 106.6(d): *Constitutional protections; First and Fifth Amendments*
[Fed. Reg. p. 61495, col. 3]

Comment: New subsection (d) clarifies that nothing in section 106.6 requires a recipient to restrict any rights that are protected from governmental action under the First Amendment, the Due Process Clauses of the Fifth and Fourteenth Amendments, or any other constitutional right.

First Amendment: The Department notes it has heard "concerns" "that Title IX enforcement has had a chilling effect on free speech."[7] This change is the Department's effort to clarify that Title IX does not require schools to infringe upon any individual's constitutional right to free speech.

Fifth Amendment: The Fifth Amendment privilege against compulsory self-incrimination "protects against any disclosures that a witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used."[8] Unfortunately, the proposed section does not specifically address the increasingly common interaction between Title IX and the Fifth Amendment. Accused students facing both a school disciplinary hearing and criminal prosecution are left with two choices: (1) waive their Fifth Amendment right to remain silent in order to defend themselves in the disciplinary process; or (2) exercise their Fifth Amendment right and have their silence held against them. This is particularly problematic because proposed section 106.45(b)(3)(vii) specifically precludes a recipient from considering statements by parties that refuse to subject themselves to cross-examination.[9] Though it is not clear, even a respondent's general denial could fall within this prohibition.

***Recommend*:**

First Amendment: Concerning the relationship between the proposed rules and First Amendment free speech protections, it would be helpful to include examples of what types of speech might cross the line into sexual harassment under Title IX.

Fifth Amendment: The dilemma faced by respondents subject to concurrent Title IX and criminal proceedings cannot be overestimated. As more and more recipient Title IX offices work closely with criminal authorities through MOUs and other agreements, FACE is hearing about respondents' statements from Title IX proceedings being used against them in criminal proceedings. Because there is no Miranda warning required in the Title IX process, we are concerned students may not be cognizant of this potential use of their statements.

At least one court has found an institution's refusal to grant a request from the local prosecutor to delay its adjudication proceedings, allegedly out of fear of an OCR investigation, constituted sex

[7] Fed. Reg., p. 61481.
[8] *Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt Cnty.*, 542 U.S. 177, 190 (2004).
[9] Discussed further in Section VIII. below at p. 35.

discrimination.[10] Today, however, it is more likely law enforcement will delay criminal prosecution until the Title IX proceeding is completed. Law enforcement is being encouraged to "actively seek to develop quality working relationships with the Title IX offices" in order to obtain evidence and statements acquired without a Miranda warning in Title IX proceedings:

> Many times institutional investigations can uncover witnesses who might be unknown to law enforcement, and because participation in the institutional investigation is mandated for students, staff, and faculty the institutions often have statements from witnesses who may choose not to cooperate with or participate in the law enforcement investigation. [¶] The investigation records are generally confidential and protected under the Federal Educational Right to Privacy Act (FERPA) but may be obtained pursuant to a validly issued search warrant or court issued subpoena.[11]

The proposed regulations would benefit from clarification and examples regarding how the Department will interpret the interaction between the Fifth Amendment and the due process procedures proposed by the rules, particularly the right to cross-examination. A suggestion might be to allow the recipient to consider a respondent's general denial under section 106.45(b)(3)(vii) during the pendency of a criminal action, despite his or her refusal to submit to cross-examination.

Another possible solution is that recipients could be permitted to temporarily suspend Title IX adjudications pending resolution of a criminal proceeding. In order to ensure a complainant is not prejudiced by such a suspension, the recipient could grant the respondent an opportunity to take a non-punitive voluntary leave of absence from participation in the recipient's programs and activities while criminal charges or prosecution is pending.

In any event, section 106.6(d) should be modified to clarify that a recipient cannot compel respondents to testify in a Title IX disciplinary process, and that respondents must not be prejudiced for exercising their Fifth Amendment rights

Whatever solution the Department chooses, it must include a requirement that the recipient inform all parties, particularly respondents, in writing of the recipient's potential cooperation with law enforcement, and that any information respondents may provide in the disciplinary process could be subpoenaed for use in a criminal proceeding.

Proposed Section 106.6(e): *Effect of GEPA/ FERPA*
[Fed. Reg. p. 61495, col. 3]

***Comment*:** New subsection (e) of 106.6 specifies that FERPA should be read to be consistent with Title IX and cannot be used to undermine the school's Title IX obligations. The subsection appears to foreclose a recipient from using FERPA as a shield to withhold from a respondent crucial information relating to a Title IX investigation. Too often respondents are told only that they have been accused of sexual misconduct, and any attempt to seek out more information surrounding the allegations are withheld under the guise of FERPA's privacy protections. This places respondents at

[10] *Wells v. Xavier University*, 7 F. Supp. 3d 746 (S.D. Ohio 2014).
[11] National District Attorneys Association Women Prosecutors Section, *National Sexual Assault Investigation and Prosecution Best Practices Guide*, January 3, 2018, p. 18, http://www.ciclt.net/ul/ndaajustice/WhitepaperFinalDraft-SA.pdf

a severe disadvantage – how can respondents adequately defend themselves from allegations and evidence of which they are unaware?

***Recommend*:** Ensuring FERPA cannot be used to withhold the information or evidence to which parties are entitled under proposed section 106.45(b) will benefit both parties, and will enhance respondents' ability to prepare an adequate defense. However, proposed subsection (e) would benefit from a more in-depth explanation of its purpose, to ensure other measures in the proposed regulations are not simply circumvented by recipients' continuing use of FERPA as a shield against the transparency and fairness these proposed rules seek to achieve.

Proposed Section 106.6(f): *Title VII of the Civil Rights Act*
[Fed. Reg. p. 61495, col. 3]

***Comment*:** Similar to subsection 106.6(e), amended subsection (f) clarifies that nothing under Title IX should be interpreted to infringe upon an employee's rights under Title VII, but the rule does not specify what any such conflict might entail.[12] It is unlikely the Department intends to create a new Title IX private right of action for employees, and instead is simply referring to preexisting Title VII rights an employee accused of sexual misconduct may have in a disciplinary process.

***Recommend*:** Proposed subsection (f) should be clarified by identifying to which employee Title VII rights the rule is referring, and/or to specify that the revision is not intended to create a new Title IX private right of action for employees.

C. *Recipients' Preliminary Responsibilities*

This section addresses the following proposed sections:

- Section 106.8(a): *Designation of Title IX coordinator*
- Section 106.8(b)(1): *Notification of policy*
- Section 106.8(b)(2): *Publications*
- Section 106.8(c): *Adoption of grievance procedures*

Section 106.8(a): *Designation of Title IX coordinator*
[Fed. Reg. p. 61496, col. 1]

***Comment*:** Section 106.8 will amend and absorb existing section 106.9 into section 106.8. Under 106.8(a), "responsible employee" will become "Title IX coordinator," consistent with current practice. Additionally, the revision clarifies that a Title IX coordinator will be permitted to "coordinate" his/her responsibilities, which, according to the Department, means the coordinator will be able to delegate responsibilities to other staff members.[13]

This is an important clarification because some schools may believe one Title IX coordinator must "carry out" all of the school's Title IX regulatory obligations, and proposed section 106.30 requires complaints be made to an individual with "authority to institute corrective measures." Permitting

[12] Fed. Reg., p. 61481, cols. 1-2.
[13] Fed. Reg., p. 61480, col. 3.

coordinators to delegate responsibilities ensures a single person is not overwhelmed, which reduces the likelihood of cut corners, and inadequate investigations.

***Recommend*:** The proposed section is in line with current practice, and to the extent the text is intended to allow delegation of Title IX coordinator's "authority to institute corrective measures," seems like a practical change. It also should assuage victims' advocates' fears that there will be only one Title IX coordinator with whom they can file a formal complaint, at least in larger schools.

Along those lines, the Department solicits comments on whether larger institutions of higher education should have a minimum number of individuals with whom individuals can file a complaint of sex discrimination.[14] It would certainly be prudent to have more than one Title IX coordinator in larger institutions to ensure the school is a capable of adequately responding to both formal and informal complaints and arranging for supportive measures. Exactly how many should be required would depend on the size of the institution. If larger universities do not maintain minimum staff levels, students may find it difficult to file complaints or obtain supportive measures, and the school's response to these requests would likely be inadequate and/or delayed.

Section 106.8(b)(1): *Notification of policy*
[Fed. Reg. p. 61496, col. 1]

***Comment*:** As proposed, subsection (b)(1) would adopt and amend existing section 106.9(a)(1)'s requirements for notification of a recipient's Title IX policy. The proposed revision reduces the list of people recipients must notify of its policy, and retains the provision that inquiries regarding Title IX can be made to the school's Title IX coordinator and/or the Department's Assistant Secretary.

***Recommend*:** In addition to the requirement to provide notice of its Title IX policy to those identified in subsection (b)(1), recipients should be required to provide information on how and where the policy can be found. As recommended under section 106.8(b)(2) below, the entire Title IX policy should be posted as a single, comprehensive PDF file on the school's website. This will facilitate easy access the full policy, which can be downloaded and printed if needed.

Section 106.8(b)(2): *Publications*
[Fed. Reg. p. 61496, col. 1]

***Comment*:** Proposed subsection (b)(2) adopts current section 106.9(b)(2), requiring recipients to "prominently display a statement" of their Title IX non-discrimination policy on their website and in each handbook or catalog made available to those listed in section 106.8(b)(1).

Proposed subsection (b)(2) will change the existing restriction on publications that "suggest" a policy of sex discrimination either by text or illustration, to prohibiting only publications that expressly "state" a policy of sex discrimination. According to the Department, this change "would remove the subjective determination of whether" other textual or non-textual advisements, such as illustrations "suggest a policy of sex discrimination."[15]

***Recommend*:** Though this clarification will certainly be simpler for a recipient to implement and the Department to enforce, a situation may arise in which a recipient "states" it does "not discriminate

[14] Fed. Reg., p. 61482, col. 1.
[15] Fed. Reg., p. 61482, cols. 1-2.

on the basis of sex," but the surrounding text and/or illustrations clearly convey otherwise. For example, a school may post signs relating to sexual misconduct which include images of a male student and bears statements such as, "don't be that guy." While the school may explicitly "state" they have a policy of non-discrimination, the sign still may "suggest" the school only thinks men commit sexual misconduct.

While we appreciate the Department's efforts to instill an element of objectivity in subsection 106.8(b)(2), we are concerned the proposed change from "suggest" to "state" will allow schools to send discriminatory messages and then hide behind the fact that those messages did not explicitly "state" they are discriminating on the basis of sex. We suggest using an objective standard that also prohibits non-textual indications of or illustrations of a message of sex discrimination.

The requirement that the information be prominently displayed on the website is a positive change that reflects today's society in which everything can easily be accessed online. However, "prominently display" may not be adequate to prevent schools from posting their Title IX policy on their website split into different hyperlinks on different pages. This practice has made it difficult for students to be confident they have located all sections of the school's applicable Title IX policies. Consequently, we also recommend that subsection (b)(2) require posting of a school's entire Title IX policy on its website in one easily accessible PDF document, and located at a single website link.

Section 106.8(c): *Adoption of grievance procedures*
[Fed. Reg. p. 61496, col. 1]

***Comment*:** Proposed section 106.8(c), moved from existing section 106.8(b), requires recipients to provide notice of their grievance procedures to students and employees. It will also clarify that the grievance procedure requirements only apply to a formal complaint (see 106.30 discussed in section III. below, for definition of "*formal complaint*").

However, the language of subsection (c) is confusing: by stating both that the procedures must provide for the prompt and equitable resolution "of student and employee complaints" and also that they must provide for the prompt and equitable resolution "of formal complaints," the implication is that these are two separate types of complaints. Because the proposed rules require employees, students and even sometimes a Title IX coordinator (see section IV. under 106.44(b)(2) below) to file a formal complaint, it is unclear why the phrase "of student and employee complaints" is necessary.

***Recommend*:** Ensuring students and faculty are notified of the grievance procedures will help ensure a fair process.[16] We also recommend deleting the phrase "of student and employee complaints" as unnecessarily repetitive and confusing.

D. *Scope of a Recipient's Responsibility*

This section addresses the following proposed sections:

- Section 106.8(d): *Application; in the United States*
- Section 106.12(b): *Religious institutions*

[16] Fed. Reg., p. 61480, col. 3.

Section 106.8(d): *Application; in the United States*
[Fed. Reg. p. 61946, cols. 1-2]

Subsection 106.8(d) states that Title IX policy and grievance procedures apply to sex discrimination "against a person in the United States." This language is new and tracks the Title IX statute which begins "No person in the United States" This "in the United States" phrase is repeated in other proposed sections such as section 106.44(a), discussed below in section IV.

There has been substantial controversy over whether the proposed rules intend to exclude off-campus conduct from the protections of Title IX. Questions have arisen specifically as to whether Title IX protections will be denied to students participating in study abroad programs through their university based in the U.S.[17] The Department seems to narrowly interpret Title IX to include only parties "located in the United States"[18] when it explains that:

> nothing in the proposed regulations would prevent a recipient from initiating a student conduct proceeding or offering supportive measures to students … located outside the United States, such as a student participating in a study abroad program.[19]

Thus, though complaints by students outside the U.S. may not fall under the recipient's Title IX obligations, it is clear that schools are free to use their general student conduct processes to adjudicate the allegations.[20]

***Recommend*:** We believe the Department's interpretation of "person in the United States" in the narrower sense may be too literal. Title IX should protect individuals studying abroad at a U.S. institution if that program is organized and wholly controlled by the institution attended by the parties involved. In these types of programs the student is required to travel abroad in order to pursue the educational opportunity, the school's professors and staff who work in the program are employees of that university, and the alleged harassment would likely continue when the students return to their U.S. institution. By removing Title IX protections from these limited types of study abroad programs, potential victims could be denied equal access to education.[21]

Proposed section 106.8(d) should interpret Title IX to protect students participating in study abroad programs organized and wholly controlled by their U.S.-based university. We do not, however, recommend Title IX be construed so broadly as to encompass a study abroad program also attended by students from schools other than the school where the complaint has been made. This would seem a step too far and is justified by the impracticality of interviewing witnesses and collecting evidence at a remote location where students potentially come from all over the world.

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[17] See also the discussion concerning the Department's interpretation of "program or activity" in section VII. below, under proposed section 106.45(b)(3) at p. 30.
[18] Fed. Reg., p. 61482, col. 2.
[19] Fed. Reg., p. 61468, col. 2.
[20] Though it is unlikely this section indicates a school is permitted to expand its obligations under Title IX to outside the U.S.; if it were the correct interpretation it would mean these rules provide only a baseline for a school's responsibility to respond. Either way, it is important to request elaboration on this point.
[21] *King v. Board of Control of Eastern Mich. University*, 221 F.Supp.2d 783 (E.D. Mich. 2002) (holding Title IX had extraterritorial application to study abroad programs and students were persons in the US because the harassment, even though initiated abroad, undermined student's education at EMU as a whole).

Section 106.12(b): *Religious institutions' exemption*
[Fed. Reg. p. 61496, col. 2]

***Comment*:** Existing section 106.12(b) provides a religious exemption to educational institutions controlled by religious organizations, but requires them to seek assurance of their exemption by submitting a letter to the Assistant Secretary identifying what aspects of the regulations conflict with a specific tenet of their religion. Proposed subsection (b), as amended, would dispense with the necessity of proactively sending the letter, and instead allow a recipient to raise the religious exemption as a defense during the course of any investigation pursued against it by the Department.

The Title IX statute expressly provides that it "shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization."[22] Religious organizations have always been exempted, so the proposed regulation is not creating a new exemption.

The Department proposes to eliminate the letter requirement on the basis that it "is unnecessary" and "impose[s] confusing or burdensome requirements on religious institutions that qualify for the exemption."[23] However, it is unclear how the Department knows what institutions qualify for the exemption, or whether this provision will allow non-exempt institutions to escape oversight.

Recommend: The Department should use this comment period to identify how many schools have requested a religious exemption under this section in the past three to five years. It is our understanding that this exemption has rarely, if ever, been used to avoid enforcement of Title IX. If this is accurate, and a mere bookkeeping matter with no tangible impact on enforcement of Title IX, the change may have no real impact.

III. Definitions

This section addresses the following proposed 106.30 definitions:

- *Complainant and Formal complaint*
- *Actual knowledge*
- *Sexual harassment*
- *Supportive measures*

Section 106.30: *Definitions: "Complainant" and "Formal complaint"*
[Fed. Reg. p. 61496, col. 3]

Comment: Section 106.30's proposed definitions of "*Complainant*" and "*Formal complaint*" obligate a school to begin a Title IX process if it has *"Actual knowledge"* of alleged sexual misconduct through a *"Formal complaint"* filed with an appropriate school official. The formal complaint must allege "sexual harassment against a respondent about conduct within the school's education program or activity,"[24] and it also must specifically request "initiation of the recipient's grievance procedures."

[22] 20 U.S.C. 1681(a)(3)
[23] Fed. Reg., p. 61482, col. 3 to p. 61483, col. 1.
[24] See discussion of "program or activity" in section VII. below, under proposed section 106.45(b)(3) at p. 30.

We have seen multiple cases in which proceedings have been pursued by Title IX officials despite the alleged victim's wishes. The requirement of a formal complaint and an express decision to begin a grievance process remedies this situation, and hopefully will minimize the chances of Title IX officials beginning a process when the alleged victim claims not to be a victim or chooses not to engage in adversarial proceedings.[25]

This proposed rule's requirement that the report be made only to certain officials is another provision that has generated significant controversy. Victims' advocates and others have criticized this requirement as likely to decrease reporting of sexual offenses by deterring complainants from coming forward. Like certain other objections to the proposed rules, these fears do not seem justified; a formal report can easily be made by telephone, email or visit to the Title IX office located on every campus.

Furthermore, under proposed section 106.8(a) (discussed above in section II.C.) there can be as many Title IX officials appointed as the recipient deems necessary to accommodate the anticipated number of complaints. Additionally, the definition of "*Supportive measures*" in this section allows a recipient to provide supportive measures whether or not a Title IX complaint has been filed or even when the conduct did not occur within the recipient's program or activity.

