106.45(b)(7)(ii)(E) as revised in the final regulations.[1576] The Department believes that the result as to each allegation in a formal complaint of sexual harassment concerns both parties and clarifies in the final regulations that the result includes both sanctions and whether remedies will be provided. The result of each determination, including listing any sanctions and stating whether remedies will be provided, should help ensure that no person is excluded from participation in, denied the benefits of, or subjected to discrimination under any education program or activity receiving Federal financial assistance without unnecessarily disclosing to the respondent the details of remedies provided to the complainant. The details of remedies provided to the complainant remain part of the complainant's education record and not the respondent's education record, unless the remedy also imposes requirements on the respondent. We acknowledge that sanctions may at times overlap with remedies. For example, the recipient may impose a unilateral no-contact order on the respondent as part of a sanction that also may constitute a remedy. Under the final regulations, the written determination should list the one-way no-contact order as a sanction against the respondent and state that the recipient will provide

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[1576] The Department's position is consistent with the 2001 Guidance, that FERPA does not conflict with the Title IX requirement "that the school notify the harassed student of the outcome of its investigation, i.e., whether or not harassment was found to have occurred, because this information directly relates to the victim." 2001 Guidance at vii. The Department, however, departs from the 2001 Guidance inasmuch as that guidance document stated, "FERPA generally prevents a school from disclosing to a student who complained of harassment information about the sanction, or discipline imposed upon a student who was found to have engaged in that harassment." *Id*. The Department acknowledged in the 2001 Guidance that exceptions "include the case of a sanction that directly relates to the person who was harassed (e.g., an order that the harasser stay away from the harassed student), or sanctions related to offenses for which there is a statutory exception, such as crimes of violence or certain sex offenses in postsecondary institutions." *Id*. at fn. 3. Through these final regulations, the Department takes the position that sanctions always directly impact the victim, as to sanctions imposed for any conduct described in § 106.30 as "sexual harassment," irrespective of whether the sanction is for a crime of violence or certain sex offenses, for *quid pro quo* sexual harassment, or for the *Davis* definition of sexual harassment in § 106.30. Irrespective of whether the sexual harassment rises to the level of a crime of violence, the sanction directly relates to the victim who should know what to expect after the conclusion of the grievance process. For example, the victim should know whether the perpetrator was expelled, or whether the perpetrator was suspended for a period of time, as such information will inevitably impact the victim. The sanction represents part of the recipient's response to addressing sexual harassment, and the victim should know how the sexual harassment which the victim suffered, was addressed.

remedies to the complainant. Thus, even where the no-contact order constitutes both a sanction and a remedy, the written determination would only list the measure insofar as it constitutes a sanction, preserving as much confidentiality as possible around the particular nature of a complainant's remedies. By way of further example, if a recipient wishes to change the housing arrangement of the complainant as part of a remedy, the written determination should simply state that remedies will be provided to the complainant; the complainant would then communicate separately with the Title IX Coordinator to discuss remedies,[1577] and the decision to change the complainant's housing arrangement as part of a remedy would not have been disclosed to the respondent in the written determination. That remedy (which does not directly affect the respondent) must not be disclosed to the respondent.

Changes: The Department revised § 106.45(b)(7)(ii)(E) to state that the written determination must include any sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant.

Comments: Commenters objected to the proposed rule, stating that Title IX should not control over FERPA, but vice versa – FERPA should take precedence over Title IX in cases of a conflict. Some commenters suggested that the 2001 Guidance more effectively handled these types of FERPA issues, and better avoided blanket statements about whether FERPA ought to be superseded by Title IX. One suggested an express statement that Title IX overrides FERPA,

[1577] To clarify this, the final regulations additionally revise § 106.45(b)(7)(iv) to state that the Title IX Coordinator is responsible for the effective implementation of remedies. Thus, where a written determination states that remedies will be provided, the complainant may contact the Title IX Coordinator to discuss the nature and implementation of such remedies.

arguing that the 2001 Guidance states as much unambiguously. Commenters stated that the proposed rules exacerbate the conflict between FERPA and Title IX. Several commenters stated that the final regulations ought to specify that complainants have the right to keep their education records private. Some commenters even stated that the Department lacked the authority to tell schools that Title IX controls over FEPRA, and that schools have an independent duty to comply with FERPA. Some commenters suggested removing any mention of FERPA, since it might confuse recipients to mention it, but say that Title IX supersedes FERPA in the case of a conflict. Other commenters asserted it might be confusing because FERPA does not apply to the types of information likely to be shared under the grievance procedures. These commenters contended that the proposed rules were not "trauma-informed," inasmuch as they are overly focused on addressing the minor problem of false accusations, as opposed to remedying sexual harassment.

Many commenters argued that FERPA does not authorize one student – or an employee, for that matter – to review the education records of a student merely because the student complains of sexual harassment. One commenter expressed concern that the proposed rules would require the sharing of student records with employees who would otherwise not be authorized to view records without the student's consent.

Some commenters suggested that the preamble's justification for records that relate to a student being construed as an exception to FERPA is wrong. Commenters contended that not every document that relates to a complainant or to an incident relates to the respondent. Schools, if they comply with the rule, asserted commenters, will be held accountable for their FERPA violations. Commenters stated the Department should reconsider whether the parties ought to be entitled to physical, mental, and academic performance records of other students.

Other commenters argued that the proposed rules would force schools to violate State law, for which they also have an independent legal duty to comply. For instance, commenters asserted that the Department cannot require schools to provide recordings that were obtained in violation of a State's two-party consent law for recordings. Commenters cited Florida and Washington law for these arguments. They argued that Washington State protects IEPs (individualized education plans) and Section 504 plans from production, but the proposed regulations would likely allow the production of these records in some cases. One commenter asserted that Florida law protects records related to sexual harassment until a finding is made, so the proposed rules will force schools to violate Florida law. A few commenters proposed that the Department should indicate whether it thinks that Title IX reports and files should be subject to a public records request, and if so, the scope and extent of such requests.

Discussion: The Department disagrees that § 106.45(b)(5)(v) inherently or directly conflicts with FERPA. A recipient should interpret Title IX and FERPA in a manner to avoid any conflicts. To the extent that there may be unusual circumstances, where a true conflict between Title IX and FERPA may exist (such as a student's formal complaint against an employee), the Department includes a provision in § 106.6(e) to expressly state that the obligation to comply with these final regulations under Title IX is not obviated or alleviated by the FERPA statute or regulations. In addressing conflicts between FERPA and Title IX, the Department in the Preamble of the 2001 Guidance states:

> In 1994, as part of the Improving America's Schools Act, Congress amended the General Education Provisions Act (GEPA) – of which FERPA is a part – to state that nothing in GEPA "shall be construed to affect the applicability of . . . title IX of the Education Amendments of 1972 . . . ." The Department interprets this provision to mean that FERPA continues to apply in the context of Title IX enforcement, but if there is a direct conflict between requirements of FERPA and requirements of Title IX, such that enforcement of FERPA would interfere with the

> primary purpose of Title IX to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions.[1578]

The General Education Provisions Act (GEPA), of which FERPA is a part, states: "Nothing in this chapter shall be construed to affect the applicability of title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, title V of the Rehabilitation Act of 1973, the Age Discrimination Act, or other statutes prohibiting discrimination, to any applicable program."[1579] The legislative history underlying this provision in GEPA demonstrates that Congress did not intend for GEPA to limit the implementation or enforcement of the Civil Rights Act of 1964. There is not much legislative history with respect to the 1994 amendment to GEPA,[1580] adding Title IX, but the legislative history with respect to the 1974 amendment to GEPA,[1581] concerning Title VI of the Civil Rights Act, is instructive. The legislative history reveals the Senate was concerned that certain provisions in GEPA may limit the Civil Rights Act of 1964.[1582] Consequently, the Senate specifically stated that "in order to make clear that the provisions in the [GEPA] do not conflict with the Civil Rights Act of 1964, subparagraph (B) expressly states that such Civil Rights Act is not an applicable statute and therefore subject to limitations on interpretations of such a statute which may occur in [GEPA]."[1583] The Senate's proposed amendment was slightly revised in the conference committee, but there was no mention of any change in purpose or scope. Specifically, the Conference Report from the House notes

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[1578] 2001 Guidance at vii.
[1579] 20 U.S.C. 1221(d).
[1580] The 1994 amendment to GEPA was part of § 211, title II of Improving America's Schools Act, Pub. L. 103-382, 108 Stat 3518.
[1581] The 1974 amendment to GEPA was part of § 505(a)(1), title V of the Education Amendments of 1974, Pub. L. 93-380, 88 Stat 484.
[1582] S. Rep. No. 93-763, at 233 (1974).
[1583] *Id*.

that the final amendments to GEPA include language that expressly addresses the conflict between GEPA and Title VI.[1584] This Conference Report provides in relevant part:

> The Senate amendment, but not the House bill, clarifies that for the purposes of the General Education Provisions Act, the Civil Rights Act shall not be considered an applicable statute, but shall continue to have full force and effect over education programs. . . . The conference substitute contains these provisions of the Senate amendment, except that the provision relating to the Civil Rights Act of 1964 states that nothing in the General Education Provisions Act shall be construed to affect the applicability of such [Civil Rights Act of 1964] to any program subject to the provisions of the General Education Provisions Act.[1585]

The legislative history thus supports the Department's 2001 interpretation that Congress intended the Civil Rights Act of 1964 to override GEPA, which includes FERPA, if there was a direct conflict between the two statutes. When Congress amended GEPA to also include Title IX in the same section and context as Title VI, Congress presumably intended that Title IX, like Title VI, override GEPA, including FERPA, if there was a direct conflict. The Department's position is consistent with its 2001 Guidance, and the Department is not departing from this position.

The Department has the authority to enforce both Title IX under 20 U.S.C. 1681 and 34 CFR Part 106 and FERPA under 20 U.S.C. 1232g and 34 CFR Part 99. Whether FERPA applies to a particular record is a fact-specific determination that FERPA and its implementing regulations address, not these final regulations.

The Department disagrees that the proposed regulations are not "trauma-informed" insofar as the Department recognizes and acknowledges the traumatic impact of sexual harassment and aims to hold recipients accountable for legally binding obligations throughout these final regulations in part because the experience of sexual harassment can traumatize

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[1584] H.R. Rep. No. 93-1211, at 177 (1974).
[1585] *Id*.

victims in a way that jeopardizes the victim's equal access to education. The Department disagrees that these final regulations are overly focused on addressing false allegations instead of remedying sexual harassment. The Department notes that under § 106.44(a), the Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. Accordingly, complainants have more control over the process to address their allegations of sexual harassment.

As previously explained, FERPA and its implementing regulations define the term "education records" as meaning, with certain exceptions, records that are directly related to a student and maintained by an educational agency or institution, or by a party acting for the agency or institution.[1586] The Department previously stated: "Under this definition, a parent (or eligible student) has a right to inspect and review any witness statement that is directly related to the student, even if that statement contains information that is also directly related to another student, if the information cannot be segregated and redacted without destroying its meaning."[1587] The Department's statement was made in response to a comment about FERPA impairing due process in student disciplinary proceedings. The Department does not think that evidence obtained as part of an investigation pursuant to these final regulations that *is directly related to the allegations raised in a formal complaint* can be segregated and redacted because

[1586] 20 U.S.C. 1232g(a)(4); 34 CFR 99.3.
[1587] 73 FR 74806, 74832-33 (Dec. 9, 2008).

the evidence directly relates to allegations by a complainant against a respondent and, thus, constitutes an education record of both the complainant and a respondent. A formal complaint that raises allegations against a student-respondent is directly related to that student. The Department is bound by the U.S. Constitution and must interpret Title IX and FERPA in a manner that does not violate a person's due process rights, including notice and an opportunity to respond. If a complainant or respondent provides sensitive records such as medical records as part of an investigation, then the parties must have an equal opportunity to inspect and review information that constitutes evidence directly related to the allegations raised in a formal complaint. If some of the information in the medical records is not directly related to the allegations raised in a formal complaint, then these final regulations do not require a recipient to share the information that is not directly related to the allegations raised in the formal complaint. As previously explained, the Department has clarified in § 106.45(b)(5)(i) that a recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for the grievance process under § 106.45(b). Accordingly, a recipient would not have access to a party's medical records unless that party gave the recipient voluntary, written consent to do so for a grievance process under § 106.45(b). If the party is not an "eligible student," as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a "parent," as defined in 34 CFR 99.3.

The Department is not persuaded that these final regulations require a recipient to violate State law. If a recipient knows that a recording is unlawfully created under State law, then the

recipient should not share a copy of such unlawful recording. The Department is not requiring a recipient to disseminate any evidence that was illegally or unlawfully obtained. Similarly, the Florida laws that the commenter cites, Florida Statutes §§ 119.071(2)(g)(1) and 1012.31(3)(a)(1) concern public disclosure of records under sunshine laws, and the Department is not requiring that a recipient widely disseminate public records upon request. The Department's requirement concerns disclosure solely to the other party to provide sufficient notice and an opportunity to respond. Similarly, the Department takes no position in these final regulations on whether records generated during a Title IX grievance process must, or should, become subject to disclosure under State sunshine laws. The Department also is not regulating on FERPA in this rulemaking and takes no position in this rulemaking as to FERPA's potential restrictions on the nonconsensual disclosure of student's education records in the context of sunshine law. Sunshine laws vary among states. Additionally, the manner in which a request under State sunshine laws is handled depends on the unique context and circumstances of the particular request. A recipient also would not be required to release an IEP or Section 504 plan that is in the recipient's possession. A recipient is required to provide any evidence "obtained as part of the investigation that is directly related to the allegations raised in a formal complaint" under § 106.45(b)(5)(vi); however, the final regulations revise § 106.45(b)(5)(i) to restrict a recipient from accessing, considering, disclosing, or otherwise using a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for a grievance process under § 106.45(b). If the party is not an "eligible student," as defined in 34 CFR 99.3, then the recipient must obtain

the voluntary, written consent of a "parent," as defined in 34 CFR 99.3. When a party offers an IEP or Section 504 plan as part of the evidence that a recipient should consider, or has granted the recipient consent to use those records in a Title IX grievance process, then the other party should be able to inspect and review this evidence, if that evidence is directly related to the allegations raised in a formal complaint.

Changes: None.

Comments: Several commenters argued that the proposed rules would put schools in direct conflict with FERPA, and that FERPA does not maintain an exception that would be applicable for all Title IX grievance proceedings. Some noted that there is no express carve-out under FERPA for such proceedings, and that schools will quickly be caught trying to navigate the legal boundaries of their obligations. The need to hire legal counsel to figure out these issues will be immediate, asserted some commenters, and schools will have difficulty believing that they really ought to be reviewing and potentially sharing with other students one student's medical records, therapy notes, or documents that contain information about prior sexual history.

One commenter argued that there is an internal contradiction, given that supportive measures are supposed to remain confidential, with § 106.45(b)(7), the provision regarding disclosure of the results of grievance process.[1588]

One commenter stated that the proposed rules leave ambiguity about whether FERPA will apply to conduct that is not covered by these proposed regulations under Title IX because it does not rise to the level of the definition of sexual harassment in § 106.30, which this commenter characterizes as narrower than the Department's past definition.

[1588] Commenter cited: § 106.45(b)(7)(ii)(E).

Another commenter stated that the proposed rules give students more rights than does FERPA, since time frames for production are shorter, which the commenter believed to be bad policy. Several commenters stated that schools need flexibility on which information is private and which information is relevant to a claim of sexual harassment.

Discussion: As explained above, the Department disagrees that there is any inherent conflict between FERPA and these final regulations, which address sexual harassment under Title IX. The Department administers both Title IX and FERPA and expressly provides in § 106.6(e) that the obligation to comply with Part 106 of Title 34 of the Code of Federal Regulations "is not obviated or alleviated by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99." The Department offers technical assistance and will address compliance with FERPA and Title IX, and recipients may consult with their own counsel about compliance with various laws. As the Department administers both FERPA and Title IX, the Department will not interpret compliance with its regulations under Title IX to violate requirements in its regulations under FERPA.

If a party (or the parent of a party) gives voluntary, written consent to a recipient under § 106.45(b)(5) to use the party's medical records that are directly related to the allegations raised in a formal complaint as part of its investigation, then the recipient must provide both parties with an equal opportunity to inspect and review such evidence. If some of the information in the medical records is not directly related to the allegations raised in a formal complaint, then these final regulations do not require a recipient to share the information that is not directly related to the allegations raised in the formal complaint. With respect to evidence of prior sexual behavior, the Department revised § 106.45(b)(6) to prohibit evidence about the complainant's sexual predisposition or prior sexual behavior unless such evidence is offered to prove that someone

other than the respondent committed the conduct alleged by the complainant or to prove consent. If a recipient obtains evidence about a party's sexual predisposition or prior sexual behavior that is directly related to the allegations raised in a formal complaint, the recipient should allow both parties an equal opportunity to inspect and review such evidence to be able to prepare to respond to it or object to its introduction in the investigative report or at the hearing.

There is no internal contradiction that supportive measures should be confidential and that the result of a grievance process under § 106.45 should be made known to both parties. A complainant must be offered and may receive supportive measures irrespective of whether the complainant files a formal complaint, and the supportive measures that a complainant or a respondent receives typically relate only to them and must be kept confidential pursuant to § 106.30. The definition of supportive measures in § 106.30 clarifies that it may be necessary to notify the other party of a supportive measure if the supportive measure requires both the complainant and the respondent's cooperation (i.e., mutual restrictions on contact between the parties). The result at the end of a grievance process under § 106.45, including any sanctions and whether remedies will be provided to a complainant, impact both parties and can, and should, be part of the written determination simultaneously sent to both parties. The complainant should know what sanctions the respondent receives because knowledge of the sanctions may impact the complainant's equal access to the recipient's education program and activity. The Department revised § 106.45(b)(7)(ii)(E) to require a recipient to state whether remedies will be provided to the complainant but not what remedies will be provided. Thus, the recipient may note in the written determination only that a complainant will receive remedies but should not note in the written determination that the recipient, for example, will change the complainant's housing arrangements as part of a remedy. A respondent should know whether the recipient will

provide remedies to the complainant because the respondent should be aware that the respondent's actions denied the complainant equal access to the recipient's education program or activity. Similarly, the parties should both know the rationale for the result as to each allegation, including a determination regarding responsibility, as provided in § 106.45(b)(7)(ii)(E), because due process principles require the recipient to provide a basis for its determination. The rationale also will reveal whether there was any unlawful bias such that there may be grounds for appeal under § 106.45(b)(8)(i)(C).

As to the commenter's question about the applicability of FERPA to conduct that is not defined in § 106.30, FERPA applies to all education records as defined in 20 U.S.C. 1232g(a)(4)(A) and 34 CFR 99.3. Whether FERPA applies does not depend on whether the conduct at issue satisfies the definition defined in § 106.30. Accordingly, there is no inherent conflict between FERPA, and these final regulations addressing sexual harassment under Title IX.

The Department does not believe that these final regulations give students more rights than FERPA due to short time frames for production. The Department acknowledges that under 20 U.S.C. 1232g(a)(1)(A) and § 99.10(b) in the FERPA regulations, an educational agency or institution must comply with a request for access to covered education records within a reasonable period of time, but not more than 45 days after it has received the request. FERPA, however, was only intended to establish a minimum Federal standard for access to education records[1589] and thus other laws may require access to education records in a shorter time frame

[1589] "Joint Statement in Explanation of the Buckley / Pell Amendment [to FERPA]," 120 CONG. REC. 39858, 39863 (Dec. 13, 1974).

than FERPA does. A recipient, moreover, has an obligation to include reasonably prompt time frames for the conclusion of a grievance process as described in § 106.45(b)(1)(v). Taking 45 days to respond to a request for access to records would not provide a reasonably prompt time frame for the conclusion of a grievance process. The ten-day time frame in these final regulations governs the minimum length of time that the parties have to submit a written response to the recipient after the recipient sends to each party and the party's advisor, if any, the evidence subject to inspection and review. These final regulations do not require a recipient to obtain evidence within a specific time frame, although a recipient is required to include reasonably prompt time frames for the conclusion of a grievance process pursuant to § 106.45(b)(1)(v) and to respond promptly under § 106.44(a). Additionally, the school has some discretion to determine what evidence is directly related to the allegations in a formal complaint.

Changes: None.

Comments: Some commenters expressed concern about the fact that private information would be readily shared with another party. One commenter asserted that the proposed regulations facilitate—rather than discourage—retaliation by having an opposing party learn confidential information about the complainant. One commenter argued that giving students access to other students' files would lead to bullying and intimidation. Commenters suggested that even if one minor portion of a document is relevant—perhaps a medical examination that occurred on the night of an alleged rape—the rest of the medical information may include a wealth of information that is totally irrelevant to the complaint, and should be redacted. A commenter argued that some documents may involve non-parties such that disclosing a complainant's documents to a respondent could reveal private information that has nothing to do with the

complainant. The commenter suggested that the Department modify the proposed regulations to insist that schools redact irrelevant information from information produced to the parties.

Similarly, commenters suggested that the disadvantage to the privacy issues would always fall, asymmetrically, on complainants. These commenters stated respondents will typically have little information in their student file that is relevant to the accusation—no rape kits, no medical or counseling information, etc.—so providing student files is asymmetrically damaging to a complainant.

Many commenters contended that there will be a chilling effect on student-complainants obtaining counseling services, if counseling records must be disclosed to a respondent. Some commenters stated that even victims who do report will often dismiss their own complaints once they realize that there is a chance of being humiliated by their records being disclosed to their harasser, and for those records to go public. One commenter stated that this effect would be particularly damaging to women of color, arguing that these women report sexual harassment at very low rates, and would be deterred from reporting if their privacy were at stake.

Some contended that even student-witnesses will be unwilling to come forward, believing that their student records might also be subject to discovery by the respondent. These commenters stated that student-witnesses will be subject to threats and intimidation, as well as potential witness tampering.

Discussion: The Department disagrees that these final regulations will lead to retaliation. As a precaution, the Department adopts a provision in § 106.71 to expressly prohibit retaliation to address the commenter's concerns. This retaliation provision is broad and would prohibit threats and intimidation as well as interfering with potential witnesses.

The Department also disagrees that the parties will be able to obtain information that is unrelated to the allegations raised in a formal complaint. Section 106.45(b)(5)(vi) only requires a recipient to provide both parties an equal opportunity to inspect and review any evidence that is directly related to the allegations raised in a formal complaint as part of the investigation. Accordingly, if there is information in a medical record that is not directly related to the allegations raised in a formal complaint, these final regulations do not require a recipient to share such information. Consistent with FERPA, these final regulations do not prohibit a recipient from redacting personally identifiable information from education records, if the information is not directly related to the allegations raised in a formal complaint. Accordingly, the Department does not need to revise the final regulations to specifically address redactions. A recipient, however, should be judicious in redacting information and should not redact more information than is necessary under the circumstances so as to fully comply with obligations under § 106.45.

The Department disagrees that its final regulations asymmetrically affect complainants, as respondents may have sensitive information too. For example, the recipient may obtain information from a criminal investigation of a respondent. Additionally, the rape shield provisions in § 106.45(b)(6) apply only to complainants.

The Department disagrees that these final regulations will have a chilling effect on reporting. A complainant is not required to submit counseling records to a recipient as part of an investigation. If the complainant does not want a respondent to inspect and review any counseling records that are directly related to allegations raised in a formal complaint, then the complainant is not required to release such counseling records to the recipient under § 106.45(b)(5)(i). (The Department notes that the same is true for respondents.) These final regulations do not foster complainants or respondents being humiliated and certainly do not

result in their records being made public. The recipient is simply giving both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint so that each party can meaningfully respond to the evidence prior to the conclusion of the investigation. This provision is critical for a complainant to provide evidence in support of allegations and for a respondent to provide evidence to challenge allegations. This provision also allows each party an opportunity to meaningfully respond to the evidence that is directly related to the allegations.

The Department disagrees that these final regulations, including the provision about an equal opportunity to inspect and review any evidence, will result in increased harm to women of color. These final regulations apply to all persons, irrespective of race, national origin, or color. Some commenters suggested that respondents who are persons of color have been more severely impacted by the lack of due process protections in a grievance process. These final regulations provide everyone the same fair and impartial grievance process described in § 106.45.

Changes: The Department adopts a provision in § 106.71 to expressly prohibit retaliation.

Comments: Some commenters were not concerned about privacy issues for respondents who have been found responsible for sexual harassment. Some suggested that if a student is found responsible, that finding should follow a student if they try to enroll in a new school so as to help keep students safe in the new school. Some commenters asserted using FERPA to protect these students is unfair and endangers students at other schools when respondents who have been found responsible transfer schools. Other commenters stated that the final regulations should provide that a student's disciplinary measures cannot be conveyed to another college under FERPA, so as to avoid destroying their lives by having a finding of responsibility follow them to other schools.

Discussion: FERPA and its implementing regulations, 20 U.S.C. 1232g(b)(6) and 34 CFR 99.31(a)(13), 99.31(a)(14), and 99.39, address the conditions permitting the disclosure, without prior written consent, to an alleged victim of a crime of violence or a nonforcible sex offense and to the general public of the final results of any disciplinary proceeding conducted by an institution against the alleged perpetrator of such crime or offense with respect to such crime or offense. Recipients may have the discretion to disclose, without prior written consent, personally identifiable information from education records of student-respondents who have been found responsible for a violation of Title IX to other third parties under other exceptions to consent in FERPA. The Department notes that such disclosures of personally identifiable information are permissive and not mandatory under FERPA, and the Department takes no position in these final regulations as to whether a recipient should disclose any personally identifiable information under FERPA. For example, an exception in FERPA and its implementing regulations at 20 U.S.C. 1232g(b)(1)(B) and 34 CFR 99.31(a)(2) and 99.34 permits a school to disclose, without prior, written consent, personally identifiable information contained in a student's education records to another school in which the student seeks or intends to enroll, or where the student is already enrolled so long as the disclosure is for purposes related to the student's enrollment or transfer. The sending school may make the disclosure if it has included in its annual notification of FERPA rights a statement that it forwards education records in such circumstances. Otherwise, the sending school must make a reasonable attempt to notify the parent or eligible student in advance of making the disclosure, unless the parent or eligible student has initiated the disclosure. The school also must provide a parent or an eligible student with a copy of the records that were released, if requested by the parent or eligible student, and an opportunity to seek to amend the education records. FERPA and its implementing regulations also provide that

an educational agency or institution may include and disclose, without prior, written consent, appropriate information in a student's education records concerning disciplinary information taken against such student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community to teachers and school officials, within the agency or institution or in other schools, who have legitimate educational interests in the behavior of the student.[1590] Similarly, the Clery Act, 20 U.S.C. 1092(g)(8)(B)(ii), and its implementing regulations, 34 CFR 668.46(k)(3)(iv), require an institution to provide the result of a proceeding, including any sanctions imposed by the institution, to both parties. In this manner, a recipient has discretion as to whether to share information with another school about a respondent.

The Department does not regulate what information schools must share when a student transfers to a different school and declines to do so here. Requiring institutions to share information goes beyond the mandate of Title IX to prohibit discrimination on the basis of sex in a particular recipient's education program or activity. Recipients may share such information as long as doing so is permissible under other applicable Federal, State, and local laws.

Changes: None.

Comments: Some commenters expressed concern that in cases where a formal complaint must be opened by a Title IX Coordinator, as opposed to by a student or employee reporting sexual harassment, that the victim's confidential information will be subject to discovery despite

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[1590] 20 U.S.C. 1232g(h) and 34 CFR 99.36(b). As explained in the "Section 106.44(c) Emergency Removal" subsection in the "Additional Rules Governing Recipients' Response" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment," section of this preamble, the Department revised § 106.44(c), which concerns emergency removal, to better align with the disclosure, without prior written consent, of personally identifiable information from education records in a health and safety emergency under FERPA and its implementing regulations. *Compare* § 106.44(c) *with* 20 U.S.C. 1232g(h) *and* 34 CFR 99.36.

declining to file a formal complaint. This leaves students and employees with no way to protect their privacy and would lead to a dramatic chilling effect on reporting.

Discussion: The Department notes that the final regulations entirely removed proposed provision § 106.44(b)(2) that would have required a Title IX Coordinator to file a formal complaint upon receiving multiple reports against the same respondent. The final regulations do not mandate circumstances where a Title IX Coordinator is required to sign a formal complaint; rather, the final regulations leave a Title IX Coordinator with discretion to sign a formal complaint. If the Title IX Coordinator signs a formal complaint against the wishes of the complainant, then the recipient likely will have difficulty obtaining evidence from the complainant that is directly related to the allegations in a formal complaint. As previously explained, the Department revised § 106.45(b)(5)(i) to specifically state that the recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for a grievance process under this section (if a party is not an "eligible student," as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a "parent" as defined in 34 CFR 99.3). Accordingly, a recipient will not be able to access, consider, disclose or otherwise use such confidential records without a party's consent.

The complainant is not required to participate in the process or to provide any information to the Title IX Coordinator and in fact, the final regulations expressly protect a complainant (or other person's) right *not* to participate in a Title IX proceeding by including

such refusal to participate in the anti-retaliation provision in § 106.71. If the recipient has commenced a § 106.45 grievance process without a cooperating complainant, the recipient must still obtain evidence about the allegations, and the complainant and respondent must have an opportunity to inspect, review, and respond to such evidence. Such evidence would be directly related to the respondent under FERPA's definition of "education records"[1591] because it is related to the allegations against the respondent. The respondent would have access to such education records under both FERPA and these final regulations implementing Title IX, and the Department interprets both FERPA and Title IX consistent with constitutionally guaranteed due process rights. A respondent should have notice of and a meaningful opportunity to respond to the evidence about the allegations against the respondent. Full and fair adversarial procedures increase the probability that the truth of allegations will be accurately determined,[1592] and reduce the likelihood that impermissible sex bias will affect the outcome. Accordingly, the respondent, like the complainant, must have the opportunity to inspect, review, and respond to such evidence. Even if a complainant chooses not to participate in a § 106.45 grievance process initiated by the Title IX Coordinator's signing of a formal complaint, the complainant is still treated as a party[1593] entitled to, for example, the written notice of allegations under § 106.45(b)(2), notice of meetings or interviews to which the complainant is invited under § 106.45(b)(5)(v), and a copy

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[1591] 20 U.S.C. 1232g(a)(4); 34 CFR 99.3.

[1592] The adversarial "system is premised on the well-tested principle that truth – as well as fairness – is 'best discovered by powerful statements on both sides of the question.'" *Penson v. Ohio*, 488 U.S. 75, 84 (1988) (quoting Irving R. Kaufman, *Does the Judge Have a Right to Qualified Counsel?*, 61 AM. BAR ASS'N J. 569, 569 (1975)).

[1593] *See* § 106.30 defining a "complainant" as "an individual who is alleged to be the victim of conduct that could constitute sexual harassment." The final regulations removed the phrase "or on whose behalf the Title IX Coordinator filed a formal complaint" to reduce the likelihood that a complainant would feel pressured to participate in a grievance process against the complainant's wishes. Thus, even where the Title IX Coordinator signs the formal complaint that initiates the grievance process (as opposed to the complainant filing the formal complaint), the complainant is treated as a party during the grievance process yet the complainant's right not to participate is protected (for example, under the anti-retaliation provision in § 106.71).

of the evidence subject to inspection and review under § 106.45(b)(5)(vi). Thus, the complainant would at least know what evidence was obtained and have the opportunity to respond to that evidence, if the complainant so desired.[1594]

The Department disagrees that these final regulations will chill reporting. These final regulations will encourage complainants to report allegations of sexual harassment because complainants must be offered supportive measures irrespective of whether they choose to file a formal complaint under § 106.44(a).[1595] These final regulations provide a fair, impartial, and transparent grievance process for formal complaints that helps ensure that all parties receive the opportunity to inspect and review any evidence obtained as part of an investigation that is directly related to the allegations in a formal complaint.

Changes: The Department revised § 106.45(b)(5)(i) to specifically state that the recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for a grievance process under

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[1594] The final regulations protect a complainant's right to seek the kind of response from a recipient that best meets the complainant's needs (i.e., supportive measures, a grievance process, or both) and nothing in the final regulations requires a complainant to participate in a grievance process against the complainant's wishes, even where the Title IX Coordinator signed a formal complaint initiating a grievance process against the respondent. Commenters pointed out the importance of respecting complainant autonomy and asserted that for a variety of reasons a complainant may not wish to file a formal complaint, yet may decide later to file a formal complaint or to participate in a grievance process initiated by the Title IX Coordinator. The final regulations balance these interests in deference to a complainant's autonomy and control as to whether initiating or participating in a grievance process best serves the complainant's needs.

[1595] § 106.71, prohibiting retaliation, protects any person's right *not* to participate in a Title IX grievance process, thereby buttressing a complainant's right under § 106.44(a) to receive supportive measures regardless of whether the complainant files a formal complaint or otherwise participates in a grievance process.

this section (if a party is not an "eligible student," as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a "parent" as defined in 34 CFR 99.3).

Comments: Commenters expressed concerns about schools producing information to students. Some contended that the proposed rules contained provisions regarding the content of the required notice that directly conflict with FERPA. Other commenters argued that the right to appeal is generally a safety net against a lack of evidence, such that there is no need for schools to produce literally all evidence directly related to the allegation. One commenter suggested that the proposed rules would likely create an inconsistency with all other forms of student misconduct investigations, where schools generally do not provide FERPA-protected education records to the accused student. Some argued that this would put Title IX in "least-favored nation" status, such that only Title IX allegations were likely to trigger these privacy concerns, as opposed to allegations based on race or disability harassment.

With respect to production of documents, many commenters expressed concern that the proposed rules did not sufficiently clarify what is discoverable and what is confidential. Commenters stated that schools may opt to collect as much information as possible in their investigations, out of fear that OCR will find them in violation of the new Title IX rules, but that will also mean access to a host of irrelevant information being given to the parties. Once in the hands of students, asserted commenters, the information is totally unprotected. The proposed rule, commenters argued, does not prohibit parties from photographing and texting even highly confidential information about the other party, even when young children are involved. One commenter suggested that there should be some exceptions on production, such as nude photos or other photos of a graphic sexual nature. Even the effort to ensure that technological platforms do not allow sharing is inadequate, commenters asserted, because smart phones are ubiquitous,

and because many schools will simply operate out of compliance with this requirement, due to a lack of funds for technological updates. Other commenters disagreed, however, stating that it would be better to allow easier access to electronic documents, since the inability to cut and paste from materials would make preparing one's defense more difficult.

Some commenters argued that a school having to review so much evidence prior to production will increase the cost of attorneys and advisors who need to be paid to review all evidence, turning the Title IX process into an expensive one. Some commenters stated that the natural result of this process is that students and employees in Title IX proceedings will try to hire attorneys to redact their own evidence before giving it to schools.

By way of contrast, some commenters argued that the proposed rules offer respondents more disclosure of exculpatory evidence than the *Brady* case does in the criminal context, which is anomalous for a noncriminal proceeding in a school setting. These commenters stated that under *Brady*, criminal prosecutors only have to disclose exculpatory evidence. They also stated that prosecutors do not have to produce evidence about sexual contact with the alleged perpetrator in the past, which is contrary to the proposed rule. Apart from prosecutors, commenters argued that police officers need not circulate draft reports to the people involved in a crime scene investigation, which is seemingly what commenters believed has to happen in the Title IX context.

One commenter stated that the production of so much evidence will jeopardize law enforcement investigations. Another commenter suggested that Title IX administrators will tell complainants not to submit certain evidence, out of fear that it will be produced to the respondent. One commenter stated that parties would strategically introduce evidence of academic performance and perhaps sexual history in order to embarrass the other party, and deter

them from continuing the process; the commenter also suggested that introducing such evidence might bias an adjudicator against the other party. Even in the best cases, asserted commenters, adjudicators would be forced to weigh whether evidence was relevant, and forced to spend time and energy on making rulings on the admissibility of documents.

Discussion: As previously explained, there is no inherent conflict between these final regulations and FERPA. An appeal right does not address the concern that parties should have access to the universe of evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint. Having such evidence will help parties adequately prepare for a hearing. These final regulations do not require disclosing education records in violation of FERPA as the Department has previously interpreted FERPA to allow for the disclosure of records that are directly related to a particular student in the context of impairing due process in student disciplinary proceedings where the information could not be segregated and redacted without destroying the meaning of the education records. These final regulations require disclosure of evidence that is directly related to the allegations raised in a formal complaint. As previously stated, these final regulations do not require a recipient to share information in a record that does not directly relate to the allegations in a formal complaint.