***Recommend*:** The changes are appropriate and grant protections to potential campus survivors of sexual assault without threatening the rights of respondents. This, along with proposed section 106.45(b)(6) permitting informal resolutions, represent a welcome shift from the Obama-era approach, which too often envisioned an adversarial formal adjudication under unfair rules as the only appropriate response to a campus Title IX complaint.

Section 106.30: *Definitions: Actual knowledge*
[Fed. Reg. p. 61496, col. 3]

Comment: Section 106.30's proposed definition of "*Actual knowledge*" requires that a school have actual knowledge of allegations to require its response under the proposed regulations. This provision eliminates the school's responsibility for knowledge possessed by, for example, school employees or resident advisors without the "authority to institute corrective measures."

Appropriately, the Department notes that "where the recipient has actual knowledge of multiple" complaints of misconduct by the same respondent, proposed section 106.44(b)(2) (discussed in section IV. below) also *requires* the Title IX coordinator to file a formal complaint.[26]

***Recommend*:** This is simply a logical limitation on a school's responsibility to respond; "Title IX does not sweep so broadly as to permit a suit for harm-inducing conduct that was not brought to the attention of someone with the authority to stop it."[27] And requiring a report to designated officials ensures that sexual misconduct reports don't get lost in a chain of command, something victims' advocates should support.

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[25] We have seen such cases at University of Southern California and Grant Neal at Colorado State University, Boulder: Kayla Schierbecker, "Athlete accused of rape by Colorado State – not his sex partner – is getting paid to drop lawsuit," *The College Fix*, July 19, 2017, https://www.thecollegefix.com/athlete-accused-rape-colorado-state-not-sex-partner-getting-paid-drop-lawsuit/

[26] Fed. Reg., p. 61471, col. 1, citing section 106.44(b)(2) at p. 61497, col. 1.

[27] Fed. Reg., p. 61467, col. s 2-3, quoting *Santiago v. Puerto Rico*, 655 F.3d 61, 75 (1st Cir. 2011) (citations omitted).

Section 106.30: *Definitions: Sexual harassment*
[Fed. Reg. p. 61496, col. 3]

Comment: Section 106.30's proposed definition of *"Sexual harassment"* outlines when an institution is liable under Title IX for mishandling sexual harassment. The definition of sexual harassment is divided by the proposed rules into three categories:

> *Sexual harassment* means:
>
> (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
>
> (2) Unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
>
> (3) Sexual assault, as defined in 34 CFR 668.46(a).

These definitions should preclude the necessity of schools acting as the "sex police,"[28] as was the case under the Obama administration which defined "sexual harassment" broadly as:

> unwelcome conduct of a sexual nature. It includes unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature, such as sexual assault or acts of sexual violence.[29]

In fact, unlike the proposed rules, the previous definition seemed to minimize the requirement that the harassment impair the complainant's educational experience:

> Unwelcome conduct of a sexual nature, however, constitutes sexual harassment *regardless of whether it causes a hostile environment or is quid pro quo*.[30]

According to a 2008 explanation by OCR, this very broad definition included such student-on-student conduct as …

> sexual propositions or pressuring students for sexual favors; touching of a sexual nature; writing graffiti of a sexual nature; displaying or distributing sexually explicit drawings, pictures, or written materials; performing sexual gestures or touching oneself sexually in front of others; telling sexual or dirty jokes; spreading sexual rumors or rating other students as to sexual activity or performance; or circulating or showing e-mails or Web sites of a sexual nature.[31]

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[28] For the last several years schools have been treating under the category of "sexual misconduct," uncomfortable or regretted sex, or similar allegations that don't involve sex and are one-time occurrences.

[29] Department of Justice, *Letter to University of New Mexico regarding Title IX and Title IV Investigation of University of New Mexico*, p. 5, April 22, 2016, https://www.justice.gov/opa/file/843901/download, quoting withdrawn *2011 Dear Colleague Letter on Sexual Violence,* U.S. Department of Education, Office for Civil Rights, (April 4, 2011) available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html.

[30] U.S. Department of Education, Office for Civil Rights, p. 9 (April 4, 2011) available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html (emphasis added.)

[31] Withdrawn U.S. Department of Education, Office for Civil Rights, *Sexual Harassment: It's Not Academic* (September 2008), available at https://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.html

Schools have interpreted the Obama administration's 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 their students. Furthermore, under prior guidance, whether or not conduct was "unwelcome" was interpreted subjectively: "Conduct is considered unwelcome if the student did not request or invite it and considered the conduct to be undesirable or offensive."[32] This interpretation included " 'sexual or dirty jokes' that are overheard by someone who finds them 'unwelcome'," or "making 'unwelcome' sexual invitations." [33]

The proposed rules attempt to correct these overly broad definitions by limiting conduct for which a school's response is required to: (1) quid pro quo and (2) serious forms of sexual harassment that impedes access to education, as well as (3) any criminal sexual assault.

Subsection (1) appropriately proscribes any sexual harassment where there is a power differential between the parties that results in some type of coercion. This would most likely occur when a professor or school employee is involved, though some feminists believe such a power differential exists naturally between male and female students, with the former wielding the power and control.[34] For example, one advocate explained:

> Rape is about power and control and not about sexual desire … Therefore, it is a bad idea to give the person with the power even more power to intimidate and hurt the victim.[35]

And a recent motion for summary judgment revealed a school official's belief that "a man could have power over a woman, even if there wasn't an authority situation. I think there could be a feeling of that just by the nature of your gender."[36]

Subsection (2) has proven to be the most controversial of the definitions, limiting itself to unwelcome sexual conduct that is "severe, pervasive, and objectively offensive." This definition comes straight from the pages of the Supreme Court's decision in *Davis v. Monroe*, of conduct for which schools can be liable if they do not respond to under Title IX:

> We consider here whether a private damages action may lie against the school board in cases of student-on-student harassment. We conclude that it may, but only where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities. Moreover, we conclude that such an action

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[32] Withdrawn U.S. Department of Education, Office for Civil Rights, *Sexual Harassment: It's Not Academic* (September 2008), available at https://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.html

[33] Eugene Volokh, "Justice Department: Any 'verbal … conduct of a sexual nature ' that any listener finds 'unwelcome' = 'sexual harassment' that universities must prevent," May 2, 2016, *Washington Post*, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/02/justice-department-any-verbal-conduct-of-a-sexual-nature-that-any-listener-finds-unwelcome-sexual-harassment-that-universities-must-prevent/?utm_term=.c20caf3594c3

[34] YWCA Spokane, *Power and Control*, https://ywcaspokane.org/programs/help-with-domestic-violence/power-and-control-wheel/ ("The Power and Control Wheel was developed by the Domestic Abuse Intervention Program from the experience of battered women in Duluth who had been abused by their male partners.)

[35] Sarah Brown and Katherine Mangan, "What You Need to Know About the Proposed Title IX Regulations," November 16, 2018, *Chronicle of Higher Education*, https://www.chronicle.com/article/What-You-Need-to-Know-About/245118

[36] *Rowles v. Curators of the University of Missouri*, Case 2:17-cv-04250-BCW, p. xvii (W.D. Mo. December 24, 2018).

> 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.[37]

Under the Obama administration Department guidance changed the "and" in "severe, pervasive, and objectively offensive" to "or" for enforcement purposes. This and other Department guidance resulted in over-enforcement and sparked criticism from countless experts, law professors including those at Penn and Harvard, and even the Association of Title IX Administrators.[38]

Over the years victims' advocates have argued the *Davis* standard should apply only to private causes of action against schools, not Department enforcement efforts, but it is illogical and confusing to subject schools to two separate standards of responsibility concerning the same conduct. And, in fact, recognizing the benefits of a consistent standard, the preamble explains:

> Although the Department is not required to adopt the liability standards applied by the Supreme Court in private suits for money damages, the Department is persuaded by the policy rationales relied on by the Court. Generally, the liability standards of actual knowledge and deliberate indifference are also appropriate in administrative enforcement of Title IX, where a recipient's federal funding is at stake if it fails to comply with Title IX, because such standards are premised on holding recipients accountable for responding to discrimination of which the recipients know and have control.[39]

More importantly, despite victims' advocates' implication that the rules' definitions somehow prohibit schools from responding to conduct outside their scope, the preamble "emphasizes" that schools are entirely free to use their own broader definitions of proscribed conduct that may not fall within the school's Title IX obligations:

> a recipient remains free to respond to conduct that does not meet the Title IX definition of sexual harassment, or that did not occur within the recipient's program or activity, including by responding with supportive measures for the affected student or investigating the allegations through the recipient's student conduct code, but such decisions are left to the recipient's discretion in situations that do not involve conduct falling under Title IX's purview.[40]

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[37] *Davis v. Monroe County Bd. of Ed.*, 526 US 629, 633 (1999).

[38] ATIXA, *2017 Whitepaper: Due Process and the Sex Police*, ("Some pockets in higher education have twisted the 2011 Office for Civil Rights (OCR) Dear Colleague Letter (DCL)1 and Title IX into a license to subvert due process and to become the sex police. The Whitepaper pushes back strongly against both of those trends in terms of best practices.") https://www.ncherm.org/wp-content/uploads/2017/04/TNG-Whitepaper-Final-Electronic-Version.pdf; Eugene Volokh, *Open Letter from 16 Penn Law Professors about Title IX and Sexual Assault Complaints*, February 19, 2015, https://www.washingtonpost.com; *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.
Gerson and Suk, *The Sex Bureaucracy*, California Law Review, Vol. 104, Iss. 4 (2016), https://scholarship.law.berkeley.edu/californialawreview/vol104/iss4/2/.

[39] Fed. Reg., page 61469, col. 1.

[40] Fed. Reg., page 61475, col. 2.

Subsection (3): Though some uninformed commentators and advocates have claimed the rules would not require a school to respond to allegations of rape, subsection (3) clearly sanctions all criminal sexual conduct included in 34 CFR 668.46(a).[41]

***Recommend*:** The rules' definition of *sexual harassment* is reasonable in that it "focuses on sexual conduct that jeopardizes a person's equal access to an education program or activity."[42] Since the very purpose of Title IX's application to sexual harassment is to protect students in their access to education, a prerequisite that the conduct affects such access would seem obvious.

The Department should use the comment process to reassure stakeholders that the intent of the rule is not to allow institutions to ignore obvious instances of sexual harassment. Though much criticism has come in bad faith—for instance, suggesting that the proposed rule would have shielded Michigan State during the Larry Nassar scandal[43]— the Department should reassure the public in its response to comments that it does not intend to let universities "off the hook," and that, in any event, schools are free to expand upon the rules' definitions through their own conduct codes.

Section 106.30: *Definitions: Supportive measures*
[Fed. Reg. p. 61496, col. 3 to p. 61497, col. 1]

Comment: The proposed regulations allow a recipient to provide supportive measures to both parties, whether or not a Title IX complaint has been filed. Importantly, the proposed regulations state that a school "is not deliberately indifferent" if it "offers and implements" support measures on behalf of a complainant who has not filed a formal complaint, or when the alleged conduct is not proscribed by the rules' definitions.

This is important for two reasons: first, because it allows the school to support and care for a complainant whose claim may not rise to the level of a Title IX violation, or who opts to not file a formal complaint; and second, because respondents are repeatedly abandoned and/or isolated from friends after being notified of a Title IX complaint, and have little or no emotional or academic support while experiencing significant trauma and academic difficulties.

Recommend: Some commenters have erroneously commented that the proposed rules restrict "access to Title IX services" through narrow sexual harassment definitions.[44] The Department should clarify that nearly the entire panoply of services is available to complainants who for one reason or another do not file a formal complaint, short of punitive measures imposed on a respondent.

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[41] 34 CFR 668.46(a) conduct includes the Federal Bureau of Investigation Uniform Crime Reporting and National Incident- Based Reporting System Crime Definitions of dating violence, domestic violence, forcible and non-forcible sex offenses, among other crimes. *Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act* (Originally the Campus Security Act) originally published in the Federal Register on April 29, 1994 (Vol. 59, No. 82) and November 1, 1999 (Vol. 64, No. 210).

[42] Fed. Reg., page 61467, col. 3; see discussion of "program or activity" in section VII. below, under proposed section 106.45(b)(3) at p. 30.

[43] A typical example: Anna North, "'This will make schools less safe'": why Betsy DeVos's sexual assault rules have advocates worried," VOX, November 16, 2018. https://www.vox.com/policy-and-politics/2018/11/16/18096736/betsy-devos-sexual-assault-harassment-title-ix .

[44] Association for the Treatment of Sexual Abusers, COMMENTS ON PROPOSED TITLE IX RULE CHANGES, Submitted via https://www.regulations.gov/comment?D=ED-2018-OCR-0064-0001 (not yet posted).

IV. Safe Harbors

This section addresses the following proposed sections providing protection for recipients that comply with their terms:

- Section 106.44(a): *Recipient's response to sexual harassment*
- Section 106.44(b)*: Specific circumstances*
- Section 106.44(c): *Emergency removal*
- Section 106.44(d): *Administrative leave*

Section 106.44(a): *Recipient's response to sexual harassment*
[Fed. Reg. p. 61497, col. 1]

***Comment*:** Proposed section 106.44(a) provides safe harbors for recipients and describes what is required to prevent them from being "deliberately indifferent" or "clearly unreasonable." Under this proposed rule, the recipient must have actual knowledge of the misconduct to require its response, the alleged violation must be in the school's "education program or activity," and the respondent must be "a person in the United States."

***Recommend*:** The proposed rule should be implemented as written.

Section 106.44(b)*: Specific circumstances*
[Fed. Reg. p. 61497, cols. 1-2]

***Comment*:** Proposed subsection (b) of new section 106.44 provides clear instructions for a recipient to ensure it is neither deliberately indifferent nor is its response to a formal complaint unreasonable, if the recipient follows the procedures listed in section 106.45. Furthermore, under proposed section 106.45(b)(2) the recipient would be required to file a formal complaint when it has actual knowledge of multiple complaints against an individual. Subsection (b)(3) permits the recipient to provide supportive measures even in the absence of a formal complaint.

Subsection (b)(4) is unnecessarily confusing in that it repeats subsection (a): that the recipient will be "deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances," and also repeats subsection (b)'s assurance that the recipient will not be deliberately indifferent if: it complies with section 106.45; subsections (b)(2) and (3) "are not implicated;" and the recipient has "actual knowledge of sexual harassment" "against a person in the United States."

***Recommend*:** The proposed section, though it seems to be unnecessarily repetitive (i.e., subsections (b)(1) and (4)) provides important reminders of a recipient's Title IX's obligation to protect the rights of students who file sexual assault complaints. Read together with section 106.30's proposed definitions of "*Complainant*," "*Respondent*," "*Supportive measures*," and "*Formal complaint,*" the proposed rules impose additional obligations on recipients, while at the same time cautioning them that the application of these rules in no way should restrict the due process rights of the respondent.

Section 106.44(c): *Emergency removal*
[Fed. Reg. p. 61497, col. 2]

Comment: The provision requires that any removal of "a respondent from the recipient's education program or activity on an emergency basis" must involve "an individualized safety and risk analysis." To justify the removal, there must be "an immediate threat to the health or safety of students or employees," and the respondent must be given "notice and an opportunity to challenge the decision immediately following the removal."

Subsection (c) appropriately recognizes that the interaction between Title IX and disability issues:

> This provision shall not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or Title II of the Americans with Disabilities Act.[45]

***Recommend*:** Proposed section 106.44(c) is generally appropriate. However, we would appreciate clarification by the Department on what constitutes an adequate "safety and risk analysis," and examples of the types of threats which justify emergency removal before any notice of the allegations.

We also suggest additional information and procedures concerning disability issues in our response to *Directed Question 5*, in section X. below.

Proposed Section 106.44(d): *Administrative leave*
[Fed. Reg. p. 61497, col. 2]

Comment: This proposed provision allows the recipient the option to place respondent employees on administrative leave.

***Recommend*:** Proposed section 106.44(d) appropriately recognizes that cases involving student respondents can have very different frameworks than cases involving faculty or administrative respondents.

V. Bias, Conflict of Interest, Equitable Treatment, Fairness

The following proposed sections together require unbiased, equitable and objective investigations and adjudications that do not discriminate on the basis of sex:

- Section 106.45(a): *Discrimination on the basis of sex*
- Section 106.45(b)(1)(i): *Equitable treatment*
- Section 106.45(b)(1)(ii): *Objective evaluation of all relevant evidence*
- Section 106.45(b)(1)(iii): *Absence of bias or conflicts of interest*
- Section 106.45(b)(1)(iv): *Presumption of non-responsibility*

[45] See discussion in section X below at p. 52 for our response to *Directed Question 5* on the adequacy of this section vis-à-vis those with disabilities. The nine "*Directed Questions*" are in the Fed. Reg., at pp. 61482-83.

Section 106.45(a): *Discrimination on the basis of sex*
[Fed. Reg. p. 61497, col. 2]

Comment: According to proposed section 106.45(a), parties must be treated without discrimination on the basis of sex. Subsection (a) recognizes that a recipient's "treatment of a complainant … may constitute discrimination on the basis of sex," but also reminds institutions that unfair treatment of a respondent "may also constitute discrimination on the basis of sex under Title IX." Proposed Section 106.45(a) joins federal judges nominated by presidents of both parties in recognizing that unfair treatment of either side can, in some circumstances, rise to the level of sex discrimination.

As mentioned in section II.A. above, male students who have been subjected to sexual misconduct violations have faced sex discrimination in two ways: first, when their complaints were not taken seriously by their schools; and second, in being subjected to biased and unfair policies and procedures that restrict their ability to defend themselves and result in wrongful findings of responsibility.

It is true that, in the first few years after the 2011 Dear Colleague letter, some district courts suggested that policies biased against respondents did not violate Title IX.[46] However, more recently an increasing wave of federal courts are expressing concerns about how respondents' treatment by institutions might be sex discrimination under Title IX. Courts have identified plausible claims of an institutions' sex discrimination against respondents in a variety of different ways. For example, sex discrimination may exist where an institution failed to investigate evidence that the complainant might also have committed sexual misconduct in the same case;[47] employed a structurally unfair procedure and crediting only female witnesses;[48] used biased training material;[49] or the institution denied the respondent necessary statistical information to test allegations of gender bias.[50]

Sex-discriminatory treatment of male complainants: Though women are traditionally believed to make up the vast majority of victims of sexual misconduct, research reveals that men are almost as likely to be victims of sexual misconduct as are women.[51] In fact, a 2016 American Association of Universities survey at twenty-seven colleges and universities, revealed that 40.9% of undergraduate

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[46] *Bleiler v. College of the Holy Cross*, 2013 U.S. Dist. LEXIS 127775 (D. Mass. Aug. 26, 2013); *Sahm v. Miami University*, 110 F. Supp. 3d 774 (S.D. Ohio 2015); *Nokes v. Miami University*, 2017 U.S. Dist. LEXIS 136880 (S.D. Ohio Aug. 25, 2017).
[47] *Doe v. Miami University*, 882 F.3d 579 (6th Cir. 2018); *Doe v. Amherst College*, 238 F. Supp. 3d 195 (D. Mass. 2017); *Doe v. Williams College*, No. 3:16-cv-30184 (D. Mass. Apr. 28, 2017); *Rossley v. Drake University*, No. 4:16-cv-00623 (S.D. Iowa Oct. 12, 2018).
[48] *Doe v. Baum*, 2018 U.S. App. LEXIS 25404 (6th Cir. Sept. 7, 2018), request for en banc reconsideration denied.
[49] *Doe v. University of Mississippi*, 2018 U.S. Dist. LEXIS 123181 (S.D. Mississippi July 14, 2018); *Saravanan v. Drexel University*, 2017 U.S. Dist. LEXIS 193925 (E.D. Pa. Nov. 24, 2017); *Doe v. University of Pennsylvania*, 270 F. Supp. 3d 799 (E.D. Pa. 2017). See discussion of training materials in section V. below at p. 26 under proposed section 106.45(b)(1)(iii), and in section X., regarding *Directed Question 4* at p. 49.
[50] *Marshall v. Ind. University*, 2016 U.S. Dist. LEXIS 117675 (S.D. Ind. Aug. 31, 2016).
[51] *National Intimate Partner and Sexual Violence Survey* (NISVS), *2010 Summary Report*, Tables 2.1 and 2.2. http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf According to the NISVS, similar percentages of men and women (Men: 5.3%; Women: 5.6%) experience sexual violence other than rape each year; see also National Alliance to End Sexual Violence website ("About 14% of reported rapes involve men or boys, 1 in 6 reported sexual assaults is against a boy, and 1 in 25 reported sexual assaults is against a man.") https://www.endsexualviolence.org/where_we_stand/male-victims/

heterosexual males had experienced sexual harassment, intimate partner violence, or stalking, compared to 60.5% of undergraduate heterosexual females.[52]

Furthermore, when school officials assume a female complainant is the victim and the accused male student the perpetrator, and discount or ignore exonerating evidence, the process necessarily favors women over men. As discussed above, in *Doe v. Columbia Univ*. the Second Circuit Court of Appeals held that, though the school's intent in adopting its policies may not have been specifically to discriminate against men, any "policy of bias favoring one sex over the other" constitutes sex discrimination. Courts have likewise suggested an institution's purported practice of finding all accused male students responsible or employing Title IX officials who were biased against male students could create sex discrimination against male respondents.[53]

Sex discrimination against a male student was demonstrated in the adjudication of a Duke University female student's complaint alleging she was too intoxicated to give consent. The male student sued Duke after he was found responsible. When Duke's dean was asked in a hearing whether both students could have assaulted one another since both were heavily intoxicated, she responded, "Assuming it is a male and female, it is the responsibility in the case of the male to gain consent before proceeding with sex."[54]

This issue was also raised in *Doe v. Amherst College* in which a federal district court denied the school's efforts to dismiss the respondent's lawsuit.[55] In *Amherst*, though the male respondent repeatedly claimed he was incapacitated when the female complainant gave him oral sex, the school found him responsible for sexual assault. It was not until he filed a lawsuit that discovery revealed his accuser had sent text messages proving he was the victim. The accused student prevailed on his selective enforcement claim because he demonstrated that his gender was a "motivating factor behind" the school's decisions based on the fact that Amherst had encouraged the female complainant to file her complaint but did not do the same for him.[56] Similarly, the court found the male student established Amherst had been deliberately indifferent to his claim; "the College did not take even minimal steps to determine whether [the plaintiff] should have been viewed as a victim under the terms of the policy."[57]

Sex-discriminatory policies and procedures: As U.S. District Judge T.S. Ellis, III, explained in *Doe v. Marymount University,* "depriving students accused of sexual assault of the investigative and adjudicative tools necessary to clear their names even when there are no due process requirements"

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[52] *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, 2015. Table 5-3. https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/AAU-Campus-Climate-Survey-FINAL-10-20-17.pdf

[53] *Doe v. University of Oregon*, 2018 U.S. Dist. LEXIS 49431 (D. Oregon Mar. 26, 2018); *Schaumleffel v. Muskingum University*, 2018 U.S. Dist. LEXIS 36350 (S.D. Ohio Mar. 6, 2018); *Gischel v. University of Cincinnati*, 302 F. Supp. 3d 961 (S.D. Ohio Feb. 5, 2018); *Doe v. Penn. State University*, 2018 U.S. Dist. LEXIS 3184 (M.D. Pa. Jan. 8, 2018); Doe v. University of Chicago, 2017 U.S. Dist. LEXIS 153355 (N.D. Ill. Sept. 20, 2017); *Doe v. Washington and Lee University*, 2015 U.S. Dist. LEXIS 102426 (W.D. Va. Aug. 5, 2015).

[54] *City Journal*, "Mainstream Ideas, Fringe Opposition." January 18, 2019. https://www.city-journal.org/neomi-rao-college-oped

[55] *Amherst Coll*., 238 F.Supp.3d at 229.

[56] *Id*. at 223.

[57] *Id*. at 224.

can contradict Title IX's promise of gender equity.[58] These policies frequently discriminate against men, who are the vast majority of respondents in Title IX proceedings. In fact, at FACE we have seen less than a handful of women accused, in comparison to over a thousand accused male respondents.

Various courts have found that Title IX procedures were applied by schools in a manner that discriminated against male respondents even though the male respondent presented credible evidence the allegation was untrue,[59] witnesses contradicted the accuser,[60] a contemporaneous video of the sexual encounter established the allegation was false,[61] or a toxicology report undermined the accuser's claims of incapacitation.[62] In each case the university essentially ignored exonerating evidence because of preconceived notions about how men and women behave,[63] and/or to allegedly preempt criticism from campus activists, the media, or the federal government that the institution was being insufficiently tough on sexual assault.[64]

In *Wells v. Xavier Univ*., the judge recognized that anti-male bias resulted in an unfair process:

> [Wells'] Complaint, however, recounts Defendants having rushed to judgment, having failed to train UCB members, having ignored the Prosecutor, having denied Plaintiff counsel, and having denied Plaintiff witnesses. These actions came against Plaintiff, he contends, because he was a male accused of sexual assault.

The discriminatory application of Title IX procedures and policies violates Title IX, whether or not the school was expressly motivated by anti-male bias. In *Doe v. Columbia Univ*., the Second Circuit Court of Appeals appropriately observed,

> A defendant is not excused from liability for discrimination because the discriminatory motivation does not result from a discriminatory heart, but rather from a desire to avoid practical disadvantages that might result from unbiased action. A covered university that adopts, even temporarily, a policy of bias favoring one sex over the other in a disciplinary dispute, doing so in order to avoid liability or bad publicity, has practiced sex discrimination, *notwithstanding that the motive for the discrimination did not come from ingrained or permanent bias against that particular sex*.[65]

In an environment where university officials are unlikely to admit their discrimination against accused male students, courts sometimes have operated by inference, as in a case at Johnson & Wales University. After examining the facts presented in the complaint, U.S. District Judge John McConnell could …

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[58] *Doe v. Marymount University*, 297 F. Supp. 3d 573, 584 n.17 (E.D. Va. 2018).
[59] *Doe v. Syracuse Universi*ty, 2018 U.S. Dist. LEXIS 157586 (N.D.N.Y. Sept. 16, 2018); *Rolph v. Hobart & William Smith Colleges,* 271 F. Supp. 3d 386 (W.D.N.Y. Sept. 20, 2017).
[60] *Doe v. Columbia University*, 831 F.3d 46 (2d Cir. 2016).
[61] *Doe v. Lynn University*, 2017 U.S. Dist. LEXIS 7528 (S.D. Fl. Jan. 19, 2017).
[62] *Prasad v. Cornell University*, 2016 U.S. Dist. LEXIS 161297 (N.D.N.Y. Feb. 24, 2016).
[63] "Mainstream Ideas, Fringe Opposition." *City Journal*, January 18, 2019. https://www.city-journal.org/neomi-rao-college-oped
[64] *Doe v. Syracuse University*, 2018 U.S. Dist. LEXIS 157586 (N.D.N.Y. Sept. 16, 2018); *Rolph v. Hobart & William Smith Colleges*, 271 F. Supp. 3d 386 (W.D.N.Y. Sept. 20, 2017).
[64] See, e.g., *Doe v. Williams College*, No. 3:16-cv-30184 (D. Mass. Apr. 28, 2017).
[65] *Doe v. Columbia University*, 831 F.3d 46, page 59, note 11 (2d Cir. 2016). (emphasis added).

> find no reason at all as to why … the result was [the accused student's] expulsion. The only inference that one could draw from that considering all the facts is that gender played a role.[66]

In *Doe v. Miami University*, the Sixth Circuit determined that "statistical evidence that ostensibly shows a pattern of gender-based decision-making and the external pressure on Miami University" from the federal government could indicate that the university discriminated on the basis of gender against the accused student.[67] Finally, in *Doe v. Baum* the Sixth Circuit held that a combination of unfair procedures (including the University's decision to disallow cross-examination before a live panel) "gives rise to a plausible claim" of discrimination under Title IX."[68]

***Recommend*:** The requirement that parties be treated equitably and without discrimination on the basis of sex is a positive step forward in combating sex discrimination against respondents in Title IX proceedings, and is consistent with both federal and state court decisions finding sex discrimination against male respondents.

Section 106.45(b)(1)(i): *Equitable treatment*
[Fed. Reg. p. 61497, col. 2]

Comment: Proposed subsection (b)(1)(i) requires recipients to treat parties equitably, provide remedies "designed to restore or preserve access to the recipient's education program or activity" upon a finding of responsibility, and provide "due process protections" for the respondent.

Multiple times throughout the proposed rules, the word "protections" has been added following the term "due process."[69] We presume that by adding the word "protections" and using lower case for the term "due process" the Department signifies that the regulations are not referring to actual constitutional "Due Process" owed only by state or governmental entities, but to the specific due process-like procedures "provided under these proposed regulations":

> The Department recognizes that some recipients are state actors with responsibilities to provide protections to students and employees under the Fourteenth Amendment's Due Process Clause. Other recipients are private institutions that do not have constitutional obligations to their students and employee. The due process protections provided under these proposed regulations aim to effectuate the objectives of Title IX by creating consistent, fair, objective grievance processes that make the process equitable for both parties and are more likely to generate reliable outcomes.[70]

The Department also notes the positive impact of fair and equitable procedural protections on confidence in the reliability of Title IX processes:

> This requires the recipient to employ a grievance process that rests on fundamental notions of fairness and due process protections so that findings of responsibility rest

[66] *Doe v. Johnson & Wales University*, No. 1:18-cv-00106 (D.R.I. May 14, 2018).
[67] *Doe v. Miami University*, 882 F.3d 579, 593 (6th Cir. 2018).
[68] *Doe v. Baum,* 2018 U.S. App. LEXIS 25404, *22-23 (6th Cir. Sept. 7, 2018).
[69] On this issue see section 106.45(b)(1)(iii) and (b)(1)(i), page 61497, as well as page 61472 of the Preamble.
[70] Fed. Reg., p. 61472, col. 3.

> on facts and evidence … When a recipient establishes an equitable process with due process protections and implements it consistently, its findings will be viewed with more confidence by the parties and the public.[71]

Thus, by these rules the Department appears to be imposing on private and public schools alike the responsibility to provide the same procedural protections, thereby eliminating the discrepancy between the rights of public and private school students in Title IX proceedings.

There is no doubt that many schools have employed inequitable, biased and unfair disciplinary procedures. In *Doe v. Regents of the University of Cal.,* California's Second Appellate District found it "ironic that an institution of higher learning, where American history and government are taught, should stray so far from the principles that underlie our democracy."[72] Other courts have noted inequality created by institutions adjusting procedures to accommodate the perceived needs of complainants, which too often has had the effect of presuming the guilt of the accused.

In *Doe v. Brandeis University*, U.S. District Judge F. Dennis Saylor held,

> It is not enough simply to say that such changes are appropriate because victims of sexual assault have not always achieved justice in the past. 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. Each case must be decided on its own merits, according to its own facts. If a college student is to be marked for life as a sexual predator, it is reasonable to require that he be provided a fair opportunity to defend himself and an impartial arbiter to make that decision. Put simply, a fair determination of the facts requires a fair process, not tilted to favor a particular outcome, and a fair and neutral fact-finder, not predisposed to reach a particular conclusion.[73]

***Recommend*:** Ensuring students are treated equitably and have the same rights in Title IX proceedings regardless of the type of school they attend is appropriate. This will benefit both parties in a dispute and should be non-controversial.

Though "due process protections" curiously are not mentioned in subsection (b)(1)(i) in relation to a complainant, subsection (b)(1)(iii), discussed below, makes it clear that the process must "ensure due process protections for all parties." However, we recommend adding "and the complainant" when referring to "due process protections" for the respondent.

Further, according to proposed section 106.30, "*Supportive measures*," respondents are also entitled to supportive measures. Whether this would include after a finding of responsibility would depend upon the findings and sanctions, but certainly respondents are entitled to supportive measures prior to a determination of responsibility, and in the event the respondent's relationship to the institution is not terminated.

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[71] Fed. Reg., p. 61472, col. 3.
[72] *Doe v. Regents of University of California* (UCSB), 28 Cal. App. 5th 44, 61 (Cal. App. 2d Dist. October 9, 2018).
[73] *Doe v. Brandeis University*, 177 F. Supp. 3d 561, 573 (D. Mass. 2016).

Section 106.45(b)(1)(ii): *Objective evaluation of all relevant evidence*
[Fed. Reg. p. 61497, col. 3]

Comment: The proposed changes in this section that require "an objective evaluation of all relevant evidence" including that which is both inculpatory and exculpatory, and state that "credibility determinations" must not be "based on a person's status."

Objective evaluation of evidence: The proper categorization of evidence has been an enormous issue due to self-selected groups like victims' advocates who often staff Title IX offices, as well as problematic "believe the victim" and "trauma-informed" policies which presume guilt, as discussed below.[74]

Unfortunately, the proposed regulations provide no standards or definitions to evaluate whether evidence is "relevant," reliable, or "reasonable" to rely upon, and, as we have seen, this determination can be impacted by victim trauma myths that ignore the context of the parties' relationship.

Though subsection (b)(1)(ii) specifies evidence must be evaluated objectively, there is a steep road for school officials to leave behind their guilt-presuming victim-centered practices. Similarly, the preamble states that, "an equitable grievance procedure will only reach such a conclusion following a process that seriously considers any contrary arguments or evidence the respondent might have."[75] However, the term "serious considers" does not provide much practical guidance.

Credibility based on status: This is not an uncommon occurrence, especially in light of the victim-centered training of Title IX officials that demands "believe the victim" because false allegations are exceedingly rare. Though the proposed rule precludes "determinations … based on a person's status as a complainant, respondent, or witness," it does not expressly address "trauma-informed" or "believe the victim" policies used by institutions in the investigation and adjudication of Title IX complaints. As mentioned elsewhere in this comment, these policies are inherently biased against male respondents,[76] and their pervasiveness necessitates an express prohibition against their use in investigations or adjudications.

For instance, in *Sahm v. Miami University*, Miami's investigator discouraged a student from testifying and presenting exculpatory evidence before the university's Title IX tribunal. U.S. District Judge Susan Dlott found it "troubling" that the investigator told the student that she should use Google to see how infrequently rape allegations were false.[77]

Meanwhile, in *Doe v. Amherst College* the hired investigator failed to track down text messages sent by the complainant on the night of the incident, messages that contradicted the complainant's story in multiple respects. When confronted with these texts during a subsequent deposition, the school's investigator explained that the texts she considered relevant were only those that were written after the complainant had come to believe she was sexually assaulted.[78]

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[74] See discussion of these policies in under *Directed Question 4*, section X. below at p. 49.

[75] Fed. Reg., page 61472, column 3.

[76] See more detailed discussions of these policies in section V. under proposed section 106.45(b)(1)(iii) at p. 26, and in section X., below, *under Directed Question 4:* adequacy of training requirement in Section 106.45(b)(1)(iii), at p. 49.

[77] *Sahm v. Miami University*, 110 F. Supp. 3d 774, 778 (S.D. Ohio 2015).

[78] *Doe v. Amherst College*, 238 F. Supp. 3d 195 (D. Mass. 2017).

***Recommend*:** The tendency of Title IX officials to discount relevant and contextual evidence is obviously unfair, and section 106.45(b)(1)(ii) will help ensure future investigations evaluate "all relevant evidence," including that which is "both inculpatory and exculpatory."

It would be helpful, however, if the rule were to provide standards by which to evaluate whether evidence is sufficiently "relevant," reliable, or "reasonable," or examples of evidence that meets these criteria. As mentioned above, we frequently see relevancy determinations impacted by victim trauma myths that ignore the context of parties' relationships.

We would like to see the rules expressly prohibit training in victim-centered," "trauma-informed" or "believe the victim" policies, except as they may be used in the interview process. These policies should never be taught for use in investigations or adjudications because they compromise objectivity, create presumptions of guilt, and result in the exclusion of otherwise relevant evidence.