These final regulations address sexual harassment, and the Department acknowledges that recipients may use a different grievance process to address sex discrimination that is not sexual harassment just as a recipient may use a different grievance process to address allegations related to race and disability. A grievance process to address race or disability concerns different considerations than a grievance process to address sexual harassment.

The Department disagrees that these final regulations require a recipient to provide completely irrelevant evidence because § 106.45(b)(5)(vi) expressly states that the recipient must

provide "any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint." The only evidence that a recipient should be providing is evidence that is directly related to the allegations raised in a formal complaint. These final regulations neither require nor prohibit a recipient to use a file sharing platform that restricts the parties and advisors from downloading or copying the evidence. Recipients also may specify that the parties are not permitted to photograph the evidence or disseminate the evidence to the public. Recipients thus have discretion to determine what measures are reasonably appropriate to allow the parties to respond to and use the evidence at a hearing, while preventing the evidence from being used in an impermissible manner as long as such measures apply equally to both parties under § 106.45(b). Such measures may be used to address sensitive materials such as photographs with nudity.

The Department agrees that a recipient will need to review all the evidence obtained as part of the investigation and determine what evidence is directly related to the allegations raised in a formal complaint. The Department disagrees that attorneys must conduct this review as lay persons also may determine what evidence is directly related to the allegations raised in a formal complaint.

Irrespective of what information is available in a criminal case, the Department believes that both parties should have the opportunity to inspect and review any evidence obtained as part of an investigation that is directly related to the allegations raised in a formal complaint. The grievance process in § 106.45 does not have all of the same protections as a court proceeding in a criminal case. For example, these final regulations do not contain a comprehensive set of rules of evidence. Neither party may issue a subpoena to gather information from each other or the recipient for purposes of the grievance process under § 106.45. Neither of the parties has a right

to effective assistance of counsel under these final regulations, whereas a criminal defendant does have that right throughout the criminal proceeding. Under these final regulations, the parties only receive an advisor, who does not need to be an attorney, to conduct cross-examination on behalf of that party so as to ensure that the parties do not directly cross-examine each other. The parties should have an equal opportunity to review and inspect evidence that directly relate to the allegations raised in a formal complaint as these allegations necessarily relate to both parties. Even if these final regulations did not exist, parties who are students would have a right to inspect and review records directly related to the allegations in a formal complaint under FERPA, 20 U.S.C. 1232g(a)(1)(A)-(B), and its implementing regulations, 34 CFR 99.10 through 99.12, because these records would directly relate to the parties in the complaint.[1596]

With respect to evidence of prior sexual behavior, the Department revised § 106.45(b)(6) to prohibit all evidence (and not just questions) about the complainant's sexual behavior or predisposition unless such evidence is offered to prove that someone other than the respondent committed the conduct alleged by the complainant or to prove consent. If a recipient obtains evidence about a party's sexual behavior or predisposition that is directly related to the allegations raised in a formal complaint, the recipient should allow both parties an equal opportunity to inspect and review such evidence to be able to prepare to respond to it or object to its inclusion in the investigative report and its use at the hearing.

These final regulations will not jeopardize or delay a law enforcement investigation, which is a completely separate process. If there is a concurrent law enforcement investigation, then a recipient may temporarily delay or extend the grievance process under § 106.45(b)(1)(v),

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[1596] 73 FR at 74832-33.

as long as the recipient documents the good cause for the temporary delay or extension. A Title IX Coordinator should not encourage or discourage a party from submitting evidence and should inform both parties that the grievance process will provide them with an opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint. These final regulations do not allow a Title IX Coordinator to restrict a party's ability to provide evidence. If a Title IX Coordinator restricts a party from providing evidence, then the Title IX Coordinator would be violating these final regulations and may even have a conflict of interest or bias, as described in § 106.45(b)(1)(iii).

If the academic record of a party is directly related to the allegations of sexual harassment, then the recipient may obtain, access, use, and disclose such evidence as part of the investigation under § 106.45. For example, if a complainant alleges that the complainant frequently missed classes as a result of the sexual harassment, then the attendance records of the complainant for that class are directly related to these allegations. Accordingly, a recipient may obtain or a party may request the recipient to obtain such attendance records as part of an investigation under § 106.45, if such records are directly related to the allegations in the formal complaint. Similarly, if a student-complainant alleges that an employee-respondent sexually harassed them on a field trip and the employee-respondent or that student-complainant did not attend the field trip, then the employee-respondent may provide the attendance records for the field trip, as these attendance records are directly related to the allegations of sexual harassment. Decision-makers should be able to determine what evidence is relevant at a hearing. Decision-makers also are capable of objectively considering the evidence without developing a bias for or against a complainant or respondent and will receive training about conflicts of interest and bias from the recipient under § 106.45(b)(1)(iii).

Changes: None.

Comments: Some commenters raised questions about procedural aspects of the grievance procedures. One stated that a single rule for the number of days before certain steps of the process occurs is arbitrary. Some cases will take longer than others to review the evidence, asserted a commenter. One commenter asked whether, if evidence is not adequately uploaded and available to the parties ten days before a hearing, must the hearing be delayed, or can the parties agree to keep the hearing date in place, and mutually waive whatever requirements the proposed rules implement? The same commenter asked whether, if no waiver occurs and one of the parties objects to holding the hearing but the school insists on proceeding, must the evidence that was produced only nine days prior to the hearing be struck?

One commenter argued the proposed rules are highly prescriptive, and that is inconsistent with the 2018 Report issued by the Federal Commission on School Safety,[1597] which stated that overly prescriptive Federal standards burdened local schools.

Discussion: These final regulations require that the parties have at least ten days to submit a written response to the evidence that is directly related to the allegations raised in a formal complaint under § 106.45(b)(5)(vi) and that the parties have the investigative report at least ten days prior to a hearing under § 106.45(b)(5)(vii). The Department does not define whether these ten days are calendar days or business days, and recipients have discretion as to whether to calculate "days" by calendar days, business days, school days, or other reasonable method. Recipients also may give the parties more than ten days in each circumstance.

[1597] Commenters cited: Dep't. of Education *et al.*, *Final Report of the Federal Commission on School Safety* (Dec. 18, 2018), https://www2.ed.gov/documents/school-safety/school-safety-report.pdf.

If the investigative report that fairly summarizes relevant evidence is not ready at least ten days prior to a hearing, then the recipient should wait to hold the hearing until the parties have at least ten days with the investigative report pursuant to § 106.45(b)(6)(i). If a recipient does not give the parties at least ten days with the investigative report prior to a hearing, the recipient will be found in violation of these final regulations, irrespective of whether the parties waive the requirements in these final regulations.

The Department disagrees that these final regulations are overly prescriptive because recipients still have ample discretion. For example, recipients determine what supportive measures to offer, the standard of evidence, how to weigh the evidence to reach the determination regarding responsibility, the sanction, and any remedies.

Changes: None.

Comments: Several commenters suggested that there was tension between the proposed rules and FERPA, and argued that there is a conflict between the proposed rules and 20 U.S.C. 1232g(b)(1), since records would need to be disclosed as part of the grievance process even without the written consent of the parties involved. One commenter suggested that the final regulations expressly state that "nothing in this part shall be read in derogation of the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99." In support of that argument, commenters stated that schools know FERPA well, that FERPA guidance is well-established, and should control so that schools do not have to modify their existent knowledge of privacy issues. One commenter suggested that schools and students should be bound not to disclose any information if the disclosure would be inconsistent with FERPA's provisions.

Discussion: As explained earlier, the Department disagrees that there is an inherent conflict between these final regulations and FERPA. FERPA and its implementing regulations define the

term "education records" as meaning, with certain exemptions, records that are directly related to a student and maintained by an educational agency or institution, or by a party acting for the agency or institution.[1598] The Department previously stated: "Under this definition, a parent (or eligible student) has a right to inspect and review any witness statement that is directly related to the student, even if that statement contains information that is also directly related to another student, if the information cannot be segregated and redacted without destroying its meaning."[1599] The Department made this statement in response to comments regarding impairing due process in student discipline cases in its notice-and-comment rulemaking to promulgate regulations to implement FERPA.[1600] The evidence and investigative report that is being shared under these final regulations directly relate to the allegations in a complaint and, thus, directly relate to both the complainant and respondent.

As explained earlier, the Department's interpretation in the 2001 Guidance still stands that "if there is a direct conflict between requirements of FERPA and requirements of Title IX, such that enforcement of FERPA would interfere with the primary purpose of Title IX to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions."[1601]

Changes: None.

Comments: Several commenters suggested that the final regulations ought to model their FERPA language on the Clery Act regulations, namely 34 CFR 668.46(l), because the Clery Act

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[1598] 20 U.S.C. 1232g(a)(4); 34 CFR 99.3.
[1599] 73 FR 74806, 74832-33 (Dec. 9, 2008).
[1600] *Id*.
[1601] 2001 Guidance at vii.

regulations clearly state that compliance with the Clery Act does not violate FERPA but, commenters argued, proposed § 106.6(e) does not clearly assure recipients that complying with these Title IX regulations does not violate FERPA. Other commenters cited to 34 CFR 668.46(k)(3)(B)(3) and suggested that the final regulations should clearly state that medical records would not be released without the written authorization required in 45 CFR 164.508(b), implementing the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Pub. L. 104-191, to mirror VAWA. In addition, commenters suggested that any release of medical records be consistent with 45 CFR 164.508(b), which is part of the Standards for Privacy of Individually Identifiable Health Information ("Privacy Rule") adopted under HIPAA. Other commenters suggested that the Department require a data security standard benchmarked to HIPAA. This commenter stated that information about sexual assault may include medical information as sensitive Protected Health Information (PHI). Information about sexual history and abuse would be valuable to criminals and State adversaries. The commenter argued that because HIPAA is a known standard, familiar to technical support professionals, and has allowances for anonymization for research, using the data security standard as provided for in HIPAA will allow anonymized data for use in secure research that may inform policies and that absent a data security standard, information technology (IT) personnel will not be aware of any obligation to make sure that computers being used to create and store the sensitive information contained in evidence and investigative reports in Title IX grievance processes need to meet data security protocols.

Other commenters stated that even given these confines, FERPA's definition of "directly related to" is too broad. These commenters expressed concern that schools will get it wrong

when trying to determine which evidence is directly related to certain allegations, which means that some highly sensitive student records will be produced, even when they should not be.

Other commenters disagreed, stating that the Department should add a sentence after the "directly related to" language that reads as or similar to the following: "In determining whether evidence is 'directly related to the allegations obtained as part of the investigation,' the recipient must construe the phrase 'directly related to' broadly and in favor of production of any evidence obtained."

Discussion: The Department disagrees that it needs to adopt language in § 668.46(l) and expressly state that "compliance [with these final regulations] does not constitute a violation of FERPA." The Department does not believe that there is any inherent conflict between these final regulations and FERPA. Additionally, these final regulations expressly state in § 106.6(e) that the obligation to comply with these final regulations "is not obviated or alleviated by the FERPA statute, 20 U.S.C. 1232g or FERPA regulations, 34 CFR part 99." Such a statement sufficiently addresses concerns that compliance with these final regulations does not violate FERPA.

The Department does not enforce HIPAA, which protects the privacy and security of certain health information. The regulations, implementing HIPAA, which include the Privacy Rule and its provisions at 45 CFR 164.508(b), apply to "covered entities," and a recipient may or may not be a covered entity. Accordingly, a recipient may not be required to comply with HIPAA, and the Department will not require recipients to comply with HIPAA through these final regulations. A recipient must comply with all laws that apply to it and is best positioned to determine whether and how HIPAA may apply to it. A recipient's grievance procedures and grievance process, which are required to be published pursuant to § 106.8(c), should provide notice to the parties that they will receive an equal opportunity to inspect and review any

evidence obtained as part of an investigation that is directly related to the allegations raised in a formal complaint of sexual harassment. Indeed, § 106.8(c) requires the recipient to notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient notice of the recipient's grievance procedures and grievance process. If a party does not want the other party to receive any of the party's medical records, then the party (or the party's parent, if applicable) is not required to provide such medical records to the recipient as part of the investigation, nor to provide consent to the recipient with respect to medical and other treatment records for which a recipient is required to obtain voluntary, written consent before accessing or using such records, under § 106.45(b)(5)(i). Recipients do not have subpoena power, and as the commenter implies, a recipient will not be able to receive a party's medical records from a covered entity under the regulations implementing HIPAA without the party's consent.

The Department also does not wish to require that recipients use a data security standard benchmarked to HIPAA or its Privacy Rule because the Department does not administer HIPAA and does not wish to add yet another set of regulations governing the same type of information that HIPAA may cover. Recipients that are subject to both HIPAA and these final regulations would then be subject to two different sets of data security standards governing the same type of information, as the Department may interpret its data security provisions differently than other Federal agencies such as the U.S. Department of Health and Human Services, which administers HIPAA. Although the Department encourages recipients to use secure data systems, Title IX does not directly concern data security, and the Department's proposed regulations did not directly address data security requirements.

The Department disagrees that "directly related to" is too broad or not broad enough. The Department purposefully chose "directly related to," as such a requirement aligns with FERPA, and recipients that are subject to FERPA will understand how to apply such a requirement. The Department also acknowledges that recipients have discretion to determine what constitutes evidence directly related to the allegations in a formal complaint. The purpose of the provision in § 106.45(b)(5)(vi) is to give parties an opportunity to inspect, review, and respond to evidence that may be used to support or challenge allegations made in a formal complaint prior to the investigator's completion of the investigative report. The recipient certainly cannot exclude any evidence that the investigator intends to use in the investigative report.

Changes: None.

Comments: Several commenters had concerns about privacy with respect to the evidence-sharing provisions of the grievance procedures. Commenters stated, for instance, that only "non-privileged" materials ought to be shared during the process, and suggested that medical records ought to be considered privileged. Similarly, some commenters suggested that financial records of students should be considered privileged, and therefore not produced.

Commenters asserted that the final regulations should clarify that under no circumstances will a school access campus medical and counseling records. These records, stated commenters, would include the results of medical tests, rape kits, and forensic evidence that is covered by HIPAA and FERPA.

Discussion: Nothing in these final regulations requires a recipient to share materials subject to the attorney-client privilege in the recipient's possession with a party as part of a § 106.45 grievance process. If a party holds the attorney-client privilege and chooses to waive the privilege to share records protected by the attorney-client privilege, then the party may do so. To

clarify this point, the Department added § 106.45(b)(1)(x) to expressly state that a recipient's grievance process must not: "require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege."

Medical records may be subject to other Federal and State laws that govern recipients, and recipients should comply with those laws. The Department believes that the final regulations, and specifically § 106.45(b)(5)(i), protect a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party. Pursuant to § 106.45(b)(5)(i), a recipient cannot access, consider, disclose or otherwise use such records unless the party gives the recipient voluntary, written consent.[1602] This restriction applies even where HIPAA or any State-law equivalent do not apply.

The Department does not wish to create more complexity and confusion by creating yet another set of regulations that apply to medical records by incorporating by reference HIPAA or attorney-client privilege rules. These final regulations, and specifically § 106.45(b)(1)(x) and § 106.45(b)(5)(i), appropriately protect medical records and attorney-client privileged information.

With respect to medical and counseling records to which a recipient does not have access, whether a recipient may access such medical and counseling records would be governed by other laws that typically require a party's consent. A recipient should comply with all applicable laws

[1602] Pursuant to § 106.45(b)(5)(i), if the party is not an "eligible student," as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a "parent," as defined in 34 CFR 99.3. § 106.45(b)(5)(i).

governing medical and counseling records. For purposes of these final regulations, the recipient should not obtain as part of an investigation any evidence, directly relating to the allegations in a formal complaint, that cannot legally be shared with the parties.

Changes: The Department added § 106.45(b)(1)(x) to expressly state that a recipient's grievance process must not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

Comments: Several commenters addressed the evidence-sharing provisions of the grievance procedures in other ways, stating that the final regulations ought to discourage schools from providing electronic access to documents. Many noted that students generally live close to the school itself, such that in-person access exclusively would likely be adequate, and would prevent the documents from being shared with outside parties or the press. Commenters also noted that electronic access may pose difficulties for students who lack a computer, or who lack internet access. Even for students who have access to these technologies, reliable access may not always be easily obtainable. Some might have to view evidence on a shared computer in a public library or a computer lab.

Some commenters contended that some students with disabilities would have difficulty accessing and reviewing all evidence in a digital format, particularly given how much material is likely to be produced under the final regulations. One commenter suggested limiting production to hard copy documents, unless the parties all agree to consent to electronic production as well. Some noted that hard copies of evidence will have to be made in many cases anyway, since those documents may need to be submitted as exhibits during the proceeding. Some commenters

suggested not even providing the parties with the evidence, but instead just describing the evidence verbally, in the hopes of encouraging dialogue and discourse.

Some commenters asserted that the final regulations should only require supervised access to all material available to the decision-makers. Other commenters disagreed with the idea of only providing supervised hard-copy access to relevant documents, arguing that parties need private access to the documents, to be able to discuss information with their advisors. Some commenters asked the Department not to allow schools to give documents directly to party advisors, asserting that a party ought to have control over what they give to their own advisor.

Some commenters suggested that schools should have flexibility to provide information in the way they see fit, accounting for the expense of some technology. One commenter suggested that the final regulations should eliminate language that dictates the manner in which records will be shared, and instead state that the files should be shared "in a manner that will prevent either party from copying, saving, or disseminating the records."

Commenters contended that the time frames for providing evidence are too short, and therefore unduly burdensome for schools. These commenters argued that the ruling in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), provides schools and school administrators with flexibility and is not designed to make the process rigid and one-size-fits-all.

Discussion: The Department disagrees that parties should only be provided with hard copies of the evidence, as directly providing the parties with a hard copy of the evidence will prevent a recipient from being able to provide "view only" access, if the recipient would like to provide "view only" access. The Department also does not wish to require recipients to provide parties the opportunity only to inspect and review hard copies of the evidence because the parties may have obligations that prevent them from inspecting and reviewing the evidence during the hours

when the recipient's operations are open to allow for such inspection and review. Nothing in these final regulations prevents a recipient from providing a hard copy of the evidence in addition to the evidence in an electronic format. Indeed, the Department revised § 106.45(b)(5)(vi)-(vii) to allow the recipient to provide a party and the party's advisor of choice with either a hard copy of the evidence and the investigative report or the evidence and the investigative report in an electronic format. Allowing the recipient to send the parties the evidence in an electronic format gives the recipient sufficient discretion to determine whether to use a file sharing platform that restricts the parties and advisors from downloading or copying the evidence, and the recipient also may opt to provide a hard copy of the evidence for the parties.[1603] The Department also fully encourages recipients to provide whatever reasonable accommodations are necessary for students with disabilities; recipients must comply with applicable disability laws while also complying with these final regulations. The Department also reiterates that a recipient may require parties to agree not to photograph or otherwise copy the evidence that the recipient provides for inspection and review. The Department also takes no position on nondisclosure agreements that comply with these final regulations. The Department, however, will not impose a uniform approach for recipients and would like recipients to have discretion in this regard. A recipient may choose to share records in a manner that will prevent either party from copying, saving, or disseminating the records, but the Department will not require the recipient to do so. Finally, the Department disagrees that describing the evidence verbally will provide the parties with a sufficient opportunity to respond to the evidence.

[1603] In response to many commenters concerned that requiring recipients to provide the evidence to parties by using a digital platform that restricts users from downloading the information would be unnecessarily costly or burdensome, the final regulations revised § 106.45(b)(5)(vi) to remove that requirement.

Descriptions of evidence may not be accurate and even the best description will not always capture the nuances of the actual evidence.

The Department agrees with commenters that providing hard copy access under and subject to the recipient's supervision may prevent the parties from freely discussing the evidence with their advisors. If a party does not want a recipient to provide a copy of the evidence or investigative report to the party's advisor, then the recipient should honor such a request. These final regulations simply prevent a recipient from refusing to provide evidence or an investigative report to a party's advisor, if the party would like the advisor to have access to the evidence or investigative report.

Changes: The Department revised § 106.45(b)(5)(vi)-(vii) to allow a recipient to provide a hard copy of the evidence and investigative report to the party and the party's advisor of choice or to provide the evidence and investigative report in an electronic format.

Comments: Several commenters had concerns about the grievance proceeding itself, and how student privacy ought to be protected in that context. Some contended that the proposed rules needed more clarity as to the content of the investigative report. The assumption by schools, asserted the commenter, will be that facts, interview statements, a credibility analysis, and the school's policy are the only components of such a report, so any other items that ought to be included, asserted the commenter, should be expressly mentioned.

Commenters asked whether, if there are multiple complainants and one respondent, are the complainants entitled to the disciplinary results for allegations related to other complainants' complaints?

Discussion: The Department does not wish to impose specific requirements for the investigative report other than the requirement that the investigative report must fairly summarize relevant

evidence, as described in § 106.45(b)(5)(vii). A recipient may include facts and interview statements in the investigative report. If a recipient chooses to include a credibility analysis in its investigative report, the recipient must be cautious not to violate § 106.45(b)(7)(i), prohibiting the decision-maker from being the same person as the Title IX Coordinator or the investigator. Section 106.45(b)(7)(i) prevents an investigator from actually making a determination regarding responsibility. If an investigator's determination regarding credibility is actually a determination regarding responsibility, then § 106.45(b)(7)(i) would prohibit it. Otherwise, the Department does not wish to be overly prescriptive with respect to the contents of the investigative report, and the recipient has discretion as to what to include in it.

If there are multiple complainants and one respondent, then the recipient may consolidate the formal complaints where the allegations of sexual harassment arise out of the same facts or circumstances, under § 106.45(b)(4). The requirement for the same facts and circumstances means that the multiple complainants' allegations are so intertwined that their allegations directly relate to all the parties. Accordingly, if the allegations of sexual harassment arise out of the same facts or circumstances, the parties must receive the same written determination regarding responsibility under § 106.45(b)(7), although the determination of responsibility may be different with respect to each allegation depending on the facts. Section 106.45(b)(7)(iii) requires the recipient to provide the written determination regarding responsibility to both parties simultaneously, and a recipient may not redact or withhold any part of the written determination regarding responsibility from the parties. If a recipient consolidates formal complaints, a recipient must issue the same written determination regarding responsibility to all parties because the allegations of sexual harassment must arise out of the same facts or circumstances such that the written determination directly relates to all the parties. If a recipient does not consolidate the

formal complaints, then the recipient must issue a separate written determination regarding responsibility for each formal complaint. If the formal complaints are not consolidated, then each complainant would receive the written determination regarding responsibility with respect to that complainant's formal complaint.

Changes: None.

Comments: Some commenters were skeptical that the proposed rules could adequately protect privacy, given work-arounds that allow parties to share information easily. Other commenters suggested that the final regulations should avoid specifying how information should be shared, given how obsolete technology can quickly become. Another commenter stated that the final regulations should require that a school provide the parties only with a log of all documents – and not the documents themselves – so that if certain documents in the log are protected by FERPA, the parties can argue over whether the document is relevant or not.

Discussion: The Department acknowledges that recipients have some discretion to determine how privacy should best be protected while fully complying with these final regulations. The Department permitted but never required that a recipient use a file sharing platform that restricts the parties and advisors from downloading or copying the evidence in the proposed regulations. The Department is removing the phrase "such as a file sharing platform, that restricts the parties and advisors from downloading or copying the evidence" in § 106.45(b)(5)(vi) to help alleviate any confusion that the proposed regulations required such a platform.

The Department disagrees that a log of all documents in an investigation will provide the parties with the same benefit as inspecting and reviewing all evidence directly related to the allegations in a formal complaint prior to the completion of an investigative report. The purpose of this provision in § 106.45(b)(5)(vi) is for parties to respond to the evidence prior to the

completion of the investigative report to help recipients provide a fair and accurate investigative report. A log of documents will not allow the parties to respond to the evidence, and the parties may not always be able to determine whether a record is an education record and whether FERPA prohibits the disclosure of personally identifiable information contained in an education record merely by reviewing a log of documents.

Changes: The Department removed the phrase "such as a file sharing platform, that restricts the parties and advisors from downloading or copying the evidence" in § 106.45(b)(5)(vi).

Comments: Some commenters expressed concern that the proposed rules would allow employees accused of sexual assault to review the private medical records of the complainant, and that it would be strange for staff members or employees of a school to have access to private student records.

Discussion: As previously stated, the Department is bound by the U.S. Constitution and must administer its final regulations in a manner that would not require any person to be deprived of due process or other constitutional rights. If an employee is a respondent, then the employee must be able to respond to any evidence that directly relates to the allegations in a formal complaint. With respect to medical records, in order for the medical record to be used in the grievance process, a complainant must either offer the recipient medical records for such use, or provide voluntary, written consent for the recipient to access and use the medical records.[1604] In the written notice of allegations required under § 106.45(b)(2), a recipient will notify the parties of the grievance process under § 106.45, including the requirement that both parties be able to review and inspect evidence obtained as part of the investigation that is directly related to the

[1604] § 106.45(b)(5)(i).

allegations raised in a formal complaint. If a complainant does not wish for the respondent to inspect and review any medical record or any part of any medical record that is directly related to the allegations, then the complainant does not have to provide that medical record to the recipient for use in the grievance process or provide consent for the recipient to otherwise access or use that medical record.

Changes: The final regulations revise § 106.45(b)(5)(i) to restrict a recipient from accessing, considering, disclosing, or otherwise using a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for a grievance process under § 106.45(b). If the party is not an "eligible student," as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a "parent," as defined in 34 CFR 99.3.

Comments: Some commenters made more general suggestions for modifying the proposed rule. One suggested that the final regulations ought to clarify that FERPA does not require that hearings be closed off to the press and to the public. The same commenter argued that in fact all hearings needed to be open to the press and the public under the First Amendment. One other commenter stated that the final regulations ought to specify whether final adjudication determinations can be publicized and published by either of the parties, or by the school itself. One commenter suggested that the final regulations state that it is not retaliation or a FERPA violation to contest or discuss allegations or to criticize dishonest allegations of sexual harassment.

Discussion: The Department disagrees that hearings under § 106.45(b)(6) must be open to the press and the public under the First Amendment, as the First Amendment does not require that a hearing to adjudicate allegations of sexual harassment in an education program or activity of a recipient of Federal financial assistance be made open to the public and the press. FERPA would preclude hearings to be open to the press and the public if the hearings would require disclosure, without prior written consent, of personally identifiable information from an education record. FERPA and its implementing regulations may govern whether the final adjudication determinations can be publicized and published by a recipient to which FERPA applies, and these final regulations do not address whether the final adjudication determinations may be publicized or published other than providing the written determination to the parties pursuant to § 106.45(b)(7)(iii). Additionally, some recipients may have non-disclosure agreements that comply with other laws, and these final regulations neither require nor prohibit such non-disclosure agreements. The final regulations provide that the recipient cannot restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence in § 106.45(b)(5)(iii). To address the commenter's concerns, the final regulations also provide that the exercise of rights protected under the First Amendment does not constitute retaliation pursuant to § 106.71. Threatening to publicize or make a written determination public for the purpose of retaliation, however, is strictly prohibited under § 106.71 of these final regulations.

Changes: The Department included a retaliation provision in § 106.71 that expressly states that the exercise of rights protected under the First Amendment does not constitute retaliation.

Comments: Some commenters offered suggestions to improve the rule. One suggested that police investigation files ought to also be made available to the parties, in addition to student

records. One commenter argued that social media profiles and materials ought to be relevant to any grievance proceeding as well, particularly for accusers who claim trauma but then post contrary items on social media. Another commenter argued that the Department should offer technical assistance to schools to ensure that the platforms for sharing information are created appropriately and that they work.

One commenter suggested that the final regulations ought to specify that records created as part of the grievance process are themselves protected by FERPA. Some commenters suggested that the final regulations should require that grievance process records containing personally identifiable information in them ought to be destroyed at the conclusion of the grievance process. One commenter asked that the Department clarify that schools have a right to redact documents, so long as the redactions are not relevant to the proceeding and the redactions are consistent with providing the parties due process. At the very least, argued commenters, a school should be allowed to place certain restrictions on students repeating information learned as part of the evidentiary production or hearing process. In the same vein, commenters asked that the Department state clearly that parties are not entitled to evidence that is not relevant to a determination of responsibility.

Commenters argued that the final regulations ought to include meaningful consequences for parties who violate the confidentiality of information. One suggested that the final regulations ought to include some statement about retaliation, which is also covered under Title IX, in terms of confidential documents.

One commenter suggested that the final regulations ought to include meaningful consequences for schools that fail to implement privacy safeguards. One stated that the final

regulations ought to instruct schools to follow the guidance issued by the Department in the Letter to Wachter (signed by Michael Hawes).[1605]

Discussion: These final regulations do not prevent a recipient from making police investigation files available to the parties. If a recipient obtains police investigation files as part of its investigation of a formal complaint under § 106.45(b)(5) and some of the evidence in the police investigation files is directly related to the allegations raised in a formal complaint as described in § 106.45(b)(5)(vi), then the recipient must provide that evidence to the parties for their inspection and review. A recipient may use social media profiles, assuming that these social media profiles are lawfully obtained, as part of the investigation. The Department will continue to provide recipients with technical assistance and as previously explained, does not require recipients to use a specific platform for sharing information.

Whether FERPA applies to records that are part of a § 106.45 grievance process depends on the circumstances. For example, education records under FERPA may not be implicated at all in a formal complaint of sexual harassment by a non-student complainant against a non-student respondent. The requirement to destroy records with personally identifiable information at the conclusion of the grievance process violates the record-keeping requirements in these final regulations. Such a requirement also may violate record-keeping requirements under the Clery

[1605] *See* Letter from Michael Hawes, Director of Student Privacy Policy, U.S. Dep't. of Education, Off. of Mgmt., to Timothy S. Wachter, Knox McLaughlin Gornall & Sennett, P.C. (Dec. 7, 2017), https://studentprivacy.ed.gov/sites/default/files/resource_document/file/Letter%20to%20Wachter%20%28Surveillance%20Video%20of%20Multiple%20Students%29_0.pdf.

Act, which provides for a seven-year retention period for sexual assault, dating violence, domestic violence, and stalking.[1606]

As previously explained, these final regulations do not require a recipient to share any information in records obtained as part of an investigation that is not directly related to the allegations in a formal complaint, and FERPA may even require redaction of such information. The Department disagrees with the statement that parties are not entitled to evidence that is not relevant to a determination of responsibility. The parties must receive all evidence obtained as part of an investigation that is directly relevant to the allegations in a formal complaint. Such evidence may not always be directly relevant to a determination regarding responsibility. The purpose of these final regulations is to provide both parties with the opportunity to respond to any evidence that directly relates to the allegations in a formal complaint, which is why the parties should have the opportunity to inspect and review such evidence prior to the hearing or prior to when a determination regarding responsibility is made if no hearing is required.

A recipient may require restrictions or use a non-disclosure agreement for confidential information as long as doing so does not violate these final regulations or other applicable laws. These final regulations do not address confidential information or how to safeguard confidential information because the Department cannot begin to identify what the universe of confidential information or records may constitute. A recipient is better able to identify what constitutes confidential records and how these records should be protected in a manner that complies with these final regulations. The Department includes a retaliation provision in § 106.71, but this

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[1606] 34 CFR 668.24(e)(2)(ii); *see* U.S. Dep't. of Education, Office of Postsecondary Education, *The Handbook for Campus Safety and Security Reporting* 9-11 (2016), https://www2.ed.gov/admins/lead/safety/handbook.pdf.

provision does not specifically address confidential documents. Nonetheless, if confidential documents are used for retaliation as defined in § 106.71, then these final regulations would prohibit such retaliation.

The Department notes that the Department's Letter to Wachter (signed by Michael Hawes),[1607] may be helpful to recipients in determining how to comply with the regulations implementing FERPA.

Changes: None.

Comments: Some commenters argued that parties ought to have access to all evidence—not just evidence that the school deems relevant—that is gathered during the course of investigating a formal complaint. Commenters argued that schools cannot be trusted to appropriately review and determine which evidence is "directly relevant," as opposed to merely "relevant" or "irrelevant." Commenters contended that schools would under-produce evidence that might be directly relevant, out of a bias toward finding a respondent to be responsible for sexual harassment. The commenters argued that schools like it when respondents are found responsible, since that will facilitate their efforts of showing that they are complying with Title IX. One commenter suggested that any evidence not produced to a party be logged, such that the parties have sufficient information to dispute the characterization as not directly relevant.

Discussion: The Department requires the recipient to provide the parties an equal opportunity to inspect and review any evidence obtained as part of an investigation that is directly related to

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[1607] *See* Letter from Michael Hawes, Director of Student Privacy Policy, U.S. Dep't. of Education, Off. of Mgmt., to Timothy S. Wachter, Knox McLaughlin Gornall & Sennett, P.C. (Dec. 7, 2017), https://studentprivacy.ed.gov/sites/default/files/resource_document/file/Letter%20to%20Wachter%20%28Surveillance%20Video%20of%20Multiple%20Students%29_0.pdf.

allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source under § 106.45(b)(vi). Even though a recipient has some discretion as to what evidence is directly related to allegations raised in a formal complaint, the Department may determine that a recipient violated § 106.45(b)(vi) if a recipient does not provide evidence that is directly related to allegations raised in a formal complaint to the parties for review and inspection. A recipient may choose to log information that it does not produce and allow the parties to dispute whether the information is directly related to the allegations. Although the Department does not impose a requirement to produce such a log during an investigation under § 106.45, recipients are welcome to do so and may use such a log to demonstrate that both parties agreed certain evidence is not directly related to the allegations raised in a formal complaint.

Changes: None.

Comment: One commenter asked how the recordkeeping requirement in § 106.45(b)(10) complies with FERPA. On the issue of records retention, one commenter suggested that seven years was slightly different than FERPA, stating that FERPA contemplated a range of five to seven years.

Discussion: The recordkeeping requirement in § 106.45(b)(10) does not conflict with FERPA. FERPA and its implementing regulations do not require recipients of Federal financial assistance to keep records for a specific amount of time. FERPA's implementing regulations only require that an educational agency or institution not destroy any education records if there is an

outstanding request to inspect and review the records.[1608] Accordingly, the seven-year retention period that the Department adopts in § 106.45(b)(10) does not in any way impact a recipient's obligations under FERPA.

Changes: None.

Section 106.6(f) Title VII and Directed Question 3 (Application to Employees)

Comments: A few commenters expressed support for applying the proposed rules to employees because it would ensure fairness and help to safeguard a level playing field.

Several commenters expressed general opposition to the NPRM itself but asserted that Title IX should apply to employees because it is necessary for student safety. Commenters stated that no unique circumstances justify treating students and faculty differently under Title IX. One commenter emphasized that employees in the workplace who are accused of sexual harassment may face life-altering consequences. This commenter asserted that recipients may have perverse incentives, due to pressure from media and the general public in the current #MeToo environment, not to provide adequate due process absent a government mandate. The commenter asserted that the NPRM's due process protections, including a clear definition of sexual harassment, with adequate notice and opportunity for a live hearing with cross-examination, also should extend to employees. The commenter also identified a risk that campus administrators may selectively promote or ignore certain Title IX claims to help or undermine the careers of certain faculty. And the commenter described a risk that a complainant faculty with seniority could coerce witnesses to provide favorable testimony.

[1608] 34 CFR 99.10(e) ("The educational agency or institution, or SEA or its component shall not destroy any education records if there is an outstanding request to inspect and review the records under this section.").

One commenter asserted that the Department enforces Title VII, while other commenters concluded that the Department does not have authority to regulate complaints that do not involve students at all, such as employee-on-employee cases. Commenters urged the Department to explicitly state that the final regulations, including the adjudication processes contained therein, only apply to "students." These commenters reasoned that Congress did not intend Title IX's protections for equal access to education to apply to employees, because employees do not receive education. According to these commenters, the Department lacks jurisdiction to regulate how recipients handle employee-related matters. One commenter requested that the Department supplement the final regulations with a clarification of the relationship between claims that contain the potential to be adjudicated under either, or both, Title VII and Title IX.

Another commenter requested further explanation of the intersection of Title VII and Title IX in the context of the respondent being a student-employee on campus.

One commenter stated that the location of the definition of "formal complaint" and the procedures themselves (§ 106.45) were located in Subpart D of the NPRM, which implied that they do not apply to employee complaints alleging sexual harassment in employment. The commenter asserted that it is unclear if recipients are expected to handle employee complaints under § 106.8 instead, which would require two different processes with different definitions of sexual harassment, and inquired as to how complaints by student-employees should be handled.

Several commenters opposed the written notice requirements in § 106.45(b)(5)(v) because they believe the provision is unclear as to how it will apply to a recipient's employees.