As mention in the next section, we additionally recommend the Department require schools to publicly disclose their training materials.

Section 106.45(b)(1)(iii): *Bias or conflicts of interest; Training materials*
[Fed. Reg. p. 61497, col. 3]

Comment: This proposed rule would require all officials involved in the process to be free of bias "for or against complainants or respondents generally," or conflicts of interest. The Department believes proposed subsection (b)(1)(iii),

> would address the problems that have arisen for complainants and respondents as a result of coordinators, investigators, and decision-makers making decisions based on bias by requiring recipients to fill such positions with individuals free from bias or conflicts of interest.[79]

The proposed subsection also provides:

> Any materials used to train coordinators, investigators, or decision-makers may not rely on sex stereotypes and must promote impartial investigations and adjudications of sexual harassment

Unfortunately, many Title IX administrators have been subjected to biased training. Though the sex-biased training materials being used were originally intended to help officials minimize victim re-traumatization and encourage reporting of sexual offenses,[80] the result is that a respondent is not presumed innocent.[81] Theories, such as those that victims lie, falsify details, or behave inconsistently as a way of coping with trauma, have only one purpose, and that is to discredit any defense based upon an a complainant's inconsistent behavior or statements. According to the FIRE, "An investigator

[79] Fed. Reg., p. 61473, col. 1.
[80] MacDonald, Heather, "The Campus Rape Myth," *City Journal*, Winter 2008, ("'believe unconditionally' in sexual-assault charges") http://www.city-journal.org/2008/18_1_campus_rape.html.
[81] Kaminer, Wendy, "'Believe The Victim"? Maybe — But Protect The Rights Of The Accused, Too,' *WBUR Boston*, February 4, 2014, http://cognoscenti.wbur.org/2014/02/04/campus-sexual-assault-wendy-kaminer.

who is trying to anticipate and counter defense strategies in the course of his/her investigation is not acting as a neutral fact-finder."[82]

In *Doe v. Ohio State University*, Judge James Graham expressed concerns about the one-sided contents of Ohio State's training material, but also expressed hope that the university had provided "training or direction on [decision-makers'] role as fair and neutral judges." Without such training, he noted that the material presented to him "plausibly alleges the panel members had illegal prejudice to [respondents], which amounts to actual bias."[83]

Judges in lawsuits against the Universities of Mississippi and Pennsylvania likewise have cited concerns with sex-biased training in their rulings, which had concrete effects in producing unfair decisions. Other courts have recognized the importance of the context of the parties' relationship in determining motivation in these cases and have criticized the school's refusal to consider such evidence.[84] "Context" clearly includes the complainant's behavior and statements both before and after the alleged event.

For example, in *Doe v. Brown University*, a critical question was why the university's Title IX tribunal discounted post-incident texts sent by the complainant that seemed to portray the incident in consensual terms. The decisive vote in the Brown tribunal, a university associate dean, testified "it was beyond my degree of expertise to assess [the complainant]'s post-encounter conduct . . . because of a possibility that it was a response to trauma."[85] U.S. District Judge William Smith held that this testimony showed a failure of Brown's training, since "it appears what happened here was that a training presentation was given that resulted in at least one panelist completely disregarding an entire category of evidence."[86]

In a 2017 decision later affirmed by the California Court of Appeal, a superior court judge found that the school's administrative process failed to comply with the law because "the [disciplinary committee] improperly permitted [the Title IX investigator] to base his evaluation on what [he] understood to be the 'trauma-informed' approach." [87] Similarly, in *Doe v. University of Mississippi*, the court found the school's training materials created "an assumption … that an assault occurred": [88]

> (1) the training material "advises that a `lack of protest or resistance does not constitute consent, nor does silence,'" (2) it "advise[s] the panel members that `victims' sometimes withhold facts and lie about details, question if they've truly been victimized, and `lie about anything that casts doubt on their account of the event,'" and (3) it explains that "when Complainants withhold exculpatory details or lie to an

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[82] Samantha Harris, "University of Texas 'Blueprint' for Campus Police Raises Fairness Concerns," *Foundation for Individual Rights in Education*, March 11, 2016. https://www.thefire.org/university-of-texas-blueprint-for-campus-police-raises-fairness-concerns/. See discussion of these policies under *Directed Question 4*, section X., p. 49 below.

[83] *Doe v. Ohio State University*, 219 F. Supp. 3d 645, 659 (S.D. Ohio 2016).

[84] *Doe v. University of Notre Dame*, 2017 U.S. Dist. LEXIS 69645, at p. 23 (original court filed version on May 8, 2017) ("In a disciplinary matter concerning behavior in a long-term existing relationship, context matters, and the motive of the complainant (as it relates to credibility) bears more scrutiny than in some other cases.")

[85] *Doe v. Brown University*, 210 F. Supp. 3d 310, 327 (D.R.I. 2016).

[86] *Id.* at 342.

[87] *Doe v. Regents of University of California*, "Notice of Order Awarding Attorneys' Fees," April 18, 2018, at p. 3, citing "Order of 11/15/17" at p. 26.

[88] *Doe v. University of Mississippi*, Civil Action No. 3:16-CV-63-DPJ-FKB, p. 20 (D. S.D. Mississippi, N.D. July 24, 2018) (using the original court filed version July 24, 2018.)

> investigator or the hearing panel, the lies should be considered a side effect of an assault."[89]

The impact of such biased training is manifest in a report issued by FIRE that observed: "An investigator who is trying to anticipate and counter defense strategies in the course of his/her investigation is not acting as a neutral fact-finder."[90]

***Recommend*:** This section's provision for training that avoids sex stereotypes and instructs in due process is welcome, though we are concerned that universities will not implement it in good faith. In the few cases where a school's entire training has become public, emphasis on fairness or the rights of a respondent has been perfunctory at best and wholly absent at worst. Instead, the apparent purpose of the training too often was to promote a sex-stereotypical belief that female complainants should be presumed truthful and respondents presumed to be guilty.

We believe the Department can do more to ensure training is unbiased and does not rely on presumptions about behavior based on sex, or whether a party is the complainant or respondent. The use of "trauma-informed" or "believe the victim" policies could be expressly restricted to interview processes. Such theories should never be used in investigations or adjudications, because they compromise objectivity, create presumptions of guilt, and result in the exclusion of otherwise relevant evidence.

To resolve this concern, in response to *Directed Question 4*, we suggest schools be required to disclose publicly their Title IX training materials because: (1) publicity can help ensure they are free from bias, and (2) as a form of notice to prospective parents and students concerning the nature of the school's Title IX training and how it may affect the student's future.[91]

Section 106.45(b)(1)(iv): *Presumption of non-responsibility*
[Fed. Reg. p. 61497, col. 3]

Comment: The proposed rules address in subsection (b)(1)(iv) as well as (b)(2)(i)(B)[92] the need for accused students to be presumed innocent. Subsection (b)(1)(iv) requires grievance procedures to 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."

Subsection (b)(2)(i)(B) requires that the written notice required to be sent to the parties "Upon receipt of a formal complaint" must include, among other things, a statement that the respondent is presumed not responsible for the alleged conduct."[93]

***Recommend*:** These provisions are welcome. Particularly under a preponderance standard it is important that an accused student be presumed innocent, to impose upon decision-makers that if they believe each party is equally truthful, the required finding would be not-responsible. Yet too

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[89] *Id.*
[90] Samantha Harris, "University of Texas 'Blueprint' for Campus Police Raises Fairness Concerns," *Foundation for Individual Rights in Education*, March 11, 2016. https://www.thefire.org/university-of-texas-blueprint-for-campus-police-raises-fairness-concerns/.
[91] See discussion of these policies under *Directed Question 4*, section X. below at p. 49.
[92] Fed. Reg., p. 61498, col. 1
[93] See discussion concerning the appropriate standard of evidence in section VIII. below, under proposed section 106.45(b)(4)(i) at p. 39.

often universities have maintained they're not required to presume the respondent innocent[94]; in some cases, respondents have even claimed that their school placed the burden of proof on them.[95] These provisions, therefore, will clarify a confusion that ought not to exist, but does.

VI. Notice of Grievance Procedures, Allegations and Evidence

This section addresses the following proposed sections:

- Section 106.45(b)(1)(vi) through (b)(1)(ix): *Basic grievance procedures required*
- Section 106.45(b)(2)(i): *Notice of allegations content*

Sections 106.45(b)(1)(iv) through (b)(1)(ix): *Basic grievance procedures*
[Fed. Reg. p. 61497, col. 3]

Comment: Proposed section 106.45, subsections (b)(1)(iv) through (b)(1)(x) require grievance procedures to include: a presumption of non-responsibility (iv); "reasonably prompt timeframes" allowing delays for good cause (v); "the range of possible sanctions" (vi); the standard of evidence to be used (vii); "procedures and permissible bases" for appeals (viii); and "the range of supportive measures available to both complainants and respondents" (ix).

***Recommend*:** It is difficult to see why any party could oppose ensuring that all parties are provided with information concerning these provisions.

Section 106.45(b)(2): *Notices of allegations content*
[Fed. Reg. p. 61497, col. 3, to p. 61498, col. 1]

Comment: This proposed subsection requires timely and ongoing notification of the recipient's grievance procedures ((b)(2)(i)(A)), and detailed notice of the allegations ((b)(2)(i)(B)). The latter must include details of the allegations and parties before any interview, the code sections violated, a presumption on non-responsibility, the opportunity to "request to inspect and review evidence under paragraph (b)(3)(viii)," and the school's code section prohibiting false statements.

Subsection(b)(3)(viii), discussed in more detail in the next section, indicates that the evidence made available is any "directly related to the allegations," whether or not it will be relied upon in the school's investigation or adjudication.

***Recommend*:** This proposed subsection seems wholly unobjectionable and will benefit both parties.

VII. Investigation

This section addresses the following proposed sections:

- Section 106.45(b)(3): *Within a program or activity*
- Section 106.45(b)(3)(i)-(v): *Investigations of a formal complaint*

[94] *Doe v. University of Cincinnati*, aff'd sub nom. *Doe v. Cummins*, 662 Fed. Appx. 437, 447 (6th Cir. 2016).
[95] *Wells v. Xavier University*, 7 F. Supp. 3d 746 (S.D. Ohio 2014).

- Section 106.45(b)(3)(viii): *Equal access to evidence*
- Section 106.45(b)(3)(ix): *Access to investigative report*

Section 106.45(b)(3): *Within a program or activity*
[Fed. Reg. p. 61497, page 61498, col. 1]

Comment: There is significant and heated controversy concerning the geographical scope of a school's responsibility to address allegations of sexual misconduct. Proposed section 106.45(b)(3) requires the alleged conduct to have occurred "within the recipient's program or activity;" if it did not, "the recipient must dismiss the formal complaint with regard to that conduct."

The Department relies on the Supreme Court decision in *Davis v. Monroe*, for the commonsense proposition that "recipients must be held liable only for conduct over which they have control."[96] Unfortunately, there is limited guidance on the specifics of whether conduct is within a school's "program or activity," in part because the inquiry is fact-specific.[97]

Despite claims to the contrary, the Department also points out that whether or not the alleged event occurred on campus is not a controlling factor: "program or activity does not necessarily depend on the geographic location of an incident (e.g., on a recipient's campus versus off of a recipient's campus)**."** [98]

> In determining whether a sexual harassment incident occurred within a recipient's program or activity, courts have examined factors such as whether the conduct occurred in a location or in a context where the recipient owned the premises; exercised oversight, supervision, or discipline; or funded, sponsored, promoted, or endorsed the event or circumstance.[99]

In fact, at least one court cited by the Department, found that an allegation about an incident at a fraternity fell within "program or activity" because the school "devotes significant resources to the promotion and oversight of fraternities through its websites, rules, and Office of Greek Affairs … is open only to KSU students, and is directed by a KSU instructor … " [100]

Other case law cited by the Department includes within the scope of "program or activity," such places as "'university libraries, computer labs, and vocational resources … campus tours, public

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[96] Fed. Reg., page 61466, col. 3, citing, *Davis v. Monroe Cty. Bd. of Educ*., 526 U.S. 629, 644-45 (1999).

[97] Fed. Reg., page 61468, col. 1. The Title IX statute defines "program or activity" as "all of the operations of" a recipient. See 20 U.S.C. 1687. An "education program or activity" includes "any academic, extracurricular, research, [or] occupational training." 34 CFR 106.31

[98] Fed. Reg., page 61468, col. 1, citing *Rost ex rel. K.C. v. Steamboat Springs RE–2 Sch. Dist*., 511 F.3d 1114, 1121 n.1 (10th Cir. 2008) ("We do not suggest that harassment occurring off school grounds cannot as a matter of law create liability under Title IX").

[99] Fed. Reg., p. 61468, col. 1.

[100] Fed. Reg., page 61468, col.s 1-2, quoting, *Farmer v. Kansas State Univ.,* 2017 WL 980460, at * 8 (D. Kan. Mar. 14, 2017) ("because 'KSU allegedly devotes significant resources to the promotion and oversight of fraternities through its websites, rules, and Office of Greek Affairs. Additionally, although the fraternity is housed off campus, it is considered a 'Kansas State University Organization,' is open only to KSU students, and is directed by a KSU instructor. Finally, KSU sanctioned the alleged assailant for his alcohol use, but not for the alleged assault. Presented with these allegations, the Court is convinced that the fraternity is an 'operation' of the University, and that KSU has substantial control over student conduct within the fraternity.").

lectures, sporting events …" [101] In fact, the Department cites a Tenth Circuit decision for the proposition that "We do not suggest that harassment occurring off school grounds cannot as a matter of law create liability under Title IX."[102]

The Department also makes clear throughout the regulatory explanations that should a school choose, it may always expand its liability under its own code of conduct to include venues such as study abroad programs:

> Importantly, nothing in the proposed regulations would prevent a recipient from initiating a student conduct proceeding or offering supportive measures to students who report sexual harassment that occurs outside the recipient's education program or activity (or as to conduct that harms a person located outside the United States, such as a student participating in a study abroad program).[103]

Given this explanation, it would seem the Department would not include under "program or activity" conduct in a study abroad program attended and staffed by individuals from other schools. This seems consistent with the *Davis* limitation of a school's Title IX responsibility to conduct over which the school has some type of control,[104] and makes sense due to the difficulty of interviewing witnesses and collecting evidence at a remote location where students may come from all over the world.

Debates also exist with respect to whether non-students can file Title IX complaints at the school attended by an accused, and the answer impliedly is no: [105]

> Notably, there may be circumstances where the harassment occurs in a recipient's program or activity, but the recipient's response obligation is not triggered because the complainant was not participating in, or even attempting to participate in, the education programs or activities provided by that recipient.[106]

As an example, the Department cites *Doe v. Brown Univ.*, in which the court found,

> no plausible claim under Title IX where plaintiff alleged that, while a Providence College student, three Brown University students sexually assaulted her on Brown's campus, and Brown notified the plaintiff that she had a right to file a complaint under Brown's Code of Student Conduct—but not Title IX— because she had not

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[101] Fed. Reg., page 61468, col. 1, quoting *Doe v. Brown Univ.*, 896 F.3d 127, 132 n.6 (1st Cir. 2018).

[102] Fed. Reg., p. 61468, col. 1, quoting *Rost ex rel. K.C. v. Steamboat Springs RE–2 Sch. Dist.*, 511 F.3d 1114, 1121 n.1 (10th Cir. 2008)

[103] Fed. Reg., page 61468, col. 2; This presumably does not mean the school can expand its obligations under the Title IX process (which would mean these rules provide only a baseline for its responsibility to respond), but rather that the school can use its general student conduct process to adjudicate allegations outside the school's Title IX jurisdiction.

[104] Fed. Reg., page 61466, col. 3, citing, *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 644-45 (1999).

[105] Though there is a recent complaint "filed in federal court by a Harvard University student who argues the school is overstepping its authority by investigating him for a rape allegation lodged by a nonstudent in a city where police declined to prosecute." Ebbert, Stephanie, "Harvard student accused of rape far from campus sues university for investigating it," *Boston Globe*, December 8, 2018, https://www.bostonglobe.com/metro/2018/12/08/should-harvard-investigate-alleged-rape-that-happened-nowhere-near-campus/3mlPW6GxXyljpgW2OU0q4K/story.html

[106] Fed. Reg., page 61468, col. 2, citing *Doe v. Brown Univ.*, 896 F.3d 127, 132-33 (1st Cir. 2018).

> availed herself or attempted to avail herself of any of Brown's educational programs and therefore could not have been denied those benefits).[107]

Finally, in an apparent effort to calm the hysteria over the scope of a school's responsibility, the Department concludes:

> The Department wishes to emphasize that when determining how to respond to sexual harassment, recipients have flexibility to employ age-appropriate methods, exercise common sense and good judgment, and take into account the needs of the parties involved.[108]

***Recommend*:** The Department should attempt to clarify the parameters of schools' Title IX obligations to respond to off-campus conduct. We believe practical considerations should apply to whether off campus facilities fall within a school's "program or activity": does the school have any control or ability to supervise the property or event? Can it access and collect evidence?

The proposed rule appropriately excludes from the institution's responsibility alleged off-campus misconduct claims unrelated to any of the recipient's programs or activities. It also should exclude allegations made by or against a non-student or one who has no relationship with the school, and those that, though they involve students, occurred during a time or place completely unrelated to school activities, such as hundreds of miles away during summer vacation.

Section 106.45(b)(3)(i)-(v): *Investigations of a formal complaint*
[Fed. Reg. p. 61498, cols. 1-3, to p. 61499, col. 1]

Comment: Provisions in this subsection represent baseline procedures for a fair adjudication, and also are consistent with a wave of federal (and state) court decisions in lawsuits filed by accused students. Specifically they require that in an investigation: the school bear the burden of proof and collecting evidence ((b)(3)(i)); the parties be provided equal opportunities to present witnesses and other inculpatory and exculpatory evidence ((b)(3)(ii)); allow the parties to discuss the allegation and gather evidence ((b)(3)(iii)); provide them the same opportunities to be accompanied by an advocate at all meetings ((b)(3)(iv)); and provide written notice of "the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings ((b)(3)(v)).