Several commenters noted that the deliberate indifference standard is lower than the standard imposed on employers under Title VII and/or the standard articulated by the 2001 guidance. One commenter asserted that the obligation to dismiss the formal complaint with

respect to conduct that does not constitute sexual harassment as defined in § 106.30 or that did not occur within the recipient's program or activity undercuts an employer's ability to take proactive steps to investigate and sanction unwelcome conduct of a sexual nature *before* it becomes sexual harassment as defined in the proposed Title IX regulations or sexual harassment prohibited under the Title VII standard.

One commenter argued that the Department should avoid taking a position on whether Title IX applies to employees. This commenter reasoned that the Department should limit this rulemaking to student-complainant cases because of a split among Federal circuit courts regarding whether Title VII provides the exclusive remedy for employee discrimination claims. Similarly, other commenters noted that because some Federal courts have held Title VII preempts Title IX regarding employment claims, extending the proposed rules in this context may be ineffective. Similarly, another commenter urged the Department to clarify that § 106.6(f) is not intended to create a new Title IX private right of action for employees.

Discussion: The Department appreciates support for its final regulations, which apply to employees. Congress did not limit the application of Title IX to students. Title IX, 20 U.S.C. 1681, expressly states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." Title IX, thus, applies to any person in the United States who experiences discrimination on the basis of sex in any education program or activity receiving Federal financial assistance. Similarly, these final regulations, which address sexual harassment, apply to any person, including employees, in an education program or activity receiving Federal financial assistance.

The Department also notes that Title VII is not limited to employees and may apply to individuals other than employees. Title VII prohibits "unlawful employment practices" against "an individual" by employers, labor unions, employment agencies, joint-labor management committees, apprenticeship programs and, thus, protects individuals other than employees such as job and apprenticeship applicants.[1609] As Title VII protects more than just employee's rights, the Department revises § 106.6(f) to state that nothing in Part 106 of Title 34 of the Code of Federal Regulations may be read in derogation of any individual's rights rather than just any employee's rights under Title VII. The Department recognizes that employers must fulfill their obligations under Title VII and also under Title IX. There is no inherent conflict between Title VII and Title IX, and the Department will construe Title IX and its implementing regulations in a manner to avoid an actual conflict between an employer's obligations under Title VII and Title IX.

The Department agrees that students and employees, including faculty and student workers, should not be treated differently under its final regulations.[1610] Employees should receive the same benefits and due process protections that students receive under these final regulations, and these final regulations, including the due process protections in § 106.45, apply to employees. The Department notes that its regulations have long addressed employees. For example, 34 CFR part 106, subpart E expressly addresses discrimination on the basis of sex in areas unique to employment. Prior to the establishment of the Department of Education, the

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[1609] 42 U.S.C. 2000e-2(a)-(d).

[1610] As discussed in the "Section 106.44(d) Administrative Leave" subsection of the "Additional Rules Governing Recipients' Responses to Sexual Harassment" section of this preamble, the exception in the final regulations under which employees are treated differently from students, is that a "non-student employee" may be placed on administrative leave during the pendency of a grievance process that complies with § 106.45.

Supreme Court noted that the Department of Health, Education, and Welfare's "workload [was] primarily made up of 'complaints involving sex discrimination in higher education academic employment.'"[1611]

The split among Federal courts relates to whether an implied private right of action exists for damages under Title IX for redressing employment discrimination by employers.[1612] These Federal cases focus on whether Congress intended for Title VII to provide the exclusive judicial remedy for claims of employment discrimination.[1613] Courts have not precluded the Department from administratively enforcing Title IX with respect to employees. The Supreme Court also expressly recognized the application of Title IX to redress employee-on-student sexual harassment in *Gebser*.[1614]

The Department's longstanding position is that its Office for Civil Rights (OCR) addresses, under Title IX, sex discrimination in the form of sexual harassment, including by or against employees. For example, the Department's 2001 Guidance specifically addressed the sexual harassment of students by school employees.[1615] The Department also has enforced its

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[1611] *Cannon v. Univ. of Chicago*, 441 U.S. 677, 708 fn. 42 (1979).
[1612] *See Doe v. Mercy Catholic Med. Ctr.*, 850 F.3d 545 (3d Cir. 2017); *Lakosi v. James*, 66 F.3d 751, 755 (5th Cir. 1995); *Burrell v. City Univ. of N.Y.*, 995 F. Supp. 398, 410 (S.D.N.Y. 1998); *Cooper v. Gustavus Adolphus Coll.*, 957 F. Supp. 191, 193 (D. Minn. 1997); *Bedard v. Roger Williams Univ.*, 989 F. Supp. 94, 97 (D.R.I. 1997); *Torres v. Sch. Dist. of Manatee Cnty., Fla.*, No. 8:14-CV-1021-33TBM, 2014 WL 418364 at *6 (M.D. Fla. Aug. 22, 2014); *Winter v. Pa. State Univ.*, 172 F. Supp. 3d 756, 774 (M.D. Pa. 2016); *Uyai v. Seli*, No. 3:16-CV-186, 2017 WL 886934 at *6 (D. Conn. Mar. 6, 2017); *Fox v. Pittsburg State Univ.*, 257 F. Supp. 3d 1112, 1120 (D. Kan. 2017).
[1613] *See id*.
[1614] *Gebser v. Lago Vista Ind. Sch. Dist*., 524 U.S. 274, 277 (1998).
[1615] 2001 Guidance at iv-v, 3, 5, 8-12.

Title IX regulations, including regulations interpreted to address sexual harassment, as to employees.[1616]

Contrary to the commenter's assertion, the Department does not have the authority to create a Title IX private right of action for employees through these final regulations. The Department has the authority to administratively enforce Title IX. Accordingly, these final regulations do not need to expressly state that the Department is not intending to create a new Title IX private right of action for employees. The commenter accurately notes that the definition of "formal complaint" and the grievance process for a formal complaint are in 34 CFR part 106, subpart D, which addresses sex discrimination on the basis of sex in education programs and activities, and not subpart E, which addresses discrimination on the basis of sex in employment in education programs and activities. Subpart D applies to all sex discrimination on the basis of sex and not just sex discrimination on the basis of sex with respect to students. Subpart D is the only subpart that directly addresses sexual harassment through these final regulations. The Department expressly states in § 106.51(b) that subpart E applies to recruitment, advertising, and the process of application for employment, the rate of pay or any other form of compensation, and change in compensation, and other matters that specifically concern employment, but subpart E does not apply to allegations of sexual harassment by or against an employee. Only

[1616] *See, e.g.*, U.S. Dep't. of Education, Office for Civil Rights, Resolution Letter to Univ. of Va. 18-20 (Sept. 21, 2015), https://www2.ed.gov/documents/press-releases/university-virginia-letter.pdf; U.S. Dep't. of Education, Office for Civil Rights, Title IX Resolution Letter to Yale Univ. 3 (June 15, 2012) ("The Title IX regulation, at 34 C.F.R. Section 106.8(a), specifically requires that each recipient designate at least one employee to coordinate its responsibilities to comply with and carry out its responsibilities under Title IX, including any investigation of any complaint communicated to it alleging noncompliance with Title IX (including allegations that the recipient failed to respond adequately to sexual harassment). This provision further requires that the recipient notify all its students and *employees* of the name (or title), email and office address and telephone number of the employee(s) so designated.") (emphasis added), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/01112027-a.pdf.

subpart D addresses sexual harassment, and these final regulations in subpart D apply to any person who experiences sex discrimination in the form of sexual harassment in an education program or activity of a recipient of Federal financial assistance. To help clarify these points, the Department has revised the final regulations so that the definitions in § 106.30 apply to the entirety of 34 CFR part 106 and not just to subpart D of 34 CFR part 106.[1617] Accordingly, recipients are expected to handle any formal complaints of sexual harassment in an education program or activity against a person in the United States through the grievance process in § 106.45. The grievance process in § 106.45 applies irrespective of whether the complainant or respondent is a student or employee. The Department is aware that Title VII imposes different obligations with respect to sexual harassment, including a different definition, and recipients that are subject to both Title VII and Title IX will need to comply with both sets of obligations. Nothing in these final regulations, however, shall be read in derogation of an individual's rights, including an employee's rights, under Title VII, as expressly stated in § 106.6(f). Similarly, nothing in these final regulations precludes an employer from complying with Title VII. The Department recognizes that employers must fulfill both their obligations under Title VII and Title IX, and there is no inherent conflict between Title VII and Title IX.

The Department does not share the commenter's concerns about the application of § 106.45(b)(5)(v) to a recipient's employees. Section 106.45(b)(5)(v) requires a recipient to provide to the party whose participation is invited or expected written notice of the date, time,

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[1617] Consistent with these clarifications regarding the coverage of sexual harassment under subpart D, including with respect to employees, we also revised § 106.44(d) (authorizing a recipient to place a non-student employee on administrative leave during the pendency of a § 106.45 grievance process) to state that nothing in subpart D precludes administrative leave, instead of stating that nothing in § 106.44 precludes administrative leave.

location, participants, and purpose of all hearings, investigative interviews, or other meetings with a party, with sufficient time for the party to prepare to participate. Employees that go through the grievance process described in § 106.45 deserve the same written notice as other individuals who go through this grievance process. Nothing precludes the recipient from providing such written notice to its employees.

The Department acknowledges that the final regulations deviate from the standard articulated in its 2001 Guidance, by which recipients must respond to allegations of sexual harassment. We explain the rationale for our departure from prior policy positions earlier in this preamble in the section on "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment." Additionally, the Department acknowledges that the standard for responding to sexual harassment under Title VII is different than the standard under Title IX. The deliberate indifference standard in § 106.44(a) is the most appropriate standard under Title IX as recipients are in the business of education where people are engaged in a marketplace of ideas that may challenge their own. To avoid restrictions on the speech, conduct, and other expressive activity that helps provide a robust education for students and academic freedom for faculty and staff, the Department adopts the standard that the Supreme Court articulated for Title IX cases rather than the standard that the Supreme Court has articulated for Title VII or other statutory schemes.

With respect to § 106.45(b)(3)(i), which requires mandatory dismissal in certain circumstances, the Department has revised this provision to clarify that such a dismissal does not

preclude action under a non-Title IX provision of the recipient's code of conduct. [1618] If a recipient has a code of conduct for employees that goes beyond what Title IX and these final regulations require (for instance, by prohibiting misconduct that does not meet the definition of "sexual harassment" under § 106.30, or by prohibiting misconduct that occurred outside the United States), then a recipient may enforce its code of conduct even if the recipient must dismiss a formal complaint (or allegations therein) for Title IX purposes. These regulations do not preclude a recipient from enforcing a code of conduct that is separate and apart from what Title IX requires, such as a code of conduct that may address what Title VII requires. Accordingly, recipients may proactively address conduct prohibited under Title VII, when the conduct does not meet the definition of sexual harassment in § 106.30, under the recipient's own code of conduct, as these final regulations apply only to sexual harassment as defined in § 106.30.

Campus administrators will not be able to ignore or promote certain reports of sexual harassment to help or undermine the careers of certain faculty. These final regulations apply to all reports of sexual harassment, and a recipient cannot ignore or promote certain reports. In response to these and other comments, the Department has added a provision to expressly prohibit retaliation in § 106.71. Under § 106.71, a faculty member with seniority could not coerce witnesses to provide favorable testimony. No recipient or other person may intimidate,

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[1618] § 106.45(b)(3)(i) (providing that the "recipient must investigate the allegations in a formal complaint. If the conduct alleged by the complainant would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient's education program or activity, or did not occur against a person in the United States, then the recipient must dismiss the formal complaint with regard to that conduct for purposes of Title IX but "such a dismissal does not preclude action under another provision of the recipient's code of conduct.").

threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this part.

Contrary to the commenter's assertion, the Department does not have authority to enforce, implement, or administer Title VII. While we appreciate the commenter's interest in supplementing the final regulations to clarify the relationship between Title VII and Title IX, we decline to include such an explanation at this time. As previously stated, there is no inherent conflict between Title VII and Title IX, and the Department will construe Title IX and its implementing regulations, including these final regulations, in a manner to avoid an actual conflict between an employer's obligations under Title VII and Title IX.

Changes: The Department revises § 106.6(f) to state that nothing in 34 CFR part 106 may be read in derogation of any individual's rights under Title VII. The Department has added § 106.71 to expressly prohibit retaliation. Additionally, the Department has revised § 106.30 to clarify that aside from the definitions of "elementary and secondary school" and "postsecondary institution," the definitions in § 106.30 apply to all of 34 CFR part 106 and not just to subpart D of part 106.[1619] For similar clarity we have revised § 106.44(d) to refer to subpart D of 34 CFR part 106

[1619] The NPRM proposed that the definitions in § 106.30 apply only to Subpart D, Part 106 of Title 34 of the Code of Federal Regulations. 83 FR 61496. Aside from the words "elementary and secondary school" and "postsecondary institution," the words that are defined in § 106.30 do not appear elsewhere in Part 106 of Title 34 of the Code of Federal Regulations. Upon further consideration and for the reasons articulated in this preamble, the Department would like the definitions in § 106.30 to apply to Part 106 of Title 34 of the Code of Federal Regulations, except for the definitions of the words "elementary and secondary school" and "postsecondary institution." The definitions of the words "elementary and secondary school" and "postsecondary institution" in § 106.30 will apply only to §§ 106.44 and 106.45. This revision is not a substantive revision because this revision does not change the definitions or meaning of existing words in Part 106 of Title 34 of the Code of Federal Regulations. Ensuring that the definitions in § 106.30 apply throughout Part 106 of Title 34 of the Code of Federal Regulations will provide clarity and consistency for future application. We also have clarified in § 106.81 that the definitions in § 106.30 do not apply to 34 CFR 100.6-100.11 and 34 CFR part 101, which are procedural provisions applicable to Title VI. Section 106.81 incorporates these procedural provisions by reference into Part 106 of Title 34 of the Code of Federal Regulations.

rather than solely to § 106.44. With respect to a mandatory dismissal under § 106.45(b)(3)(i), the Department has revised this provision to clarify that such a dismissal is only for Title IX purposes and does not preclude action under another provision of the recipient's code of conduct.

Comments: Another commenter urged the Department to explicitly require that all of a recipient's employees be aware of the possibly criminal nature of employee-on-student sexual misconduct under State laws and to comply with State mandatory reporting requirements. One commenter stated that elementary and secondary school recipients must ensure that if a student discloses information about sexual misconduct by another student or employee, that all employees must report the information to the Title IX Coordinator.

Discussion: The Department encourages all recipients to comply with all laws applicable to the recipient. The Department, however, does not have the authority to enforce or administer State laws or State mandatory reporting requirements. Additionally, it would be a huge burden for the Department to keep track of all the possibly criminal nature of employee-on-student sexual misconduct under State laws and State mandatory reporting requirements to make certain that recipients are aware of such State law requirements or are complying with such requirements.

The Department agrees with the commenter's sentiment that any employee in the elementary and secondary context should be responsible for instituting corrective measures on behalf of the recipient if these employees have notice of sexual harassment or allegations of sexual harassment, and the Department has revised the definition of "actual knowledge" in § 106.30 to include notice to all employees of an elementary or secondary school. Although an elementary or secondary school may require employees to report the information to the Title IX Coordinator, a student's report of sexual harassment or notice of sexual harassment or allegations

of sexual harassment to any employee of the elementary or secondary school is sufficient to hold the school district liable for a proper response under these final regulations.

Changes: The Department has revised the definition of actual knowledge in § 106.30 to include notice of sexual harassment to any employee in the elementary or secondary school context.

Comments: Some commenters proposed that the Department apply the proposed rules to employees but with some modifications. Commenters asserted that overzealous Title IX enforcement and a broad conception of "harassment" has undermined faculty rights, free speech, and academic inquiry. One commenter requested that the Department not adopt the student-on-student harassment definition for faculty, but to instead adopt a "severe or pervasive" standard for the employment context. This commenter also suggested that the final regulations clearly state they do not preclude recipients' obligation to honor additional rights negotiated by faculty in any collective bargaining agreement or employment contract. Another commenter contended that, unlike employees, students can be protected during an investigation by a no-contact order. But employees presumably have ongoing relationships with other community members and are likely to continue working together throughout the investigation period. The commenter expressed concern that employees may risk their jobs by acting as a complainant or witness.

Discussion: As explained above, the Department's final regulations apply to employees, and the Department cannot discern any meaningful justification to treat employees, including faculty, differently than students with respect to allegations of sexual harassment. The Department believes that students and employees should have the same protections with respect to regulations addressing sexual harassment. The Department notes that employees, including faculty, sometimes sexually harass students. It would be difficult to reconcile how regulations would apply to employee-on-student sexual harassment, if the Department had a different set of

regulations that apply to employees than to students such that a student-complainant's rights depended on the identity of the respondent as a student or employee.

The Department does not wish to adopt a "severe or pervasive" standard for the reasons explained throughout this preamble, including in the "Definition of Sexual Harassment" subsection of the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section, and these reasons include guarding against the infringement of First Amendment freedoms such as academic freedom. The Department recognizes that other laws such as Title VII may have a different standard and impose different requirements. There is no inherent conflict between Title VII and Title IX, and employers may comply with the requirements under both Title VII and Title IX.

These final regulations do not preclude a recipients' obligation to honor additional rights negotiated by faculty in any collective bargaining agreement or employment contract, and such contracts must comply with these final regulations. In the Department's 2001 Guidance, and specifically in the context of the due process rights of the accused, the Department recognized that "additional or separate rights may be created for employees . . . by . . . institutional regulations and policies, such as faculty or student handbooks, and collective bargaining agreements."[1620] The Department has never impeded a recipient's ability to provide parties with additional rights as long as the recipient fulfils its obligations under Title IX. The Department has never suggested otherwise, and we believe it is unnecessary to expressly address this concern in the regulatory text. Although recipients may give employees additional or separate rights, recipients must still comply with these final regulations, which implement Title IX.

[1620] 2001 Guidance at 22.

A recipient may provide a mutual restriction on contact between the parties, including when an employee is a party, under the final regulations. The final regulations do not restrict the availability of supportive measures, as defined in § 106.30, to only students. Rather, supportive measures are available to any complainant or respondent, including employee-complainants and employee-respondents.

In response to commenters' concerns, the Department has added a provision to expressly prohibit retaliation in § 106.71. Under § 106.71, no recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. The Department will not tolerate retaliation against anyone, including an employee who is a complainant or a witness.

Changes: The Department has added a provision to § 106.71 to expressly prohibit retaliation.

Comments: Many commenters argued that application of the proposed rules to employees is problematic because it would conflict with Federal law and congressional intent. Commenters noted that Title VII already prohibits sex discrimination, including sexual harassment, in the employment context, and that other Federal laws prohibit harassment based on other protected characteristics such as race, age, and disability in the employment context. Commenters contended that it would be illogical for the Department to establish protections for respondents accused of sexual harassment that do not exist for respondents accused of race, age, or disability discrimination. A few commenters proposed that the final regulations explicitly state that they apply only to allegations involving student-respondents, and that sexual allegations against employees are governed by Title VII and State and local non-discrimination in employment

laws. Similarly, another commenter asked that the final regulations explicitly state that Title VII and similar State and local laws apply where the respondent is an employee, and that Title IX does not require any process in such cases. Some commenters also expressed concern that if the proposed rules apply in the employment context, then recipients would face the impossible situation of having to comply with contradictory Title IX and Title VII standards. Commenters described specific conflicting elements of Title IX and Title VII, including the NPRM's formal complaint requirement, notice requirement, deliberate indifference standard, sexual harassment definition, and the live hearing requirement. Commenters argued these Title IX provisions, which they alleged conflict with Title VII, are less protective than Title VII, and that the Department should not provide less protection to children in school than adults in the workplace. Some commenters also suggested that conflicts between Title IX and Title VII may create confusion and expose recipients to liability. One commenter asserted that the Department should proceed carefully when affecting a recipient's personnel decisions because Congress expressed concern about the potential for Federal overreach when creating the Department in 1979 and included a clear statutory prohibition that the Department may not exercise direction, supervision, or control over any recipient's administration or personnel.

Some commenters expressed confusion about the applicability of the proposed grievance process provisions (specifically, § 106.45) to employees and asked the Department to clarify the scope of the grievance procedure requirements with respect to employees. These commenters argued that applying the grievance process required under the final regulations to complaints against all faculty and staff would be an expansion of Title VII and is outside of the Department's jurisdiction. They also noted that employers already have well-established policies

and procedures informed by decades of Title VII jurisprudence which drive their responses to allegations of sexual harassment and differ greatly from the requirements in § 106.45.

Discussion: The Department disagrees that applying these final regulations to employees conflicts with Federal law and congressional intent. Congress enacted both Title VII and Title IX to address different types of discrimination. Congress enacted Title IX to address sex discrimination in any education program or activity receiving Federal financial assistance, whereas Congress enacted Title VII to address sex discrimination in the workplace. As commenters also acknowledge, the Supreme Court in interpreting Title IX and Title VII has held that different definitions of and standards for addressing sexual harassment apply under Title IX than under Title VII. Although there may be some overlap between Title VII and Title IX, it is not illogical for the Department to establish protections for parties who are reporting sexual harassment or defending against allegations of sexual harassment that are not the same as for parties who are dealing with race, age, or disability discrimination because Title IX, unlike Title VII, solely concerns sex discrimination in an education program or activity that receives Federal financial assistance. Allegations of sexual harassment may implicate a person's reputation, for example, in ways that allegations of race, age, or disability discrimination may not, even though all of these types of discrimination are prohibited. For instance, false statements about a person's sexual activity may be actionable as defamation *per se*.[1621]

The Department acknowledges that Title VII and Title IX impose different requirements and that some recipients will need to comply with both Title VII and Title IX. Although

[1621] *E.g.*, *Rose v. Dowd*, 265 F. Supp. 3d 525, 541 (E.D. Pa. 2017) (noting that statements imputing serious sexual misconduct constitute defamation *per se* under multiple State laws).

recipients have noted that Title VII and Title IX have different standards for sexual harassment, recipients have not explained why they cannot comply with both standards. The Department's view is that there is no inherent conflict between Title VII and Title IX, including these final regulations. For example, Title VII defines sexual harassment as severe or pervasive conduct, while Title IX defines sexual harassment as severe and pervasive conduct. Nothing in these final regulations precludes a recipient-employer from addressing conduct that it is severe or pervasive, and § 106.45(b)(3)(i) provides that a mandatory dismissal under these final regulations does not preclude action under another provision of the recipient's code of conduct. Thus, a recipient-employer may address conduct that is severe or pervasive under a code of conduct for employees to satisfy its Title VII obligations. Courts impose different requirements under Title VII and Title IX, and recipients comply with case law that interprets Title VII and Title IX differently. Similarly, recipients may comply with different regulations implementing Title VII and Title IX. For example, nothing in Title VII precludes an employer from allowing employees to file formal complaints or from providing notice to an employee such as notice of the allegations against the employee or notice of the dismissal of any allegations as required in these final regulations. These final regulations require all recipients with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, to respond promptly in a manner that is not deliberately indifferent, irrespective of whether the complainant and respondent are students or employees.

The Department is not exercising direction, supervision, or control over any recipient's administration or personnel. Indeed, § 106.44(b)(2) specifically states that the Assistant Secretary will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient, or otherwise evidence of discrimination under Title IX

by the recipient, solely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence. Accordingly, the Department will not dictate what the recipient's determination regarding responsibility should be for a respondent who is an employee. Similarly, the Department will not require a recipient to impose a specific type of disciplinary sanction on a respondent who is an employee. The Department only requires a recipient to describe the range of possible disciplinary sanctions in § 106.45(b)(1)(vi) and does not otherwise require a recipient to include specific disciplinary sanctions.

The Department acknowledges that the grievance process in § 106.45 may apply to employees and disagrees that applying such a grievance process to employees is an expansion of Title VII. The grievance process in § 106.45 does not contradict Title VII or its implementing regulations in any manner and at most may provide more process than Title VII requires. These final regulations, however, do not expand Title VII, as these final regulations are promulgated under Title IX. As previously explained, Title IX prohibits discrimination on the basis of sex in a recipient's education program or activity against a person in the United States. Title IX and these implementing regulations do not necessarily apply in all circumstances, and there may be circumstances in which Title VII but not Title IX applies. For example, if the alleged sexual harassment did not occur in an education program or activity of the recipient, then Title IX and these final regulations would not apply.

Changes: None.

Comments: A handful of commenters argued that application of the proposed rules to employees is problematic because it would conflict with State laws, collective bargaining agreements, and other employee contracts. Commenters asserted several State employment statutes and local

policies covering issues including the definition of sexual harassment, retaliation, complaint processes, discovery and cross-examination, and other related matters that may conflict with the proposed standards and grievance procedures.

Commenters also noted the proposed rules would conflict with many collective bargaining agreements covering unionized employee groups that cover matters such as employee pay, working conditions, and disciplinary processes such as the applicable standard of evidence. Application of the NPRM to these employee groups, they contended, could violate existing multi-year agreements, undermine parties' expectations, and would likely require recipients to undergo a lengthy and complex renegotiation of union contracts. Commenters expressed concern about Federal intrusion on freedom of contract. One commenter argued that a collective bargaining agreement providing for notice to the accused employee and availability of a post-termination grievance procedure and evidentiary hearing before a neutral and experienced arbitrator satisfies an employee's constitutional due process rights under U.S. Supreme Court case law and is superior to the NPRM's hearing process because, among other things, the arbitration process preserves the employer's decision-making role and is more efficient because the union cannot initiate arbitration if misconduct is clear in its judgment.

One commenter asserted that the live hearing requirement for postsecondary institutions creates an unnecessary and duplicative process for employees who are subject to a collective bargaining agreement. According to this commenter, the collective bargaining agreement between a recipient and a union usually requires "just cause" for discipline, and "just cause" requires the employer to have evidence of guilt and make decisions after a fair investigation.[1622]

[1622] Kenneth May *et al.*, *Elkouri & Elkouri: How Arbitration Works* 15-4 to 15-6 (8th ed. 2017 Supp.).

This commenter further asserts that a hearing is typically not part of the determination of "just cause" unless the recipient and the union specifically bargain for such a pre-termination hearing. This commenter stated that unions that do not require a pre-termination hearing often bargain to provide a grievance procedure that concludes with an arbitration of the dismissal through a hearing with cross-examination. This commenter is concerned that a live hearing with cross-examination under § 106.45(b)(6)(i) will create a significant disincentive for an employee to complain about harassment because that employee may be subject to a pre-termination live hearing as well as an arbitration that requires a hearing with cross-examination. This commenter also asserts that employers will resolve employment disputes with employees and unions through resolution agreements to avoid an additional hearing.

Another commenter expressed concern that applying the proposed rules to unions or members of unions with collective bargaining agreements may cause unrest, strikes, and increase litigation risk under Federal and State labor laws. One commenter asserted that applying the NPRM to non-student employees may conflict with State tort law requirements, which impose liability on employers for actions of their employees in certain circumstances. A few commenters emphasized that the relationship between recipients and employees is fundamentally different than the relationship between recipients and students; recipients may have a strong interest in maintaining privacy for parties and witnesses in workplace investigations because those individuals may continue working within the campus community. Another commenter asked whether the NPRM requires disclosure of all related evidence in employee matters, including potentially confidential employment information regarding other employees.

Discussion: The Department acknowledges that some collective bargaining agreements may need to be renegotiated for a recipient to comply with these final regulations, and the Department

understands that some recipients have concerns about strikes and unrest as well as increased litigation risk under Federal and State labor laws. The Department also acknowledges concerns about a recipient's obligation to comply with various State employment laws and other laws as well as these final regulations. The Department reminds recipients that recipients *choose* to receive Federal financial assistance and that these final regulations are a condition of that Federal financial assistance. Recipients may wish to forego receiving Federal financial assistance if the recipients do not wish to renegotiate a collective bargaining agreement or are concerned about complying with State employment laws or other laws. The Department is not intruding on the freedom of contract, as recipients remain free to choose whether to enter into an agreement with the Department to comply with these final regulations as a result of receiving Federal financial assistance.

The Department disagrees with the commenter who recommends adopting an arbitration process for employees for the purpose of responding to sexual harassment. We believe that the process in § 106.45 to address formal complaints of sexual harassment provides robust due process protections and are not certain whether these same due process protections will be offered in an arbitration process. With respect to the arbitration process described by the commenter, the union cannot initiate arbitration if misconduct is clear in its judgment. Such an arbitration provision gives great authority to the union to determine whether the employee is even eligible to receive the opportunity to enjoy the alleged due process protections in the arbitration process. Unlike the arbitration process that the commenter describes, these final regulations provide a formal complaint process that any complainant may initiate. Additionally, recipients may facilitate an informal resolution process under § 106.45(b)(9).

The Department appreciates the commenter's concerns about collective bargaining agreements that require a post-termination grievance procedure. The commenter acknowledges that requirements in collective bargaining agreements differ and that some agreements provide a pre-termination hearing, while other agreements provide a post-termination hearing. The commenter further acknowledges that the hearing required in a collective bargaining agreement is a result of a negotiation or bargain between unions and recipients. If a recipient chooses to accept Federal financial assistance and thus become subject to these final regulations, then the recipient may negotiate a collective bargaining agreement that requires a pre-termination hearing consistent with the requirements for a hearing under § 106.45(b)(6). Nothing precludes a recipient and a union from renegotiating agreements to preclude the possibility of having both a pre-termination live hearing that complies with § 106.45(b)(6) and a post-termination arbitration that requires a hearing with cross-examination. These final regulations do not require both a pre-termination hearing and a post-termination hearing, and recipients have discretion to negotiate and bargain with unions acting on behalf of employees for the most suitable process that complies with these final regulations.

The Department agrees that employers have a strong interest in maintaining privacy for parties and witnesses in workplace investigations. In response to concerns regarding privacy and confidentiality, the Department has added a provision in § 106.71 that requires the recipient to keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute or regulations, 20 U.S.C. 1232g and 34 CFR part 99, or as required by law, or to

carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

Changes: The Department has added a provision to § 106.71 that requires the recipient to keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute or regulations, 20 U.S.C. 1232g and 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

Comments: Commenters cautioned that the Department should not disrupt school processes. One commenter contended that the NPRM is too prescriptive and wrongly imposes a one-size-fits-all system, thus ignoring the reality that recipients employ a wide variety of workers with different relationships to their employer, such as temporary, part-time, and full-time employees; or at-will, unionized, and tenured employees. These different roles often have unique applicable grievance procedures, and the commenter contended that the Department is wrongly considering imposing the same process on all of them.

Some commenters believed the NPRM interferes with the at-will employment doctrine. Commenters asserted the NPRM should not address harassment by employees; under the at-will doctrine, absent a specific contract term to the contrary, an employee can quit or be fired without liability on the employer or employee, with or without cause. One commenter asserted that the Department failed to provide a principled reason why sex discrimination and harassment cases, but not other types of discrimination or harassment, justify overruling the at-will doctrine.

Another commenter emphasized that while Title VII also prohibits sex discrimination, it does not require the type of detailed disciplinary proceedings under the NPRM. However, private employers can presumably fire employees for sexual harassment after simply conducting an internal investigation. This commenter concluded that it would be illogical for private employees in every industry except for higher education to be subject to general rules governing at-will employees, while the Department suddenly vests employees at private universities with certain "due process" rights.

Commenters discussed specific aspects of the NPRM such as the live hearing requirement and the possibility that recipients would have to supply legal advisors for employees and described these provisions as dramatically altering the nature of the relationship between the employee and recipient.

Discussion: The Department realizes that recipients, like most employers, may have different types of employees, including temporary, part-time, full-time, tenured, and at-will employees. The presence of different types of employees does not require that these employees be treated any differently for purposes of sexual harassment. A recipient should not be able to treat an allegation of sexual harassment differently based on the type of employee who is reporting the sexual harassment or who is the subject of the report. The Department believes that irrespective of position, tenure, part-time status, or at-will status, no employee should be subjected to sexual harassment or be deprived of employment as a result of allegations of sexual harassment without the protections and the process that these final regulations provide.

Employers also may not take an adverse employment action against at-will employees, if such an adverse employment action constitutes discrimination under Title VII, which includes sex discrimination. Thus, these final regulations are not imposing obligations that unduly burden

recipient-employers. Contrary to the commenters' assertions, the Department is not "overruling" the at-will employment doctrine or requiring private employees in every industry except for higher education to be subject to general rules governing at-will employees. These final regulations do not apply only to postsecondary institutions but also to elementary and secondary schools as well as other recipients of Federal financial assistance such as some museums. These final regulations apply to any education program or activity of a recipient receiving Federal financial assistance. If recipients do not wish to become subject to these final regulations, then recipients may choose not to receive Federal financial assistance. If the commenter's argument is followed to its logical conclusion, then a recipient may terminate an at-will employee for reporting sexual harassment and not offer any protections to such employees to come forward with allegations of sexual harassment under Title IX. The Department finds it concerning that recipients would wish to terminate any employee, including an at-will employee, for reporting sexual harassment and not offer any protections to such employees to come forward with allegations of sexual harassment. Similarly, the Department finds it concerning that recipients may wish to terminate a person's employment based on an allegation of sexual harassment without any investigation or other fact-finding activity. We believe that these final regulations provide the most appropriate protections and process for both employees reporting sexual harassment and employees accused of sexual harassment. As explained earlier in this section, allegations of sexual harassment have different consequences than allegations of other types of discrimination. For example, allegations of sexual harassment may lead to a criminal conviction.

Contrary to the commenter's assertions, these final regulations would not require a recipient to provide legal advisors for employees. Advisors do not have to be attorneys, and the Department has revised the final regulations to clarify that the advisors may be, but are not

required to be, attorneys.[1623] These final regulations do not otherwise dramatically alter the relationship between the recipient and the employee, as employers have always had to address sexual harassment in the workplace under either Title IX or Title VII. These final regulations simply provide greater clarity and consistency with respect to the recipient's obligations to respond to allegations of sexual harassment under Title IX.

Changes: The Department has revised § 106.45(b)(5)(iv) and § 106.45(b)(6)(i) to clarify that an advisor may be, but is not required to be, an attorney.

Comments: One commenter requests clarification on whether the definition of student as a person who has gained admission implies that one also becomes an employee at the time of a job offer as opposed to at the time the offer is signed and accepted.

Discussion: The Department appreciates the opportunity to clarify whether the definition of the term "student" as "a person who has gained admission"[1624] implies that one also becomes an employee at the time of a job offer as opposed to at the time the offer is signed and accepted. The Department notes that the definition of "student" in 34 CFR 106.2(r) only refers to that term and does not affect the definition of the term "employee" under the final regulations. The Department defers to State law with respect to employees, and State law will govern whether a person is an employee as opposed to an independent contractor. State law also will govern whether a person is an employee at the time of a job offer as opposed to the time when that person accepts the job offer. The Department notes, however, that employment status may not always be the most

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[1623] The final regulations include language clarifying that party advisors may be, but need not be, attorneys, in § 106.45(b)(5)(iv) (regarding both parties' equal opportunity to select an advisor of choice), § 106.45(b)(2) (initial written notice of allegations must advise parties of their right to select an advisor of choice), and § 106.45(b)(6)(i) (requiring recipients to provide a party with an advisor to conduct cross-examination on behalf of a party if the party does not have an advisor at the hearing).

[1624] *See* 34 CFR 106.2(r) ("*Student* means a person who has gained admission.") (emphasis in original).

relevant determination as a complainant must be participating in or attempting to participate in an education program or activity of the recipient at the time of filing a formal complaint as explained in the definition of "formal complaint" in § 106.30.

Changes: None.

Comments: One commenter argued the NPRM is unconstitutional under U.S. Supreme Court case law as applied to religiously-affiliated institutions insofar as it would preclude recipients from immediately terminating employment of any employee whose duties include ministerial tasks.

Discussion: An educational institution that is controlled by a religious organization is exempt from complying with Title IX and these final regulations to the extent that Title IX or its implementing regulations would not be consistent with the religious tenets of such organization under 20 U.S.C. 1681(a)(3). These final regulations, thus, are not unconstitutional, and a recipient may assert an exemption under § 106.12 of these final regulations, if applicable.

Changes: None.

Comments: A few commenters expressed concern about applying the NPRM to student complaints against employees because it could increase unfairness and chill reporting. Commenters noted that employee-respondents generally have funding to pay for private, skilled attorneys with experience in cross-examination, whereas students may be more likely to hire non-attorneys or less talented low-cost attorneys as advisors. This would only exacerbate a power differential between employees tied to the campus and students who stand to lose a degree for which they invested significant time, energy, and money. Commenters also stated that it can be extremely challenging for student-complainants to be subjected to cross-examination by employee-respondents, especially if the respondent is a prominent faculty member.

Discussion: We disagree that these final regulations will chill reporting as applied to employee-on-student sexual harassment. These final regulations provide a complainant with various options, including the guarantee that the recipient must offer supportive measures, irrespective of whether the complainant files a formal complaint. These final regulations also contain robust retaliation protections. It is unfair and inaccurate to assume that an employee will always have more resources than a student and that an employee will be able to hire a skilled attorney as an advisor. Employees include all levels of employees, and an employee who is a janitor may not earn as much as an employee who is a tenured professor. Additionally, some students may come from wealthy families who will provide an attorney as an advisor for the student. The status of a party as a student or an employee is not always indicative of the resources available to that party. Both parties will be subjected to cross-examination through a party's advisor, and parties have the option of being in separate rooms during the live hearing pursuant to § 106.45(b)(6)(i).

Changes: None.

Comments: Some commenters stated that the NPRM's requirements, as applied to employees, are unduly burdensome on recipients, would unnecessarily lengthen resolution time frames, and would increase compliance costs. In particular, commenters noted, the NPRM's live hearing with cross-examination requirement would lengthen complaint resolution time, impede recipients' ability to take action against employees who violated policy, and add substantial compliance costs as recipients must ensure those overseeing hearings and conducting cross-examination are competent and qualified to do so. Commenters urged the Department not to turn recipients into arms of the criminal justice system.

Discussion: The Department believes that these final regulations provide a balanced approach to responding to a complainant's report of sexual harassment, while also affording both parties due

process protections. These final regulations provide that a recipient must respond promptly in a manner that is not deliberately indifferent under § 106.44(a). The Department further notes that under § 106.45(b)(1)(v), a recipient must include reasonably prompt time frames for the conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes, if the recipient offers informal resolution processes. These final regulations require a recipient-employer to respond promptly including when a respondent is an employee. For the reasons stated earlier in this preamble and earlier in this section, these final regulations should apply to both students and employees. Recipients should be willing to respond in a manner that is not deliberately indifferent irrespective of the cost of compliance of providing hearing officers and advisors to conduct cross-examination. Additionally, a recipient has more discretion under these final regulations than under the Department's past guidance. For example, a recipient may offer an informal resolution process to resolve sexual harassment allegations as between two employees under § 106.45(b)(9). A recipient, however, cannot offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student because as explained more fully in the "Informal Resolution" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble, the power dynamic and differential between an employee and a student may cause the student to feel coerced into resolving the allegations.

Changes: None.

Comments: One commenter argued that the NPRM's application to academic medical centers is problematic because these institutional structures typically have thousands of employees uninvolved with any education program or activity, who work entirely in clinical care and do not interact with students. The commenter asserted that the Department should not establish broader

due process protections for these employees than for similarly situated employees at non-academic medical centers or for students alleging sexual misconduct outside an education program or activity. The commenter proposed that the Department allow these entities to develop their own disciplinary processes.

Another commenter suggested that case law is split as to whether medical residents and post-graduate fellows, who meet the definition of "employees" under Title VII and most statutes, are covered by Title IX at all. This uncertainty exposes academic medical centers to litigation risk from both complainants and respondents. The commenter contended that if the Department concludes medical residents are covered by Title IX, then the final regulations should not apply to sexual harassment complaints by patients against medical residents because the formal grievance process would be unworkable for cases involving only non-students.

Discussion: The Department understands that academic medical centers are unique entities, but Congress did not exempt academic medical centers that receive Federal financial assistance from Title IX.[1625] Title IX and these final regulations require recipients to respond to sexual harassment in the recipient's education program or activity, as defined in § 106.30. The Department is not creating broader due process protections for employees at these academic medical centers than at non-academic medical centers. The Department is providing adequate due process protections in this context for employees of any recipient of Federal financial assistance, irrespective of the nature or character of the recipient. The recipient remains free to

[1625] The Department notes that academic medical centers also may fall under the jurisdiction of the Office for Civil Rights at the U.S. Department of Health and Human Services.

choose not to receive Federal financial assistance and, thus, not become subject to these final regulations.

The Department realizes that the live hearing required for postsecondary institutions in § 106.45(b)(6)(i) may prove unworkable in a different context. Accordingly, as to recipients that are not postsecondary institutions, the Department has revised § 106.45(b)(6)(ii) to provide that the recipient's grievance process *may* require a live hearing and *must* afford each party the opportunity to submit written questions, provide each party with the answers, and allow for additional, limited follow-up questions from each party. Academic medical centers are not postsecondary institutions, although an academic medical center may be affiliated with a postsecondary institution or even considered part of the same entity as the postsecondary institution. Through this revision the Department is giving entities like academic medical centers greater flexibility in determining the appropriate process for a formal complaint.

Academic medical centers may develop their own disciplinary processes as long as these processes comply with these final regulations. These final regulations address sexual harassment as defined in § 106.30, and nothing in these final regulations precludes a recipient, including an academic medical center, to respond to conduct that is not sexual harassment under another provision of the recipient's code of conduct.

The Department is not categorically exempting any person, including medical residents, from Title IX and these final regulations. Whether these final regulations apply to a person, including a medical resident, requires a factual determination as each incident of sexual harassment is unique. If a medical resident is accused of sexual harassment in an education program or activity of the recipient against a person in the United States, the recipient must respond promptly in a manner that is not deliberately indifferent. The Department notes that the

Title IX statute[1626] and existing Title IX regulations,[1627] already contain detailed definitions of "program or activity" that, among other aspects of such definitions, include "all of the operations of" a postsecondary institution or local education agency. The Department will interpret "program or activity" in these final regulations in accordance with the Title IX statutory (20 U.S.C. 1687) and regulatory definitions (34 CFR 106.2(h)) as well as the statement (based on Supreme Court language in *Davis*[1628]) added in the final regulations to § 106.44(a) that "education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the context of the harassment and the respondent.[1629]

The Department disagrees that the formal complaint process would be unworkable for cases involving only non-students. A recipient may make supportive measures available to patients and medical residents. For example, patients may be assigned to a different physician, and a medical resident's schedule may be changed to avoid interaction with a complainant or a respondent. Patients may choose to resolve any report of sexual harassment against a medical resident through an informal resolution process, if the recipient provides such an informal resolution process. The Department acknowledges that a person, including a patient, must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed. The Department realizes that the recipient may not

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[1626] 20 U.S.C. 1687.
[1627] 34 CFR 106.2(h); 34 CFR 106.2(i) (defining "recipient"); 34 CFR 106.31(a) (referring to "any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance").
[1628] *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 646 (1999).
[1629] "Education program or activity" in § 106.44(a) also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

require a patient to participate in a formal complaint process, but a patient who is participating in or attempting to participate in the education program or activity of the recipient must have the option to file a formal complaint under these final regulations.

The Department realizes that the live hearing required for a postsecondary institution in § 106.45 may prove unworkable in a different context. Accordingly, for recipients that are not institutions of higher education, the recipient's grievance process *may* require a live hearing and *must* afford each party the opportunity to submit written questions, provide each party with the answers, and allow for additional, limited follow-up questions from each party under § 106.45(b)(6)(ii). As previously stated, academic medical centers are not postsecondary institutions, although an academic medical center may be affiliated with a postsecondary institution or even considered part of the same entity as the institution of higher education. Through this revision the Department is giving entities like academic medical centers greater flexibility in determining the appropriate process for a formal complaint.

Changes: The Department has revised § 106.45(b)(6)(ii), which concerns the type of process a recipient must provide in response to a formal complaint, to apply to recipients that are not postsecondary institutions.

Comments: One commenter asserted that aspects of § 106.45(b) are unworkable for U.S. medical schools because medical students typically participate in clinical clerkships with preceptors located at separate facilities far from the medical school building. The commenter emphasized that it is not feasible to ask preceptive physicians at separate hospital systems who are parties or witnesses to participate in interviews, hearings, and cross-examination at the home institution.

Discussion: Recipients, including medical schools, must determine what constitutes an education program or activity. If a medical student experiences sexual harassment or is accused of sexual

harassment in an education program or activity of the recipient against a person in the United States, the recipient must respond promptly in a manner that is not deliberately indifferent. The Title IX statute[1630] and existing Title IX regulations,[1631] already contain detailed definitions of "program or activity" that, among other aspects of such definitions, include "all of the operations of" a postsecondary institution or local education agency. The Department will interpret "program or activity" in these final regulations in accordance with the Title IX statutory (20 U.S.C. 1687) and regulatory definitions (34 CFR 106.2(h)) as well as the statement (based on Supreme Court language in *Davis*[1632]) added in the final regulations to § 106.44(a) that "education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the context of the harassment and the respondent. The commenter's description of the clinical clerkships with preceptors located at separate facilities far from the medical school building may or may not be part of the recipient's education program or activity. The recipient must consider whether the recipient exercised substantial control over both the respondent and the hospital or medical clinic where the clinical clerkship is held. The Department also notes that we have revised § 106.45(b)(1)(iii) to require recipients to train Title IX personnel on the scope of the recipient's education program or activity.

If the clinical clerkship is part of the education program or activity of the recipient, the recipient may always ask preceptive physicians at separate hospital systems to participate in

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[1630] 20 U.S.C. 1687.
[1631] 34 CFR 106.2(h); 34 CFR 106.2(i) (defining "recipient"); 34 CFR 106.31(a) (referring to "any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance").
[1632] *Davis*, 526 U.S. at 646.

interviews, hearings, and cross-examination remotely. The Department realizes that the recipient may not have any control over physicians at separate hospital systems and allows a recipient to dismiss a formal complaint if specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein under § 106.45(b)(3)(ii). Even if a recipient cannot gather evidence sufficient to reach a determination, the recipient must still offering supportive measures to its students or employees who are complainants under § 106.44(a), which may include the opportunity to participate in a different clinical clerkship to fulfill an academic requirement.

Changes: None.

Comments: Many commenters offered suggestions to the Department regarding the application of the NPRM to employees. One commenter requested that the final regulations explicitly endorse the important role of shared governance in an institution of higher education's development of Title IX policies, as faculty are in the best position to make responsibility determinations regarding faculty-respondents. This commenter argued that any Title IX investigation of faculty should start with a referral to the established faculty governance committee or, if it does not exist, the final regulations should mandate its creation.

The commenter also proposed that the final regulations explicitly require equal due process protections for faculty employees at all levels. Another commenter proposed that the Department define "employee" as including all adults, staff, and volunteers working under the school's purview. One commenter argued that the final regulations should not apply to third parties who do not have a formal affiliation with the recipient.

One commenter requested that the Department make deliberately false accusations by students against employee-respondents a Title IX violation as gender discrimination and, if not, then at least require recipients to take action under other civil rights laws or recipient policy.

One commenter asserted that the NPRM requires "equitable" procedural elements and "equal" treatment of parties, but that Title IX's mandate is for "equitable" not "equal" access. This commenter recommended that the Department revise the final regulations to address the need for "equitable" treatment of parties. According to this commenter, equitable treatment might not be exactly the same treatment due to the parties' different circumstances, and this commenter asserted that equity and equality are not synonymous.

Discussion: The Department is aware that many postsecondary institutions require faculty-governance, and these final regulations do not preclude participation of a faculty-governance committee for reports of sexual harassment against faculty members. Indeed, the hearing officers may be faculty members as long as these hearing officers are trained, do not have any conflict of interest, do not have bias for or against complainants or respondents generally or for an individual complainant or respondent, and comply with the other requirements in § 106.45(b)(1)(iii). The Department need not mandate such a faculty-governance committee, as recipients have discretion to determine how best to deal with reports or formal complaints of sexual harassment against faculty members. The Department will defer to the discretion of the recipient in this regard.

As previously stated, Congress did not limit the application of Title IX to students. Title IX, 20 U.S.C. 1681, expressly states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." Title IX,

thus, applies to any person in the United States who experiences discrimination on the basis of sex under any education program or activity receiving Federal financial assistance. Similarly, these final regulations, which address sexual harassment, apply to any person, including an employee, in an education program or activity receiving Federal financial assistance. The Department does not define the level and type of employee, as the Department may not be able to adequately capture all the possible types of employees who work for a recipient of Federal financial assistance.

These final regulations also may apply to volunteers, if the volunteers are persons in the United States who experience discrimination on the basis of sex under any education program or activity receiving Federal financial assistance. As previously stated, each incident of sexual harassment presents unique facts that must be considered to determine the recipient's obligations under these final regulations.

These final regulations recognize that a party may make deliberately false accusations, and the retaliation provision in § 106.71(b)(2) expressly states in relevant part: "Imposing sanctions for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation . . . ." A recipient may take action against a party who makes a materially false statement in bad faith in the course of a grievance proceeding. Such a materially false statement may but does not always constitute discrimination on the basis of sex. A recipient would need to examine the content, purpose, and intent of the materially false statement as well as the circumstances under which the statement was made to determine whether the statement constitutes sex discrimination.

The Department has made revisions to address the need to treat the parties equitably. The Department revised § 106.44(a) to require that recipients treat complainants and respondents

equitably, specifically to mean offering supportive measures to a complainant and a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures, as defined in § 106.30, for a respondent. Similarly, we have revised § 106.45(b)(1)(i) to require equitable treatment of complainants by providing remedies where a respondent is found responsible, and equitable treatment of respondents by applying a grievance process that complies with § 106.45 before imposing disciplinary sanctions or other actions that are not "supportive measures," as defined in § 106.30. In this manner, the final regulations more clearly define where equal treatment of parties, versus equitable treatment of parties, is required.

Changes: The Department has revised § 106.44(a) to require recipients to treat complainants and respondents equitably by offering supportive measures to a complainant and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. Similarly, we have also revised § 106.45(b)(1)(i) to require equitable treatment of the parties by providing remedies to a complainant where a respondent is found responsible and requiring a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent.

Comments: Many commenters requested clarification from the Department on matters relating to the application of Title IX to employees. Commenters asked whether the NPRM only applies to complaints by students against students, employees, and third parties or whether it also applies to complaints by employees against students and other employees. One commenter inquired whether the proposed rules applies to third-party complaints against students.

Another commenter asserted that Title VII deems employers responsible for harassment by non-supervisory employees or non-employees over whom it has control if the employer knew about the harassment and failed to take prompt and appropriate corrective action; however, the commenter asserted, the NPRM stated that recipients are only liable for conduct over which they "have control." This commenter requested that the Department clarify this intersection of Title VII and Title IX.

One commenter asked whether the Title VII or Title IX sexual harassment definition applies where employees allege harassment by students. One commenter asked whether the NPRM's deliberate indifference standard or the Title VII standard regarding employer liability applies for employee-on-employee cases that occur on campus. Another commenter asked whether the NPRM applies to students who are also full-time employees of the recipient.

One commenter expressed concern that the NPRM's live hearing requirement for sex discrimination, whether involving faculty, staff, or students, may create confusion and conflict between Title IX, Title VI, and Title VII. For example, this commenter stated, if allegations also involve racial discrimination then it is unclear whether the recipient must carve out the non-sex discrimination issue and proceed without a live hearing yet address the sex-related claims with a hearing.

Discussion: These final regulations may apply to reports and formal complaints by employees against students and other employees, and also may apply to third-party complaints against students. These final regulations also may apply to students who are full-time employees. As explained earlier, Title IX, 20 U.S.C. 1681 prohibits discrimination on the basis of sex against a person in the United States in an education program or activity and does not preclude application to specific groups of people such as employees. Similarly, these final regulations require a

recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States to respond promptly and in a manner that is not deliberately indifferent, under § 106.44(a). If a recipient has actual knowledge of a student sexually harassing an employee or a third party in a recipient's education program or activity in the United States, then the recipient must respond in a manner that is not deliberately indifferent.[1633] With respect to the whether a grievance process is initiated against a respondent, at the time of filing a formal complaint, a complainant, whether an employee or a third party or a student, must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.[1634] The Department acknowledges that a third party may be less likely to participate in a grievance process under § 106.45 than a party who is a student or employee of the recipient,[1635] but nothing prevents a recipient from complying with these final regulations by promptly responding when the recipient has actual knowledge of sexual harassment or allegations of sexual harassment under § 106.44(a), including by offering supportive measures to a complainant.

The Department recognizes that Title VII and Title IX may impose different obligations, but the Department does not administer or oversee the administration of Title VII. Accordingly, the Department will not opine on how Title VII should be administered or a recipient's

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[1633] Any person may be a complainant (i.e., a person alleged to be the victim of sexual harassment), including a student, employee, or third party. § 106.30 (defining "complainant"). Any person may report sexual harassment – whether the person reporting is the alleged victim themselves, or a third party – and trigger the recipient's response obligations. *E.g.*, § 106.8(a); § 106.30 (defining "actual knowledge").

[1634] § 106.30 (defining "formal complaint"). *See also* § 106.45(b)(3)(ii) (authorizing discretionary dismissal of a formal complaint in certain circumstances, including when the respondent is no longer enrolled or employed by the recipient, or where specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination regarding responsibility).

[1635] We reiterate that a recipient is prohibited from retaliating against any person for participating, or refusing to participate, in a Title IX grievance process. § 106.71(a).

obligations under Title VII, including when the sexual harassment definition or reasonableness standard under Title VII applies. To the extent that the commenters seek clarity on a recipient's responsibilities under Title IX, these final regulations provide such clarity. The Department adopts a deliberate indifference standard in § 106.44(a). The Department recognizes that an employer may have a different standard under Title VII, and nothing in these final regulations or in 34 CFR part 106 precludes an employer from satisfying its legal obligations under Title VII. There is no inherent conflict between Title VII and Title IX, and the Department will construe Title IX and its implementing regulations in a manner to avoid an actual conflict between an employer's obligations under Title VII and Title IX. The Department also clarifies in § 106.44(a) that education program or activity includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs.

These final regulations may impose different requirements than Title VI and Title VII, but they do not present an inherent conflict with these other statutory schemes. The Department also administers Title VI and acknowledges that a recipient has discretion to determine whether the non-sex discrimination issue such as race discrimination should go through a process like the process described in § 106.45. If allegations of sexual harassment arise out of the same facts and circumstances as allegations of race discrimination under Title VI, the recipient has the discretion to use the process described in § 106.45 to address sex and race discrimination or choose a different process that complies with the Department's regulations implementing Title VI to address the allegations of race discrimination.

Changes: None.

Comments: One commenter expressed support for § 106.6(f), and asserted that the provision appropriately clarifies that Title IX cannot deprive individuals of their Title VII rights.

Another commenter argued that § 106.6(f) fails to clearly distinguish application of Title IX from Title VII. This commenter urged the Department to clarify § 106.6(f) by identifying which specific employee Title VII rights Title IX will not derogate, and to also explicitly state that the NPRM does not create a new Title IX right of action for employees. Another commenter requested that Title VII be the exclusive remedy for complainants alleging sex discrimination in employment, and that the final regulations should explicitly state that Title VII preempts Title IX in such cases. One commenter argued that the Department lacks regulatory authority under Title IX to override statutory rights provided by Title VII. This commenter provided no further explanation. One commenter suggested that if § 106.6(f) states that employee rights under Title VII will not be impinged by Title IX regulations, then the final regulations should similarly state that Title IX rights will not be impinged by Title VII regulations.

Discussion: The Department appreciates the comment in support of its final regulations. The Department does not have the authority to administer or oversee the administration of Title VII and, thus, will not opine on any specific rights under Title VII that an employee has.

The Department does not have the power to create a "new Title IX right of action for employees." The courts will determine what rights of action employees have under Title IX and Title VII. As previously noted, the split among Federal courts is whether an implied private right of actions exists for damages under Title IX for redressing employment discrimination by

employers.[1636] These cases focus on whether Congress intended for Title VII to provide the exclusive judicial remedy for claims of employment discrimination.[1637] Courts, however, have not precluded the Department from administratively enforcing Title IX with respect to employees. Indeed, the Supreme Court expressly recognized the application of Title IX to redress employee-on-student sexual harassment in *Gebser*.[1638] The Department notes that its regulations have long addressed employees. For example, 34 CFR part 106, subpart E expressly addresses discrimination on the basis of sex in areas unique to employment. When the Department was formerly part of the Department of Health, Education, and Welfare, the Supreme Court noted that the Department's "workload [was] primarily made up of 'complaints involving sex discrimination in higher education academic employment.'"[1639]

The Department is not overriding statutory rights provided by Title VII, and the commenter does not explain how these final regulations override any statutory rights under Title VII.

These final regulations do not need to state that Title IX rights will not be impinged by Title VII regulations, as nothing suggests that Title VII may impinge on Title IX rights under these final regulations. As previously noted, the Department does not administer or oversee the administration of Title VII and will not issue regulations to administer Title VII.

[1636] *See Lakosi v. James*, 66 F.3d 751, 755 (5th Cir. 1995); *Burrell v. City Univ. of N.Y.*, 995 F. Supp. 398, 410 (S.D.N.Y. 1998); *Cooper v. Gustavus Adolphus Coll.*, 957 F. Supp. 191, 193 (D. Minn. 1997); *Bedard v. Roger Williams Univ.*, 989 F. Supp. 94, 97 (D.R.I. 1997); *Torres v. Sch. Dist. of Manatee Cnty., Fla.*, No. 8:14-CV-1021-33TBM, 2014 WL 418364 at *6 (M.D. Fla. Aug. 22, 2014); *Winter v. Penn. State Univ.*, 172 F. Supp. 3d 756, 774 (M.D. Pa. 2016); *Uyai v. Seli*, No. 3:16-CV-186, 2017 WL 886934 at *6 (D. Conn. Mar. 6, 2017); *Fox v. Pittsburg State Univ.*, 257 F. Supp. 3d 1112, 1120 (D. Kan. 2017).
[1637] *See id*.
[1638] *Gebser*, 524 U.S. at 277.
[1639] *Cannon*, 441 U.S. at 708 fn.42.

Changes: None.

Comments: Several commenters contended that establishing different Title IX standards than other non-discrimination laws will send the wrong message. Commenters emphasized that all forms of discrimination are wrong, and the Department should not create different standards for Title IX with different levels of protection that do not apply to Title VII and other non-discrimination statutes schools must follow. One commenter asserted that telling employees to report sexual harassment under Title IX may confuse people and lead them to believe that sexual harassment wasn't already illegal prior to Title IX or prior to the existence of a Title IX office on campus.

Discussion: The Department respectfully disagrees that establishing different requirements under Title IX than other non-discrimination laws will send the wrong message. Sex discrimination and the handling of sex discrimination claims differ in some important ways from other types of discrimination, such as discrimination on the basis of race. For example, a person may be criminally charged with some forms of sexual harassment such as sexual assault. The Department discusses the differences among various non-discrimination statutes, such as Title VI, Title IX, and Section 504, in greater detail in the "Different Standards for Other Harassment" subsection of the "Miscellaneous" section of this preamble.

The Department acknowledges that these final regulations share some similarities with Title VII but also differ from Title VII. As previously explained, an employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on the individual's participation in unwelcome sexual conduct, which is commonly referred to as *quid pro quo* sexual harassment, also remains a part of the Department's definition. *Quid pro quo* sexual

harassment is also recognized under Title VII.[1640] As discussed in greater detail, below, some commenters requested that the Department more closely align its definition of sexual harassment with the definition that the Supreme Court uses in the context of discrimination based on sex in the workplace under Title VII. The Supreme Court declined to adopt the definition of sexual harassment in the workplace for Title IX, and the Department is persuaded by the Supreme Court's reasoning in *Davis* that "schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults."[1641] Similarly, a postsecondary institution also differs from the workplace. The sense of Congress is that institutions of higher education should facilitate the free and robust exchange of ideas,[1642] but such an exchange may prove disruptive, undesirable, or impermissible in the workplace. The Department, like the Supreme Court, does not wish to extend the definition of sexual harassment in Title VII to Title IX because such an extension would broaden the scope of prohibited speech and expression and may continue to cause recipients to infringe upon the First Amendment freedoms of students and employees.

The Department does not believe that allowing employees to report sexual harassment or other sex discrimination under Title IX or to the Title IX Coordinator or a Title IX office will somehow lead people to believe that sexual harassment was lawful until Title IX was enacted or until these final regulations take effect. As many commenters have noted, Title VII also prohibits discrimination based on sex in employment, and employees should know that Congress has prohibited sex discrimination in the workplace.

[1640] *E.g.*, *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 752-53 (1998).
[1641] *Davis*, 526 U.S. at 651-52 (citing *Meritor Sav. Bank, FSB v. Vinson*, 277 U.S. 57, 67 (1986)).
[1642] 20 U.S.C. 1101a(a)(2)(C).

Changes: None.

Comments: Many commenters stated that establishing different standards in Title IX than in other non-discrimination law will reduce recipient flexibility. One commenter argued that the NPRM appears to require schools to establish a more complainant-hostile process for employee sexual harassment matters than other discrimination-related and employee misconduct matters. According to this commenter, this may expose schools to potential Title VII liability for sex discrimination.

One commenter asserted that § 106.45(b)(6)(i), as proposed in the NPRM, requires a recipient to permit a party's advisor to ask any questions that are relevant and that the rape shield provision does not preclude. This commenter was concerned that a wide range of cross-examination questions may deter victims of sexual harassment, including employees, from filing a formal complaint.

Commenters also sought clarity as to what extent application of the proposed rules would impede employers' affirmative defense to harassment claims under Title VII or be evidence of negligence in responding to sexual harassment. At least two commenters opined that these final regulations diminish a recipient's affirmative defense under *Faragher v. City of Boca Raton*[1643] and *Burlington Industries, Inc. v. Ellerth*[1644] commonly referred to as the *Faragher-Ellerth* defense. These commenters noted that under the *Faragher-Ellerth* defense, an employer must demonstrate that the employee unreasonably failed to utilize the employer's internal corrective mechanism. One commenter expressed concern that an employee may successfully argue that it

[1643] 524 U.S. 775, 777-78 (1998).
[1644] 524 U.S. 742, 765 (1998).

was reasonable to refuse to participate in a process that requires a live hearing with cross-examination because such a process actually deters complaints of sexual harassment. Another commenter asserted that the *Faragher-Ellerth* defense requires the employer to exercise reasonable care and noted that an employer is vicariously liable for the actions of its supervisors under Title VII. This commenter contended that vicarious liability is at odds with the requirement of actual knowledge, as defined in § 106.30.

A few commenters suggested that the Department is perversely imposing more stringent standards for students, including minors, than adults to get help. These commenters argued that there should not be a more demanding standard to take care of children than adults. One commenter generally stated that the Department should be mindful of the existing Trump Administration policy against creating duplicative or conflicting regulations.

Another commenter asserted that while one might argue that the boilerplate language in the proposed rules indicating that nothing therein derogates an employee's Title VII rights means that schools may disregard the requirements set out in the proposed rules when considering employee complaints of sexual harassment, schools choosing this path would run significant risks. According to this commenter, such schools would invite OCR complaints or lawsuits by respondents alleging that their Title IX rights under the proposed regulations had been violated. This commenter asserted that such a legal challenge by respondents would no doubt rely heavily upon the Department's suggestion that any deviation from the proposed rules may constitute sex discrimination against respondents in violation of Title IX. This commenter contended that the confusion and potential litigation created by the proposed rules threatens harm to employees and employers, serving no one's interest.

Discussion: The Department disagrees that establishing unique obligations under Title IX than under other non-discrimination law will reduce flexibility for recipients. Instead, these final regulations will provide consistency and clarity as to what a recipient's obligations are under Title IX and how a recipient must respond to allegations of sexual harassment under Title IX. These final regulations provide a recipient discretion through the deliberate indifference standard in § 106.44(a) and through other provisions such as the provision in § 106.44(b) that the Assistant Secretary will not second-guess the recipient's determination regarding responsibility.

These final regulations do not establish a more complainant-hostile process for employee sexual harassment matters than other discrimination-related and employee misconduct matters that may expose schools to potential Title VII liability for sex discrimination. These final regulations do not favor either complainants or respondents and require a recipient's response to treat complainants and respondents equitably under § 106.44(a) and § 106.45(b)(1)(i) by offering a complainant supportive measures (or remedies where a determination of responsibility for sexual harassment has been made against the respondent), and both § 106.44(a) and § 106.45(b)(1)(i) preclude the imposition of disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent unless the recipient first applies a grievance process that complies with § 106.45. These final regulations do not require a recipient to violate Title VII, and the commenter does not explain how these final regulations may expose recipients to liability under Title VII for sex discrimination. Recipients should comply with both Title VII and Title IX, to the extent that these laws apply, and nothing in these final regulations precludes a recipient from complying with Title VII.

The Department appreciates the commenters' concerns about a live hearing with cross-examination that allows all relevant questions that the rape shield provision in § 106.45(b)(6)

does not preclude. Allowing all relevant questions provides a robust process where decision-makers may make informed decisions regarding responsibility after hearing all the facts, and these decision-makers receive training on how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias pursuant to § 106.45(b)(1)(iii). Such a fulsome process does not necessarily deter complainants from coming forward with allegations of sexual harassment and filing a formal complaint. Complainants receive the same opportunity to ask any and all relevant questions, including questions about a respondent's sexual behavior or predisposition, as the rape shield provision applies only to the complainant's sexual behavior or predisposition. A live hearing with cross-examination provides both parties with a fair, equitable process that results in more accurate and reliable outcomes. Additionally, the Department added a strong retaliation provision in § 106.71 which will protect any individual involved in a Title IX matter, including employees, from intimidation, threats, coercion, or other discrimination for participating or refusing to participate in any manner in an investigation, proceeding, or hearing.

These final regulations would not impede an employer's affirmative defenses to sexual harassment claims under Title VII, nor do these final regulations provide evidence of negligence in responding to sexual harassment under Title VII. These final regulations provide in § 106.6(f) that nothing in this part shall be read in derogation of an individual's rights, including an employee's rights, under Title VII or its implementing regulations. Employers may not be able to use affirmative defenses to sexual harassment under Title VII for the purposes of Title IX, but these final regulations do not in any way derogate an employers' affirmative defenses to sexual harassment under Title VII. What constitutes sexual harassment and how a recipient is required to respond to allegations of sex harassment may be different under Title VII and Title IX.

The Department acknowledges that employers may invoke the *Faragher-Ellerth* affirmative defense under Title VII. The *Faragher-Ellerth* affirmative defense essentially allows an employer to avoid strict or vicarious liability for a supervisor's harassment of an employee, when it does not result in a tangible employment action.[1645] The defense requires "(a) that the employer exercised reasonable care to prevent and correct promptly any . . . harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid harm otherwise."[1646] The Department acknowledges that the definition and standard of sexual harassment under Title VII is different than under Title IX, and an employer may need to implement policies to address conduct that goes beyond the definition of sexual harassment in § 106.30 to fulfill its obligations under Title VII.

For example, the *Faragher-Ellerth* affirmative defense requires an employer to exercise reasonable care with respect to supervisor-on-employee harassment, while Title IX requires a recipient not to be deliberately indifferent. As one commenter stated, Title VII also requires a negligence standard if a co-worker harasses another co-worker. Title VII defines sexual harassment as severe or pervasive conduct, while Title IX defines sexual harassment as severe and pervasive. Under Title VII, an employer may be held vicariously liable for its supervisors' actions, whereas Title IX requires a recipient to have actual knowledge of sexual harassment. Employers are aware that complying with Title IX and its implementing regulations does not satisfy compliance with Title VII. These final regulations expressly provide that nothing in this

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[1645] *Ellerth*, 524 U.S. at 765.
[1646] *Id*.

part may be read in derogation of an individual's rights, including an employee's rights, under Title VII, and these final regulations do not prevent or preclude a recipient from complying with Title VII.

Additionally, these final regulations clearly provide that a complainant need not file a formal complaint for the recipient to provide supportive measures. Indeed, § 106.44(a) requires a recipient to offer supportive measures to a complainant, irrespective of whether the complainant files a formal complaint. Nothing in these final regulations prevents an employer from asserting that the consideration and provision of supportive measures may fulfill an employer's obligation to take preventive or corrective measures for purposes of the *Faragher-Ellerth* affirmative defense. Similarly, these final regulations do not prevent an employer from asserting that an employee's opportunity to file a formal complaint and initiate a grievance process under § 106.45 may fulfill an employer's obligation to provide a preventive or corrective opportunity for purposes of the *Faragher-Ellerth* affirmative defense, especially as recipients are required under § 106.8 to notify all employees and applicants for employment of the Title IX Coordinator's contact information and the grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond. Employers will not have to choose between asserting the *Faragher-Ellerth* affirmative defense or complying with these final regulations.[1647]

[1647] The Department has revised § 106.45(b)(3)(i), which requires a mandatory dismissal in certain circumstances, to clarify that such a dismissal is solely for Title IX purposes, and does not preclude action under another provision of the recipient's code of conduct. If a recipient has a code of conduct for employees that goes beyond what Title IX requires and these final regulations require, then a recipient may proceed to enforce its code of conduct despite dismissing a formal complaint (or allegations therein) for Title IX purposes. These regulations do not preclude a recipient from enforcing a code of conduct that is separate and apart from what Title IX requires; for example, with respect to investigating and adjudicating misconduct that does not meet the definition of "sexual harassment" as defined in § 106.30.

Although employers may have different obligations and be subject to different standards under Title VII and Title IX, these final regulations may be implemented in a manner that complements these similar yet different obligations.

The Department disagrees that it is providing more stringent standards for students, including minors, than adults to get help. As previously noted, a recipient must offer supportive measures to any complainant who reports sexual harassment, which will help ensure that all complainants receive help. These final regulations also contain some greater protections in the elementary and secondary context, where there are more minors, than in the higher education context. For example, the Department's definition of actual knowledge in § 106.30 includes all employees working in the recipient's education program or activity in the elementary and secondary context, and a recipient with actual knowledge of sexual harassment in an education program or activity against a person in the United States is required to respond promptly in a manner that is not deliberately indifferent under § 106.44(a).

The Department is mindful of President Trump's Executive Orders, and these final regulations are not duplicative. The Department is finally providing regulations that address sexual harassment as sex discrimination in education programs or activities under Title IX. The Department has the authority to issue these final regulations and is clearly stating in these final regulations that these regulations do not derogate an employee's rights under Title VII.

Finally, at least one commenter misunderstands what the Department means in § 106.6(f). The Department is not stating in § 106.6(f) that these final regulations do not apply to employees or that recipients who receive Federal financial assistance must only comply with Title VII with respect to employees. To the extent that Title IX may apply to a recipient's employees, a recipient must comply with Title IX. If a recipient does not comply with Title IX,

then a recipient may be liable under these final regulations and may be the subject of a complaint to OCR. As explained earlier, Title IX may apply to a recipient's employees. The Department simply clarifies, through § 106.6(f), that individuals, including employees, also may have rights under Title VII, and these final regulations do not derogate those rights.

Changes: None.

Comments: Several commenters requested that the Department issue joint guidance with the EEOC to ensure Title VII and Title IX are interpreted consistently with each other and to minimize potential conflicts between the two frameworks. One such commenter argued that the Title IX grievance process should not apply to any adverse *employment* action against a student-employee where the job in question is not an integral part of the recipient's educational program (for example, where the student accused of sexual harassment is fired from working at the campus cafeteria).

Discussion: The Department appreciates the commenters' desire for guidance on Title VII and Title IX. The Department acknowledges that the Supreme Court has interpreted Title VII and Title IX differently and we encourage people to rely on case law to understand the different legal frameworks for Title VII and Title IX. For example, adverse employment actions are a concept that exist under Title VII case law, but not Title IX case law. The Department of Education also cannot bind the EEOC to act or respond in a certain manner through this notice-and-comment rulemaking on Title IX.

As previously explained, these final regulations require a recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States to respond promptly in a manner that is not deliberately indifferent. It is irrelevant whether the student-respondent is an employee if the sexual harassment occurs in an education

program or activity of the recipient against a person in the United States. Depending on the facts and circumstances of such an incident of sexual harassment, the recipient may have obligations under both Title VII and Title IX.

Changes: None.

Comments: One commenter raised the specific issue of a potential conflict between § 106.44(b)(2) and Title VII implementing regulations. This commenter asserted that § 106.44(b)(2) would provide that the Department ordinarily accepts the recipient's factual determinations regarding responsibility and would not deem it as deliberately indifferent solely because the Assistant Secretary would have reached a different outcome. This commenter asserted that § 106.44(b)(2) may conflict with the Title VII requirement that employee complaints or complaints solely alleging employment discrimination against an individual filed with the Department must be referred to the EEOC for their own investigation and evaluation under 28 CFR 42.605. The commenter emphasized that the EEOC would never simply defer to an employer's conclusion that its officials did nothing wrong. According to this commenter, the EEOC conducts its own investigation and makes an independent assessment of the facts. This commenter stated that in some circumstances a referring agency, such as the Department, is required to "give due weight to EEOC's determination that reasonable cause exists to believe that Title VII has been violated" under 28 CFR 42.610(a). The commenter urged the Department to clarify which set of regulations apply in this context to avoid recipient confusion.