It is not evident whether the rules anticipate advisors actively assisting those whom they represent other than in the context of cross-examination. Often referred to as "potted plants," advocates have been unable to advise parties or speak on their behalf during proceedings. Because the proposed section allows schools to "establish restrictions" on the advocate's participation, this may be interpreted by schools to deny them the right to confer with those they represent during meetings and hearings.

***Recommend*:** Most of this subsection's provisions should not be in any way controversial. However, the provision allowing recipients to "establish restrictions regarding the extent to which the advisor may participate in the proceedings" could provide an explanation or examples of reasonable

[107] Fed. Reg., page 61468, col. 2.
[108] Fed. Reg., page 61468, col. 2.

restrictions. It is not evident whether the rules even anticipate advisors actively assisting those whom they represent, other than in the context of cross-examination.

At a minimum, proposed section 106.45(b)(3)(iv), should be clarified regarding whether, aside from cross-examination, the advocate will be permitted to converse with or actively assist the student during the various proceedings. We recommend the section be modified to allow the advisor to communicate with and speak on behalf of the student he/she is assisting during all proceedings.[109]

Section 106.45(b)(3)(viii): *Equal access to evidence*
[Fed. Reg. p. 61498, col. 3]

Comment: Proposed subsection (b)(3)(viii) would require students be informed of and permitted to access all evidence collected by the school "directly related to the allegations," whether or not it will be relied upon in the school's investigation or adjudication. Presently, parties are routinely denied or given very limited access to evidence and witness statements, including their accuser's statement(s).[110]

The subsection specifically also requires disclosure of evidence on which the school may *not* rely. This is significant because it is commonplace for some schools to ignore or improperly characterize evidence as "irrelevant." In *Doe v. Ohio State* (2018), U.S. District Judge James Graham noted that OSU's withholding information about the academic accommodation that the complainant received deprived the respondent of a right to "effectively cross-examine" his accuser, who had,

> a motive to claim she was too drunk to remember the encounter: she was threatened with expulsion from medical school and might be able to remain in school if she claimed to be the victim of a sexual assault.[111]

The proposed rule merely codifies what numerous federal courts already have recognized: that "universities have perhaps, in their zeal to end the scourge of campus sexual assaults, turned a blind eye to the rights of accused students."[112]

Subsection (b)(3)(viii) also appropriately recognizes that, for the right to cross-examination to be meaningful, schools must supply access to all evidence accumulated during the investigation.

There could be some confusion due to the proposed subsection's inclusion of evidence "directly related to the allegations" when read along with proposed section 106.45(b)(3)(ix), as discussed in the next section.

***Recommend*:** Proposed section 106.45(b)(3)(viii) is appropriate; equal access to evidence and the ability to access such evidence at a hearing will benefit both complainants and respondents.

It is unclear whether students' access to evidence under this section would include evidence that is both inculpatory or exculpatory. It is also not evident if subsection (ix)'s use of "relevant" to describe evidence that should be included in the investigation report is equivalent to subsection (viii)'s

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[109] Speaking on behalf of a student is particularly important when the student has a communication-related disability. See our response to *Directed Question 5*, in section X. below at p. 52.
[110] *Doe v. University of Southern California* 246 Cal.App.4th 221, 248, 253, 200 Cal.Rptr.3d 851 (2nd Appl. Dist., Div. 5, 2016) (denied access to evidence.)
[111] *Doe v. Ohio State*, 2018 U.S. Dist. LEXIS 68364, at *25 (S.D. Ohio April 24, 2018).
[112] *Doe v. University of Notre Dame*, 2017 U.S. Dist. LEXIS 69645, at *30 (N.D. Ind. May 8, 2017).

reference to evidence "directly related to the allegations raised in a formal complaint" and/or "evidence upon which the recipient does not intend to rely"[113]

The proposed section may need to be amended due to the potential confusion created by its "directly related to the allegations" language, as discussed below and in response to *Directed Question 7*.[114]

Additionally, the provision that requires evidence to be provided "in an electronic format, such as a file sharing platform, that restricts the parties and advisors from downloading or copying the evidence," should assuage expressed concerns by victims' advocates about the release or publication of confidential information.[115]

Section 106.45(b)(3)(ix): *Access to investigative report*
[Fed. Reg. p. 61498, col. 3, to p. 61499, col. 1]

Comment: This provision requires the recipient to:

> Create an investigative report that fairly summarizes relevant evidence and, at least ten days prior to a hearing … provide a copy of the report to the parties for their review and written response.

***Recommend*:** Proposed section 106.45(b)(3)(ix) seems appropriate; equal access to the investigative report will benefit both parties.

As mentioned above, the Department needs to reconsider its use of the phrase "directly related to the allegations" in subsection (b)(3)(viii), while subsection (b)(3)(ix) uses "relevant evidence." *Directed Question 7,* anticipates this confusion and we have provided a comment in response.[116]

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[113] These two subsections of § 106.45(b)(3) read: (viii) Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format, such as a file sharing platform, that restricts the parties and advisors from downloading or copying the evidence, and the parties shall have at least ten days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject herein to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination; and (ix) Create an investigative report that fairly summarizes relevant evidence and, at least ten days prior to a hearing (if a hearing is required under this section) or other time of determination regarding responsibility, provide a copy of the report to the parties for their review and written response.

[114] See response to *Directed Question 7* in section X. below at p. 57.

[115] This is a change from the draft regulations leaked in late 2018. The reason for the change is victim advocates' concerns that accused students would publicize private information. This is interesting because we have most frequently encountered accusers who distribute or publicize confidential information about the accused.

[116] *Directed Question 7* can be found at Fed. Reg., page 61483, col. 2 of the preamble. See also our discussion of this question below in section X. at p. 57.

VIII. Adjudication

This section addresses the following proposed sections:

- Section 106.45(b)(3)(vi) and (vii): *Live hearing and cross-examination; Restrictions*
- Section 106.45(b)(4)(i): *Responsibility determination; Single investigator; Standard of evidence*
- Section 106.45(b)(1)(viii), (b)(5): *Appeals*
- Section 106.45(b)(6): *Informal resolution*
- Section 106.45(b)(7): *Recordkeeping*
- Section 106.45 (b)(1)(v): *Reasonably prompt timeframes*

Section 106.45(b)(3)(vi) and (vii): *Live hearing and cross-examination*
[Fed. Reg. p. 61498, col. 1, to p. 61499, col. 1]

Comment: The proposed rule requires institutions of higher education to provide a live hearing at which cross-examination is permitted by a party's advisor; allows parties to request to be located in separate rooms, as long as the other party and decision-maker(s) can see and hear that party respond to questions; allows the exclusion of irrelevant questions; and precludes certain questions pertaining to a party's sexual history.

Live hearing: Currently, many schools do not use hearings at all, or use them only in an appeal process after the student has already been found responsible.[117] The latter obviously puts students at a disadvantage before having had any opportunity to be heard.[118]

There are erroneous claims that this rule would require a "public" hearing. Proposed subsection (b)(3)(vii) merely calls for a live (not public) event where the parties and decision-makers can see and hear each other while questions are asked and answered.

Cross-examination: The rule requires an institution of higher education to allow cross-examination by a party's advisor. This requirement is consistent with developing case law in several jurisdictions in which courts have held that cross-examination must be provided, particularly when credibility is at issue.[119] As the Sixth Circuit Court of Appeal has noted,

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[117] The hearing-on-appeal rule is common in state-run institutions in both California and Arizona.

[118] *Doe v. University of Southern California* 246 Cal.App.4th 221, 248, 253, 200 Cal.Rptr.3d 851 (2nd Appl. Dist., Div. 5, 2016) (no opportunity to be heard before decision-makers.)

[119] *Doe v. Baum* (University of Michigan) 903 F.3d 575, 578 (6th Cir. 2018) ("[t]he ability to cross-examine is most critical when the issue is the credibility of the accuser."); *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 399-402 (6th Cir. 2017) ("In the case of competing narratives, 'cross-examination has always been considered a most effective way to ascertain truth.'"); *Doe v. University of Southern California* (USC) ____ Cal.App.5th ____, 2018 (2nd Appl. Dist., Div. 7 2018) p. 31 (using the original court-filed opinion on December 11, 2018) (decision-maker must be able to see witness respond to questions); *Doe v. Claremont McKenna College* (CMC) 25 Cal.App.5th 1055, 1070 (2nd Appl. Dist., Div. 1, 2018); *Doe v. Univ. of Michigan*, No.2:18-cv-11776-AJT-EAS, Docket 30, (S.D.MI. July 6, 2018); Doe v. Alger (James Madison University), 228 F. Supp. 3d 713, 730 (W.D. Va. 2016); *Doe v. University of Mississippi*, Case No.3:18-cv-00138, (S.D. Miss. January 16, 2019); *Lee v. The University of New Mexico*, Case 1:17-cv-01230-JB-LF, pp. 2-3 (D. NM. 2018); Doe v. University of So. Miss., No. 2:18-cv-00153 (S.D. Miss. ND Sept. 26, 2018) (It is at least plausible in this he said/she said case, that giving Doe an opportunity to cross-examine Roe could have added some value to the hearing under the second Mathews factor."); *Doe v. Penn. State University*, No. 4:18-CV-00164, 2018 U.S. Dist. LEXIS 141423 (M.D. Pa. Aug. 21, 2018); *Nokes v. Miami University*, 2017 U.S. Dist. LEXIS 136880, at *39, fn 10 (S.D. Ohio Aug. 25, 2017) (citation omitted) ("A case that 'resolve[s] itself into a problem of credibility' cannot itself be resolved without a mutual test of credibility.")

> A case that "resolve[s] itself into a problem of credibility" cannot itself be resolved without a mutual test of credibility, at least not where the stakes are this high . . . One-sided determinations are not known for their accuracy.[120]

The rationale for this requirement is twofold:

> Not only does cross-examination allow the accused to identify inconsistencies in the other side's story, but it also gives the fact-finder an opportunity to assess a witness's demeanor and determine who can be trusted. So, if a university is faced with competing narratives about potential misconduct, the administration must facilitate some form of cross-examination in order to satisfy due process. [121]

In *Doe v. Regents of the University of Cal.*, California's Second Appellate District found it,

> ironic that an institution of higher learning, where American history and government are taught, should stray so far from the principles that underlie our democracy. This case turned on the Committee's determination of the credibility of the witnesses. Credibility cannot be properly decided until the accused is given the opportunity to adequately respond to the accusation. The lack of due process in the hearing here precluded a fair evaluation of the witnesses' credibility. In this respect, neither Jane nor John received a fair hearing.[122]

In weighing the respective burdens of providing cross-examination, the 6th Circuit Court of Appeal in *Doe v. Baum* recognized that, in comparison to the risks of an erroneous finding of responsibility on the life of a respondent, "providing Doe a hearing with the opportunity for cross-examination would have cost the university very little." [123]

Appropriately, subsection (b)(3)(vii) requires questions be asked by the parties' advisors and allows parties to request to be located in separate rooms during cross-examination, as long as the other party and decision-maker(s) can see and hear that party respond to questions. The advisor requirement should not minimize, and may in fact improve the effectiveness of questioning, particularly if the advisor is an attorney. It will also lessen the likelihood of the parties' emotions interfering with the desired outcome, as well as any re-traumatization. Similarly allowing a party to be situated in another room but visible is a reasonable accommodation to prevent or minimize re-traumatization. However, what happens when the student cannot afford an attorney, and is appointed a college advocate who refuses to ask relevant questions?

The requirement of cross-examination is a game-changer; many school processes currently require the parties to submit written questions in advance to be asked by a school official. This may occur at a hearing, but more often the questioning is conducted by an investigator who interviews each party separately. However, FACE has numerous cases in which some or all of the submitted questions

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[120] *Doe v. University of Cincinnati*, 872 F.3d 393, at 403 (6th Cir. 2017) (citation omitted).

[121] *Doe v. Baum* (University of Michigan) 903 F.3d 575, 581 (6th Cir. 2018) (citations omitted).

[122] *Doe v. Regents of University of California* (UCSB), 28 Cal. App. 5th 44, 61 (Cal. App. 2d Dist. October 9, 2018).

[123] *Doe v. Baum* (University of Michigan) 903 F.3d 575, 582 (6th Cir. 2018); see also, *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 400, 403 (6th Cir. 2017) (a "finding of responsibility for a sexual offense can have a lasting impact on a student's personal life, in addition to [the student's] educational and employment opportunities[.]")) (internal quotation marks and citations omitted).

were never asked, were reworded to undermine their effectiveness, and follow-up questions ignored. It is our belief that written questions are never an effective substitute for live cross-examination; [124] credibility can only be determined when questions are asked in real time in the presence of parties and decision-makers who are able to listen and observe a witness's demeanor, and when immediate follow-up questions are permitted.

Decision to exclude questions: This subsection additionally obligates the decision-maker to explain any decision to exclude a question as "not relevant." This requirement is helpful in that it may reveal biased decision-making. For example, questions concerning a complainant's inconsistent pre- or post-event behavior or statements have been deemed "irrelevant," usually based on unscientific victim trauma myths. Unfortunately, this provision, like the proposed regulations as a whole, does little to preclude the actual use of these myths.[125]

Failure or refusal to submit to cross-examination: Finally, under this subsection the decision-maker would not be able to consider the testimony of any party or witness who refused to be questioned.

> 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 consequence for a complainant's failure to submit to cross-examination should prevent the disciplinary process from proceeding at all, though this does not seem to be what the rule anticipates. [126] A request for clarification on this point would be advisable.

The application of this rule to the failure of a respondent to submit to cross-examination when there are criminal charges, or a prosecution pending is discussed in above section II.A. under Section 106.6(d).

Exclusions re sexual history: The proposed regulations restrict "evidence of the complainant's sexual behavior or predisposition." Appropriately, the restriction does not apply to a complainant's sexual behavior or predisposition with the respondent when it is offered to prove consent.[127] Such evidence is also permitted "to prove that someone other than the respondent committed the conduct alleged by the complainant." For example, in *Doe v. Brandeis*, the university interpreted each sexual act

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[124] *Doe v. Baum* (University of Michigan) 903 F.3d 575, 582 (6th Cir. 2018) ("written statements cannot substitute for cross-examination."); *Doe v. Univ. of Notre Dame*, 2017 U.S. Dist. LEXIS 69645, p. 25 (N.D. Ind. May 8, 2017) (using original court filed version on May 8, 2017), vacated by request of the parties after settlement in *Doe v. Univ. of Notre Dame,* 2017 WL 7661416 (N.D.IN. Dec. 27, 2017) ("That all questions must be proposed in writing and are asked of witnesses only at the discretion of the Hearing Panel does not permit a robust inquiry in support of a party's position. The stilted method does not allow for immediate follow-up questions based on a witness's answers, and stifles John's presentation of his defense to the allegations.")

[125] See discussion of these policies in section X. below, under *Directed Question 4*.

[126] *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 401–02 (6th Cir. 2017): "Given the parties' competing claims, and the lack of corroborative evidence to support or refute Roe's allegations, the present case left the ARC panel with 'a choice between believing an accuser and an accused.' Yet, the panel resolved this 'problem of credibility' without assessing Roe's credibility. In fact, it decided plaintiff's fate without seeing or hearing from Roe at all. That is disturbing and, in this case, a denial of due process." (citations omitted).

[127] See, for example, *Doe v. Trustees of Boston College*, where the university improperly encouraged favorable treatment of the student that Doe claimed actually committed the sexual assault. *Doe v. Tr. of Boston College,* 892 F.3d 67 (1st Cir. 2018).

between the two students as occurring in a vacuum, as if they did not know each other, rather than in the context of an existing, exclusive, long-term relationship.[128]

Motivation: The exclusion of evidence concerning the complainant's sexual relationship with the respondent can be problematic when a respondent seeks to prove the complainant had a motive to fabricate or conceal a sexual interaction. The Federal Rules of Evidence permit this evidence "if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party."[129] This often arises when there is evidence of the complainant's motivation to lie or cover up his/her willing engagement in the alleged interaction, such as, for example, when a religious parent, boyfriend or friend discovers the sexual interaction. FACE has seen each of these scenarios repeatedly.

***Recommend*:** The subsection (3)(vii) requirement that the questioning must come from an attorney or an advisor poses some problems in cases where the student cannot afford an attorney, particularly when the student is appointed a college advocate who refuses to ask relevant questions. Nonetheless, this requirement reaches a reasonable balance between the university's interest in encouraging more reporting and the respondent's right to be able to defend him- or herself.

The restriction in subsection (3)(vii), excluding "evidence of the complainant's sexual behavior or predisposition," deserves clarification. The restriction could present difficulties for a respondent alleging the complainant's alleged motive was concealing their consensual sexual encounter from the complainant's friends, parents, or boyfriend, as alleged in complaints in *Doe v. Swarthmore College* and *Doe v. Johnson & Wales University*.[130] In the latter case the specifics of the complainant's sexual relationship with her boyfriend would not be necessary, but it would be critical to a respondent's defense to establish the existence of that relationship because preserving that relationship could provide a motive to falsely allege misconduct by the respondent. We would like the Department to make clear that it is appropriate to allow "evidence of the complainant's sexual behavior or predisposition," when used to show the complainant's motivation to fabricate.

Generally, these requirements and restrictions are reasonable, despite victims' advocates' and other groups' assumptions that the proposed rules will allow the respondent's advisor to "aggressively" question and/or re-traumatize a complainant. Realistically, it is unlikely campus officials will permit an advisor to question a party in an inappropriate manner. In the experience of the "potted plant" lawyers who now appear in campus conduct hearings, school officials are perfectly capable of controlling advocates. Furthermore, the proposed rule minimizes the likelihood potential victims will be re-traumatized by allowing a party to be located in a separate room and requiring an advisor do any questioning.

Finally, the courts have emphasized that cross-examination is the best tool for determining credibility, which often is the primary issue in these disputes. And we must remember that *both* parties are students entitled to their education, and their respective interests must be weighed. Here, when weighing the potential destruction of a respondent's life against requiring a complainant to

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[128] *Doe v. Brandeis University*, 177 F. Supp. 3d 561, 573 (D. Mass. 2016).
[129] Fed. R. Evid. 412, https://www.law.cornell.edu/rules/fre/rule_412.
[130] *Doe v. Swarthmore College* complaint, No. 2:14-cv-00532; *Doe v. Johnson & Wales University*, No. 1:18-cv-00106 (D.R.I. May 14, 2018).

merely answer questions about his/her own allegations, we believe this proposed rule is successful in reaching a balanced solution.

Section 106.45(b)(4)(i): *Responsibility determination; Single investigator; Standard of evidence*
[Fed. Reg. p. 61499, col. 1]

Comment: Proposed subsection (b)(4)(i) of 106.45 would prevent use of the single investigator model and allow schools the option to use the clear and convincing standard of evidence as an alternative to the preponderance standard. Although the sentiment was only implied, lowering the standard of evidence and other pro-complainant requirements imposed by the Obama administration appeared to be premised on a belief that making it easier to find accused students guilty would increase reporting of offenses to campus authorities. While we don't know if lowering the standard actually increased reporting, a UCLA professor's academic study revealed that its use would likely result in a 20 and 33 percent rate of innocent students being found guilty.[131]

Single investigator prohibition: The likelihood of confirmation bias is one reason the rule proposes precluding investigators from also serving as adjudicators.[132] The single-investigator model would be also be inconsistent with proposed section 106.45(b)(3)(vii), because its very design that model eliminates the possibility of real-time cross-examination. The Department believes …

> that fundamental fairness to both parties requires that the … drafting of an investigative report, and ultimate decision about responsibility should not be left in the hands of a single person.[133]

Under a single-investigator model, though an investigator may ask questions of one party proposed by the opposing party in writing, there is no opportunity for either party to know what initial or follow-up questions were actually asked by the investigator, the manner in which those questions were asked, or whether and how the other party responded.[134] This practice precludes any ability of either decision-makers or the opposing party to discover inconsistencies or observe a witness' demeanor. And as discussed below, it is in consistent with recent court decisions finding an investigator's filtering or paraphrasing questions, denying a respondent the right to cross-examine his accuser, or allowing an investigator to influence or participate in decision-making each contributed to an unfair process.[135]

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[131] John Villasenor, "A probabilistic framework for modelling false Title IX 'convictions' under the preponderance of the evidence standard," *Law, Probability and Risk*, Volume 15, Issue 4, Dec. 1, 2016, pp. 223–237. https://academic.oup.com/lpr/article/15/4/223/2549058.

[132] *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 573 (D. Mass. 2016) ("obvious" the "dangers of combining in a single individual the power to investigate, prosecute, and convict, with little effective power of review"). There are "hybrid" models, such as in most public universities in California, where the appeal allows a hearing in certain circumstances, but this is only following the responsibility finding.

[133] Fed. Reg., page 61478, col. 1.

[134] *John Doe v. University of Michigan*, et al., Case No. 18-1177, *p. 7 (E.D. Mich. July 6, 2018).

[135] *Id.* ("private questioning through the investigator," deprived the accused student "of a live hearing and the opportunity to face his accuser."); *Doe v. Penn. State Univ.*, No. 4:18-cv-164, Docket 27 (M.D.Pa. 2018) (court found it insufficient that the investigator had "filtered," "paraphrased," and then "directed some questions from Mr. Doe to Ms. Roe during the interviews," because it was "unclear whether any of Mr. Doe's questions went unasked or unanswered, and unclear whether (or how) those questions were rephrased."); *Doe v. Claremont McKenna College*, 25 Cal.App.5th

The rule's exclusion of the single investigator model would implement procedures required by several recent court decisions.[136] For example, U.S. District Judge Matthew Brann allowed a lawsuit against Penn State to proceed, writing,

> In a case like this, however, where everyone agrees on virtually all salient facts except one—i.e., whether or not Ms. Roe consented to sexual activity with Mr. Doe—there is really only one consideration for the decisionmaker: credibility. After all, there were only two witnesses to the incident, with no other documentary evidence of the sexual encounter itself. As a result, in this Court's view, the Investigative Model's virtual embargo on the panel's ability to assess that credibility raises constitutional concerns.[137]

The Judge's comment captures the many shortcomings of the single-investigator model. In addition to denying cross-examination by design, the model's blending of investigative and adjudicative functions dramatically increases the chances of finding an innocent student responsible.

Standard of evidence: Though the proposed subsection leaves the choice of a standard of evidence to recipient, it also incentivizes schools to consider a higher standard. In order to "ensure that recipients do not single out respondents in sexual harassment matters for uniquely unfavorable treatment,"[138] the Department has included a very important condition that a recipient must use the same standard (1) as "for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction," and (2) "as it does for complaints against employees, including faculty."

The Department recognizes the importance of this second condition in avoiding …

> the specially disfavored treatment of student respondents in comparison to respondents who are employees such as faculty members, who often have superior leverage as a group in extracting guarantees of protection under a recipient's disciplinary procedures.[139]

1055, 1072-73 (2nd Appl. Dist., Div. 1, 2018) (all decision makers "must make credibility determinations, and not simply approve the credibility determinations of the one Committee member who was also the investigator.")

[136] *Doe v. University of Michigan*, et al., Case No. 18-1177, *p. 7 (E.D. Mich. July 6, 2018) ("private questioning through the investigator," deprived the accused student "of a live hearing and the opportunity to face his accuser."); *Doe v. Penn. State University*, No. 4:18-cv-164, Docket 27 (M.D.Pa. 2018) (court found it insufficient that the investigator had "filtered," "paraphrased," and then "directed some questions from Mr. Doe to Ms. Roe during the interviews," because it was "unclear whether any of Mr. Doe's questions went unasked or unanswered, and unclear whether (or how) those questions were rephrased."); *Doe v. University of Cincinnati*, 872 F.3d 393, 401–02 (6th Cir. 2017) (complainant did not appear; insufficient to require accused to submit questions through investigator or decision-makers); *Doe v. Brandeis University*, 177 F. Supp. 3d 561, 573 (D. Mass. 2016) ("obvious" the "dangers of combining in a single individual the power to investigate, prosecute, and convict, with little effective power of review"); *Doe v. Claremont McKenna College*. 25 Cal.App.5th 1055, 1072-73 (2nd Appl. Dist., Div. 1, 2018) (all decision makers "must make credibility determinations, and not simply approve the credibility determinations of the one Committee member who was also the investigator."); *Doe v. Miami University*, 882 F.3d 579, 601, 605 (6th Cir. Feb. 9, 2018) (court found "legitimate concerns" raised by the investigator's "alleged dominance on the three-person [decision making] panel," because "she was the only one of the three with conflicting roles.")

[137] *Doe v. Penn. State University*, 2018 U.S. Dist. LEXIS 141423 at *12 (M.D. Pa. August 21, 2018).

[138] Fed. Reg., p. 61477, col. 3.

[139] Fed. Reg., p. 61477, col. 3.

The Department also acknowledges a higher standard would be appropriate in cases involving sexual misconduct because,

> a finding of responsibility carries particularly grave consequences for a respondent's reputation and ability to pursue a profession or career, a higher standard of proof can be warranted. Indeed, one court has held that in student disciplinary cases involving serious accusations like sexual assault where the consequences of a finding of responsibility would be significant, permanent, and far-reaching, a preponderance of the evidence standard is inadequate.

The likelihood that nearly 30% of innocent students will found guilty with the preponderance standard, and the fact that those innocent students will nevertheless suffer the "grave consequences" of a guilty finding, demand a higher standard requiring decision-makers to be convinced a student is guilty. This would increase the reliability of findings, while also impressing upon decision-makers that guilt is not an either-or proposition, but a threshold that must be met.[140]

The courts are beginning to agree: in 2018, a federal court held that—given the lack of other procedural safeguards and the seriousness of the allegations—preponderance is not an appropriate standard for use in sexual misconduct cases.[141] In 2018 two other court expressed similar concerns about the use of a preponderance standard to adjudicate Title IX complaints.[142]

The previous administration's rationale that campus Title IX adjudications resemble civil litigation which traditionally uses preponderance ignores the significant discrepancies in procedural protections between campus and civil proceedings: in the former there is no discovery, no perjury, no public hearings, no right to an independent adjudicator, rules of evidence or an impartial judge and jury. These circumstances further support a regulation that schools be required to use the clear and convincing standard in Title IX complaints.

***Recommend*:** The exclusion of an option to use a single investigator model by section 106.45(b)(4)(i) is an extremely important provision intended to limit the effect of bias, and a rule we strongly support. This is particularly relevant today, as such models are becoming more and more common. Universities should have an interest "in securing *accurate* resolutions of student complaints," because their educational mission would be stymied by ejecting "*innocent* students who would otherwise benefit from and contribute to their academic environment."[143]

Though, as discussed above and in our response to *Directed Question 6*, a higher standard of evidence would impress upon decision-makers that evidence of responsibility must meet a specific threshold when determining guilt instead of a zero-sum proposition as many treat it,[144] we endorse the rule's requirement that the same standard be used for disciplinary actions involving students, as that applied to faculty matters.

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[140] See note 144, *infra*, and our response to *Directed Question 6* in section X. below at p. 51.
[141] *Lee v. University of N.M.,* No. 1:17-cv-01230 (D.N.M. Sept. 20, 2018).
[142] *Doe v. DiStefano*, 2018 U.S. Dist. LEXIS 76268, *22–23 (D. Colo. May 7, 2018); *Doe v. University of Mississippi*, 2018 U.S. Dist. LEXIS 123181 (S.D. Mississippi July 14, 2018).
[143] *Doe v. Penn. State University*, 2018 U.S. Dist. LEXIS 141423 at *12 (M.D. Pa. August 21, 2018).
[144] This is particularly important because victim-focused decision-makers consider a "not responsible" finding equivalent to finding the complainant is a liar. Moving the goal post more toward a presumption of innocence conveys to decision-makers that this is not a zero-sum game, but a threshold of proof which must be reached.

Section 106.45 (b)(1)(viii) and (b)(5): *Appeals*
[Fed. Reg. p. 61499, col. 2]

Comment: Sections 106.45 (b)(1)(viii) and (b)(5) of the proposed rules permit schools to allow appeals by both parties. This is a change from the earlier leaked draft of the rules that sanctioned a school's decision to allow only a respondent to appeal. However, subsection (b)(5) precludes a complainant from appealing to request imposition of a different sanction.

No federal court has ever ruled that complainants have a right under Title IX to appeal not-responsible findings. Before 2011, one Department resolution letter had approved a school granting only the accused a right to appeal because "he/she is the one who stands to be tried twice for the same allegation."[145] Two more resolution letters made clear that Title IX did not require that complainants be allowed to appeal not-responsible findings.[146]

Multiple lawsuits from respondents have raised questions of fundamental fairness in how schools have administered appeals of not-guilty findings. At George Mason, the appeals officer improperly communicated with the complainant before overturning the not-guilty finding.[147] At James Madison, university procedures allowed the complainant to introduce new (and, it turned out, misleading) evidence without allowing the respondent a chance to rebut the material.[148] And at the University of Michigan, the Appeals Board made credibility judgments about the two parties without ever hearing from them.[149]

***Recommend*:** The rule's mandate to also allow appeals for complainants at schools that allow the respondent to appeal raises fairness concerns. While the rule appropriately clarifies that the complainant ought not have the right to appeal the sanction, there should be a requirement that the appeals process cannot in any way undermine the procedural rights of the respondent. Otherwise, schools intent on retaining the one-sided procedures of the post-2011 era could develop practices where campus appeals panels routinely overturn accurate not-responsible findings that are decided under the more robust procedural protections ensured by these proposed rules.

Permitting appeals also could affect credibility determinations because there is no assurance that credibility determinations will not be reconsidered on appeal; allowing a different official or panel to revisit and possibly reverse the decision-makers seems to negate or undermine the benefits of requiring a hearing with live testimony to assess credibility in the first instance. Obviously, the appeal official or panel is in no better positioned to determine the credibility of either party than the decision-makers.

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[145] Skidmore College, OCR Complaint No. 02-95-2136 (Feb. 12, 1996).
[146] University of Cincinnati, OCR Complaint No. 15-05-2041 (Apr. 13, 2006) ("there is no requirement under Title IX that a recipient provide a victim's right of appeal") and Suffolk University Law School, OCR Complaint No. 01-05-2074 (Sept. 30, 2008) ("appeal rights are not necessarily required by Title IX, whereas an accused student's appeal rights are a standard component of University disciplinary processes in order to assure that the student is afforded due process before being removed from or otherwise disciplined by the University").
[147] *Doe v. Rectors of George Mason University*, 149 F. Supp. 3d 602 (E.D. Va. 2016).
[148] *Doe v. Alger*, 228 F. Supp. 3d 713 (W.D. Va. 2016).
[149] *Doe v. Baum* (University of Michigan) 903 F.3d 575 (6th Cir. 2018); request for en banc reconsideration denied.

Section 106.45(b)(6): *Informal resolution*
[Fed. Reg. p. 61499, cols. 2-3]

Comment: The proposed regulations permit mediation or similar informal processes as an option for resolving Title IX disputes. Any form of informal resolution was discouraged by previous guidance, on the assumption that it would be too traumatic for "victims."

Many of the Title IX allegations FACE has encountered over the past several years have involved situations such as drunken hook-ups, retribution for the end of or refusal to engage in a relationship, and used as an excuse for why the accuser had sex, cheated on a partner, is failing classes, or violated religious beliefs. Because these are educational environments we believe it is appropriate to respond to non-criminal allegations with education and discussion, rather than the immediate commencement of an adversarial process.

***Recommend*:** This change is a welcome one, especially given the oft-stated belief from organizations that champion the rights of complainants that universities should do all they can to provide maximum freedom of action to complainants.

Section 106.45(b)(7): *Recordkeeping*
[Fed. Reg. p. 61499, col. 3]

Comment: The proposed rule would require all records of the Title IX disciplinary process to be retained and accessible to the parties for three years. This is a very helpful provision, as many families have had the same experience as the student in *Doe v. Alger*, where the school official permitted the accused student to review the file, but told him that he could not "make or receive copies of any file materials, [but] he could take notes ..." [150]

It is unclear what types of records this section anticipates schools should keep. Should there be transcripts of hearings or merely a list of steps taken? The requirement that schools "create" records concerning the disciplinary process leaves open either possibility. Similarly, the rule's requirement that the school "document the basis for its conclusion that its response was not clearly unreasonable," and "that it has taken measures designed to restore or preserve access to the recipient's educational program or activity," could allow merely a list of steps taken.

***Recommend*:** These provisions are welcome and unobjectionable. The response to comments should clarify that this information should be shared with a student promptly upon request, to ensure that universities do not wait until after the adjudication process to share this information.[151] The knowledge that they will need to share their training material with any respondent who requests it

[150] *Doe v. Alger* (James Madison University), 175 F.Supp.3d 646, 651 (W.D. VA. 2016). The court did not specifically hold the conditions under which the student was forced to review evidence were inadequate, but in a subsequent decision found "there were significant anomalies in the appeal process that show, especially when viewed collectively, that Doe was denied a meaningful opportunity to be heard during the appeal." *Doe v. Alger*, 228 F. Supp. 3d at p. 731. In January of this year, a federal magistrate recommended an award of $850,000 in attorney's fees on behalf of the accused student. *Doe v. Alger* (James Madison University), Civil Action No. 5:15-cv-35, (W.D. VA. 2018) (using originally filed opinion January 31, 2018.)

[151] See *Doe v. Johnson & Wales University*, No. 1:18-cv-00106 (D.R.I. May 14, 2018), for a university refusal, without explanation, to share its training material upon request by the lawyer for the respondent.

hopefully will encourage universities to steer clear of the current, guilt-presuming training, which too often relies on sex stereotypes.

The Department also should consider addressing how transcripts of students are marked when they are found responsible, and a provision for removing such notations and/or expunging certain records after a certain number of years.[152]

As mentioned elsewhere, the Department should require schools to disclose publicly the materials used to train Title IX officials for two reasons: (1) publicity can help ensure they are free from bias, and (2) as a form of notice to prospective parents and students concerning the nature of the school's Title IX training and how it may affect the student's future.

Section 106.45 (b)(1)(v): *Reasonably prompt timeframes*
[Fed. Reg. p. 61497, col. 3]

Comment: This provision, requiring "reasonably prompt timeframes," recognizes the difficulty that a "recommended" 60-day limit for adjudication posed for a respondent. Colleges often spend far fewer than 60 days completing the adjudication process, often at the expense of allowing a respondent sufficient time to defend himself.

In an early example from the post-2011 Dear Colleague letter era, Vassar College completed its investigation, adjudication, and expulsion of an accused student in fewer than ten days. The haste was especially problematic given that the complainant had waited 364 days to file a complaint, with no allegations of subsequent harassment; and the hasty hearing denied to the respondent (a foreign national) sufficient time to ensure that his exculpatory witnesses would appear at the hearing.[153]

However, this proposed rule would benefit from clarification regarding how the Department will interpret the interaction between the Fifth Amendment and this subsection's requirement for "reasonably prompt timeframes." Though the section mentions "Good cause" for delay "may include considerations such as … concurrent law enforcement activity," recipients undoubtedly could use guidance on to what extent they may delay their disciplinary proceeding for criminal prosecutions which may take years to resolve.

A possible solution to concurrent Title IX and criminal proceedings mentioned above[154] is that recipients be permitted to suspend Title IX adjudications pending resolution of a criminal proceeding. In order to ensure a complainant is not prejudiced by the temporary suspension of the process, the recipient could grant the respondent the opportunity to take a non-punitive voluntary leave of absence from participation in recipient's programs and activities while criminal charges or prosecution is pending.

***Recommend*:** Regulatory action is particularly important in this area because courts have shown more flexibility in granting colleges leeway to conduct rushed adjudications than they have in other areas that raise procedural concerns. It is also helpful that the section mentions "Good cause" for delay "may include considerations such as … concurrent law enforcement activity," as this is becoming a more frequent scenario for respondents.