Discussion: The Department appreciates the commenter's concerns but disagrees that a conflict exists. The Department acknowledges that the Assistant Secretary will not second-guess a recipient's determination regarding responsibility under § 106.44(b)(2). These final regulations, however, do not apply to the EEOC and do not dictate how the EEOC will

administer Title VII or its implementing regulations. If the Assistant Secretary refers a complaint to the EEOC under Title VII or 28 CFR 42.605, then the EEOC will make a determination under its own regulations and not the Department's regulations. Even if the Department is required in some circumstances to give due weight to the EEOC's determination regarding Title VII under 28 CFR 42.610(a), the Department does not have authority to administer or enforce Title VII. There may be incidents of sexual harassment that implicate both Title VII and Title IX, and this Department will continue to administer Title IX and its implementing regulations and will defer to the EEOC to administer Title VII and its implementing regulations.[1648]

Changes: None.

Comments: Several commenters raised a number of issues that did not directly relate to the provision in § 106.6(f) regarding Title VII. One commenter suggested that the Department collect racial data from campuses to ensure we know how many persons of color have been expelled under Title IX "campus kangaroo courts." This commenter expressed concern that the Department may be inadvertently encouraging racial discrimination while trying to eliminate sex discrimination. Another commenter sought to remind the Department that, in addition to enforcing Title IX, the Department enforces Title VII and other civil rights laws and should vigorously enforce all of them to protect individual rights. One commenter asserted that the proposed regulations would apply to sexual harassment complaints and investigations involving more than eight million employees in primary and secondary schools, and more than four million

[1648] 28 CFR 42.610(c) also states: "If the referring agency determines that the recipient has not violated any applicable civil rights provision(s) which the agency has a responsibility to enforce, the agency shall notify the complainant, the recipient, and the Assistant Attorney General and the Chairman of the EEOC in writing of the basis of that determination." Accordingly, these regulations contemplate that each agency enforces the civil rights provisions that the agency has the responsibility to enforce.

employees at institutions of higher education, including a disproportionately female workforce in elementary and secondary schools and almost half of faculty in degree-granting institutions of higher education who are women.

Discussion: The Department did not propose any reporting requirements from postsecondary institutions or other recipients in the NPRM and does not think that such reporting requirements are necessary to address any racial discrimination that may occur in proceedings under these final regulations. Students who experience racial discrimination in a proceeding under Title IX may file a complaint under Title VI with OCR, and the Department will vigorously enforce Title VI's racial discrimination prohibitions. With respect to concerns about the number of students of color who may be expelled from school, we believe that the grievance process in § 106.45 will provide all parties, including persons of color, with sufficient due process protections.

Contrary to the commenter's assertions, the Department does not have the authority to enforce Title VII. The Department is committed to rigorously enforcing the civil rights laws that it is legally authorized to enforce.

The Department is aware that these final regulations will impact recipients and the people in a recipient's education program or activity and appreciates the commenter's references to statistics about the people whom these final regulations will affect.

Changes: None.

Section 106.6(g) *Exercise of Rights by Parents/Guardians*

Comments: Some commenters expressed concern about whether the proposed regulations allowed parents, on behalf of their child, to report sexual harassment, file a formal complaint, request particular supportive measures, review the evidence during a grievance process, and exercise similar rights given to a party under the proposed rules. Commenters wondered if a

minor student's parent would be permitted to attend interviews, meetings, and hearings during a grievance process or whether that would be allowed only if the minor student's parent was also the party's advisor of choice under § 106.45(b)(5)(iv).

Discussion: The Department recognizes that when a party is a minor or has a guardian appointed, the party's parent or guardian may have the legal right to act on behalf of the party. For example, if the parent or guardian of a student has a legal right to act on behalf of a student, then the parent or guardian must be allowed to file the formal complaint on behalf of the student, although the student would be the "complainant" under the proposed regulation. In such a situation, the parent or guardian must be permitted to exercise the rights granted to the party under these final regulations, whether such rights involve requesting supportive measures or participating in a grievance process. Similarly, the parent or guardian must be permitted to accompany the student to meetings, interviews, and hearings during a grievance process to exercise rights on behalf of the student, while the student's advisor of choice may be a different person from the parent or guardian. Whether or not a parent or guardian has the legal right to act on behalf of an individual would be determined by State law, court orders, child custody arrangements, or other sources granting legal rights to parents or guardians. Additionally, FERPA and its implementing regulations address the circumstances under which a parent or guardian is accorded certain rights granted thereunder, such as the opportunity to inspect and review a student's education records as set forth at 34 CFR 99.10 and 99.12.[1649] Thus, FERPA generally would address a parent's or guardian's opportunity to inspect and review evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint pursuant to § 106.45(b)(5)(vi),

[1649] 20 U.S.C. 1232g; 34 CFR Part 99.

provided such evidence constitutes a student's education record. However, in circumstances in which FERPA would not accord a party the opportunity to inspect and review such evidence, these final regulations do so and provide a parent or guardian who has a legal right to act on behalf of a party with the same opportunity.[1650] To clarify that these final regulations respect all legal rights of parents or guardians, we have added § 106.6(g) to address this issue; this provision applies not only to sexual harassment proceedings under Title IX but also to any issue of sex discrimination arising under Title IX.

Changes: We have added § 106.6(g), which addresses exercise of rights by parents or guardians, and states that nothing in part 106 may be read in derogation of any legal right of a parent or guardian to act on behalf of a complainant, respondent, party, or other individual, subject to paragraph (e) of this section, including but not limited to filing a formal complaint.

Section 106.6(h) Preemptive Effect

Comments: Commenters requested that the final regulations clearly state whether these final regulations supersede enforcement of State non-discrimination or civil rights laws with respect to provisions concerning sexual harassment. Some commenters reasoned that the final regulations should be a floor that does not preclude States from supplementing the legal requirements in these final regulations. Another commenter expressed concern that these final regulations will preempt State laws that the commenter described as designed to protect survivors of sexual violence. One commenter asserted that at least ten States have State laws that would conflict with

[1650] § 106.6(e) (providing that the obligation to comply with this part is not obviated or alleviated by the FERPA statute or regulations).

the Department's proposed rules.[1651] One commenter argued that Virginia law is more protective of victims than the proposed rules, including prompt review of any sexual violence report by a university committee within 72 hours of the report, mandatory notification of law enforcement, robust privacy protections, extensive outside support for victims, annual review of sexual violence policies with certification to the Virginia Secretary of Education, provisions for transcript notations on perpetrators' academic transcripts, and requiring certain injuries to children be reported by physicians, nurses, and teachers.

Another commenter requested that the Department implement the Title IX regulations in a manner that allows institutions of higher education in Colorado to retain their existing processes and procedures; while this commenter did not assert that the proposed regulations directly conflict with the processes and procedures that institutions of higher education in Colorado use, the commenter asserted that changing current Title IX policies and procedures would be costly and Colorado institutions of higher education already have policies and procedures in place that address due process concerns and protect survivors. A commenter from Hawaii expressed concerns that a "2018 state Title IX bill" shows that Hawaii constituents take Title IX very seriously and argued that the NPRM makes it unclear how Hawaii would implement its State law if the NPRM were to take effect.

At least one commenter advised the Department to include an explicit preemption clause in the final regulations, given the likelihood of conflict with State laws, unclear case law, and

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[1651] Commenter cited: California (Cal. Educ. Code § 67386, Cal. Educ. Code § 66290.1); Connecticut (Conn. Gen. Stat. Ann. § 10a-55m); Hawaii (Haw. Rev. Stat. Ann. § 304A-120), Illinois (110 Ill. Comp. Stat. Ann. 155); Maryland (Md. Code Ann., Educ. § 11-601); New Jersey (N.J. Stat. Ann. § 18A:61E-2); New York (N.Y. Educ. Law §§ 6439-49); Oregon (Or. Rev. Stat. Ann. § 350.255, Or. Rev. Stat. Ann. § 342.704); Texas (Tex. Educ. Code Ann. § 51.9363); and Virginia (Va. Code Ann. § 23.1-806).

because education is an area where the Federal government does not occupy the entire field. This commenter relied for its arguments on the Tenth Amendment, and the Supreme Court's ruling in *National Federation of Independent Business v. Sebelius*.[1652] This commenter specifically noted that there is a provision in the Department's current regulations implementing Title IX, which addresses preemption. Current 34 CFR 106.6(b) provides "The obligation to comply with this part is not obviated or alleviated by any State or local law or other requirement which would render any applicant or student ineligible, or limit the eligibility of any applicant or student, on the basis of sex, to practice any occupation or profession." This commenter contended that 34 CFR 106.6(b) may cause a court to question why the regulations implementing Title IX contain only one provision that specifically addresses preemption.

Discussion: The Department reiterates that nothing in these final regulations, including the provisions concerning sexual harassment with which commenters expressed concern, inherently prevents recipients from complying with State and local laws or policies. With respect to aspects of State laws that commenters asserted "diverge from" the NPRM, the Department disagrees that commenters identified an actual conflict between State law and these final regulations, as explained throughout this section of the preamble.

Virginia law, as described by the commenter, does not conflict with these final regulations. These final regulations do not prohibit extensive outside support for victims, notations on academic transcripts, annual review of sexual violence policies, or any of the other aspects of Virginia law that the commenter described. Similarly, these final regulations may not conflict with processes and procedures used by institutions of higher education in Colorado; to

[1652] 567 U.S. 519 (2012).

the extent that the commenter was asserting that Colorado institutions should not be required to expend resources changing aspects of their Title IX policies and procedures because Colorado law already ensures that Colorado institutions appropriately support survivors while addressing due process concerns, the Department has determined that a standardized Title IX grievance process and uniform requirements that recipients offer supportive measures to complainants constitute the most effective procedures and requirements to further Title IX's non-discrimination mandate. While institutions may find it necessary to expend resources to come into compliance with these final regulations, the benefits of ensuring that every student, in every school, college, and university that receives Federal funds, can rely on predictable, transparent, legally binding rules for how a recipient responds to sexual harassment, outweigh the costs to recipients of altering procedures to come into compliance with the requirements in these final regulations. Recipients may continue to comply with State law to the extent that it does not conflict with the requirements in these final regulations addressing sexual harassment. The Department appreciates that many States have laws that address sexual harassment, sexual violence, sex offenses, sex discrimination, and other misconduct that negatively impacts students' equal educational access. Nothing in these final regulations precludes a State, or an individual recipient, from continuing to address such matters while also complying with these final regulations.

In the event of an actual conflict between State or local law and the provisions in §§ 106.30, 106.44, and 106.45, which address sexual harassment, the latter would have preemptive effect. Under conflict preemption, "a federal statute implicitly overrides state law . . . when state law is in actual conflict with federal law" either because it is "impossible for a private party to comply with both state and federal requirements" or because "state law stands as an obstacle to

the accomplishment and execution of the full purposes and objectives of Congress."[1653] It is well-established that "state laws can be pre-empted by federal regulations as well as by federal statutes." [1654] The Supreme Court has held: "Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation."[1655] The Department is acting within the scope of its congressionally delegated authority in promulgating these final regulations under Title IX to address sexual harassment as a form of sex discrimination.

In response to commenters' requests for a regulation that expressly addresses whether these final regulations concerning sexual harassment preempt State or local law and to generally address commenters' concerns about preemption, the Department has added § 106.6(h) which provides that to the extent of a conflict between State or local law and Title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law. The Department acknowledges that its current regulations in 34 CFR 106.6(b) expressly address preemption with respect to any State or local law or other requirement which would render any applicant or student ineligible, or limit the eligibility of any applicant or student, on the basis of sex, to practice any occupation or profession. The Department does not wish for any recipient or court to conclude that 34 CFR 106.6(b) constitutes the only instance in which the Department intended to give preemptive

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[1653] *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (internal quotation marks and citations omitted). The U.S. Department of Justice previously expressed a similar position with respect to the preemptive effect of other regulations promulgated by the Department. Statement of Interest by the United States, *Massachusetts v. Pa. Higher Educ. Assistance Agency, d/b/a FedLoan Servicing*, No. 1784-CV-02682 (Mass. Super. Ct. filed Jan. 8, 2018).
[1654] *Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) ("state laws can be pre-empted by federal regulations as well as federal statutes"); *see Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 873 (2000).
[1655] *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 396 (1986).

effect to its regulations promulgated under Title IX. By adding § 106.6(h), the Department clearly and unequivocally states its intention that these final regulations concerning sexual harassment preempt State and local law to the extent of a conflict.

The Department cannot state categorically that the final regulations concerning sexual harassment are always a "floor" because in some cases these final regulations may require more protections with respect to sexual harassment as a form of sex discrimination than what State law may require. Similarly, some State laws may require recipients to provide additional protections for both complainants and respondents that exceed these final regulations.[1656] As long as State and local laws do not conflict with the final regulations concerning sexual harassment, recipients should comply with the State and local laws as well as these final regulations.

Changes: The Department has added § 106.6(h), which provides that to the extent of a conflict between State or local law, and Title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law.

Comments: One commenter argued that the Department has no right to invade the police powers of a State like New York, which has already regulated extensively on the topic of campus sexual harassment and assault, and the NPRM would inappropriately "lessen the effectiveness" of New York's "Enough is Enough" law as well as the New York's Dignity for all Students Act (DASA), if not outright contradict it. For example, some commenters noted that New York's

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[1656] The Department in its 2001 Guidance and specifically in the context of the due process rights of the accused, acknowledged that "additional or separate rights may be created for employees or students by State law." 2001 Guidance at 22. In both the 2001 Guidance and these final regulations, the Department takes the position that any additional or separate rights do not relieve the recipient of complying with Title IX and its implementing regulations. *See id*.

"Enough is Enough" law requires extensive information outlining requirements that cover content, training, and distribution of specific information, requires postsecondary institutions to adopt a uniform definition of affirmative consent, requires ongoing training year-round to address topics related to sexual harassment, and requires periodic campus climate assessments, among other requirements. Other commenters also described aspects of New York's "Enough is Enough" law. One commenter asserted that the proposed regulations require a recipient to dismiss a complaint if alleged misconduct did not occur within the institution's program or activity, whereas New York law may still require a recipient to address such misconduct. One commenter stated that New York law requires affirmative consent for sexual activity. At least one commenter urged the Department to adopt the provisions in New York's "Enough is Enough" law.

Some commenters expressed concerns about the proposed rules permitting delays in a grievance process for longer than what is permitted under State law. According to one commenter, New York's law specifies that ten days is the maximum number of days for a temporary delay when law enforcement action is taking place concurrently with a campus disciplinary process.

Discussion: The Department does not believe that these final regulations generally conflict with State and local laws. To address commenters' questions about preemption and for the reasons explained above, the Department has added § 106.6(h) which provides that to the extent of a conflict between State or local law and Title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law.

With respect to New York's "Enough is Enough" law and DASA, these final regulations do not appear to directly conflict with the commenters' description of State law requirements. These final regulations do not prevent a postsecondary institution from engaging in ongoing or year-round training (of employees, or students), conducting campus climate assessments, or adopting a particular definition of consent. Indeed, § 106.30 expressly states that the Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault, a provision that specifically addresses the issue raised by commenters, that some State laws require institutions to use an affirmative consent definition. Similarly, these final regulations acknowledge in revised §106.45(b)(3)(i) that even though a recipient may be required to dismiss a formal complaint in certain circumstances, such a dismissal is only for Title IX purposes and does not preclude the recipient from action under another provision of the recipient's code of conduct. Accordingly, if New York law requires a recipient to respond to conduct that these final regulations do not deem covered under Title IX, a recipient may do so. The Department has considered the provisions for addressing sexual harassment and sexual assault contained in various State laws, including in New York, and in use by various individual institutions. However, the Department does not wish to adopt wholesale New York's "Enough is Enough" law or other State laws or institutional policies and explains throughout this preamble why these final regulations provide the best means for effectuating Title IX's non-discrimination mandate.

These final regulations do not require a recipient to delay a grievance process for longer time periods than what is permitted under State law. The Department emphasizes that a recipient must respond "promptly" when it has actual knowledge of sexual harassment in its education program or activity pursuant to § 106.44(a). Section 106.45(b)(1)(v) regarding reasonably

prompt time frames for the conclusion of the grievance process would not necessarily conflict with State laws by allowing delays during a grievance process, for good cause, including concurrent law enforcement activity. For example, there is no inherent conflict with a temporary ten-day delay, which according to a commenter is permissible under New York State law when a concurrent law enforcement action is taking place, as long as a recipient responds promptly when it has actual knowledge of sexual harassment in its education program or activity and also meets the requirement in § 106.45(b)(1)(v) to conclude its grievance process under reasonably prompt time frames the recipient has designated. Accordingly, the commenter's example of a potentially conflicting State law does not in fact present an inherent conflict with these final regulations.

Changes: None.

Comments: Other commenters expressed concern that the proposed regulations may conflict with a union's duty to provide representation during the grievance process. One commenter asserted that many State labor laws already provide that an employee subject to investigatory interviews is allowed to have a union representative present for a meeting that might lead to discipline.

Discussion: There is no inherent conflict between these final regulations and any requirement that a union representative must be present for an investigatory interview that might lead to discipline. These final regulations require a recipient to provide a written notice upon receipt of a formal complaint of sexual harassment, to both parties, that the parties may have "an advisor of their choice, who may be, but is not required to be, an attorney" pursuant to § 106.45(b)(2)(i)(B), and also require (in § 106.45(b)(5)(iv)) a recipient to provide the parties with the same opportunities to have an advisor present during any grievance proceeding, without limiting the choice or presence of advisor for either the complainant or respondent. Nothing in these final

regulations precludes a recipient from complying with the State laws that the commenter describes; § 106.45(b)(5)(iv) means that a recipient cannot preclude a party from selecting a union representative as the party's advisor of choice during a Title IX grievance process. Furthermore, while § 106.71 requires a recipient to keep confidential the identity of parties to a Title IX grievance process, which limits the discretion of a recipient to permit parties to have persons *other than the party's advisor of choice* present during the grievance process, that provision limits the confidentiality obligation by expressly stating that the recipient must keep party identities confidential except as required by law. If a State law requires a recipient to permit a union representative to be present during a disciplinary proceeding, the recipient may not be in violation of these final regulations by permitting a party to a Title IX grievance process from being accompanied by both an advisor of choice and a union representative. We reiterate, however, that a party is always entitled under these final regulations to select a union representative as the party's advisor of choice to advise and assist the party during the grievance process.

In the event of an actual conflict between State labor laws or union contracts and the final regulations, then the final regulations would have preemptive effect. To generally address commenters' questions about preemption and for the reasons explained above, the Department has added § 106.6(h) which provides that to the extent of a conflict between State or local law and Title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law.

Changes: None.

Comments: One commenter asserted that § 106.8(d) conflicts with Minnesota State law, under which Minnesota institutions of higher education can address sexual misconduct occurring

outside the United States. This commenter argued that, because study abroad programs are educational and approved by the home campus (located in the United States), the Department should ensure that recipients have the ability to protect students and employees by providing remedial services and imposing discipline over campus activities occurring outside the United States.

Discussion: The final regulations, by recognizing the jurisdictional limitation in the Title IX statute, 20 U.S.C. 1681(a) (which states that "no person in the United States" may be discriminated against on the basis of sex), do not conflict with State laws that allow or require a recipient to address discrimination or misconduct that falls outside Title IX. Nothing in the final regulations precludes recipients from addressing sexual misconduct that occurs in a recipient's study abroad programs. The Department has revised § 106.45(b)(3)(i) to clarify that a mandatory dismissal of allegations in a formal complaint of sexual harassment because the allegations concern sexual harassment that occurred outside the United States is a dismissal only for Title IX purposes and does not preclude action under another provision of the recipient's code of conduct. Accordingly, a recipient may address conduct that occurs outside of the United States pursuant to its own code of conduct, including where a recipient is required to address such conduct under a State law.

Changes: None.

Comments: Some commenters argued that ending the single investigator model would conflict with State laws. Commenters stated that ending the single investigator model conflicts with State law requirements governing elementary and secondary school administrators because in the elementary and secondary school context, a site administrator typically has final responsibility for Title IX compliance. These commenters argued that the Department should not preclude a

site administrator from being the Title IX Coordinator, the investigator, and the decision-maker, because the typical job description for a site administrator requires that person to be a knowledgeable investigator familiar with school district policy and the school community best positioned to fulfill the functions of a Title IX Coordinator, investigator, and decision-maker. Commenters asserted that under State laws, site administrators must respond to, investigate, and intervene regarding discrimination complaints, including following established disciplinary procedures as applicable. One commenter reasoned that if the respondent is an employee then the site administrator with line authority may be in the best position to investigate due to confidentiality with personnel issues, and the Department should not create a conflicting process.

Discussion: With respect to potential conflict with State laws regarding the prohibition of the single investigator model contained in § 106.45(b)(7)(i) of the final regulations, the final regulations preclude the decision-maker from being the same person as the Title IX Coordinator or the investigator, but do not preclude the Title IX Coordinator from also serving as the investigator. Further, the final regulations do not prescribe which of the recipient's administrators are in the most appropriate position to serve as a Title IX Coordinator, investigator, or decision-maker, and leave recipients discretion in that regard, including whether a recipient prefers to have certain personnel serve in certain Title IX roles when the respondent is an employee. Finally, although the final regulations, § 106.45(b)(7)(i) precludes the decision-maker from being the same person as the Title IX Coordinator or investigator, this provision does not preclude the investigator from, for instance, making recommendations in an investigative report, so long as the decision-maker exercises independent judgment in objectively evaluating relevant evidence to reach a determination regarding responsibility. Thus, the Department does not believe that the commenter's description of the typical job duties of a site

administrator under State laws poses an actual conflict with the final regulations. To generally address commenters' questions about preemption and for the reasons explained above, the Department has added § 106.6(h) which provides that to the extent of a conflict between State or local law and Title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law.

Changes: None.

Comments: Some commenters contended that the NPRM's jurisdictional approach conflicts with State laws, which may pose enforcement problems, create confusion, impose additional cost burdens, and trigger lengthy litigation. These commenters noted, for example, that California explicitly requires institutions of higher education to have policies addressing sexual violence involving students both on campus and off campus and that New Jersey law includes a broader definition of sexual misconduct that includes conduct occurring in certain off-campus locations.

Discussion: With respect to potential conflict with State laws that may have different jurisdictional schemes, the Department reiterates that nothing in the final regulations prevents recipients from initiating a student conduct proceeding or offering supportive measures to students who report sexual harassment that occurs outside the recipient's education program or activity, and that the final regulations do not distinguish between off-campus and on-campus conduct. Instead, these final regulations require a recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States to respond promptly in a manner that is not deliberately indifferent. The Department has revised § 106.45(b)(3)(i) to clarify that a mandatory dismissal of allegations in a formal complaint of sexual harassment because the alleged conduct did not occur in the recipient's

education program or activity is only for purposes of Title IX and does not preclude action under another provision of the recipient's code of conduct. A recipient may address conduct that Title IX and these final regulations do not require a recipient to address, pursuant to its own code of conduct, including where the recipient is obligated to address the conduct under a State law. To generally address commenters' questions about preemption and for the reasons explained above, the Department has added § 106.6(h) which provides that to the extent of a conflict between State or local law and Title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law.

Changes: None.

Comments: Some commenters argued that the proposed rules should not require school districts to adopt and publish a grievance procedure that aligns with the proposed regulations, and that instead the Department should permit school districts to adopt and publish grievance procedures that align with their State's requirements where States have acted on their own authority to require school districts to adopt grievance procedures related to non-discrimination, sexual harassment, and due process in the context of student discipline. Commenters argued that if the Department does not permit school districts to do this, the final regulations will create uncertainty and impose an unnecessary burden on school districts, potentially conflicting with State laws.

Discussion: Nothing in the final regulations inherently prevents school districts from adopting and publishing grievance procedures, and a grievance process that complies with § 106.45 for resolution of formal complaints of sexual harassment, that align with their State's requirements where States have acted on their own authority to require school districts to adopt grievance

procedures related to non-discrimination, sexual harassment, and due process in the context of student discipline. However, in the event of an actual conflict between these final regulations concerning sexual harassment and State laws or local laws, the final regulations would have preemptive effect over conflicting State or local law. To generally address commenters' questions about preemption and for the reasons explained above, the Department has added § 106.6(h) which provides that to the extent of a conflict between State or local law and Title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law.

Changes: None.

Comments: A few commenters argued that the NPRM proposes to set a national standard on various matters related to the investigation and adjudication of claims of sexual harassment, including sexual assault, by school districts and public and private institutions of higher education, that those same topics are the subject of State, local, and Tribal laws, but that the NPRM contains no discussion of preemption, contrary to both Executive Order 13132 and Executive Order 12988, and the 2009 Presidential Preemption Memorandum.

A few commenters asserted that it is inappropriate for the Department to intrude on areas of traditional State and local control, such as regulation of education. Commenters argued that, under Executive Order 13132, the Department should have consulted with State and local officials before issuing the proposed rules because the Department is formulating policy that will have federalism implications and may limit States' ability to protect their own constituents' safety. One commenter contended that the Department is leaving States with an impossible choice between accepting Federal funding and protecting students' full access to their education. This commenter also asserted that the NPRM could keep States from regulating in an area of

traditional State authority without good cause, thus amounting to a constructive revocation of States' power beyond the Department's authority under statute.

Another commenter asserted that the impact of the Supreme Court's *Sebelius* decision[1657] on Title IX is unclear and argued that a law enacted under the Spending Clause may be analyzed for constitutionality under a contract theory or the unconstitutional conditions doctrine. This commenter contended that the Department is favoring a contract theory and that if the unconstitutional conditions doctrine is applied, then the impact of these final regulations on State laws, recipients, and students will require a State-by-State fact-intensive inquiry. According to this commenter, the uncertainty of how constitutional law will apply to these final regulations will create confusion for recipients who must comply with State laws as well as these final regulations.

Discussion: As an initial matter, some commenters' characterization of Executive Order 13132, 64 FR 43255 (Aug. 10, 1999) is inaccurate. That Order's goal was "to guarantee the Constitution's division of governmental responsibilities between the Federal government and the states" by "further[ing] the policies of the Unfunded Mandates Reform Act".[1658] The purpose of that statute is "to end the imposition, in the absence of full consideration by Congress, of Federal mandates on State, local, and Tribal governments without adequate Federal funding, in a manner that may displace other essential State, local, and tribal governmental priorities."[1659] In other words, when the Federal government proposes to impose an *unfunded mandate* on the States (including local governments) and Tribal governments with federalism implications and effects

[1657] Commenter cited: *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).
[1658] 2 U.S.C. 1501 *et seq.*
[1659] 2 U.S.C. 1501(2).

on State and local laws, Executive Order 13132 requires the Federal government to consult with State and local authorities. However, application of these final regulations is entirely dependent on whether an education program or activity receives Federal financial assistance; these final regulations are not a mandate (unfunded or otherwise).[1660]

Furthermore, as this preamble's discussion pertaining to the Spending Clause of the U.S. Constitution demonstrates,[1661] Title IX was enacted pursuant to that constitutional provision. "Congress may use its spending power to create incentives for States to act in accordance with Federal policies."[1662] "[W]hen 'pressure turns into compulsion,'" – such as undue influence, coercion or duress – "the legislation runs contrary to our system of federalism."[1663] As the Spending Clause analysis demonstrates, the Federal government is not coercing recipients to comply with these final regulations. Title IX and its implementing regulations fall within the authority of the Federal government: operators of education programs or activities must comply with Title IX's non-discrimination mandate, if an education program or activity receives Federal financial assistance. By statute, Congress has conferred authority to the Department to promulgate regulations under Title IX to effectuate the purposes of Title IX.[1664] Nor is there any support for the argument that the Federal government is precluding the States from regulating in an area of traditional State authority without good cause. Compliance with Title IX and its implementing regulations is "much in the nature of a contract: in return for Federal funds, the States agree to comply with federally imposed conditions."[1665] The commenter's assertion that

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[1660] *See* 20 U.S.C. 1681(a).
[1661] *See* the "Spending Clause" subsection of the "Miscellaneous" section of this preamble.
[1662] *Sebelius*, 567 U.S. at 577-78.
[1663] *Id*. (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).
[1664] 20 U.S.C. 1682.
[1665] *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

protection of students' equal access to education is an area of traditional State control indicates that these final regulations are not invalid even under the unconstitutional conditions doctrine of the Spending Clause analysis, because the States themselves are at liberty to enact these regulations.[1666] Nothing in these final regulations prevents States from continuing to address discrimination on the basis of sex in education, or equal educational access on the basis of sex, in a manner that also complies with these final regulations. Moreover, these final regulations do not require the relinquishment of a constitutional right and expressly provide in § 106.6(d) that these final regulations do not require the restriction of any rights guaranteed against government action by the U.S. Constitution, including but not limited to the First, Fifth, and Fourteenth Amendments of the U.S. Constitution. Irrespective of whether a court applies a contract theory or the unconstitutional conditions doctrine, these final regulations pass constitutional muster. These final regulations are in pursuit of the general welfare, are unambiguous, and are related to a national concern.[1667] Sexual harassment as a form of sex discrimination is an issue that is national in scope and significance, and Congress enacted Title IX to address sex discrimination on a Federal level.

Nor does the 2009 Presidential Preemption Memorandum ("2009 Obama Memorandum") support the commenters' argument.[1668] The objective of that 2009 Obama Memorandum was to proclaim the "general policy" that "preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the

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[1666] *See South Dakota v. Dole*, 483 U.S. 203, 209-12 (1987).
[1667] *See id.* at 206-09.
[1668] *See* 74 FR 24693 (2009).

States and with a sufficient legal basis for preemption."[1669] The 2009 Obama Memorandum asserted that the States do have a potent role in protecting the health and safety of citizens and the environment.[1670] The 2009 Obama Memorandum stated that Federal overreach through preemption obstructs States from "apply[ing] to themselves rules and principles that reflect their own particular circumstances and values."[1671] On this ground, President Obama directed executive branch agencies not to include preemption statements in "regulatory preambles . . . except where preemption provisions are also included in the codified regulation" or in "codified regulations except where such provisions would be justified under legal principles governing preemption, including the principles outlined in Executive Order 13132."[1672] President Obama also directed agencies to "review regulations issued in the last 10 years that contain statements in regulatory preambles or codified provisions intended . . . to preempt State law, in order to decide whether such statements are justified under applicable legal principles governing preemption."[1673] Even assuming that the 2009 Obama Memorandum applies, the Department has in fact complied with it, with respect to promulgation of these final regulations.

Furthermore, Executive Order 12988, a Clinton Administration executive order (to which the 2009 Obama Memorandum does not cite), requires agencies, when promulgating regulations, to "make every reasonable effort . . . [to] specif[y] in clear language the preemptive effect, if any, to be given to the regulation." The Department has complied with Executive Order 12988 as well, and these final regulations clearly state in § 106.6(h) that to the extent of a conflict between

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[1669] *Id.*
[1670] *Id.*
[1671] *Id.*
[1672] *Id.*
[1673] *Id.*

State or local law, and Title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law.

These final regulations also do not violate the Tenth Amendment. That Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[1674] The Supreme Court's position is sufficiently clear on this topic. "[W]hile [the Federal government] has substantial power under the Constitution to encourage the States to provide for [a set of new rules concerning a national problem], the Constitution does not confer upon [the Federal government] the ability simply to compel the States to do so."[1675] The Tenth Amendment "states but a truism that all is retained which has not been surrendered."[1676] As the constitutional commenter and chronicler, the Honorable Joseph Story, Associate Justice, Supreme Court of the United States, explained, "[t]his amendment is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution. Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities."[1677] The Supreme Court always has maintained that "[t]he States unquestionably do retai[n] a significant measure of sovereign authority . . . to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government."[1678] Just as in *New York v. United States*, in which the "Petitioners d[id] not

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[1674] U.S. CONST. amend. X.
[1675] *New York v. United States*, 505 U.S. 144, 149 (1992).
[1676] *United States v. Darby*, 312 U.S. 100, 124 (1941).
[1677] 3 J. Story, *Commentaries on the Constitution of the United States* 752 (1833).
[1678] *Garcia v. San Antonio Metro. Transit Auth*., 469 U. S. 528, 549 (1985) (citations and internal quotation marks omitted).

contend that [the Federal government] lacks the power to regulate the disposal of low level radioactive waste,"[1679] here too there can be no dispute that the Federal government retains the authority to regulate sexual harassment and assault, a national problem, in education programs or activities that receive Federal financial assistance, even though the same matters also fall within the traditional police powers of the States. The Department, through these final regulations, is not compelling the States to do anything. In exchange for Federal funds, recipients – including States and local educational institutions – agree to comply with Title IX and regulations promulgated to implement Title IX as part of the bargain for receiving Federal financial assistance, so that Federal funds are not used to fund sex-discriminatory practices. As a consequence, the final regulations are consistent with the Tenth Amendment.

Although a commenter's assertion that States possess general police powers is correct,[1680] the Supreme Court also has held that Congress's authority to act can be quite expansive under the powers granted to Congress under the U.S. Constitution, and such exercise of enumerated powers by Congress does not convert Federal government authority into general police powers.[1681] The Department disagrees with a commenter's assertion that these final regulations alter the nature of the bargain recipients accept in exchange for Federal financial assistance in violation of Congress's Spending Clause authority, notwithstanding the Supreme Court's holding in *Sebelius* that congressional expansion of the Medicaid program violated the Spending Clause. The *Sebelius* Court reasoned that the Affordable Care Act at issue in that case expanded the

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[1679] *New York*, 505 U.S. at 159-60.
[1680] *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 535-36 (2012) (affirming that States have general police powers).
[1681] *Id.* at 536-37 (analyzing the Affordable Care Act under Congress's enumerated powers to regulate interstate commerce and "tax and spend" and noting that the latter authority gives "the Federal Government considerable influence even in areas where it cannot directly regulate.").

Medicaid program in a manner that "accomplishes a shift in kind, not merely degree."[1682] The *Sebelius* Court explained that Congress exceeded its Spending Clause authority because it attempted to "transform[]" the original Medicaid program from a program "to cover medical services for four particular categories of the needy [individuals with disabilities, the blind, elderly, and needy families with dependent children]" into part of a "comprehensive national plan to provide universal health insurance coverage."[1683] By contrast, the Department's Title IX regulations do not expand or stray from the original purpose and scope of the Title IX statute enacted by Congress. The subject of these final regulations remains the same as that described in the Title IX statute – ensuring that no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. These final regulations do not expand the category of persons protected under Title IX (i.e., any person in the United States participating in or benefiting from an education program or activity). As discussed elsewhere in this preamble, the final regulations adopt and adapt the Supreme Court's interpretation of Title IX recognizing sexual harassment as a form of sex discrimination. Furthermore, the Department's Title IX regulations have, for decades, required recipients to adopt and publish grievance procedures for the prompt and equitable resolution of complaints of sex discrimination. Thus, the final regulations are akin to the Medicaid program amendments

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[1682] *Id.* at 583 ("The Medicaid expansion, however, accomplishes a shift in kind, not merely degree. The original program was designed to cover medical services for four particular categories of the needy: the disabled, the blind, the elderly, and needy families with dependent children. See 42 U.S.C. 1396a(a)(10). Previous amendments to Medicaid eligibility merely altered and expanded the boundaries of these categories. Under the Affordable Care Act, Medicaid is transformed into a program to meet the health care needs of the entire nonelderly population with income below 133 percent of the poverty level. It is no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage.").
[1683] *Id.* at 583-84.

acknowledged by the *Sebelius* Court to have constituted an appropriate exercise of Spending Clause authority,[1684] rather than the "transformation" of Title IX into coverage of subjects outside the scope of the original statute or an expansion of Title IX obligations "in kind" rather than "in degree."

The NPRM provided that this regulatory action does not unduly interfere with State, local, or tribal governments in the exercise of their governmental functions.[1685] For example, the NPRM acknowledged that when a party is a minor, has been appointed a guardian, is attending an elementary or secondary school, or is under the age of 18, recipients have discretion to look to State law and local educational practice in determining whether the rights of the party shall be exercised by the parent(s) or guardian(s) instead of or in addition to the party.[1686] The final regulations set forth this proposition more clearly in § 106.6(g). These final regulations also provide significant flexibility to recipients; for example, the final regulations in § 106.30 expressly provide that the Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault, such that States are free to prescribe a definition of consent for use in sexual assault cases in educational institutions without conflict with these final regulations. Similarly, these final regulations do not prohibit recipients from addressing conduct that is not covered under these final regulations, such that States are free to require recipients to address conduct that, for instance, did not occur in an education program or activity, or that does not meet the § 106.30 definition of sexual harassment. Finally, the NPRM

[1684] *Id.* at 583 (noting previous amendments affecting, and expanding, the Medicare program that constituted an expansion "in degree" and not "in kind").
[1685] 83 FR 61484.
[1686] 83 FR 61482.

also "encouraged State and local elected officials to review and provide comments on the[] proposed regulations," and the Department has carefully considered and responded to such comments.[1687]

Recipients do not need to choose between Federal financial assistance and protecting students' equal access to their education because these final regulations help ensure that students have equal access to a recipient's education program or activity. For example, § 106.44(a) requires a recipient to treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. Supportive measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party. Where a respondent is found responsible for sexually harassing a complainant, the recipient must effectively implement remedies for the complainant, which must be designed to restore or preserve equal access to the recipient's education program or activity, pursuant to § 106.45(b)(1)(i) and § 106.45(b)(7)(iv).

Changes: None.

Comments: Many commenters identified substantive areas of potential conflict between State and local laws and the NPRM. Commenters noted that Illinois law requires Illinois IHEs to address, investigate, and resolve sexual misconduct complaints regardless of location; whereas the NPRM only applies to conduct within an education program or activity against a person in

[1687] 83 FR 61495.

the United States. New Jersey law explicitly includes harassment occurring online and in certain off-campus locations.

A few commenters generally asserted that the proposed rules appeared to be inconsistent with other laws such as the Clery Act and VAWA. Other commenters argued that conflict regarding geographical application may also arise under VAWA and the Clery Act. One commenter stated that the NPRM may conflict with VAWA and the Clery Act regarding evidentiary standards.

Some commenters noted that States such as California, Connecticut, Illinois, and New Mexico have laws requiring that school disciplinary boards use the preponderance of the evidence standard to evaluate sexual misconduct on campus. One commenter asserted that applying the same standard of evidence for complaints against students as it does for complaints against employees, including faculty, is problematic because the Connecticut General Statutes require that for cases of sexual assault, stalking, and intimate partner violence, the institution must use the preponderance of the evidence standard. Additionally, one commenter stated that Connecticut requires "affirmative consent."

One commenter generally argued that the NPRM would undermine State efforts to require or encourage schools to provide more robust supportive measures to students. This commenter did not explain further. One commenter stated that the NPRM would preempt State laws that include broader sexual harassment definitions, such as New Jersey law.

Commenters raised the issue that Illinois law prohibits parties from cross-examining each other and permits only indirect questioning at the presiding school officials' discretion, whereas the proposed rules require cross-examination through advisors. One commenter also argued that this provision conflicts with or is inconsistent with Illinois State law Preventing Sexual Violence

in Higher Education, 110 ILCS 155, which requires all higher education institutions in Illinois to adopt a comprehensive policy concerning sexual violence, domestic violence, dating violence, and stalking consistent with governing Federal and State law, regarding the standard of evidence because Illinois State law requires use of the preponderance of the evidence standard to determine whether the alleged violation of the comprehensive policy occurred.[1688] Another commenter expressed concern about providing documentation to both parties as part of the grievance process and noted that such a provision conflicts with practices in Illinois courts where the State prevents the reporting party from providing the defendant with a copy of a police report, and the police report can only be provided to an attorney due to safety concerns.

One commenter asserted that in Kentucky, evidence offered to provide that the reporting party engaged in other sexual behavior or evidence offered to prove the reporting party's sexual disposition is inadmissible and opined that allowing this type of evidence to be introduced within a Title IX proceeding is a clear conflict between the proposed rules, and State law.

Commenters asserted substantive conflicts with State law may arise regarding grievance procedures under the proposed rules, including with respect to privacy protections, equal opportunity for the parties to inspect and review evidence, admissibility of past sexual history, and the presumption of non-responsibility.

One commenter opined that it would be confusing for school and university officials to conform to Federal regulations that conflict with local and State laws.

Discussion: For some of the State laws that the commenters cited (such as Illinois and New Jersey laws that may include sexual misconduct complaints of conduct that occurs outside of an

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[1688] 110 Ill. Comp. Stat. 155/25(5).

education program or activity, State laws encouraging more robust supportive measures, and the broader definition of sexual harassment in New Jersey's law), there is no actual conflict because nothing in these final regulations prohibits a recipient from complying with these particular State laws. For example, if a State law contains stricter requirements such as stricter reporting requirements and timelines, and also addresses anti-bullying, then there is no inherent conflict with these final regulations. Similarly, if a State law requires a recipient to investigate and address conduct that these final regulations do not address, then these final regulations do not prevent a recipient from doing so. Indeed, the Department revised § 106.45(b)(3)(i), which concerns mandatory dismissals, to expressly state that such a dismissal is only for Title IX purposes and does not preclude action under another provision of the recipient's code of conduct. Accordingly, recipients may continue to respond to conduct even if Title IX and these implementing regulations do not require a recipient to do so. Similarly, the Department revised the definitions in § 106.30 to address "Consent," and § 106.30 expressly states that the Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault and, thus, there is no conflict with any State law that requires a particular definition of consent with respect to sexual assault.

The Department disagrees that these final regulations conflict with State laws that require the use of the preponderance of the evidence standard because recipients are free to adopt the preponderance of the evidence standard under these final regulations. There also is nothing problematic with requiring that the same standard be used for complaints against employees as complaints against students. Indeed, if a State's laws require institutions to use a preponderance of the evidence standard, then using that same standard for complaints against employees as complaints against students may level the field when a student files a formal complaint against

an employee. Students should not be subject to a higher burden of proof for complaints against employees than complaints against students, especially as the power dynamic is typically skewed in favor of an employee in these circumstances.

With respect to the Illinois law requiring higher education institutions to adopt policies, no conflict appears to exist because, as the commenter explains, such policies must be consistent with Federal law, which includes these final regulations. Also, with respect to Illinois law, these final regulations do not require the parties to directly cross-examine each other; instead, the cross-examination is conducted by a party's advisor and personal questioning by one party of another is expressly prohibited under § 106.45(b)(6)(i). These final regulations also do not appear to conflict with court practices in Illinois regarding sharing documents with complainants and respondents. The commenter appears to reference a practice by Illinois courts and does not indicate that the State mandates that postsecondary institutions or elementary and secondary schools comply with a court practice to provide documents to an attorney rather than to a defendant. To the extent that these final regulations present an actual, direct conflict with Illinois State law, then these final regulations preempt State law pursuant to § 106.6(h). A recipient may choose not to accept Federal financial assistance, if the recipient does not wish to be subject to Title IX and these final regulations.

The Department notes that these final regulations provide a robust rape shield provision in § 106.45(b)(6)(i)-(ii) that provides: "Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the

respondent and are offered to prove consent." To the extent that this rape shield provision directly conflicts with Kentucky State law, then these final regulations preempt State law.

To generally address commenters' questions about preemption and for the reasons explained above, the Department has added § 106.6(h) which provides that to the extent of a conflict between State or local law and Title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law.

These final regulations do not conflict with the Clery Act and VAWA or the Department's regulations implementing the Clery Act and VAWA, in any aspect, including with respect to geographic requirements and the standard of evidence. If the Department interprets these final regulations as consistent with the Clery Act and VAWA, then recipients that are subject to these final regulations must be able to comply with these final regulations as well as the Department's regulations implementing the Clery Act and VAWA. The Department addresses comments about the Clery Act in the "Clery Act" subsection of the "Miscellaneous" section. These final regulations do not conflict with the Clery Act, as amended by VAWA, and even incorporate the definitions of "dating violence," "domestic violence," and "stalking" in VAWA as part of the definition of sexual harassment in § 106.30.

Recipients have been able to navigate the art of complying with numerous Federal regulations promulgated by various executive agencies while also complying with State laws. School and university officials will determine how to comply with the State and Federal legal obligations. The Department will provide technical assistance with respect to the obligations under these Federal regulations.

Changes: None.

Comments: Many commenters contended that there would be negative consequences from conflicts between the NPRM and other Federal and State law. Commenters argued against imposing a one-size-fits-all approach, given the vast diversity among recipients in terms of size, resources, missions, and communities, and urged the Department to give recipients flexibility to tailor their own systems. Commenters expressed concern that the interaction between the NPRM and FERPA, the Clery Act, Title VI, and Title VII may be confusing and unclear.

One commenter generally argued the NPRM would provide narrower protections and preempt many State anti-harassment laws, which would unfairly benefit respondents over complainants. Another commenter stated that the Department is jeopardizing recipients' access to State funding because schools would be in an impossible position of having to comply with both State and Federal law. Commenters emphasized the widespread nature of the NPRM's conflict with State laws across the country including laws in at least ten States, arguing that these conflicts could chill reporting, pose enforcement problems, impose additional cost burdens, and prompt lengthy litigation battles. One commenter asserted that the NPRM is so overly prescriptive that it would be difficult for institutions of higher education to simultaneously comply with it and the State of Washington's Administrative Procedure Act (Washington's APA) which, among other things, requires the presiding officer to be free of bias, prejudice, or other interest in the case, permits representation, contains notice procedures, allows the opportunity to respond and present evidence and argument, permits cross-examination, prohibits *ex parte* communications with the decision-maker, prohibits the investigator from being the presiding officer at the hearing, requires written orders, and permits appeal. Another commenter raised similar concerns about what the State of Washington requires and requested that the

Department clarify these final regulations do not preclude a determination that a recipient's actions constitute discrimination under State civil rights laws.

Discussion: The Department acknowledges that State laws may impose different requirements than these final regulations and asserts that in most circumstances, compliance with both State law and the final regulations is feasible. State laws that have a different definition of sexual harassment or require a recipient's response regardless of where misconduct occurs do not necessarily conflict with the final regulations. As previously explained, § 106.45(b)(3)(i), concerning mandatory dismissals of formal complaints, expressly provides that such a dismissal is only for Title IX purposes and does not preclude action under another provision of the recipient's code of conduct. Accordingly, recipients are free to respond to conduct that these final regulations do not address.

Similarly, the requirements in Washington's APA, as described by the commenter, do not conflict with and may complement these final regulations. The requirements that the commenter describes in Washington's APA actually mirror many of the requirements in these final regulations. For example, the final regulations require the Title IX Coordinator, investigator, and decision-maker to be free from bias and conflicts of interest just as Washington's APA requires the presiding officer to be free of bias, prejudice, or other interest in the case. The final regulations allow the parties to have an advisor (who may be, but is not required to be, an attorney), and Washington's APA permits representation. Both these final regulations and Washington's APA contain notice procedures, allow the opportunity to respond and present evidence and argument, permit cross-examination, prohibit the investigator from also being a decision-maker, and permit appeal.

We seek to provide recipients flexibility to tailor their systems as they see fit where we believe such flexibility is appropriate. These final regulations do not preclude a State from determining whether a recipient's actions constitute discrimination under State civil rights laws. To generally address commenters' questions about preemption and for the reasons explained above, the Department has added § 106.6(h) which provides that to the extent of a conflict between State or local law and Title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law.

In various sections of this preamble, we explain how these final regulations are consistent with FERPA and other Federal statutory provisions.[1689]

Changes: None.

Comments: Some commenters argued the NPRM may exceed the Department's authority under Title IX and the Administrative Procedure Act ("APA"). A few commenters argued the NPRM is inconsistent with Title IX and its legislative purpose. This commenter requested that the Department not move forward with the proposed regulations until it publishes a substantive analysis addressing federalism and conflict of law issues created by it. This commenter also noted that the constitutional authority for Title IX could be either or both the Spending Clause and the Fourteenth Amendment. According to this commenter, the Fourteenth Amendment does not require a recipient to consent to conditions and, thus, reliance on such consent is misplaced to

[1689] *E.g.*, the "Section 106.6(e) FERPA" subsection and the "Section 106.6(f) Title VII and Directed Question 3 (Application to Employees)" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble.

mitigate federalism concerns. However, this commenter cited case law suggesting that preemption and federalism analyses vary depending on which authority the Department is invoking. This commenter urged the Department to prove it has not exceeded its authority in issuing the proposed regulations.

Discussion: Throughout the preamble and specifically in the "Miscellaneous" section (e.g., "Executive Orders and Other Requirements," "Length of Public Comment Period/Requests for Extension," "Conflicts with First Amendment, Constitutional Confirmation, and International Law," "Different Standards for Other Harassment," and "Spending Clause" subsections) the Department has thoroughly explained why it believes the final regulations are consistent with the APA[1690] and other Federal statutes. The Department adhered to the notice-and-comment rulemaking process required under the APA. The Department also already noted that with respect to these final regulations' relationship with State law, the final regulations are not an unfunded mandate that implicate federalism and conflict of law issues, but rather condition Federal financial assistance on compliance with these final regulations. To generally address commenters' questions about preemption and for the reasons explained above, the Department has added § 106.6(h) which provides that to the extent of a conflict between State or local law and Title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law.

The Department agrees that these final regulations could be justified under the Federal government's Fourteenth Amendment authority, in addition to the straightforward Spending Clause authority. The Fourteenth Amendment's Enforcement Clause, in § 5 of the Amendment,

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[1690] 5 U.S.C. 701 *et seq.*

authorizes the Federal government to enforce it by appropriate legislation. That power includes "the authority both to remedy and to deter violation of rights guaranteed [by the Fourteenth Amendment] by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text."[1691] The Supreme Court often has stated that "Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct."[1692] "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress's enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States."[1693] In *Hibbs*, in which the Supreme Court considered whether a male State employee could recover money damages against the State because of its failure to comply with the family-care leave provision of the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2601 *et seq*., the Court upheld the FMLA as a legitimate exercise of Congress's § 5 power to combat unconstitutional sex discrimination, "even though there was no suggestion that the State's leave policy was adopted or applied with a discriminatory purpose *that would render it unconstitutional*" under the Equal Protection Clause.[1694] The Court explained that when the Federal government seeks to remedy or prevent discrimination on the basis of sex "§ 5 authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause" including in the sphere of private discrimination.[1695] After all, the

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[1691] *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000).
[1692] *Nev. Dep't. of Human Resources v. Hibbs*, 538 U.S. 721, 727-728 (2003).
[1693] *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976) (citations and internal quotation marks omitted).
[1694] *Tennessee v. Lane*, 541 U.S. 509, 519-20 (2004) (emphasis added).
[1695] *Id*. at 520.

Fourteenth Amendment's enforcement power is a "broad power indeed."[1696] These final regulations could thus be justified under this power, in addition to the Federal government's Spending Clause powers.[1697] And in all events, these regulations are consistent with the APA, Title IX, and other Federal statutory provisions.

Changes: None.

Comments: A number of commenters asserted that informal resolution under the NPRM would conflict with State law. Commenters argued that the NPRM's conflicts with State law regarding mediation could trigger enforcement problems, cause confusion for recipients and students, impose additional cost burdens, and prompt lengthy litigation.

Discussion: The final regulations allow but do not require recipients to provide an informal resolution process pursuant to § 106.45(b)(9). If State law prohibits informal resolution, then a recipient does not need to offer an informal resolution process. Additionally, § 106.45(b)(9) provides that a recipient may not require the parties to participate in an informal resolution process. The Department believes that § 106.45(b)(9) leaves substantial flexibility with recipients as to whether to adopt informal resolution processes and how to structure and administer such processes, decreasing the likelihood that a recipient's compliance with these final regulations causes conflict with the recipient's compliance with any State law addressing mediations for campus sexual assault.

To generally address commenters' questions about preemption and for the reasons explained above, the Department has added § 106.6(h) which provides that, to the extent of a

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[1696] *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 732 (1982).
[1697] *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 637 (1999); *South Dakota v. Dole*, 483 U.S. 203 (1987).

conflict between State or local law and Title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law.

Changes: None.

Section 106.8(a) Designation of Coordinator

Comments: Several commenters expressed general support for § 106.8(a), noting that it codifies good practices already implemented at many schools, standardizes the importance of the Title IX Coordinator's role, and explicitly clarifies the independent compliance and investigatory responsibilities of the Title IX office. One commenter specifically appreciated the addition of the Title IX Coordinator's e-mail address to the required notification, and another appreciated that this provision requires institutions to specify the Title IX Coordinator's "name or title" because recipients experience high turnover rates in the position of Title IX Coordinator. At least one commenter appreciated that this provision allows the Title IX Coordinator to delegate responsibilities to other staff members including the responsibility for implementing supportive measures.

Some commenters requested clarification that Title IX Coordinators can delegate certain responsibilities or play more of a coordinating role rather than a direct role in certain circumstances. Many of these commenters asserted that the current regulations provide for this interpretation, but that proposed § 106.8(a) did not afford the same flexibility to Title IX Coordinators. For instance, commenters asked whether a Title IX Coordinator's delegated employee can evaluate reports to determine whether they are covered by Title IX, determine which reports require formal proceedings, coordinate responses to all reports, or sign formal complaints on behalf of the Title IX Coordinator. Some commenters asked the Department to

include an express list of nondelegable functions which the Title IX Coordinator must carry out personally.

Some commenters recommended that the Department add language requiring a minimum standard of "at least one full-time, dedicated" employee for recipients with student populations under 10,000, and for recipients with student populations over 10,000 to employ one full-time Title IX Coordinator, at least one full-time investigator, and a full-time administrative assistant to ensure minimum capacity. Several commenters suggested that more than one Title IX Coordinator may be necessary to fulfill all the required functions of the office, further suggesting that the number of Title IX Coordinators or size of the office should be proportionate to the size of the student body. One commenter stated that § 106.8(a) made the Title IX Coordinator more inaccessible and invisible to complainants because it situated the Title IX Coordinator as an administrator at the school district level.

Some commenters suggested that the Department should provide additional financial resources to institutions so that institutions can develop a more efficient and decentralized Title IX office under the direction of the Title IX Coordinator.

Discussion: We appreciate the comments received in support of § 106.8(a). Based on the widespread use by commenters of the term "Title IX Coordinator," the Department revised this provision to specifically label the employee designated under § 106.8(a) as the "Title IX Coordinator," specify that recipients must refer to that person as the "Title IX Coordinator," and we use that label throughout the final regulations. Uniformity in the label by which the person designated in § 106.8(a) is referred will further the Department's interest in ensuring that students in schools, colleges, and universities know that notifying their school's "Title IX Coordinator" triggers their school's legal obligations to respond to sexual harassment under these

final regulations. The final regulations require recipients to identify the designated individual by the official title, "Title IX Coordinator," as well as require recipients to notify students and employees (and others) of the electronic mail address of the Title IX Coordinator, in addition to providing their office address and telephone number, to better ensure that students and employees have accessible options for contacting a recipient's Title IX Coordinator.[1698] We have also revised § 106.8(a) to state that the recipient must not only designate but also "authorize" at least one Title IX Coordinator, to further reinforce that a recipient's Title IX Coordinator (and/or any deputy Title IX Coordinators or other personnel to whom a Title IX Coordinator delegates tasks) must be authorized to coordinate the recipient's obligations under these final regulations. Nothing in the final regulations restricts the tasks that a Title IX Coordinator may delegate to other personnel, but the recipient itself is responsible for ensuring that the recipient's obligations are met, including the responsibilities specifically imposed on the recipient's Title IX Coordinator under these final regulations, and the Department will hold the recipient responsible for meeting all obligations under these final regulations.[1699]

Nothing in the final regulations precludes a recipient from designating multiple Title IX Coordinators, nor from designating "deputy" or "assistant" coordinators to whom a Title IX

[1698] We have also revised § 106.8(a) to expressly provide that every person has clear, accessible reporting channels to the Title IX Coordinator, by stating that any person may report sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sexual harassment), in person, by mail, by telephone, or by e-mail, using the listed contact information for the Title IX Coordinator (or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report), and that a report may be made at any time (including during non-business hours) by using the listed telephone number or e-mail address, or by mail to the listed office address.

[1699] For example, under § 106.44(a) the recipient must respond to sexual harassment promptly in a non-deliberately indifferent manner, and as part of this obligation the recipient's Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.

Coordinator delegates responsibilities, nor is a Title IX Coordinator prevented from working with other administrative offices and personnel within a recipient institution in order to "coordinate" the recipient's efforts to comply with Title IX. Ultimately, the recipient itself is responsible for compliance with obligations under Title IX and these final regulations, and § 106.8(a) requires at least one recipient employee to serve as a Title IX Coordinator. If a recipient enrolls so many students that a single Title IX Coordinator is unable to coordinate the recipient's Title IX compliance then the recipient may need to hire additional personnel, but the Department declines to require that result. The Department's interest is in the recipient's compliance with Title IX obligations, but the Department desires to leave recipients as much flexibility as possible to decide how to achieve compliance so that a recipient's funds and resources are most efficiently allocated to achieve fulfilment of a recipient's Title IX obligations as well as a recipient's educational purpose and mission. Similarly, the Department declines to mandate that recipients with larger student populations employ more Title IX staff or that a Title IX Coordinator must be a full-time or dedicated position. The Department does not wish to prescribe a recipient's administrative or personnel affairs; the Department's interest is in prescribing each recipient's obligations under Title IX. To emphasize that the recipient's Title IX Coordinator must not be designated "in name only" to merely technically comply with this provision, we have revised § 106.8(a) to state that the recipient must designate "and authorize" a Title IX Coordinator to coordinate the recipient's efforts to comply with Title IX.

The Department recognizes that the position of Title IX Coordinator tends to be a high-turnover position, and that this creates challenges for recipients and their educational

communities.[1700] We believe that revisions to § 106.8(a) in these final regulations help ensure that a recipient provides constant access to a Title IX Coordinator, without forcing recipients to divert educational resources to Title IX personnel unless the recipient has determined that the recipient needs additional personnel in order to fulfill the recipient's Title IX obligations.

The Department disagrees that proposed § 106.8(a) modified existing 34 CFR 106.8(a) in any manner that would result in the Title IX Coordinator being less accessible to students because a recipient's Title IX Coordinator may be a single coordinator for an entire school district; the existing regulations, proposed regulations, and final regulations consistently and appropriately recognize that Title IX governs each "recipient"[1701] of Federal financial assistance which "operates an education program or activity,"[1702] not each individual school building. In order to better address the accessibility of a recipient's Title IX Coordinator for all students (as well as employees and others), we have revised § 106.8(a) in these final regulations to expressly provide that any person may use the Title IX Coordinator's contact information (which must include an office address, telephone number, and e-mail address) to report sexual harassment. Therefore, even if the Title IX Coordinator's office location is in an administrative building that is not easily accessible to all students, any person may contact the Title IX Coordinator (in person, by mail, telephone, or e-mail) including in ways that allow reporting during non-business

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[1700] *E.g.*, Sarah Brown, *Life Inside the Title IX Pressure Cooker*, CHRONICLE OF HIGHER EDUCATION (Sept. 5, 2019) ("Nationwide, the administrators who are in charge of dealing with campus sexual assault and harassment are turning over fast. Many colleges have had three, four, or even five different Title IX coordinators in the recent era of heightened enforcement, which began eight years ago. Two-thirds of Title IX coordinators say they've been in their jobs for less than three years, according to a 2018 survey by the Association of Title IX Administrators, or ATIXA, the field's national membership group. One-fifth have held their positions for less than a year."); Jacquelyn D. Wiersma-Mosley & James DiLoreto, *The Role of Title IX Coordinators on College and University Campuses*, 8 BEHAVIORAL. SCI. 4 (2018) (finding that most Title IX Coordinators have fewer than three years of experience, and approximately two-thirds are employed in positions in addition to serving as the Title IX Coordinator).
[1701] 34 CFR 106.2(i) (defining "recipient").
[1702] 34 CFR 106.2(i) (defining "recipient"); 34 CFR 106.2(h) (defining "program or activity").

hours (i.e., by mail, telephone, or e-mail).[1703] Furthermore, if a recipient designates or authorizes employees to serve as deputy or assistant Title IX Coordinators (perhaps with the goal of having Title IX office personnel located on various satellite campuses, or in individual school buildings, to make Title IX personnel more accessible to students), then such employees are officials with authority to institute corrective measures on behalf of the recipient[1704] and notice to such employees conveys actual knowledge to the recipient, requiring the recipient's prompt response under § 106.44(a).

If the Title IX Coordinator is located in an administrative office or building that restricts, or impliedly restricts, access only to certain students (e.g., a women's center), such a location could violate § 106.8(a) by not "authorizing" a Title IX Coordinator to comply with all the duties required of a Title IX Coordinator under these final regulations (for example, a Title IX Coordinator must intake reports and formal complaints of sexual harassment from any complainant regardless of the complainant's sex).

These final regulations are focused on clarifying recipients' legal obligations under Title IX and do not address grants or funding that a recipient might use to hire Title IX personnel.

We have revised § 106.8, for clarity and ease of reference, by describing the group of individuals and entities entitled to receive notice of the recipient's non-discrimination policy, and

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[1703] We have added § 106.71 prohibiting retaliation against any individual for exercising rights under Title IX, and we emphasize that *any person* has the right to report sexual harassment to the recipient's Title IX Coordinator. Thus, for example, a recipient may not intimidate, threaten, coerce, or discriminate against an employee who reports sexual harassment allegations (whether as the alleged victim or as a third party) to the Title IX Coordinator, even if the recipient's code of conduct or employment policies state that such an employee is not permitted to report directly to the Title IX Coordinator (e.g., states that such an employee must only report "up" the employee's chain of command.)

[1704] Section 106.30 (defining "actual knowledge" to include notice to any official of the recipient who has authority to institute corrective measures on behalf of the recipient).

notice of the recipient's Title IX Coordinator's contact information, in paragraph (a) rather than (as in the NPRM) in § 106.8(b)(1); thus, in provisions such as § 106.8(b)(2) reference is made to "persons entitled to a notification under paragraph (a)" rather than the NPRM's reference to "persons entitled to a notification under paragraph (b)(1)." We have further revised § 106.8(a) by requiring reference to the recipient's employee(s) designated to coordinate the recipient's Title IX responsibilities as the recipient's "Title IX Coordinator," and references throughout § 106.8 (and throughout the entirety of these final regulations), including § 106.8(b)(1), now reference the "Title IX Coordinator" instead of "the employee designated pursuant to paragraph (a)." We have further revised § 106.8(b)(2)(i) to require the recipient to prominently display the contact information required to be listed for the Title IX Coordinator under paragraph (a) of this section, and the notice of non-discrimination described in paragraph (b)(1) of this section, on the recipient's website, if any, and in each handbook or catalog that the recipient makes available to persons entitled to a notification under § 106.8(a).

Changes: We have revised §106.8(a) to clarify that the individual designated by the recipient is referred to as the "Title IX Coordinator" and added that the Title IX Coordinator must not only be designated but also "authorized" to coordinate the recipient's Title IX obligations. We have moved the list of persons whom a recipient must notify of the recipient's non-discrimination policy, and of the Title IX Coordinator's contact information, to § 106.8(a) rather than listing those persons in § 106.8(b)(1). We have revised § 106.8(a) to state that any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be victimized by sex discrimination or sexual harassment) by using the listed contact information for the Title IX Coordinator, and stating that such a report may be made at any time (including during non-business hours) by using the telephone number or e-mail address,

or by mail to the office address, listed for the Title IX Coordinator. We have revised § 106.8(b)(2)(i) to require the recipient to prominently display on the recipient's website the Title IX Coordinator's contact information required to be listed under § 106.8(a), as well as the recipient's notice of non-discrimination required under § 106.8(b)(1).

Section 106.8(b) Dissemination of Policy

Removal of 34 CFR 106.9(c)

Comments: Some commenters discussed the removal of 34 CFR 106.9 and the way the Department incorporated, but modified, provisions found in 34 CFR 106.9 into the final regulations at § 106.8(b). One commenter stated that for elementary and secondary schools, which are not subject to subpart C of the current part 106 (admissions and recruitment) and which do not solicit applicants for admission, proposed § 106.8(b) created confusion as to how to implement such a provision. The commenter believed that notice on the recipient's website would be sufficient notice to stakeholders within the recipient's community.

Some commenters objected to removing the requirement in 34 CFR 106.9 that recipients take specific, continuing steps to notify specified people of the recipient's non-discrimination policy, and removal of the requirement that recipients distribute publications without discrimination on the basis of sex. Some commenters noted the Department expected that the availability of websites would address the removal of "taking continuing steps" but these commenters were not convinced that posting on websites achieves the same purpose. Other commenters asserted that changing the language around publications is not sufficient to ensure, as 34 CFR 106.9(c) did, that publications will be distributed without discrimination on the basis of sex. One commenter asserted that for example, under 34 CFR 106.9(c) a school district could

not send school catalogs to parents of girls but not parents who have only boys, yet this would be allowed under the NPRM.

At least one commenter stated that the Department failed to mention or justify the removal of the requirement to train recruiters on its non-discrimination policy, which the commenter argued is an important requirement to ensure that such a policy is not diluted in the field. One commenter generally expressed that 34 CFR 106.9 contains important mechanisms to prevent discrimination based on sex and their removal only makes Title IX protections weaker.

Discussion: The Department appreciates commenters' support for, and other commenters' concerns about, removing 34 CFR 106.9 and incorporation of many of its provisions into § 106.8(b). As discussed further below, the Department believes that § 106.8(b) now more clearly and reasonably describes recipients' obligations to notify its educational community of a recipient's obligation not to engage in sex discrimination under Title IX. The Department appreciates commenters' concerns that requiring the recipient's non-discrimination policy to be posted on a recipient's website is not the same as requiring notice to each of the categories of persons and organizations listed under now-removed 34 CFR 106.9(a)(1).[1705] However, the Department believes that recipients and their educational stakeholders should benefit from the technological developments (such as wide use of websites) that have emerged in the decades since promulgation of Title IX regulations in 1975, to more efficiently and cost-effectively communicate important notices, including the required notice of non-discrimination. The

[1705] Now-removed 34 CFR 106.9(a)(1) refers to the following group of persons: applicants for admission and employment, students and parents of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient. Section § 106.8(a) alters this list by removing "sources of referral of applicants for admission and employment" and adding "legal guardians" of elementary and secondary school students.

Department believes that § 106.8(b)(1) now appropriately requires recipients to notify an appropriately broad list of persons and organizations of, as well as to post on its website and in handbooks and catalogs (in § 106.8(b)(2)), the recipient's non-discrimination policy (as well as the Title IX Coordinator's contact information). The Department believes that these requirements reasonably reduce the burden on recipients to take "specific and continuing steps" to notify relevant persons of the recipient's non-discrimination policy, without diminishing the goal of ensuring that a recipient's educational community understands that the recipient has a policy of non-discrimination in accordance with Title IX (as well as knowing the contact information for the Title IX Coordinator so that any person may report sex discrimination, including sexual harassment).

The Department understands commenters' concerns that 34 CFR 106.9(c) specifically prohibited recipients from distributing publications on the basis of sex. Although similar language does not appear in § 106.8(b), the Department believes that such language is not necessary because if a commenter's example did occur (e.g., a school sent a school catalog only to male students but not to female students), Title IX already prohibits different treatment on the basis of sex.

The Department understands a commenter's concern that removing reference to "sources of referral" (language that appears in 34 CFR 106.9(a)) from the group of persons and entities who must be notified of a recipient's non-discrimination policy could dilute the understanding of a recipient's non-discrimination policy "in the field." We disagree, however, that recipients should continue to be required to send separate notice to all persons who act as recruiters for a recipient, because such persons are not always easily identifiable, and will have the benefit of the publicly available notice that § 106.8(b)(2) requires to be prominently displayed on each

recipient's website. Additionally, 34 CFR 106.51(a)(3) continues to prohibit a recipient from entering into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination, including "relationships with employment and referral agencies" such that Title IX regulations continue to clearly prohibit a recipient from indirectly discriminating in employment by, for instance, working with a referral source that discriminates on the basis of sex.[1706] Similarly, 34 CFR 106.21(a) continues to prohibit recipients from discriminating on the basis of sex with respect to admissions, and the Department will continue to hold recipients responsible for sex discriminatory admissions policies and practices regardless of whether any individual or entity recruits applicants on the recipient's behalf.

Changes: To more clearly acknowledge that the reference to "employment" in § 106.8(b)(1) is unrelated to the provision's reference to "subpart C of this part" (which applies to admissions), the word "employment" is moved to follow reference to "subpart C" instead of appearing as "admissions and employment" preceding that reference. The list of persons whom a recipient must notify of the recipient's non-discrimination policy has been moved from § 106.8(b)(1) to § 106.8(a) so that § 106.8(b)(1) now references "persons entitled to a notification under paragraph (a)."

List of Publications

Comments: Some commenters discussed the way that § 106.8(b)(2)(i) changes the provision in removed 34 CFR 106.9(b)(1) regarding the list of types of publications and other materials where recipients must publish the recipient's non-discrimination policy required under §

[1706] *See also* § 106.53(a) ("A recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees.").

106.8(b)(1). One commenter supported proposed § 106.8(b)(2)(i), stating that the provision streamlines the list of types of publications and asserted that requiring the recipient's non-discrimination policy to be published on the recipient's website, and in handbooks and catalogs, is more consistent with the ways institutions of higher education disseminate important information to students and employees. The commenter stated that the Department previously issued guidance on notices of non-discrimination in 2010 and recommended that if the proposed rules are adopted, the Department should clarify any parts of the sample notice provided in the 2010 guidance that have changed as a result.

Other commenters opposed these changes. One commenter stated that the Department failed to provide a reason for why the list of publications needed to be streamlined or why particular materials were removed from the list in 34 CFR 106.9(b) (e.g., application forms).[1707] The commenter also argued that the Department failed to explain why it added handbooks to the list and how that item overlaps or not with items removed from that list, such as announcements and bulletins. The commenter stated that if the scope of handbooks is the same as, for instance, announcements and bulletins, then there is no reason for this change and if it is different than the practical effect will be to increase burden on recipients because the prior list of publications and materials remains in the Title IX regulations of 25 other Federal agencies.

Discussion: The Department appreciates commenters' support for, and concerns regarding, § 106.8(b). The Department streamlined the list of types of publications that must contain the

[1707] Now-removed 34 CFR 106.9(b)(1) listed the following types of publications in which a recipient needed to include the recipient's non-discrimination policy: announcement, bulletin, catalog, or application form. Section 106.8(b)(1)(i) removes reference to announcements, bulletins, and application forms, retains reference to catalogs, adds handbooks, and § 106.8(b)(2)(i) adds a requirement to post the non-discrimination policy on the recipient's website, if any.

recipient's non-discrimination policy (and, under the final regulations, must also contain the Title IX Coordinator's contact information) because the Department believes that the items listed in 34 CFR 106.9(b) that do not appear in § 106.8(b) were superfluous; for example, applicants for admission are required to receive notification of the recipient's non-discrimination policy, so including "application forms" as a listed type of publication is unnecessary. As to "announcements" and "bulletins," such items lack a clear definition, and as described below, the Department believes that the streamlined list of types of publications, combined with the new requirement to post on the recipient's website, ensures that the recipient's educational community is aware of the recipient's non-discrimination policy (and Title IX Coordinator's contact information). The Department added "handbooks" and retained "catalogs" on the list to reflect the reality of what types of publications schools most frequently use that ought to contain the recipient's non-discrimination policy (and Title IX Coordinator's contact information). In addition, § 106.8(b)(2) requires that the non-discrimination policy must be posted prominently on the recipient's website. The Department believes this list of types of publications is broad enough to achieve the purpose of ensuring that relevant individuals and organizations (i.e., the list of persons entitled to notice under § 106.8(a)) see the recipient's non-discrimination policy on pertinent recipient materials without also retaining reference to "announcements," "bulletins" and "application forms" from now-removed 34 CFR 106.9(b)(1). The Department does not agree with commenters who asserted that the Department is increasing the burden on recipients because the list of publications in removed 34 CFR 106.9(b)(1) (i.e., announcements, bulletins, catalogs, application forms) remains in the Title IX regulations of 25 other Federal agencies. The Department believes that these final regulations appropriately update relevant Title IX regulations enforced by the Department regardless of whether other agencies also adopt the same

regulations, and nothing in § 106.8 makes it difficult for a recipient to comply with other agency regulations.

The Department appreciates a commenter's request to clarify whether § 106.8 changes anything in the sample notice of non-discrimination contained in the fact sheet on non-discrimination policies published by the Department in 2010.[1708] These final regulations, including § 106.8, apply and control over any statements contained in Department guidance, and recipients should be aware that the sample notice contained in that 2010 fact sheet does not require reference to a "Title IX Coordinator" or an e-mail address listed for a Title IX Coordinator, while § 106.8 does require that information.

Changes: We have revised § 106.8(b)(2)(i) to require recipients to publish on their websites, if any, the contact information for their Title IX Coordinator required under § 106.8(a).