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[152] See discussion in section IX.A. below at p. 45.
[153] *Yu v. Vassar College*, 97 F. Supp. 3d 448 (S.D.N.Y. 2015).
[154] See discussion in section II.B. above, under Section 106.6(d): Constitutional protections, at p. 6.

IX. Issues Not Addressed by Proposed Rules

This section addresses the following proposed sections:

- *Transcript notations and expungement*
- *False allegations*
- *Preemption clause*
- *Native American students entitled to due process*

A. *Transcript notations and expungement*

Comment: While the proposed regulations represent a significant step forward in ensuring Title IX proceedings prioritize truth-seeking over appearing tough on sexual misconduct, hundreds of FACE families realize these regulatory changes have come too late for their sons and daughters. At the same time, we are cognizant of the reality that correcting what we have come to refer to as the "injustice gap" could be an enormous undertaking.

It is ironic that many of the same advocates who want to "ban the box" allowing convicted felons to attend college are simultaneously calling for transcript notations for sexual misconduct. The incongruous result of this inconsistency is that the impact of a college "finding" (not "verdict") of what is euphemistically called "responsibility" (not "guilt") in a process they call "educational" is arguably more destructive of the accused student's future than a felony conviction. Furthermore, as discussed above, the term "sexual misconduct," is misleading because it can indicate a wide range of non-criminal behavior from requesting a date, to innocent touching, all the way to rape.

Though FACE has been contacted by over one thousand families, we cannot possibly know how many more innocent students were subjected to inequitable disciplinary processes as a result of withdrawn Department guidance or other policies that will be changed or disapproved by the proposed rules. Nor do we know how many of these students would have been found "not responsible" had definitions of misconduct been those under the proposed regulations discussed above.

We do know, however, that our students have been severely traumatized and their educational and career opportunities unfairly destroyed.

***Recommend*:** Our suggestion would be for the Department to allow schools to expunge records of students found responsible under withdrawn or disapproved Title IX policies, without penalizing schools that opt to do so. If the Department were to approve this practice, it might incentivize schools to reconsider some cases. This of course would be limited to lower level, non-criminal or non-violent findings, and not include cases in which the incident involved weapons, evidence of force, incapacitation, or where there were multiple parties, or multiple incidents.

We believe it is possible to correct the injustice gap without creating significant burdens on institutions, students, or the Department. In the era of "ban the box" it is illogical to disallow those found responsible on college campuses to be permanently banned from education by findings reached under broad, non-criminal definitions, a lower standard of evidence, and very few procedural safeguards.

Institutions could in this manner resolve current or prevent future litigation[155] without the threat of being penalized by the Department. The Department also would be able to resolve existing or avoid new OCR complaints based on its now-abandoned policies, many of which restricted the rights of and denied protections to accused students.

Any "no contact" orders may be permitted to remain in effect until graduation or as long as deemed necessary. A school's decision to expunge a record would be conditioned upon the student releasing the institution from any liability in finding the student responsible or issuing sanctions under former policies disapproved by new regulations.

B. *False allegations*

Comment: The proposed regulations are silent on consequences for false allegations, apparently leaving it up to schools to decide whether to sanction persons making such allegations. Proposed section 106.45(b)(2)(i)(B), however, requires parties to be be notified "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."

***Recommend*:** The Department should encourage schools to punish proven false allegations

C. *Preemption clause*

Comment: The regulation of educational disciplinary procedures is something of a hybrid; though Title IX was enacted under Congress' Spending Clause, giving the Department the legal authority to offer federal funds to recipients contingent upon their compliance,[156] education is also a field traditionally occupied by state and local authorities.[157] The Tenth Amendment preserves state autonomy by limiting federal power to that not reserved to the states.[158] On the other hand, Title IX is a civil rights law, and civil rights is an area in which there is an established dominant federal interest.[159] Furthermore, over the years there has been "a significant expansion of Federal support for education."[160]

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[155] Though the reality is many if not most statutes of limitation will have run for older cases. However, there is a question as to whether disapproval of former policies can be used to establish those policies were inherently unfair.

[156] *National Federation of Independent Business v. Sebelius* (2012) "that Congress conditioning a state's receipt of the entirety of its federal Medicaid funds on whether said state elected to expand its Medicaid program in accordance with the Patient Protection and Affordable Care Act was an unconstitutionally coercive use of Congress's spending power. Here the Department also has the express authority to withdraw funding under The Title IX statute, 20 USC §1682, for noncompliance with its regulations."[156] Section § 106.4(a) of the existing regulations also requires, as a condition of accepting federal funds, that the recipient agree in advance to comply with the regulations.

[157] The Department of Education acknowledges on its website that "Education is primarily a State and local responsibility in the United States. It is States and communities, as well as public and private organizations of all kinds, that establish schools and colleges, develop curricula, and determine requirements for enrollment and graduation." May 25, 2017; The Federal Role in Education, Overview ("the Federal contribution to elementary and secondary education is about 8 percent.") accessed at https://www2.ed.gov/about/overview/fed/role.html .

[158] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[159] The Federal Role in Education, History, accessed at https://www2.ed.gov/about/overview/fed/role.html.

[160] *Id.*

> Today, ED operates programs that touch on every area and level of education. The Department's elementary and secondary programs annually serve nearly 18,200 school districts and over 50 million students attending roughly 98,000 public schools and 32,000 private schools. Department programs also provide grant, loan, and work-study assistance to more than 12 million postsecondary students.[161]

Generally, although the exercise of Congress' spending power has been upheld, case law is far from clear.[162] For example, even though Congress' power is "exceptionally broad" under the Commerce Clause,

> state laws are not *per se* preempted. Rather, "state law is pre-empted only when it conflicts with the operation or objectives of federal law, or when Congress 'evidences an intent to occupy a given field."[163]

Furthermore, states are permitted to enact *stricter* requirements than federal law allows. The current flurry of state efforts to codify Obama-era guidance in this area could pose a potential problem when those laws impose requirements such as a lower standard of evidence or deny cross-examination; are these state laws "stricter" or more lenient than the proposed regulations?

The Supreme Court traditionally relies upon legislative intent, and "prefers interpretations that avoid preempting state laws."[164] "Discerning congressional intent to occupy an area is a question of statutory interpretation based on an examination of the pervasiveness of the federal statute."[165] However, courts are also reluctant to invalidate state statutes if the legislative intent is not clear; "To conclude that federal regulations preempt state regulatory powers, Congress' intent must be unmistakable or the nature of the subject matter must permit no other conclusion."[166]

As an example, consider Title VII's specific "savings" or "anti-preemption" clause, which expressly validates state laws to the extent they do not conflict with Title VII's purpose and effect:

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[161] *Id.*

[162] Spending Clause, Article I, Section 8, Clause 1 of the U.S. Constitution: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."

[163] THE ROLE OF STATE LAW IN AN ERA OF FEDERAL PREEMPTION: LESSONS FROM ENVIRONMENTAL REGULATION JOHN P. DWYER*, LAW AND CONTEMPORARY PROBLEMS Vol. 60: No. 3 p. 208 n. 22, 1997, quoting *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 593 (1987) (quoting *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 248 (1984), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1053&context=lcp

[164] *Cornell University Law School*. *"Preemption"*. *law.cornell.edu.*

[165] Fishman, Leta L. (1993) "Preemption Revisited: Title VII and State Tort Liability After International Union v. Johnson Controls," *St. John's Law Review*: Vol. 66 : No. 4 , Article 3, p. 1051 Available at: https://scholarship.law.stjohns.edu/lawreview/vol66/iss4/3, citing Laurence H. Tribe, *American Constitutional Law* § 6-25, at 480, note 2 (2d ed. 1988); John E. Nowak & Ronald D. Rotunda, *Constitutional Law* § 9.1, at 311 (4th ed. 1991) ("It is for the courts to determine congressional intent when the legislature has not made it clear."); *Rice v. Santa Fe Elevator*, 331 U.S. 218, 230 (1947) ("The pervasiveness of a statute may 'make reasonable the inference that Congress left no room for the States to supplement it.'")

[166] Fishman, Leta L. (1993) "Preemption Revisited: Title VII and State Tort Liability After International Union v. Johnson Controls," *St. John's Law Review*: Vol. 66 : No. 4 , Article 3, p. 1052, citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963) ("To conclude that federal regulations preempt state regulatory powers, Congress' intent must be unmistakable or the nature of the subject matter must permit no other conclusion"); see also *New York Dep't of Social Servs v. Dublino*, 413 U.S. 405, 413 (1973) (requiring a "clear manifestation of intent" to preempt).

> Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.[167]

There is also already one section in the preexisting Title IX regulations which addresses preemption:

> § 106.6(b) *Effect of State or local law or other requirements*. The obligation to comply with this part is not obviated or alleviated by any State or local law or other requirement which would render any applicant or student ineligible, or limit the eligibility of any applicant or student, on the basis of sex, to practice any occupation or profession.

Though its scope is limited, the presence of section 106.6(b) could cause a court to wonder why this is the rules' only reference to preemption.[168] Additionally, proposed section 106.6(d)-(f) also would provide that the obligations imposed by the proposed rules are not not intended to interfere with other laws. The presence of these two provisions could subject the regulations to the rule that "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not preempted,"[169] known as the principle of *expression unius est exclusion alterius*.[170]

***Recommend*:** We recommend the Department add an explicit preemption clause to the proposed rules. The likelihood of conflicting state laws is already apparent, and the case law unclear, particularly in an area such as education where federal government does not occupy the entire field.

D. *Native American students entitled to due process*

Comment: 25 CFR §42.8 concerns Native American students' rights in formal disciplinary hearings and applies to all institutions receiving funds from the Bureau of Indian Affairs.

The due process rights to which Native Americans are entitled in campus disciplinary hearings include: (a) The right to have present at the hearing the student's parents or guardians (or their designee); (b) The right to be represented by counsel (legal counsel will not be paid for by the Bureau-funded school or the Secretary); (c) The right to produce, and have produced, witnesses on the student's behalf and to confront and examine all witnesses; (d) The right to the record of the disciplinary action, including written findings of fact and conclusions; (e) The right to administrative review and appeal under school policy; (f) The right not to be compelled to testify against himself

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[167] 42 U.S.C. § 2000e-7 (1988):

[168] *Wyeth v. Levine*, 555 US 555 (2009) (Stevens - Hold: The Food Drug and Cosmetic Act (FDCA) did not preempt a state tort lawsuit that declared an FDA-approved drug label unsafe. Congress modified the medical devices part of the act to add an express preemption clause, but did not do so for drug labeling, so it can be have said to endorsed continuing state lawsuits in the area.)

[169] Kellen Norwood, "Federal Preemption of State and Local Law," p. 9, *American Bar Assn*., citing *Cipollone v. Liggett Grp., Inc*., 505 U.S. 504, 517 (1992). https://www.americanbar.org/content/dam/aba-cms-dotorg/products/ecd/ebk/214781428/Chapter%201.pdf

[170] New Latin, "a principle in statutory construction: when one or more things of a class are expressly mentioned others of the same class are excluded." *Merriam-Webster's Dictionary of Law* 1996.

or herself; and (g) The right to have an allegation of misconduct and related information expunged from the student's school record if the student is found not guilty of the charges.

***Recommend*:** Students subjected to Title IX disciplinary proceedings should be given the same due process rights as Native Americans. Denying those rights to non-Native Americans could constitute racial discrimination.

X. Directed Questions

This section addresses the following *Directed Questions*:

- *Directed Question 4: Is the training requirement in Section 106.45(b)(1)(iii) sufficient?*
- *Directed Question 5: Is 106.44(c) adequate to protect individuals with disabilities?*
- *Directed Question 6: What should be the standard of evidence?*
- *Directed Question 7: Does the "'directly related to the allegations" language need clarification?*

Directed Question 4: *Is the training requirement in Section 106.45(b)(1)(iii) sufficient?*[171]

Comment: *Directed Question 4* asks us whether Section 106.45(b)(1)(iii) "is adequate to ensure that recipients will provide necessary training to all appropriate individuals." In response, we believe the answer is definitely no. The rule should require training materials to exclude presumptions such as that men are the aggressor in sexual encounters, or reliance on unscientific victim trauma theories to excuse and ignore a complainant's statements or conduct inconsistent with having been sexually assaulted.[172]

Three proposed rules go a long way toward ensuring school officials do not use or apply sex-biased policies in the investigation or adjudication of Title IX complaints: section 106.45(b)(1)(iii) prohibits school officials from relying "on sex stereotypes" in their decisions; section 106.45(b)(1)(ii) states "that credibility determinations may not be based on a person's status as a complainant, respondent, or witness," and section 106.45(b)(7) requires schools to disclose their training materials to parties in a Title IX process.

Unfortunately, the proposed regulations do not adequately address the content of training materials. Simply precluding reliance on sex stereotypes and disregarding the fact that one party is a potential victim will not be sufficient. Campus decision-makers are regularly instructed to ensure "victims of sexual violence are believed and that they're seen as credible,"[173] and to be "very, very cautious in accepting a man's claim that he has been wrongly accused of abuse or violence."[174] Similarly,

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[171] Fed. Reg., page 61483, col. 1

[172] "Trauma-informed" theories such as the "neurobiology of trauma" claim that any inconsistent statements or behavior by a complainant creates "counterintuitive behavior" "typical" of someone having suffered trauma. This alleged constellation of "trauma" symptoms, even if it were based on neuroscience, are hardly relevant to typical, non-criminal allegations of sexual misconduct on campuses.

[173] For example, *Start by Believing* is a public awareness campaign designed by End Violence Against Women International to change the way the public "responds to rape and sexual assault in our communities." http://www.startbybelieving.org.

[174] Young, Cathy, "Harvard Liberals Hate New Campus Sex Laws," *The Daily Beast*, October 19, 2014, http://www.thedailybeast.com/articles/2014/10/19/harvard-liberals-hate-new-campus-sex-laws.html.

according to the victims' rights campaign *Start by Believing*, "[w]e should believe, as a matter of default, what an accuser says" because "the costs of wrongly disbelieving a survivor far outweigh the costs of calling someone a rapist."[175] This message glibly minimizes the impact of wrongful accusations, and erroneous findings of guilt.

In the few cases where a school's training materials have become public, emphasis on fairness or the rights of a respondent has been perfunctory at best and wholly absent at worst. Instead, the apparent purpose of the training too often is to promote the sex-stereotypical belief that complainants should be presumed truthful.[176] Other school training informs decision-makers that "[s]ex offenders are overwhelmingly white males."[177] Harvard's policy was, according to Harvard Law Professor Janet Halley, "100% aimed to convince [adjudicators] to believe complainants, precisely when they seem unreliable and incoherent."[178]

More problematic are pervasive "trauma-informed" theories falling under the "neurobiology of trauma" umbrella, that claim a complainant's inconsistent statements or behavior exhibit "counterintuitive behavior" which is "typical" of someone having suffered trauma. These theories also include such alleged reactions as freezing during an assault, which has been proven only to apply in life threatening situations and is based primarily on experiments with animals.

Proposed section 106.45(b)(1)(iii) must specifically preclude the use of victim-centered and trauma-informed policies in the investigation and adjudication of Title IX complaints. Distortions produced by these theories and practices are much more damaging than acknowledged by the Department:

> Stakeholders have raised concerns that recipients sometimes ignore evidence that does not fit with a predetermined outcome, and that investigators and decision-makers have inappropriately discounted testimony based on whether it comes from the complainant or the respondent.[179]

Theories, that victims lie, falsify details, or behave inconsistently as a way of coping with trauma, have only one purpose, and that is to discredit any defense based upon a complainant's inconsistent behavior or statements. According to FIRE, "An investigator who is trying to anticipate and counter defense strategies in the course of his/her investigation is not acting as a neutral fact-finder." [180]

Courts have not looked favorably on schools' use of these practices. In a 2017 decision later affirmed by the California Court of Appeal, a superior court judge found that the school's administrative process failed to comply with the law because "the [disciplinary committee] improperly permitted [the Title IX investigator] to base his evaluation on what [he] understood to be the 'trauma-informed'

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[175] End Violence Against Women International, *Start by Believing*, http://www.startbybelieving.org.

[176] KC Johnson and Stuart Taylor, "The Title IX Training Travesty," *The Weekly Standard*, Nov. 10, 2017, https://www.weeklystandard.com/kc-johnson-and-stuart-taylor-jr/the-title-ix-training-travesty

[177] *Doe v. Ohio State Univ.,* No. 2:15-cv-2830, 2016 WL 692547, at *3 (S.D. Ohio 2016)*; see also Doe v. Univ. of Pa.*, 270 F. Supp. 3d 799, 823 (E.D. Pa. 2017).

[178] Emily Yoffe, *The Bad Science Behind Campus Response to Sexual Assault*, The Atlantic, Sept. 8, 2017, https://www.theatlantic.com/education/archive/2017/09/the-bad-science-behind-campus-response-to-sexual-assault/539211/.

[179] Fed. Reg., page 61473, column 1.

[180] Samantha Harris, "University of Texas 'Blueprint' for Campus Police Raises Fairness Concerns," *Foundation for Individual Rights in Education*, March 11, 2016. https://www.thefire.org/university-of-texas-blueprint-for-campus-police-raises-fairness-concerns/.

approach."[181] In *Doe v. University of Mississippi*, the court found the school's training materials created "an assumption … that an assault occurred": [182]

> (1) the training material… "advise[s] the panel members that 'victims' sometimes withhold facts and lie about details, question if they've truly been victimized, and 'lie about anything that casts doubt on their account of the event,'" and (3) it explains that "when Complainants withhold exculpatory details or lie to an investigator or the hearing panel, the lies should be considered a side effect of an assault." [183]

Other courts have recognized the importance of the context of the parties' relationship in determining motivation in these cases, and criticized the school's refusal to consider such evidence based on precepts that find inconsistent statements or behavior by a complainant to be "counterintuitive behavior" which is "typical" of someone having suffered trauma.[184] This allows decision-makers to ignore the context of the parties' relationship, and context obviously includes the complainant's behavior and statements both before and after the alleged event.