Professional Organizations

Comments: One commenter objected to the requirement in § 106.8(b)(1) to notify professional organizations, asserting that such organizations do not have much bearing at the elementary and secondary school level. The commenter further asserted that the proposed rules did not clarify how to identify appropriate professional organizations, nor whether the organization has a right of action or standing that warrants the need to provide it with separate notice. Finally, the

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[1708] U.S. Dep't. of Education, Office for Civil Rights, Fact Sheet, "Notice of Non-discrimination" (August 2010), https://www2.ed.gov/about/offices/list/ocr/docs/nondisc.pdf. The 2001 Guidance at 20 encourages recipients to ensure that the school community has adequate notice of the school's non-discrimination policy, and of the procedures for filing complaints of sex discrimination, by having copies available at various locations throughout the school or campus, including a summary of the procedures in handbooks and catalogs sent to students and parents, and identifying personnel who can explain how the procedures work. These final regulations at § 106.8(b)-(c) similarly require notice of the recipient's non-discrimination policy, and notice of the recipient's grievance procedures for complaints of sex discrimination, and grievance process for formal complaints of sexual harassment, to members of the recipient's educational community, as well as the contact information for the Title IX Coordinator.

commenter stated that the proposed rules did not clarify whether publishing the recipient's non-discrimination policy on the recipient's website as required under § 106.8(b)(2)(i) also fulfils the requirement under § 106.8(b)(1) that the recipient "must notify" the group of persons listed in that provision, which would include any applicable professional organizations.

Discussion: The Department does not agree that the reference to "professional organizations" has little or no bearing in elementary and secondary schools, because the phrase appears in § 106.8(b)(1) as part of describing "all unions or professional organizations holding collective bargaining agreements or professional agreements with the recipient" and the Department believes that the persons and organizations in this description do have need to receive notice of a recipient's non-discrimination policy. Whether an organization describes itself as a "union" or uses a different label, the term "or professional organizations holding collective bargaining agreements or professional agreements" encompasses the reality that many elementary and secondary schools have employees who are unionized or otherwise collectively bargain or hold professional agreements with the recipient. Such unions or similar organizations should receive notice that the recipient does not discriminate under Title IX (and should receive notice of the recipient's Title IX Coordinator's contact information), both for the protection of union or similar organization members as employees of the recipient with rights under Title IX, and because such employees may have duties and responsibilities flowing from a recipient's Title IX obligations. For these reasons, the Department disagrees that "professional organizations" should be removed from the list of persons whom a recipient must notify of the recipient's non-discrimination policy (and of the Title IX Coordinator's contact information).

The Department appreciates the opportunity to clarify that posting the recipient's non-discrimination policy (and the Title IX Coordinator's contact information) prominently on a

recipient's website (required under § 106.8(b)(2)(i)) does *not* satisfy the recipient's obligation to "notify" the persons listed in § 106.8(a) (i.e., applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, unions and similar organizations) of the non-discrimination policy and Title IX Coordinator's contact information. These final regulations do not prescribe a particular form or method by which recipients "must notify" the foregoing group of persons and entities, in recognition that existing regulations at 34 CFR 106.9(a)(2), which became effective in 1975 and constituted the Department's first Title IX implementing regulations, were concerned with prescribing the form of "initial" notice (within 90 days after the effective date of the 1975 regulations) of a recipient's non-discrimination policy (and thus prescribed that notice could occur via publication in local newspapers, alumni or other recipient-operated newspapers or newsletters, and other written communications to students and employees). Most recipients have already complied with the regulatory requirement to send an "initial" notice within 90 days of the effective date of the 1975 regulations. As to every recipient, regardless of when the recipient first becomes subject to Title IX, the recipient under these final regulations "must notify" the list of persons and entities in § 106.8(a) by some effective method separate and apart from also complying with § 106.8(b)(2)(i) by posting required information on the recipient's website.

Changes: None.

Parents of Elementary and Secondary School Students

Comments: Commenters expressed concerns about the removal of parents of elementary and secondary school students from the list in proposed § 106.8(b)(1)[1709] of persons to whom recipients must send notice of their non-discrimination policy (and Title IX Coordinator's contact information). Commenters asserted that the Department did not provide a reason for why the list of individuals and entities needs to be streamlined, and argued that streamlining the list will not reduce the burden on school districts because the requirement to notify parents of elementary and secondary school students remains in the Title IX regulations of 25 other Federal agencies. Commenters expressed concern that eliminating parents of elementary and secondary school students from this list would lead to underreporting of sexual harassment because if parents are not informed of the school's non-discrimination policy, parents will be deprived of the tools they need to protect their children's rights under Title IX.

One commenter was concerned with omitting parents of elementary and secondary school students from the list in proposed § 106.8(b)(1) in light of the fact that per the proposed rules, elementary and secondary school students could be subject to cross-examination and their parents would not have knowledge of the procedures involved in reporting sexual harassment. Commenters argued that most elementary and secondary school students are minors and rely on their parents in making decisions related to school. Commenters expressed concern that by removing parents of elementary and secondary school students from the list, the Department would be placing a large burden on minor students to be aware of a complex policy regarding

[1709] As discussed previously, the list of persons whom a recipient "must notify" of the recipient's non-discrimination policy, and of the Title IX Coordinator's contact information, has been moved in the final regulations to § 106.8(a) instead of in proposed § 106.8(b)(1).

sex discrimination. Commenters argued that the lack of notice to parents limits the potential for legal remedies because the proposed rules require actual knowledge of sexual harassment via notice to the Title IX Coordinator or an official with the authority to institute corrective measures on behalf of the recipient, and young students cannot be expected to know how to contact those officials. Commenters asserted that since the parents of elementary and secondary school students would no longer be required to receive notice of the non-discrimination policy, children would have the task of providing notice to these individuals and would have to understand that what they have experienced is sexual harassment and feel comfortable sharing the experience with a stranger.

Discussion: The Department is persuaded by commenters' arguments that streamlining the list of persons who must be notified of the recipient's non-discrimination policy (described in § 106.8(b)(1)) should not include eliminating "parents of elementary and secondary school students" from that list.[1710] The Department is further persuaded by commenters' concerns that neglecting to include parents on this list places young students at unnecessary risk of not knowing their Title IX rights, and not having an effective means of asserting their rights because their parent has not been notified of the recipient's non-discrimination policy (and of the Title IX Coordinator's contact information). Therefore, the final regulations not only restore "parents" to this list, but add "parents *and legal guardians*" of elementary and secondary school students (emphasis added), to ensure that a responsible adult with the ability to exercise rights on behalf of elementary and secondary school students receives notice of the recipient's non-

[1710] As noted above, we have revised § 106.8 to move this list of persons whom a recipient "must notify" of the recipient's non-discrimination policy and of the recipient's Title IX Coordinator's contact information to § 106.8(a), such that § 106.8(b)(1) now refers back to the "persons entitled to a notification" listed in § 106.8(a).

discrimination policy as well as notice of the recipient's Title IX Coordinator's contact information. We have also added § 106.6(g) to these final regulations, to expressly acknowledge the legal rights of parents and guardians to act on behalf of individuals with respect to exercise of rights under Title IX, including but not limited to filing a formal complaint of sexual harassment.

Changes: The final regulations revise § 106.8(a) to add to the list of persons receiving notice of the recipient's non-discrimination policy, and notice of the recipient's Title IX Coordinator's contact information, "parents or legal guardians of elementary and secondary school students." We have also added § 106.6(g) to these final regulations, to expressly acknowledge the legal rights of parents and guardians to act on behalf of individuals with respect to exercise of rights under Title IX.

Subjectivity in Publications' Implication of Discrimination

Comments: Several commenters discussed the change in language from removed 34 CFR 106.9(b)(2) to § 106.8(b)(2)(ii).[1711] One commenter expressed support for the change in language. The commenter stated that 34 CFR 106.9 is not sufficiently detailed to allow a school to know if a publication meets the Department's standards and may lead to inconsistency in enforcement across OCR's field offices. Some commenters opposed the change and asserted that the Department's rationale for the change in language was to remove subjective determinations so that the requirement would be clearer for those enforcing it and for recipients seeking to comply with it but did not believe more clarity was needed. Some of these commenters asserted

[1711] 34 CFR 106.9(b)(2) ("A recipient shall not use or distribute a publication of the type described in this paragraph which suggests, by text or illustration, that such recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by this part."); *cf.* § 106.8(b)(2)(ii) ("A recipient must not use or distribute a publication stating that the recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by title IX or this part.").

that the Department had yet to respond to a commenter's Freedom of Information Act (FOIA) request for records about the subjectivity or lack of clarity in 34 CFR 106.9(b)(2) and argued that once the Department responds to the FOIA request the Department should reopen the public comment period to allow for additional evidence and arguments. Some commenters also contended that the elimination of the word "illustration" from 34 CFR 106.9(b)(2) is contrary to the Title IX regulations of 25 other Federal agencies (many of whom fund the same recipients as the Department) and is in tension with regulations issued by Federal agencies under other statutes prohibiting sex discrimination, which do extend to non-textual components of communications. Commenters argued that there is no indication in the NPRM or otherwise that any of these agencies have had difficulty enforcing such regulations, or that covered entities have sought greater clarity because such standards are too subjective.

Discussion: The Department appreciates commenters' arguments that 34 CFR 106.9(b)(2)'s phrasing that a recipient cannot use or distribute any publication that "suggests, by text or illustration" that the recipient treats people differently based on sex is superior to the phrasing in § 106.8(b)(2)(ii) that a recipient must not use or distribute a publication "stating that the recipient" treats people differently based on sex. The Department believes, however, that requiring recipients to (a) have a non-discrimination policy, (b) notify relevant persons and entities of that policy, and (c) post that policy on the recipient's website and in handbooks and catalogs, sufficiently ensures that a wide pool of people affiliated with the recipient, and the general public, understand a recipient's obligation to not discriminate based on sex.[1712] The

[1712] We have revised § 106.8(b)(2)(ii) to refer to "title IX or this part" rather than simply "this part" to acknowledge that Title IX, 20 U.S.C. 1681 *et seq.* contains exemptions and exceptions to Title IX's non-discrimination mandate, not all of which are reflected expressly in the Department's implementing regulations.

Department does not believe that recipients' graphic or pictorial illustrations that appear on a recipient's various publications (e.g., pictures of children in a classroom in a recipient's catalog, or photos of students in caps and gowns on a recipient's website) should be scrutinized by the Department for the purpose of deciding whether by virtue of such graphics, photos, or illustrations the recipient is "suggesting" that the recipient discriminates in violation of the recipient's clearly stated policy that the recipient does *not* discriminate. Rather, the Department believes that recipients' publications should take care not to "state" different treatment based on sex in contravention of the recipient's required non-discrimination policy.

The sufficiency of the Department's response to any individual FOIA request is beyond the scope of this rulemaking. Further, the Department does not believe that evidence of specific instances in which a recipient or the Department actually found the "suggests, by text or illustration" language in 34 CFR 106.9(b)(2) to be confusing or unfairly subjective is necessary in order to justify the Department's reconsideration of this language and the Department's conclusion that the better policy is to evaluate "statements" made in recipient's publications rather than "suggestions" made via illustrations.

The Department acknowledges that § 106.8(b)(2)(ii) uses different language than the Title IX regulations of other Federal agencies. The Department believes that these final regulations appropriately update the Title IX regulations enforced by the Department, regardless of whether other agencies also adopt the same language in each provision, and nothing in § 106.8 creates a conflict with, or makes it difficult for a recipient to comply with, other agencies' regulations.

Changes: None.

Judicial Requirements for Sex Discrimination

Comments: One commenter stated that for more than 30 years, courts and agencies enforcing Title IX have applied the language in 34 CFR 106.9(b)(2) to address sex stereotyping without apparent difficulty and asserted that not including in § 106.8(b)(2)(ii) the language from 34 CFR 106.9(b)(2) regarding a publication that "suggests, by text or illustration" different treatment on the basis of sex (and replacing that language with language in § 106.8(b)(2)(ii) referencing a publication "stating" different treatment on the basis of sex) runs contrary to clearly established Supreme Court precedent that explicitly recognizes the right to be protected from discrimination and harassment based on sex, including sex stereotyping. This commenter further asserted that for the same reason, § 106.8 is fundamentally inconsistent with the plain language of the Title IX statute (20 U.S.C. 1681) because the Supreme Court has held that a school can violate Title IX where a student is denied access to educational benefits and opportunities on the basis of sex, even in the absence of a facially discriminatory policy. This commenter also contended that § 106.8 is inconsistent with the Title IX statute and applicable case law because the language in § 106.8 prohibits explicit intentional discrimination yet allows implicit discrimination, which can deny students a fair and equal education. In support of this, the commenter stated that courts have consistently recognized and upheld Title IX regulations that prohibit policies found to have a discriminatory effect on one sex.

Discussion: The Department does not believe that the reference in § 106.8(b)(2)(ii) to a recipient's publication as "stating" that the recipient does not treat people differently based on sex instead of a publication that "suggests, by text or illustration" that a recipient treats people differently based on sex, constitutes rejection or modification of the way that Federal courts have applied sex stereotyping as a theory of sex discrimination. Nothing in the language of §

106.8(b)(2)(ii) restricts or changes the Department's ability to evaluate a recipient's publication for statements of different treatment on the basis of sex, including on a theory of sex stereotyping. Whether a publication "states" different treatment on the basis of sex, including based on a theory of sex stereotyping, is an inquiry distinct from whether the publication might be viewed as "suggesting" or implying different treatment on the basis of sex, including based on a theory of sex stereotyping. For reasons explained above, the Department does not believe it is reasonable or useful for the Department to scrutinize every graphic, picture, and illustration in a recipient's publications to discern whether such illustrations suggest, or imply, different treatment that is not intended, not applied, and not reasonably perceived as such.

Changes: None.

Implicit Forms of Sex Discrimination

Comments: A number of commenters offered examples of ways schools could suggest that they discriminate on the basis of sex without explicitly stating it, to explain commenters' concerns regarding the proposed rules' replacement of language from 34 CFR 106.9(b)(2) with the language in § 106.8(b)(2)(ii). One commenter argued that the Department provided no statistical or other evidence to show that the rationale for the provision has changed, or that sex stereotyping no longer needs to be remedied. The commenter contended that published policies and materials of a school can be susceptible to suggestions of sex stereotyping even where the publications do not "state" discriminatory practices. The commenter argued that both male and female students continue to be subjected to sex stereotyping in the forms of visual images, statements, and conduct that limits or denies their access to career and technical education paths based on sex. Commenters asserted that male students are discouraged from engaging in dance or theater because these occupations are not sufficiently "masculine," and female students are

discouraged from participating in science or engineering based on stereotypical conceptions of a woman's ability to do math and science. One commenter asserted that it is rare for an entity to directly state that it discriminates and that there are many other ways a discriminatory message can come across; for example, a brochure used to recruit applicants to a nursing school should not contain 40 photos of female students and no photos of male students.

Another commenter expressed concern that there are numerous symbols that get a point across as well as, if not better than, actually stating something (e.g., burning a cross on one's lawn). One commenter asserted that overt racism and sexism are less common in the modern era and that statements hinting at a policy of sex discrimination are used in lieu of explicit statements. The commenter asserted that for example, instead of a recipient stating that it reserves Advanced Placement classes for college-bound men because a woman's place is in the home, the recipient might state "we promote traditional gender roles and encourage women to take appropriate coursework to prepare for those roles." The commenter argued that while both statements have the same message and refer to a school's pattern of violating Title IX by forbidding women from taking the same classes as men, only one is explicit enough to contravene the proposed regulations. One commenter stated that while the commenter appreciated the Department's efforts to instill objectivity into § 106.8(b)(2)(ii), the commenter was concerned that the provision would allow schools to send discriminatory messages and then hide behind the fact that those messages did not explicitly state the schools were discriminating on the basis of sex. The commenter asserted that for example, a school may post a sign relating to sexual misconduct which includes images of a male student and the statement "don't be that guy," which suggests that the school thinks only men commit sexual assault even though the school may state that it has a policy of non-discrimination. The commenter suggested that the

Department use an objective standard that also prohibits non-textual indications of sex discrimination.

Some commenters stated that the only example of the Department's application of 34 CFR 106.9(b)(2) that they could locate was a case in which OCR determined that a school handbook describing a club as "open to all boys" violated 34 CFR 106.9(b)(2), even though the language did not state the club was "not open to all girls" because the description indicated that the club was intended for students of a particular sex. These commenters expressed concern that proposed § 106.8(b)(2)(ii) could overrule this decision, which would enable recipients to steer students into programs and activities based on sex.

Discussion: For reasons described above, the Department does not believe it is appropriate to scrutinize the graphics, photos, and illustrations chosen by a recipient in its publications in order to determine whether a recipient's publication "suggests" different treatment based on sex. The Department disagrees with the commenter who argued that a recipient should not be allowed to use a picture on a nursing school brochure depicting a group of women, without additional context about the brochure asserting that men were treated differently in such a nursing program. The Department does not believe that examining illustrations used in a recipient's publications yields a reasonable, fair, or accurate assessment of whether a recipient engages in sex discrimination, and does not believe that expecting a proportionality requirement in the illustrative, graphic, and photographic depictions of all the kinds of students to whom a recipient's programs are available bears a reasonable relation to whether the recipient treats students or employees differently on the basis of sex contrary to the recipient's policy of non-discrimination. To the extent that a commenter accurately describes an OCR enforcement action as concluding that a recipient's publication violated 34 CFR 106.9 because the publication

described a program as "open to all boys," such a result could also follow from application of § 106.8 because the publication could be found to "state" different treatment on the basis of sex. Thus, the enforcement action described by the commenter may not reach a different result under the final regulations. Similarly, a commenter's example of a recipient publication showing a picture of a male with text stating "Don't be that guy" and referring to sexual assault prevention could be evaluated under § 106.8 as to whether the publication states different treatment on the basis of sex, without using the language "suggests, by text or illustration" used in 34 CFR 106.9.

Changes: None.

Analogous Provisions in Other Laws

Comments: Some commenters asserted that proposed § 106.8(b)(2)(ii) is not aligned with analogous provisions that Congress has enacted in laws prohibiting sex discrimination to address the problem of entities attempting to exclude a protected group by indicating they are not welcome; commenters referred to, for example, Title VII and the Fair Housing Act which prohibit notices, statements, or advertisements that indicate preference, limitation, or discrimination. The commenters argued that the word "indicate" used in these statutes is much closer to the word "suggest" in 34 CFR 106.9(b)(2) and asserted that it is unclear why the Department would want to create a regime where a recipient could not indicate that it did not hire or rent to women, but could suggest that it did not admit women to its education program.

Discussion: The Department acknowledges commenters' references to non-Title IX statutes that use words like "indicate" to prohibit discrimination on prescribed bases. However, for the reasons described above, the Department believes that under Title IX, prohibiting recipients from using publications "stating" that the recipient discriminates under Title IX sufficiently advises recipients not to make such statements in publications, without unnecessarily scrutinizing

recipients' publications' pictures, graphics, and illustrations for a "suggestion" of discrimination where none is actually practiced by the recipient, and where statements in a publication do not convey different treatment on the basis of sex. Section 106.8(b)(2)(ii) allows the Department to analyze the context of such a publication and require a recipient to change such statements as necessary to promote the purposes of Title IX.

Changes: None.

Suggested Modifications

Comments: One commenter suggested that the Department require a recipient's non-discrimination policy to be published in multiple locations on the website where appropriate, including for example, the recipient's human resources page and admissions page. Another commenter suggested that the Department require recipients to post all of a recipient's Title IX policies and procedures on their website in one easily accessible PDF document and located at a single website link. One commenter stated that the Department did not provide an adequate definition of the characteristics of display that would qualify as "prominent" and recommended that the Department clarify the definition of "prominent display" as that phrase is used in § 106.8(b)(2)(i). The commenter also recommended that the Department reiterate Federal standards regarding translation of materials into languages other than English.

One commenter urged the Department to require recipients that have identified conflicts between the application of Title IX and the religious tenets of religious organizations that controls such recipients to include such information in their non-discrimination policy. The commenter asserted that requiring this information would promote consumer choice and is consistent with all other information that Federal law requires a school to disclose, particularly in higher education, and would enable a student to make a knowing and voluntary choice about

whether to attend the school. The commenter also argued that requiring recipients to disclose inapplicability of Title IX to some or all of their programs in their non-discrimination policy should not be limited to religious institutions, and that it should also apply, for example, to an educational institution that receives Federal funds and believes that it is exempt from Title IX because it is training people for the merchant marines, or to a voluntary youth services organization or social fraternity or sorority whose membership practices are not subject to Title IX.

One commenter requested clarification regarding the language in § 106.8(b)(2)(ii) that recipients must not use publications stating that they treat applicants, students, or employees differently "on the basis of sex" except as such treatment is permitted "by this part." One commenter asked whether an educational institution within the scope of § 106.12(a) is required to (a) notify applicants, students, employees, and others that it does not discriminate on the basis of sex, even though that is not true, or (b) notify applicants, students, employees, and others that it does not discriminate on the basis of sex, except in circumstances identified in that notification that are permissible because of § 106.12(a).

Discussion: The Department appreciates commenters' suggestions for modifications to the way notice and publication of a recipient's non-discrimination policy is given in § 106.8. The Department notes that nothing in the final regulations prevents a recipient from choosing to adopt commenters' suggestions, for example that the policy is placed on multiple, specific pages of the recipient's website; ensuring the policy appears as a PDF linked document on the website; and that the notice appears in multiple languages. However, the Department believes that § 106.8 sets forth reasonable, enforceable requirements that achieve the purpose of ensuring that relevant persons and organizations know the recipient's non-discrimination policy, without prescribing

how the recipient must organize its website. There is no exemption for a recipient's non-discrimination policy required under § 106.8, from laws, regulations, Federal standards, and recipient policies regarding translation of materials and information into languages other than English.

The Department does not believe that recipients with religious or other exemptions to Title IX are making false representations by complying with § 106.8, because (a) a recipient's non-discrimination policy must state that the requirement not to discriminate extends to admission "unless subpart C of this part does not apply" and (b) the final regulations add "by title IX or this part" instead of just "by this part" in § 106.8(b)(2)(ii). These qualifiers encompass the reality that some recipients are exempt from Title IX in whole or in part due to the various statutory and regulatory exemptions, including the religious exemption whereby a recipient is exempt from Title IX to the extent that application of Title IX is inconsistent with a religious tenet of a religious organization that controls the recipient. Moreover, nothing in the final regulations precludes a recipient from stating on its website, in publications, and elsewhere that the recipient has a particular statutory or regulatory exemption under Title IX. Further, under § 106.8(b)(1) any person can inquire about application of Title IX to the recipient by referring inquiries to the recipient's Title IX Coordinator, the Assistant Secretary, or both.

Changes: The final regulations use the phrase "permitted by title IX or this part" instead of "permitted by this part" to more comprehensively reference Title IX exemptions contained in the Title IX statute, as well those exemptions contained in Title IX regulations.

Section 106.8(c) Adoption and Publication of Grievance Procedures

Comments: Some commenters expressed support for § 106.8(c), asserting that it would bring clarity to the regulatory requirement that formal complaints of sexual harassment must use "prompt and equitable" grievance procedures.

One commenter expressed concern that the proposed rules did not address "totalitarian" reporting methods such as third-party reporting, bystander intervention, and posting fliers all over campus that encourage students to make reporting a habit.

Discussion: The Department appreciates commenters' support for the proposed rules' intention in § 106.8(c) to clarify that recipients must apply prompt and equitable grievance procedures to resolve complaints of sex discrimination generally, and to resolve formal complaints of sexual harassment. As explained below, we have revised § 106.8(c) to clarify that recipients must have "prompt and equitable" grievance procedures for complaints of sex discrimination, and must have in place a grievance process that complies with § 106.45 for formal complaints of sexual harassment.

The Department believes that the notice and publication requirements in § 106.8(b) and the adoption and publication of grievance procedures provisions in § 106.8(c) adequately ensure that the recipient disseminates information about its obligation not to discriminate under Title IX, and how to report and file complaints about sex discrimination, including sexual harassment. The Department notes that while the definition of "actual knowledge" in § 106.30 provides for a recipient to obtain actual knowledge of sexual harassment via third-party reporting, the definition of "formal complaint" in § 106.30 precludes a third party from filing a formal complaint, which is defined as a document that must be filed by a complainant or signed by the Title IX Coordinator. As discussed elsewhere in this preamble, the final regulations neither require nor

prohibit a recipient from disseminating information about bystander intervention designed to prevent sexual harassment. A primary focus of these final regulations is to govern a recipient's response to sexual harassment of which the recipient has become aware, and to provide accessible options for any person to report sexual harassment to trigger a recipient's response obligations. Similarly, nothing in the final regulations requires or prohibits a recipient from posting flyers on campus encouraging students and others to report sexual harassment; recipients should retain flexibility to communicate with their educational community regarding the importance of reporting sexual harassment. The Department believes that Title IX's non-discrimination mandate is best served by ensuring that a recipient's response obligations are triggered via notice of sexual harassment from any source, and that third-party reporting appropriately furthers the purposes of Title IX. We have revised § 106.8(a) to emphasize that "any person" may report sexual harassment (whether or not the person reporting is the person alleged to be the victim of sexual harassment) using the contact information listed for the Title IX Coordinator, and specifying that such a report may be made "at any time (including during non-business hours)" by using the telephone number or e-mail address, or by mail to the office address, listed for the Title IX Coordinator. We have also revised the § 106.30 definition of "actual knowledge" to emphasize that "notice" includes (but is not limited to) a report to the Title IX Coordinator as described in § 106.8(a). The Department disagrees that accessible reporting channels, and the right of *any* person to report sexual harassment, constitute a "totalitarian" system or otherwise has negative consequences. As demonstrated by the data discussed in the "General Support and Opposition" section of this preamble, sexual harassment is a prevalent problem affecting the educational access of students at all educational levels, and a recipient's knowledge of sexual harassment triggers the recipient's non-deliberately indifferent

response under these final regulations so that instances of sexual harassment are addressed in a manner that is not clearly unreasonable in light of the known circumstances.[1713]

Changes: We have revised § 106.8(a) to state that any person may report sex discrimination, including sexual harassment, whether or not the person reporting is the person alleged to be victimized by sex discrimination or sexual harassment, by using the contact information listed for the Title IX Coordinator, and stating that such a report may be made at any time (including during non-business hours) by using the telephone number or e-mail address, or by mail to the office address, listed for the Title IX Coordinator. We have also revised the § 106.30 definition of "actual knowledge" to specify that "notice" conveying actual knowledge on the recipient includes reporting sexual harassment to the recipient's Title IX Coordinator as described in § 106.8(a).

Comments: Some commenters expressed confusion as to whether the "grievance procedures" referenced in § 106.8(c) would apply to sexual harassment, sex discrimination generally, or both. Some commenters criticized the § 106.45 grievance process as "extreme" and argued that recipients should not have to use the same "weaponized" process to address non-sexual harassment sex discrimination. Other commenters asserted that the proposed rules created a dual system of grievance procedures: "prompt and equitable" grievance procedures applicable to sex discrimination generally, and to "informal complaints" of sexual harassment, and separate grievance procedures (described in § 106.45) for formal complaints of sexual harassment. Some commenters asserted that the phrasing in proposed § 106.8(c) was unnecessarily confusing

[1713] Section 106.44(a) (describing a recipient's general response obligations upon having actual knowledge of sexual harassment against a person in the United States in the recipient's education program or activity).

because "grievance procedures that provide for the prompt and equitable resolution of student and employee complaints . . . and of formal complaints" suggests that two separate processes are required; commenters recommended removing the phrase "student and employee complaints" to affirm that "prompt and equitable" grievance procedures are used only in response to "formal complaints." Some commenters wondered if a complaint about retaliation would be handled under the § 106.45 grievance process, or under the "prompt and equitable" grievance procedures referenced in § 106.8(c).

Some commenters argued that schools do not need more specific procedural rules than the directive in § 106.8(c) that grievance procedures must be "prompt and equitable" and that the "extreme" procedures in § 106.45 are not necessary. Other commenters argued that schools need more guidance as to how to handle non-sexual harassment sex discrimination complaints than the broad "prompt and equitable" requirement in § 106.8(c). Some commenters argued that while § 106.8(c) "claims" that procedures resolving formal complaints of sexual harassment must be "equitable," the provisions of § 106.45 are inequitable.

Some commenters asserted that recipients know they are supposed to "adopt and publish" grievance procedures yet, commenters claimed, most recipients still do not adopt and publish their grievance procedures or designate a Title IX Coordinator. Some commenters asserted that § 106.8(c) should only require recipients to "adopt and publish" grievance procedures that align with the recipient's State laws regarding imposition of discipline in response to sexual harassment or sex discrimination. At least one commenter argued that § 106.8(c) should expressly require that recipients must "adopt and publish" the recipient's entire grievance process "soup-to-nuts" so that parties to a sexual harassment complaint do not need to wait until the process has begun to be informed by the recipient of exactly what the grievance process

entails; the commenter gave an example of the commenter's university's written grievance procedures that informed students in writing, on the university's website, of several steps in the grievance process and then stated that "the remainder" of the recipients' procedures would "be explained to a respondent and complainant" as needed, which the commenter asserted is unfair.

One commenter urged the Department to modify § 106.8(c) to specifically require elementary and secondary schools to provide copies of the school's complaint form, because the commenter asserted that many schools use their own customized form yet fail to make the form available, so students and employees do not know how to actually file a complaint.

One commenter stated that because Title IX was written to prevent all discrimination, a recipient's policy should not distinguish among, and should address, all types of harassment with basic common sense rules such as: (1) every educational institution should have a harassment policy written by a representative group of educators and students or their parents and approved by the parent's association or student council; (2) every student and/or parent should receive and sign an acknowledgement of that policy; (3) every educational institution should be responsible for inappropriate behavior on any of its educational and recreational areas; (4) complaints may be filed by an alleged victim or their representative who can be a parent, educational, medical or law enforcement professional; (5) complaints must be acknowledged within a week and addressed by an independent board of individuals which should include parents, educational, medical or law enforcement professionals, and peers at the postsecondary level; (6) complaints should be forwarded to law enforcement when appropriate; (7) opportunity for redress should be allowed by a second independent board if the first verdict is unacceptable; and (8) a no bullying/no harassment curriculum should be mandatory for all students and all teaching professionals, and coaches should be required to attend training on this subject.

One commenter recommended that students and employees should be notified promptly when a policy or procedure is changed in order for the community to be made aware of any alterations to the policies and procedures to which they are held accountable and by which they are protected.

Discussion: In response to commenters' concerns that the wording in § 106.8(c) did not clearly convey that under the final regulations a recipient must adopt a grievance process that complies with § 106.45 for handling formal complaints of sexual harassment, the final regulations revise § 106.8(c) to specify that a recipient must not only adopt and publish grievance procedures "for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part" but also a "grievance process that complies with § 106.45 for formal complaints as defined in § 106.30." While a recipient is free to apply the § 106.45 grievance process to resolve complaints of non-sexual harassment sex discrimination, the final regulations only require a recipient to use the § 106.45 grievance process with respect to formal complaints of sexual harassment.[1714] These final regulations do not recognize a response specifically for an "informal complaint" of sexual harassment. These final regulations require a recipient to investigate and adjudicate using a grievance process that complies with § 106.45 in response to any formal complaint of sexual harassment,[1715] and preclude a recipient from imposing disciplinary sanctions on a respondent without first following a grievance process that

[1714] As discussed throughout this preamble, including in the "Role of Due Process in the Grievance Process" section of this preamble, the Department has selected the specific procedures prescribed in the § 106.45 grievance process for the purpose of addressing the unique challenges presented by sexual harassment allegations, and such challenges may or may not be present with respect to other forms of sex discrimination, many of which result from official school policy rather than from the independent choices of individual students, employees, or third parties.

[1715] Section 106.44(b)(1).

complies with § 106.45.[1716] Thus, if a recipient has actual knowledge of sexual harassment allegations (whether via a verbal or written report or other means of conveying notice to a Title IX Coordinator, official with authority to institute corrective measures, or any elementary or secondary school employee), but neither the complainant (i.e., the person alleged to be the victim) nor the Title IX Coordinator decides to file a formal complaint, the recipient must respond promptly in a non-deliberately indifferent manner, including by offering supportive measures to the complainant, but cannot impose disciplinary sanctions without following the § 106.45 grievance process. We have also clarified, in § 106.71(a), that complaints of retaliation for exercise of rights under Title IX must be handled by the recipient under the "prompt and equitable" grievance procedures referenced in § 106.8(c) for handling of complaints of non-sexual harassment sex discrimination.

We have also revised § 106.8(c) to expand the group of persons to whom notice of the "prompt and equitable grievance procedures" and "grievance process that complies with § 106.45" must be provided: rather than sending such notice only to students and employees, recipients now also must send that notice to "persons entitled to a notification under paragraph (a) of this section" (i.e., § 106.8(a)), which, as discussed above, includes students, employees, applicants for admission and employment, parents or legal guardians of elementary and secondary school students, and unions and similar professional organizations). Moreover, this provision is revised to clarify that the notice about the grievance procedures (which apply to sex discrimination) and grievance process (which applies specifically to sexual harassment) must include "how to report or file a complaint of sex discrimination, how to report or file a formal

[1716] Section 106.44(a).

complaint of sexual harassment, and how the recipient will respond." These changes to § 106.8(c) thus ensure that more people affected by a recipient's grievance procedures (for sex discrimination, and per § 106.71(a) of the final regulations, complaints of retaliation under Title IX) and grievance processes for Title IX sexual harassment, receive notice of those grievance procedures and grievance processes, including how to initiate those procedures and processes.

These revisions to § 106.8(c) emphasize that a result of the final regulations is creation of a prescribed grievance process for Title IX sexual harassment (which is triggered when a complainant files, or a Title IX Coordinator signs, a formal complaint), while the handling of non-sexual harassment sex discrimination complaints brought by students and employees (for instance, complaints of sex-based different treatment in athletics, or with respect to enrollment in an academic course) remains the same as under current regulations (i.e., recipients must have in place grievance procedures providing for prompt and equitable resolution of such complaints). Thus, § 106.8(c) better ensures that students, employees, parents of elementary and secondary school students, applicants for admission and employment, and unions, all are aware of a recipient's procedures and processes for intaking reports and complaints of all forms of sex discrimination including the particular reporting system, grievance process, and recipient responses required under these final regulations regarding sexual harassment. For reasons discussed throughout this preamble, including in the "General Support and Opposition for the Grievance Process in § 106.45" section of this preamble, the Department believes that the prescribed procedures that recipients must use in a Title IX sexual harassment grievance process are necessary to achieve the purposes of increasing the legitimacy and reliability of recipient determinations regarding responsibility for sexual harassment while decreasing the likelihood of sex-based bias influencing such determinations, and we clarify in revised § 106.8(c) that the §

106.45 grievance process is different from the directive that recipients' handling of complaints of other types of sex discrimination must be "prompt and equitable." We therefore decline to authorize recipients to substitute a State law grievance procedure for the § 106.45 grievance process. Because recipients must "adopt and publish" (and send notice to the group of people identified in § 106.8(a) of) a grievance process that complies with § 106.45, the Department believes that each recipient's educational community will be aware of the procedures involved in a recipient's grievance process without the unfairness of waiting until a person becomes a party to discover what the recipient's grievance process looks like. Non-sexual harassment sex discrimination often presents situations that differ from sexual harassment (for example, a complaint that school policy treats female applicants differently from male applicants, or that school practice is to devote more resources to male sports teams than to female sports teams), and the Department does not, in these final regulations, alter recipients' obligation to handle complaints of non-sexual harassment sex discrimination by applying grievance procedures that provide for the "prompt and equitable resolution" of such complaints.

The Department understands that despite 34 CFR 106.9 having required, for decades, recipients to adopt and publish prompt and equitable grievance procedures (and designate an employee to coordinate the recipient's efforts to comply with Title IX), some recipients have not "adopted and published" grievance procedures for handling sex discrimination complaints, and have not designated a Title IX Coordinator. The Department intends to enforce these final regulations vigorously for the benefit of all students and employees in recipients' education programs or activities, and any person may file a complaint with the Department alleging that a recipient is non-compliant with these final regulations. We have revised § 106.8(c) to more clearly require recipients to give notice to its educational community of how to report sex

discrimination or sexual harassment, how to file a complaint of sex discrimination or a "formal complaint of sexual harassment," and "how the recipient will respond."

We appreciate a commenter's concern that some recipients use a specific form for students and employees when filing a sex discrimination complaint. Under these final regulations at § 106.30, a "formal complaint" of sexual harassment is defined as a "document signed by a complainant" and a formal complaint may be filed by a complainant in person or by mail to the office address, or by e-mail, using the listed contact information for the Title IX Coordinator, or by any other method designated by the recipient. Thus, even if a recipient desires for complainants to only use a specific form for filing formal complaints, these final regulations permit a complainant to file a formal complaint by either using the recipient-provided form (or electronic submission system such as through an online portal provided for that purpose by the recipient), or by physically or digitally signing a document and filing it as authorized (i.e., in person, by mail, or by e-mail) under these final regulations.