The assumption that a complainant is truthful and his/her recollections accurate is particularly concerning in campus sexual misconduct proceedings. The reality that memories are easily contaminated by peer influence, social barometers, ideology, and attitudes[185] is especially relevant to campuses, where powerful ideology infuses not only the disciplinary process, but the entire campus belief system, and is unchecked by the fear of reprisal for critical expression. Furthermore, complainants may come to believe their false memories; "exposure to false or misleading post event information can lead to confidently held false memories of having witnessed events that were never actually experienced." [186]

In *Doe v. Brandeis University*, District Court Judge F. Dennis Saylor observed "[h]uman memories are transient, and subject to substantial modifications and degradation over time," and that they are also,

> readily susceptible to such factors as hindsight bias (that is, the influence of one's current perceptions, knowledge, and state of mind) and suggestibility (that is, the influence of suggestion, express and implicit, by others). … It is possible that his sexual assault training had a suggestive effect on his memory, causing him to subconsciously reinterpret his memories.[187]

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[181] *Doe v. Regents of Univ. of California*, "Notice of Order Awarding Attorneys' Fees," April 18, 2018, at p. 3, citing "Order of 11/15/17" at p. 26.

[182] *Doe v. University of Mississippi*, Civil Action No. 3:16-CV-63-DPJ-FKB, p. 20 (D. S.D. Miss., N.D. July 24, 2018) (using the original court filed version July 24, 2018.)

[183] *Id.*

[184] *Doe v. Univ. of Notre Dame*, 2017 U.S. Dist. LEXIS 69645, at p. 23 (original court filed version on May 8, 2017) ("In a disciplinary matter concerning behavior in a long-term existing relationship, context matters, and the motive of the complainant (as it relates to credibility) bears more scrutiny than in some other cases.")

[185] Robert A. Nash and James Ost, *False and Distorted Memories* (Current Issues in Memory) (2017), at p. 55 (citations omitted).

[186] *Id.,* at p. 72 (citations omitted).

[187] *Doe v. Brandeis University*, 177 F. Supp. 3d at p. 609.

That this effect is exacerbated by "the passage of time," common with campus allegations, "increases the chance that eyewitnesses will adopt misinformation and that their memories will be altered."[188] If both parties were intoxicated the problem of faulty memories is exacerbated.

Despite absolutely no scientific research to support its applications in such situations, the entire constellation of theoretical traumatic rape victim behaviors endorsed by victims' advocates is used as a measuring stick for the alleged "trauma" suffered by complainants in response to a broad range of lesser misconduct on campus.

Recommend: Proposed subsections (b)(1)(ii) and (b)(1)(iii) of 106.45 are not sufficient to stem the tide of increasingly common victim trauma and behavioral theories used on today's campuses. Victim-centered policies were originally developed to minimize victim re-traumatization and encourage reporting of sexual offenses,[189] and, as mentioned above, remain appropriate for interviewing potential victims. However, it is very important that the Department do more to ensure training of investigators and adjudicators is unbiased and does not rely on presumptions about behavior based on sex, or whether a party is the complainant or respondent. The use of "trauma-informed" and "believe the victim" policies must be expressly addressed and restricted to the interview process because they compromise objectivity, create presumptions of guilt, and result in the exclusion of otherwise relevant evidence.

We also are concerned subsection (b)(1)(iii) will be difficult to enforce, as Title IX officials and other school personnel involved in these processes often are a self-selected group likely to include victims' advocates, self-identified victims, and those associated with women's studies. As a solution we recommend imposing a requirement for diversity among investigators and decision-makers.

Finally, as noted above, the Department should require schools to disclose publicly the training materials for two reasons: (1) publicity can help ensure they are free from bias, and (2) as a form of notice to prospective parents and students concerning the nature of the school's Title IX training and how it may affect the student's future.

Directed Question 5: *Is 106.44(c) adequate to protect individuals with disabilities?* [190]

Comment: *Directed Question 5* provides an opportunity for comment on whether proposed section 106.44(c) adequately addresses student rights under disability laws in Title IX proceedings, "or whether the Department should consider including additional language to address the needs of students and employees with disabilities as complainants and respondents."

We appreciate the Department's efforts to address needs of the ever-growing population of disabled students on college campuses. The Americans with Disability Act (ADA) requires compliance by both

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[188] Henry Otgaar and Mark L. Howe (2017-10-02). *Finding the Truth in the Courtroom: Dealing with Deception, Lies, and Memories* (p. 13). Oxford University Press. Kindle Edition (emotionally valanced material is more likely to give rise to false memories than neutral material.)

[189] MacDonald, Heather, "The Campus Rape Myth," *City Journal*, Winter 2008, ("'believe unconditionally' in sexual-assault charges") http://www.city-journal.org/2008/18_1_campus_rape.html.

[190] Fed. Reg., page 61483, columns 1-2.

public and private schools.[191]

> The ultimate purpose of Title IX is to prevent discrimination on the basis of sex from acting as an artificial barrier to success in education; however, sex-based discrimination is not a unilateral experience, and the current approach often fails to take into account the additional barriers that come with closely related issues of disability.[192]

There are two aspects to the relationship between Title IX and disability issues: First, individuals with Autism Spectrum Disorder, or language-based learning disabilities are highly vulnerable to a Title IX accusation. They often lack appropriate social skills, do not understand nonliteral language, and are terrified of persons with authority, quick to apologize for fear of "getting in trouble", and desperately want to "fit in." These aspects allow them to be easily manipulated as well as their intentions misunderstood.

Second, students with disabilities are not always able to understand the Title IX process or how to defend themselves and are often unaware they are entitled to accommodations. Unfortunately, most of the available literature and school policies focus on complainant disabilities while entirely ignoring the needs of disabled respondents.

The proposed rules also do not adequately take into account the significant issues faced by respondents with disabilities. Protections for accused disabled students should extend to any disciplinary proceeding which could result in the removal of disabled students' access to education.

Every notice or student conduct code policy must discuss a respondent's rights to disability accommodations. Though every school policy includes a "statement of protection" concerning the rights of students with disabilities,[193] many respondents with disabilities are not informed or aware that their rights under disability law also are available to them in participating in a Title IX disciplinary proceeding. Furthermore, school policies rarely mention a respondent's rights to disability accommodations, while they universally address the complainant's rights under the ADA.[194]

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[191] Private schools are included under Title III of the ADA, sections 12181(7)(J) ("The following private entities are considered public accommodations") and 12182; the ADA was enacted under the commerce clause. https://www.ada.gov/pubs/adastatute08.htm#SubchapIII

[192] Taylor S. Parker, The Less Told Story: The Intersection of Title IX and Disability, *Stetson.edu*, https://www.stetson.edu/law/academics/highered/home/media/Title%20IX%20and%20Disability%20Taylor%20S%20Parker.pdf. But note that the article's very first paragraph concludes: "In particular, there remain physical, social, and institutional barriers which uniquely obstruct access to education for students with disabilities bringing sex-based discrimination claims." (emphasis added.) However, the article does acknowledge that respondents are also entitled to accommodations (p. 18).

[193] See, for example, The University of Iowa's policy, Chapter 7 – Disability Protection Policy and Accessibility Statement, at https://opsmanual.uiowa.edu/community-policies/disability-protection-policy-and-accessibility-statement.

[194] See, generally, EduRisk, *Accommodating Students With Disabilities in the Title IX Process*, March 2017, which instructs schools to "Offer assistance in complaint filing instructions to qualified disabled students," but never mentions offering the same to respondents. https://www.eduriskssolutions.org/blogs/?Id=3277. In the same vein see archived 2014 "Questions and Answers on Title IX and Sexual Violence," which does the same.https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf. In fact, a search for "title ix and disability rights of respondents" turned up very little, except numerous school policies addressing complainants' disability rights.

For the disabled student, understanding the Title IX process often requires more than the communication of words; respondents with communication disabilities not readily visible are especially vulnerable and have suffered significantly as a result.

There are many ways the school's failure to recognize the need for and provide rights under disability laws can detrimentally impact respondents. For example, some fonts are inaccessible to disabled students:

> If a font is not designed in a particular way, it might make it difficult for the reader to tell the difference between letter shapes and ultimately make it hard or impossible to understand what is written.[195]

A recommendation might include the use of bold print in notices to emphasize important points.[196] Thus, emails to a disabled student would use bold print for the statement of protection and notice of their right to access accommodations, with links to contact the appropriate officials.

Today the overwhelming majority of schools have no effective communication between their Title IX and disability offices. Disabled students are therefore not recognized by Title IX officials. One way to connect the university's disability services with the Title IX office might be to have students who might need accommodations provide advance permission for a disciplinary office to consult with the disability office should the student be subjected to a disciplinary proceeding. With this permission perhaps the student's file could be tagged to alert the Title IX office of the student's disability, thereby ensuring his or her disability rights are protected.

Recommend: We suggest the Department consult organizations such as the Council of Parent Attorneys and Advocates, Inc. at www.copaa.org for further assistance in accommodating the needs and rights of students with disabilities. Knowledgeable disability professionals can instruct on how clear communications, policies and procedures can benefit the disabled student, and ensure fairness and justice takes precedence, and the federally protected rights of students with disabilities are honored.

Directed Question 6: *What should be the standard of evidence?*[197]

Comment: *Directed Question 6* seeks comment on (1) whether it is desirable to require a uniform standard of evidence for all Title IX cases rather than leave the option to schools to choose a standard, and if so then what standard is most appropriate; and (2) if schools retain the option to select the standard they wish to apply, whether it is appropriate to require schools to use the same standard in Title IX cases that they apply to other cases in which a similar disciplinary sanction may be imposed.

Section 106.45(b)(4)(i) of the proposed rules allow schools to choose whether they use clear and convincing as an alternative to the preponderance standard of evidence. Though the proposed subsection leaves the choice of a standard of evidence to recipient, it also incentivizes schools to consider a higher standard: in order to "ensure that recipients do not single out respondents in

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[195] Recite Me, "Choosing an Accessible Font," page 3, http://www.reciteme.com/common/ckeditor/filemanager/userfiles/Accessible_Font_PDF-2.pdf.

[196] *Id.* at p. 6.

[197] Fed. Reg., page 61483, col. 2.

sexual harassment matters for uniquely unfavorable treatment,"[198] the Department has included a very important requirement that a recipient must use the same standard (1) as "for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction," and (2) "as it does for complaints against employees, including faculty." The Department recognizes the importance of this latter requirement in avoiding …

> the specially disfavored treatment of student respondents in comparison to respondents who are employees such as faculty members, who often have superior leverage as a group in extracting guarantees of protection under a recipient's disciplinary procedures.[199]

The Department also acknowledges a higher standard would be appropriate in cases involving sexual misconduct because,

> a finding of responsibility carries particularly grave consequences for a respondent's reputation and ability to pursue a profession or career, a higher standard of proof can be warranted. Indeed, one court has held that in student disciplinary cases involving serious accusations like sexual assault where the consequences of a finding of responsibility would be significant, permanent, and far-reaching, a preponderance of the evidence standard is inadequate.[200]

The higher clear and convincing standard of evidence is also supported by the UCLA study estimating that as many as 30% of innocent students are likely to be found guilty under the preponderance standard. The "grave consequences" suffered by an innocent student further justify a higher standard which, rather than treating the proposition as a zero-sum proposition,[201] requires that decision-makers be *convinced* the student is responsible:

> This risk [of erroneous deprivation of protected interests] is all the more troubling considering the significance of Doe's interests … Time and again, this circuit has reiterated that students have a substantial interest at stake when it comes to school disciplinary hearings for sexual misconduct. Being labeled a sex offender by a university has both an immediate and lasting impact on a student's life. The student may be forced to withdraw from his classes and move out of his university housing. His personal relationships might suffer. And he could face difficulty obtaining educational and employment opportunities down the road, especially if he is expelled. [202]

In 2018, a federal court held that—given the lack of other procedural safeguards and the seriousness of the allegations—preponderance is not an appropriate standard for use in sexual misconduct

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[198] Fed. Reg., p. 61477, col. 3.

[199] Fed. Reg., p. 61477, col. 3.

[200] *Doe v. Baum (University of Michigan)* 903 F.3d 575, 582 (6th Cir. 2018) citing *Mathews v. Eldridge,* 424 U.S.319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *Doe v. Miami Univ.,* 882 F.3d 579, 600 (6th Cir. 2018); *Univ. of Cincinnati,* 872 F.3d at 400; and *Doe v. Cummins,* 662 F. App'x 437, 446 (6th Cir. 2016).

[201] See note 144, *infra.*

[202] *Doe v. Baum (University of Michigan)* 903 F.3d 575, 582 (6th Cir. 2018) citing *Mathews v. Eldridge,* 424 U.S.319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *Doe v. Miami Univ.,* 882 F.3d 579, 600 (6th Cir. 2018); *Univ. of Cincinnati,* 872 F.3d at 400; and *Doe v. Cummins,* 662 F. App'x 437, 446 (6th Cir. 2016).

cases.[203] Judges in two other cases have expressed concerns about the use of a preponderance standard to adjudicate Title IX complaints.[204]

The previous administration's argument that campus Title IX adjudications resemble civil litigation, in which preponderance is used, ignores the significant differences between civil and campus systems: in the latter there is no discovery, no testimony under oath, no public hearings, no right to an independent adjudicator, rules of evidence or an impartial judge and jury. The Department also recognizes that disciplinary proceedings are more akin to administrative proceedings than to civil actions, and that a clear and convincing evidence standard is often employed in the latter;[205]

> Title IX grievance processes lack certain features that promote reliability in civil litigation. For example, many recipients will choose not to allow active participation by counsel; there are no rules of evidence in Title IX grievance processes; and Title IX grievance processes do not afford parties discovery to the same extent required by rules of civil procedure.[206]

Several courts have recognized the damages to reputations and future opportunities by a finding of responsibility for sexual misconduct. The Sixth Circuit in *Doe v. Miami University* found such students:

> may face severe restrictions, similar to being put on a sex offender list, that curtail his ability to gain a higher education degree.... Thus, the effect of a finding of responsibility for sexual misconduct on 'a person's good name, reputation, honor, or integrity' is profound.[207]

Similarly, the courts have observed that allegations of campus sexual misconduct are often also "accusations that constitute serious felonies under virtually every state's laws," [208] and that a sexual misconduct finding "may permanently scar [the student's] life and career," because he would be "marked for life as a sexual predator." [209]

A higher standard also is necessary to impress upon decision-makers that evidence of responsibility must meet a specific threshold when determining guilt. This is particularly important because victim-focused decision-makers consider a "not responsible" finding equivalent to finding the complainant is a liar. Moving the goal post more toward a presumption of innocence conveys to decision-makers that this is not a zero-sum game, but a threshold of proof which must be reached.

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[203] *Lee v. University of N.M.,* No. 1:17-cv-01230 (D.N.M. Sept. 20, 2018).

[204] *Doe v. DiStefano*, 2018 U.S. Dist. LEXIS 76268, *22–23 (D. Colo. May 7, 2018); *Doe v. University of Mississippi*, 2018 U.S. Dist. LEXIS 123181 (S.D. Mississippi July 14, 2018).

[205] Fed. Reg., page 61477, column 2, citing *Nguyen* v. *Washington Dept. of Health,* 144 Wash. 2d 516 (2001) (requiring clear and convincing evidence in sexual misconduct case in a professional disciplinary proceeding for a medical doctor as a way of protecting due process); *Disciplinary Counsel* v. *Bunstine,* 136 Ohio St. 3d 276 (2013) (clear and convincing evidence applied in sexual harassment case involving lawyer).

[206] Fed. Reg., page 61477, column 2.

[207] *Doe v. Miami Univ.*, 882 F.3d 579, 600 (6th Cir. 2018) (quoting *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (citations omitted).

[208] *Doe v. Brown Univ.,* 166 F. Supp. 3d 177, 184 (D.R.I. 2016)

[209] *Doe v. Brandeis Univ.,* 177 F. Supp. 3d 561, 573, 607 (D. Mass. 2016).

Recommend: With any standard of evidence, we should support the proposed rules' requirement that the same standard be used for disciplinary actions involving students, as that applied to faculty. The preamble explains:

> Likewise, to avoid the specially disfavored treatment of student respondents in comparison to respondents who are employees such as faculty members, who often have superior leverage as a group in extracting guarantees of protection under a recipient's disciplinary procedures, recipients are also required to apply the same standard of evidence for complaints against students as they do for complaints against employees, including faculty.[210]

This latter caveat is more likely to have an impact on schools' choice of a standard, and in response to *Directed Question 6*,[211] we believe that "it is appropriate to require schools to use the same standard in Title IX cases that they apply to other cases in which a similar disciplinary sanction may be imposed," but particularly the standard used for faculty and employees due to the "superior leverage" those groups possess.

Directed Question 6 also requests comments on "whether it is desirable to require a uniform standard of evidence for all Title IX cases rather than leave the option to schools to choose a standard, and if so then what standard is most appropriate." Of course, we believe a uniform clear and convincing standard would be more appropriate for the reasons cited above, but requiring the standard to be the same as that applied to faculty matters is a good backup plan.

Directed Question 7: *Does the "'directly related to the allegations" language need clarification?*

Comment: It is unclear whether students' access to evidence under this section would include evidence that is both inculpatory or exculpatory. It is also not evident if subsection (ix)'s use of "relevant" to describe evidence that should be included in the investigation report is equivalent to subsection (viii)'s reference to evidence "directly related to the allegations raised in a formal complaint" and/or "evidence upon which the recipient does not intend to rely."

Recommend: As discussed above in section VII, we would like the Department to clarify 106.45(b)(3)(iv)'s "directly related to the allegations" language in subsection (viii). This language should be made consistent with subsection (ix)'s use of "relevant" to describe evidence included in the investigation report. For example, by using "relevant and directly related to the allegations." Otherwise, if these two subsections address different categories of evidence, then we are concerned that the investigative report may not include all evidence collected or made "available to the parties."

[210] Fed. Reg., page 61477, column 3.

[211] Fed. Reg., page 61483, column 2.

XI. Conclusion

Thank you for providing us the opportunity to comment on the proposed Title IX regulations.

If you have question please contact:

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