These final regulations do not preclude a recipient from following the steps suggested by a commenter with respect to involving parent and student groups in the development of a recipient's anti-harassment policy, so long as the recipient adopts and publishes a grievance process for formal complaints of sexual harassment that complies with § 106.45, and so long as the recipient's reporting system for responding to sexual harassment complies with § 106.8, § 106.30, and § 106.44 in these final regulations.

Because recipients must "adopt and publish" the recipient's grievance procedures (for sex discrimination) and grievance process (for formal complaints of sexual harassment), the recipient's obligation is to "publish" (and send notice, as appropriate) when the recipient no

longer uses one grievance procedure or grievance process and instead uses a different procedure or process.

Changes: The final regulations revise § 106.8(c) by distinguishing between the "grievance procedures" for "prompt and equitable resolution" of complaints of non-sexual harassment sex discrimination, and the "grievance process that complies with § 106.45 for formal complaints" of sexual harassment; expands the list of people whom the recipient must notify of the foregoing procedures and processes (by referencing the revised list in § 106.8(a)); and adds clarifying language that the information provided must include how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond.

Section 106.8(d) Application Outside the United States

Comments: One commenter expressed general support for § 106.8(d). Some commenters argued that § 106.8(d) is inconsistent with the spirit of Title IX and the Clery Act. Commenters contended that, under the NPRM, no misconduct outside the United States would be covered, which frustrates the basic goal of Title IX to protect students when participating in educational programs or activities receiving Federal funds. Commenters also asserted that § 106.8(d) is inconsistent with the Clery Act because the Clery Act addresses conduct committed abroad on campuses of institutions of higher education. Commenters asserted that this inconsistency would impede the Title IX Coordinator's ability to implement consistent responses to sexual misconduct and identify patterns that could threaten individuals and communities. Commenters argued that this conflict also creates the need for separate processes to address the same misconduct, which undermines the Department's stated goal of streamlining processes to create more efficient systems.

Discussion: The Department appreciates the general support for this provision and appreciates commenters' concerns. Section 106.8(d) of the final regulations clarifies that the recipient's non-discrimination policy, grievance procedures that apply to sex discrimination, and grievance process that applies to sexual harassment, do not apply to persons outside the United States. Contrary to the claims made by some commenters that this provision conflicts with the spirit of Title IX, the Department believes that by its plain text the Title IX statute does not have extraterritorial application. Indeed, 20 U.S.C. 1681 indicates that "*No person in the United States* shall, on the basis of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance" (emphasis added). We believe a plain language interpretation of a statute is most consistent with fundamental rule of law principles, ensures predictability, and gives effect to the intent of Congress. Courts have recognized a canon of statutory construction that "Congress ordinarily intends its statutes to have domestic, not extraterritorial, application."[1717] This canon rests on presumptions that Congress is mainly concerned with domestic conditions and seeks to avoid unintended conflicts between our laws and the laws of other nations.[1718] If Congress intended Title IX to have extraterritorial application, then it could have made that intention explicit in the text when it was passed in 1972. The Supreme Court most recently acknowledged the presumption against extraterritoriality in *Morrison v. National Australian Bank*,[1719] and *Kiobel v. Royal Dutch Petroleum*.[1720] In *Morrison*, the Court reiterated the "longstanding

[1717] *Small v. United States*, 544 U.S. 385 (2005).
[1718] *See Smith v. United States*, 507 U.S. 197, 204 (1993).
[1719] 561 U.S. 247 (2010).
[1720] 569 U.S. 108 (2013).

principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."[1721] The Court concluded that "[w]hen a statute gives no clear indication of extraterritorial application, it has none."[1722] As discussed in the "Section 106.44(a) 'against a person in the U.S'" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this preamble, the Department believes that restricting Title IX coverage to persons in the United States applies the statute as passed by Congress. However, in response to commenters' assertions that § 106.8(d) was not faithful to the wording of the Title IX statute, the final regulations revise this provision's header to read "*Application outside the United States*" and simplify the provision's wording to more clearly accomplish the provision's goal by stating: "The requirements of paragraph (c) of this section apply only to sex discrimination occurring against a person in the United States."

With respect to the concerns raised by commenters that § 106.8(d) would conflict with the Clery Act, the Department acknowledges certain misconduct committed overseas is reportable under the Clery Act where, for example, the misconduct occurs in a foreign location that a U.S.-based institution owns and controls. However, the Clery Act and Title IX do not have precisely the same scope or purpose, and the text of the Title IX statute and controlling case law on the topic of extraterritoriality support the conclusion that Title IX does not apply to sex discrimination that occurs outside the United States. The Department does not believe the

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[1721] *Morrison v. Nat'l Australian Bank*, 561 U.S. 247, 255 (2010).
[1722] *Id.; Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108, 115 (2013) (citing *Morrison*, 561 U.S. at 255).

interpretation of Title IX as embodied in these final regulations prevents or complicates a postsecondary institution's compliance with reporting obligations under the Clery Act.[1723]

Changes: The final regulations revise § 106.8(d) so that its header reads "*Application outside the United States*" and simplify the wording to more clearly accomplish the provision's goal by stating that the requirements of paragraph (c) of this section apply only to sex discrimination occurring against a person in the United States.

Comments: A number of commenters raised the issue that § 106.8(d) may endanger students and faculty abroad. Commenters argued that sexual misconduct abroad, whether perpetrated by other students, faculty, graduate advisors, or other recipient employees, may significantly impact survivors' academic and career trajectories.[1724] Commenters argued that the effect of § 106.8(d) would be to force victims to drop out of their schools to avoid hostile environments created by misconduct committed abroad. Some commenters asserted that the U.S. generally has more robust disciplinary systems for addressing sexual misconduct than other countries. Commenters contended that for the Department to deny Title IX protections outside the United States would mean unfairly punishing students who simply were in the wrong place when they were assaulted. One commenter asserted that § 106.8(d) will also endanger recipient faculty and staff who are sexually assaulted while participating in conferences and other activities abroad. This commenter argued that Title IX should apply where both parties are affiliated with the recipient. A few commenters contended that the Department is ignoring the reality that study abroad programs

[1723] For further discussion on the intersection between these final regulations and the Clery Act, see the "Clery Act" subsection of the "Miscellaneous" section of this preamble.

[1724] Commenters cited: Robin G. Nelson *et al.*, *Signaling Safety: Characterizing Fieldwork Experiences and Their Implications for Career Trajectories*, 119 AM. ANTHROPOLOGIST 4 (2017).

and foreign educational activities are increasingly common. These commenters asserted that, beyond formal study abroad programs, many other undergraduate and graduate students are engaged in research, fieldwork, and data collection abroad, across a wide range of fields, and argued that the NPRM does not just impact study abroad programs, but also students temporarily visiting other countries for educational purposes.

Discussion: For the same reasons discussed under the "Section 106.44(a) 'against a person in the U.S'" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this preamble, the Department believes that restricting Title IX to persons in the United States applies the statute as passed by Congress, and notes that Congress remains free to modify Title IX to overcome the judicial presumption against extraterritorial application of Title IX. Under these final regulations recipients remain free to adopt robust anti-harassment and assault policies that apply to the recipient's programs or activities located abroad, to use recipients' disciplinary systems to address sexual misconduct committed outside the United States, and to protect their students from such harm by offering supportive measures to students impacted by misconduct committed abroad.

Changes: None.

Section 106.12 Educational Institutions Controlled by a Religious Organization

Comments: Some commenters expressed support for the changes to § 106.12(b), on the basis that the changes offered additional flexibility to religious educational institutions, and religious freedom is a vital constitutional guarantee. Commenters also elaborated on the benefits of religious freedom, suggesting that religion helps preserve civic virtues, and instills positive moral values for both individuals and communities. Some commenters noted that freedom of religion is specifically contemplated by the U.S. Constitution, in the First Amendment's Free Exercise

Clause. Drawing on this fact, commenters noted that the freedom of religion has been a touchstone of American government since the country was founded. Other commenters stated that proposed § 106.12(b) is consistent with the Religious Freedom Restoration Act, since it avoids placing an unnecessary burden on religious institutions. Some commenters noted that proposed § 106.12(b) has the ancillary benefit of avoiding confusion for schools, since many institutions may not obtain a religious exemption before having a complaint against them filed, but now they will know that there is no such duty. The corollary to this point, asserted commenters, is that opponents of a school's religious exemption may not incorrectly argue that a school has "waived" a right to invoke a religious exemption.

Discussion: The Department appreciates and agrees with the comments in support of § 106.12(b), which align with the Title IX statute, the First Amendment, and the Religious Freedom Restoration Act, 42 U.S.C. 2000bb-1. The final regulations bring § 106.12(b) further in line with the relevant statutory framework in this context, which states that Title IX "shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization," 20 U.S.C. 1681(a)(3), and that the term "program or activity," as defined in 20 U.S.C. 1687, "does not include any operation of an entity which is controlled by a religious organization if the application of section 1681 of this title to such operation would not be consistent with the religious tenets of such organization."

No part of the statute requires that recipients receive an assurance letter from OCR, and no part of the statute suggests that a recipient must be publicly on the record as a religious institution claiming a religious exemption before it may invoke a religious exemption in the context of Title IX. Nevertheless, the current regulations are not clear on whether recipients may

claim the exemption under § 106.12(a) only by affirmatively submitting a letter to the Assistant Secretary for Civil Rights.

However, longstanding OCR practice aligns with the statute, and the final regulations codify OCR's practice. To the extent that a recipient would like to request an assurance letter from OCR, the agency will continue to respond to such requests, as an option for recipients that are educational institutions controlled by a religious organization.

Changes: None.

Comments: Commenters noted that religious educational institutions themselves are vital for American society, noting that schools, among other religious institutions, have contributed to the alleviation of social ills through philanthropic and humanitarian projects. Religious educational institutions, suggested commenters, are necessary for religious freedom, and the proposed rules are consistent with the robust views of religious freedom that have been expressed by the U.S. Constitution, the U.S. Supreme Court, and Congress itself when it enacted Title IX. To that end, commenters noted that the Federal government ought to be making it easier for religious institutions to operate and thrive, not harder. Commenters noted that it would be a waste of a school's resources to apply for a religious exemption assurance letter, when no letter is in fact needed to invoke a religious exemption to Title IX. At least under the proposed rule, asserted the commenters, the Department's entanglement with a religious institution's tenets might be limited to those cases where a complaint is filed, or where the school affirmatively requests an exemption assurance letter.

Discussion: The Department appreciates the positive feedback on the proposed revisions in § 106.12(b) and believes that the Department's prior practice and the revisions to §106.12(b) in

these final regulations have the effect of promoting religious freedom. The final regulations codify longstanding OCR practices, and are consistent with the Title IX statute.

Changes: None.

Comments: Some commenters discussed current § 106.12, as well as the practice of OCR. Commenters stated that the status quo requires a religious institution to affirmatively request an exemption, and that imposing such a duty inappropriately places the burden on religious educational institutions. Instead, the commenters suggested, the burden would more appropriately be placed on the government, by having to disprove the application of a religious exemption. Indeed, commenters suggested that the status quo could occasionally be turned against religious educational institutions, by denying religious exemptions or forcing schools to wait an excessively long period of time before obtaining a letter of assurance from OCR.

Discussion: Contrary to commenters who suggested that the status quo requires schools to affirmatively request an assurance letter from OCR, OCR has previously interpreted the current regulation to mean that a school can invoke a religious exemption even after OCR has received a complaint regarding the educational institution. Additionally, the Department views both the status quo and the final regulations to require a recipient to invoke and establish its eligibility for an exemption, and does not view the final regulations as placing the burden on the Federal government to disprove any claim for religious exemption. However, it may be correct that many schools and individuals—such as these commenters themselves—have incorrectly read current § 106.12 to mean that a recipient must always seek or receive an assurance letter from OCR to assert the religious exemption before any complaint is filed against the school, if a religious exemption is to be invoked. These final regulations clarify that this is not the case.

Changes: None.

Comments: In the same vein, many commenters supported § 106.12(b) because the provision alleviated the need for schools to request an assurance letter in order to invoke a religious exemption. That purported need, the commenters asserted, was inconsistent with the authority granted by Congress to the Department of Education in Title IX itself. It was better, the commenters argued, to simply allow schools the option to obtain the assurance ahead of time, but not require it. Commenters suggested that forcing religious institutions to jump through hoops in order to invoke a religious exemption imperils schools' deeply held religious beliefs. At least one commenter stated that religious educational institutions have a natural tendency to reduce their interactions with government, and thus allowing schools to maintain a religious exemption to Title IX even absent an assurance letter was appropriate.

Discussion: The proposed revisions to § 106.12(b) codifies OCR's practice of permitting recipients to invoke a Title IX religious exemption without having obtained an assurance letter. However, the Department agrees with the concern that the current regulation is not as clear as it could be on this point, and that appears to have resulted in some confusion among recipients who were unaware of OCR's existing practice.

Changes: None.

Comments: Some commenters noted that § 106.12(b) will aid religious educational institutions, and assist with their legal compliance regimes under Title IX. For instance, one commenter asserted that a religious educational institution that had single-sex classes would understand that they do not have to comply with the single-sex provisions of the current Title IX regulations and instead would simply be able to maintain a religious exemption generally, if the classes were based on religious tenets or practices. In other cases, commenters stated, schools would be able to maintain more flexibility in their school policies, such as whether to allow students who were

assigned one sex at birth to use the intimate facilities assigned to another sex; whether to offer birth control as part of their health services; and how to structure dormitory and other housing policies.

Discussion: The Department appreciates the positive feedback on § 106.12(b) and agrees with commenters that stated that the final regulations will assist recipients with complying with Title IX. The final regulations codify longstanding OCR practices, and are consistent with the Title IX statute.

Changes: None.

Comments: Many commenters suggested that the proposed change in § 106.12(b) is a good way to prevent future administrations from maintaining a hostile posture toward religious educational institutions. These commenters suggested that the process of compelling a school to write a request letter to the Assistant Secretary for Civil Rights, and then waiting for OCR to respond, may raise fears that the Federal government is passing judgment on religious institutions, or that hostility toward certain categories of exemptions could trigger additional delays, or perhaps unduly close scrutiny of whether a religious educational institution really is eligible for such an exemption. Commenters also suggested that close scrutiny of religious exemption requests excessively entangles OCR with religious educational institutions.

Discussion: The Department is mindful of the concerns that educational institutions controlled by a religious organization sometimes express that OCR "entangles" itself with a recipient's religious practices by scrutinizing them too closely, or by delaying the issuance of an assurance letter (even when such delay is due to administrative backlogs and is not an intentional delay). The Department appreciates the positive feedback on § 106.12(b) and believes that the final regulations will help the Department and its OCR administer these final regulations consistent

with the U.S. Constitution by minimizing entanglement issues. The final regulations codify longstanding OCR practices, and are consistent with the Title IX statute.

Changes: None.

Comments: Some commenters sought to address concerns about religious exemptions generally, suggesting that religious institutions need to rely on Title IX less than other schools, since some acts – like sexual harassment or sexual assault – are generally considered abhorrent sins under most religious persuasions. Some comments mentioned Christianity, in particularly, as a religion that is committed to promoting the safest environment for students, free from discrimination and harassment. In that vein, commenters stated that Christian principles have caused Christian colleges to be exceptionally diligent in protecting students and employees from sexual harassment and sexual assault. Some commenters stated that it is inappropriate for a school to invoke a religious exemption in order to escape Title IX liability, since religious values disfavor discrimination, and discrimination is generally against a religious moral code. Commenters also stated that religious exemptions are contrary to the Bible, in that the Bible condemns sexual harassment and assault, and religious institutions should be leading the charge against such misconduct. One commenter stated that God made beings different from each other, and discrimination against students is contrary to God's creation.

Discussion: The Department appreciates the commenter's concerns and perspectives. The Department notes that the religious exemption applies only to the extent application of this part would not be consistent with the religious tenets of such organization. Through 20 U.S.C. 1682, Congress authorized the Department to effectuate the provisions of Title IX, which includes a religious exemption. The Department does not take a position on whether it is appropriate for a school to invoke such an exemption and is effectuating the provisions of Title IX, including the

religious exemption that Congress provided in 20 U.S.C. 1681(a)(3) through these final regulations, which are consistent with the First Amendment and the Religious Freedom Restoration Act.

Changes: None.

Comments: Several commenters noted that they supported § 106.12(b) because of its breadth, reading the provision to mean that any school, even with a minor religious affiliation, would be eligible for a religious exemption. The commenters asserted that this was the correct approach, and that the Department was wise to embrace such a broad religious exemption.

Discussion: Title IX and current § 106.12 provide that they do not apply to an "educational institution which is controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such organization." The Department does not consider the final regulations to be broader than the scope of the current regulations or the statute.

Changes: None.

Comments: One commenter argued that there is a potential internal contradiction between § 106.8 and proposed § 106.12. While a recipient may have a duty to issue a general notice of non-discrimination, the commenter argued that they might—at the same time—maintain a religious exemption that permitted such discrimination. The commenter argued that this would allow schools to mislead students by sending out a misleading non-discrimination notice. The commenter contended that this "bait and switch" would undermine OCR's credibility, and would mean that students at religious institutions will be deterred from filing complaints. To solve this problem, the commenter suggested schools claiming a religious exemption should have to include such a statement in the non-discrimination notice mandated by § 106.8.

Discussion: Recipients are permitted to distribute publications under § 106.8(b)(2)(ii) that clarify that the recipient may treat applicants, students, or employees differently on the basis of sex to the extent "such treatment is permitted by Title IX or this part." Nothing in the final regulations mandates that recipients deceive applicants, students, or employees regarding their non-discrimination practices, and recipients that assert a religious exemption are not required to misstate their actual policies when disseminating their Title IX policy under § 106.8. Indeed, if a recipient provided inaccurate or false information in any notification required under § 106.8, then the recipient would not be in compliance with § 106.8. We note that nothing in the final regulations supersedes any other contractual or other remedy that an applicant, student, or employee may have against a recipient based on an alleged misstatement or false statement. Students at schools that assert a religious exemption also may always file a complaint with OCR.

Changes: None.

Comments: Numerous commenters expressed opposition to religious exemptions as a general matter, suggesting that such exemptions are commonly used to discriminate against students or employees, cause harm to students and employees, and often are not adequately disclosed in a public and transparent way so as to give students and employees appropriate notice that they would not be protected by Title IX. These commenters argued that the interests underlying the protection of civil rights outweigh the need to protect a religious institution's discomfort regarding student behavior. Students at religious institutions, including LGBTQ students, asserted the commenters, deserve protection just as much as all other students. Commenters asserted that the Department owes a duty to students to protect their civil rights and argued that the proposed rules run contrary to that duty.

In the same vein regarding transparency, some commenters argued that permitting recipients to invoke religious exemptions without having to make a public statement will pit students against their own schools. The commenters say that since a school is designed to cultivate critical thinkers, depriving students of transparency runs counter to this interest. Additionally, commenters stated that students who seek abortions, hormone therapy, or access to intimate facilities that are sex-segregated, may feel like their own school does not protect them, and may feel betrayed by their own institution, leading to an environment of distrust on campus. Worse, the commenters say, some students could feel bullied, threatened, or harassed once students see that the school itself is openly discriminating against its students. Commenters noted that the same could be true for employees, and not just students.

Commenters argued that even if a school is entitled to assert a religious exemption, proposed § 106.12(b) goes too far because it seems to encourage schools to lie in wait before formally invoking the religious exemption. Commenters stated that religious educational institutions should have a legal obligation to give students notice prior to enrolling or working at a school maintaining a religious exemption. For that reason, commenters stated, § 106.12(b) is in tension with the OCR's usual assurance process for all recipients of Federal education funds, which requires a school to assure the Department that it will comply with non-discrimination laws as a condition of receiving Federal education dollars. Another commenter argued that for private religious elementary and secondary schools that educate students as part of their Free and Appropriate Public Education, it is highly troubling for parents not to know about Title IX exemptions prior to enrollment. One commenter alleged that allowing a recipient to invoke a religious exemption after a complaint has been filed with OCR is contrary to the due process principles that these final regulations are attempting to preserve and protect.

Discussion: In response to the comments about the propriety of having any religious exemption or the need to protect civil rights over religious freedom, the Department notes that Title IX itself guarantees the religious exemption and these final regulations do not change our long-standing practice of honoring and applying the religious exemption in the appropriate circumstances. As some commenters in support of § 106.12(b) noted, the proposed regulations do not prevent OCR from investigating a complaint simply because the complaint involves an educational institution controlled by a religious organization. The recipient must additionally invoke a religious exemption based on religious tenets. Moreover, this does not prevent OCR from investigating or making a finding against a recipient if its religious tenets do not address the conduct at issue. In those cases, OCR will proceed to investigate, and if necessary, make a finding on the merits.

The Department also appreciates the feedback on the potential policy implications of the proposed rule; however, the Department is limited by the Title IX statute,[1725] and cannot make changes to the final regulations that are inconsistent with the statute, regardless of the policy implications addressed by commenters. As mentioned, the final regulations codify longstanding OCR practices, and are consistent with the Title IX statute. The Department does not believe that its current practice or the final regulations violate the U.S. Constitution. The Department further asserts that § 106.12(b) in these final regulations is consistent with the First Amendment, including the Free Exercise Clause as well as the Establishment Clause, because the Department is not establishing a religion and is instead respecting a recipient's right to freely exercise its religion. Additionally, § 106.12(b) in these final regulations is consistent with the Religious

[1725] 20 U.S.C. 1681(a)(3) ("[T]his section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization").

Freedom Restoration Act, 42 U.S.C. 2000bb *et seq.*, which applies to the Department, and requires the Department not to substantially burden a person's exercise of religion unless certain conditions are satisfied.[1726] As the Title IX statute does not require a recipient to request and receive permission from the Assistant Secretary to invoke the religious exemption, requiring a recipient to do so may constitute a substantial burden that is not in furtherance of a compelling government interest or the least restrictive means of furthering that compelling government interest under the Religious Freedom Restoration Act, 42 U.S.C. 2000bb-1. Such a requirement also is unnecessary in light of the other requirements in these final regulations that a recipient notify students, prospective students, and others about the recipient's non-discrimination statement as well as its grievance procedures and grievance process to address sex discrimination, including sexual harassment.

Section 106.8 requires all recipients to notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient of its non-discrimination on the basis of sex as well as its grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond. Additionally, § 106.8(b)(2)(ii) provides that a recipient must not use or distribute a publication stating that the recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by Title IX or these final regulations. Accordingly, students

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[1726] *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (holding "person" within meaning of the Religious Freedom Restoration Act's protection of a person's exercise of religion includes for-profit corporations).

and prospective students should receive adequate notice of the recipient's non-discrimination statement as well as its grievance procedures and grievance process regarding sex discrimination, including sexual harassment, and such notice is consistent with due process principles. Such transparency helps guard against any misunderstandings, irrespective of whether a school asserts a religious exemption.

The religious exemption in Title IX, 20 U.S.C. 1681(a)(3), applies to an educational institution which is controlled by a religious organization, and students and prospective students likely will know whether an educational institution is controlled by a religious organization so as not to be surprised by a recipient's assertion of such a religious exemption. Additionally, the Department also notes that under § 106.8(b)(1) any person can inquire about the application of Title IX to a particular recipient by inquiring with the recipient's Title IX Coordinator, the Assistant Secretary, or both.

OCR is unaware of a religious school claiming an exemption from Title IX's obligations to respond to sexual harassment on the basis that such a response conflicts with the religious tenets of an organization controlling the religious school. As the Department explains more thoroughly in the "Gender-based harassment" subsection of the "Sexual Harassment" subsection of the "Section 106.30 Definitions" section, these final regulations focus on prohibited conduct. The Department believes any person may experience sex discrimination, irrespective of the identity of the complainant or respondent.

Nothing in the final regulations mandates that recipients deceive applicants, students, or employees regarding their non-discrimination practices, a recipient remains free to describe its religious exemption on its website, and nothing in the final regulations supersedes any other

contractual or other remedy that an applicant, student, or employee may have against a recipient based an alleged misstatement or false statement.

Changes: None.

Comments: Some commenters ascribed particularly nefarious motives to recipients, arguing that schools often intentionally deceive applicants to the school in order to obtain application fees or tuition revenues. These commenters alleged that religious educational institutions deliberately hid their purported exemptions from Title IX and would then blindside students once they were already enrolled in school. One commenter suggested bigoted university officials would use religious exemptions as a fig leaf to impose personal beliefs, such as denying transgender students medical coverage for hormone therapy.

Discussion: Nothing in these final regulations mandates that recipients deceive applicants, students, or employees regarding their non-discrimination practices, and nothing in the final regulations supersedes any other contractual or other remedy that an applicant, student, or employee may have against a recipient based an alleged misstatement or false statement. On the contrary, as explained above, these final regulations including § 106.8, promote transparency by requiring a recipient to provide notice of its non-discrimination statement as well as its grievance procedures and grievance process to address sex discrimination, including sexual harassment. Additionally, § 106.8(b)(1) allows inquiries about the application of Title IX and this part to a recipient to be referred to the recipient's Title IX Coordinator, to the Assistant Secretary, or both.

The Department disagrees with the suggestion that religious exemptions are tools for bigotry or should not be provided due to such characterizations. The First Amendment to the Constitution protects religious exercise, and Congress placed a religious exemption in Title IX and numerous other statutes. The Department's experience is that exemptions for religious

liberty overwhelmingly serve to advance freedom and diversity in education, not bigotry. To the extent that an official of a recipient invokes a religious exemption "as a fig leaf" in order to impose only personal beliefs, that recipient would not qualify for a religious exemption because the religious exemption requires the application of Title IX and its regulations to be inconsistent with the religious tenets of a religious organization and not just inconsistent with personal beliefs.

Changes: None.

Comments: Some commenters ascribed nefarious motives to the Department. Commenters asserted that the people drafting the proposed rules would not be in favor of religious exemptions if their wives, mothers, or daughters were the victims of sexual assault. One stated that honoring women and girls' rights is what Jesus calls for and implied that the proposed regulations go against this principle. Some commenters objected that the inclusion of religious exemptions is clearly a political decision made by politicians in this administration who seek to avoid accountability for their own sexual misconduct. Other commenters stated that the drafters of the proposed rules do not have the interests of students at heart, and that the proposed rules are intentionally designed to institutionalize patriarchy and homophobia. Other commenters stated that the inclusion of the religious exemption provision was a political decision to curry favor with religious institutions and warned the Department not to divide people. Another commenter suggested that the provision was an effort by Secretary Betsy DeVos to establish a Christian fascist nation that favors a fundamentalist strain of Christianity.

Discussion: Although the Department appreciates the feedback on the proposed rule, it rejects the assumptions of these commenters. As stated above, the Department's goals for these final regulations are to establish a grievance process that is rooted in due process principles of notice

and opportunity to be heard and that ensures impartiality before unbiased officials. Specifically, these goals are to (i) improve perceptions that Title IX sexual harassment allegations are resolved fairly and reliably, (ii) avoid intentional or unintentional injection of sex-based biases and stereotypes into Title IX proceedings, and (iii) promote accurate, reliable outcomes, all of which effectuate the purpose of Title IX to provide individuals with effective protection from discriminatory practices, including remedies for sexual harassment victims. As stated above, § 106.12 reflects the statutory exemption for religious educational institutions granted by Congress, and the religious exemption applies only to the extent that the tenets of a religious organization controlling a religious educational institution conflict with the application of Title IX.

These final regulations apply to prohibit certain conduct and apply to anyone who has experienced such conduct, irrespective of a person's sexual identity or orientation. The Department believes that these final regulations provide the best protections for all persons, including women and people who identify as LGBTQ, in an education program or activity of a recipient of Federal financial assistance who experience sex discrimination, including sexual harassment.

Contrary to commenters' assertions, these final regulations do not establish a religion, and § 106.12(b) applies to all religions and not just Christianity.

The Department disagrees that these final regulations are patriarchal. These final regulations empower complainants with a choice to consider and accept supportive measures that a recipient must offer under § 106.44(a) and/or to file a formal complaint to initiate a grievance process under § 106.45.

The Department does not seek to curry favor with a particular population of recipients or individuals. The Department seeks to effectuate Title IX's non-discrimination mandate consistent with the U.S. Constitution, including the First Amendment, as well as other Federal laws such as the Religious Freedom Restoration Act.

Changes: None.

Comments: Some commenters suggested that religious educational institutions could manipulate the revisions to § 106.12(b) to their benefit. For instance, one commenter asserted that a school might wait to see how a Title IX investigation by OCR is going, and then if OCR is on the verge of issuing a finding in the case, the school might invoke a religious exemption at the last minute. Other commenters stated that a school might invoke a religious exemption as a way to retaliate against students, or would abuse the ability to invoke a religious exemption even when the school's tenets do not strictly contradict Title IX. One commenter asserted that recipients of all religious persuasions will suffer, when the public assumes that all religious schools discriminate against students.

Another commenter suggested that OCR ought to closely scrutinize claims of religious exemptions, and that schools should not receive any deference when invoking a religious exemption or arguing that their tenets conflict with Title IX. The commenter argued that this would be like letting a corporation verify or change its own tax status while being investigated by the Internal Revenue Service, e.g., moving to non-profit status in the middle of a tax fraud investigation.

Discussion: The Department appreciates the feedback on the potential policy implications of the proposed rules and believes that some of the commenters misunderstand § 106.12(b). Section 106.12(b) states: "In the event the Department notifies an institution that it is under investigation

for noncompliance with this part and the institution wishes to assert an exemption set forth in paragraph (a) of this section, the institution may at that time raise its exemption by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization, whether or not the institution had previously sought assurance of an exemption from the Assistant Secretary." When the Department notifies a recipient that it is under investigation for noncompliance with this part or a particular section of this part, the recipient identifies the provisions of this part which conflict with a specific tent of the religious organization. Of course, a recipient must know what it is under investigation for, in order to assert an applicable exemption such as a religious exemption. Nonetheless, a recipient cannot invoke a religious exemption "at the last minute" because the recipient must be an educational institution which is controlled by a religious organization, and such control by a religious organization is not something that occurs "at the last minute." The educational institution must have been controlled by a religious organization when the alleged noncompliance occurred, and the educational institution is only exempt from Title IX and these final regulations to the extent that Title IX or these final regulations are not consistent with the religious tenets of such organization.

Additionally, retaliation is strictly prohibited under § 106.71, and a recipient cannot invoke a religious exemption to retaliate against a person. Similarly, a recipient may only assert an exemption to the extent that Title IX or these regulations are not consistent with the religious tenets of the religious organization that controls an educational institution.

The Department is not aware of any assumption that all educational institutions which are controlled by a religious organization engage in discriminatory practices, and the Department's

experience has not been that all educational institutions which are controlled by a religious organization engage in discriminatory practices.

Under long-standing OCR policy, OCR's practice is generally to avoid questioning the tenet that an educational institution controlled by a religious organization has invoked to cover the conduct at issue. OCR does not believe it is in a position, generally, to scrutinize or question a recipient's sincerely held religious beliefs, and the First Amendment likely prohibits questioning the reasonableness of a recipient's sincerely held religious beliefs. However, recipients are not entitled to any type of formal deference when invoking eligibility for a religious exemption, and recipients have the duty to establish their eligibility for an exemption, as well as the scope of any exemption. These final regulations, including § 106.12(b), make no changes to the conditions that must apply in order for a religious educational institution to qualify for the religious exemption.

Changes: None.

Comments: Some commenters stated that the Department failed to adequately provide a rationale for changing current 34 CFR 106.12(b) in the manner proposed in § 106.12(b), and argued that the Department failed to disclose the potential negative impacts of this change. The commenters suggested that the proposed rules ought to more carefully explain how compliance with Title IX is burdensome for religious institutions, given that the current procedures, according to commenters, are exceptionally generous to religious institutions. Additionally, these commenters stated that the Department should reassess the religious exemption to weigh more heavily a school's potential to be dishonest and to discriminate.

Commenters stated that they favored what they considered to be current OCR practice, under which, commenters asserted, most requests for exemptions came by letter before a

complaint was opened, and under which OCR posts a publicly-available list of all schools that had invoked an exemption. Commenters contended that the Obama-era approach was popular among students and faculty, and was fair to all parties. Commenters also suggested that a requirement to force religious institutions to submit assurance requests ahead of time saves agency resources for OCR, so the preamble's assertion that the prior practice is confusing and burdensome is an absurd thing to say. Commenters argued that proceeding with this rationale will mean violating the Administrative Procedure Act, because the current procedures are not confusing or burdensome, as set forth clearly in the current regulation. Commenters argued that the current procedures require religious institutions to establish which tenets of their religion are in conflict with Title IX, whereas the proposed regulations would not require schools to fully elaborate which of their tenets are contradicted by Title IX.

Discussion: The Department appreciates the feedback on the potential policy implications of the proposed rule. The Department acknowledges that its practices in the recent past regarding assertion of a religious exemption, including delays in responding to inquiries about the religious exemption and publicizing some requests for a religious exemption, may have caused educational institutions to become reluctant to exercise their rights under the Free Exercise Clause of the First Amendment, and the Department would like educational institutions to fully and freely enjoy rights guaranteed under the Free Exercise Clause of the U.S. Constitution without shame or ridicule. The Department may be liable for chilling a recipient's First Amendment rights and also is subject to the Religious Freedom Restoration Act. The Department properly engaged in this notice-and-comment rulemaking to clarify that the Department, consistent with 20 U.S.C. 1681, will not place any substantial burden on a recipient that wishes to assert the religious exemption under Title IX.

The Department is giving due weight to Congress' express religious exemption for recipients in Title IX, and Congress did not require a recipient to first seek assurance of such a religious exemption from the Department. The First Amendment and the Religious Freedom Restoration Act, which apply to the Department as a Federal agency, cause the Department to err on the side of caution in not hindering a recipient's ability to exercise its constitutional rights.

Based on at least some commenters asserting that recipients needed more clarity on the current regulations, the Department respectfully disagrees with commenters arguing that confusion and burdens have not resulted from the text of the current regulations. In any event, the final regulations codify longstanding OCR practices, and are consistent with the Title IX statute.

With respect to publishing a list of all recipients who have received assurances from OCR, OCR declines to set forth any formal policy in the final regulations. Such lists are necessarily incomplete, since they do not adequately describe the scope of every exemption, and because many recipients that are eligible for religious exemptions may nevertheless not seek assurance letters from OCR. However, nothing in the final regulations addresses publishing such a list, one way or another. In any event, correspondence between OCR and recipient institutions, including correspondence addressing religious exemptions, is subject to Freedom of Information Act requirements.

Changes: None.

Comments: Commenters argued that OCR's practice regarding religious exemptions has worked since 1975, and that the time period between 1975 and the present day spans numerous presidencies across both Democrat and Republican administrations. One commenter stated that

no religious exemption request has ever been denied, so addressing this topic in formal rulemaking is unnecessary.

Commenters contended that the change to the text of the religious exemption regulation is not responsive to any specific issue or wrong, and that the current regulation appropriately burdens the institution, as opposed to students.

Commenters also stated that the revisions to § 106.12(b) would largely remove the Department and OCR out of the religious exemption process, since students may not challenge a school's assertion of a religious exemption during the school's handling of a complaint. That would be problematic, asserted commenters, because students would be blindsided by assertions of exemptions that have not yet been evaluated or ruled on by the Department and OCR, so a student challenging an exemption, asserted commenters, would have their complaint ignored or stayed while they waited for OCR to rule on the validity of the exemption assertion.

Commenters suggested that placing the burden on a party not invoking the exemption is discordant with other areas of law, such as many States' requirement that parents submit a religious objection to immunizations in writing, or that an entity bear the burden of establishing its entitlement to tax-exempt status. Indeed, say the commenters, the Department administers the Clery Act, which is another statute that burdens schools by requiring them to collect and report information.

Discussion: The Department disagrees with commenters that assert § 106.12(b) should not be part of this notice-and-comment rulemaking. Some commenters have asserted that the current § 106.12(b) has caused confusion, and the Department wishes to clarify that neither Title IX nor these final regulations require a recipient to request an assurance of a religious exemption under 20 U.S.C. 1681(a)(3). Additionally, the Department wishes to avoid liability under the First

Amendment and the Religious Freedom Restoration Act, and to the extent that § 106.12(b) may be ambiguous or vague, the Department would like to take this opportunity to revise § 106.12(b) to be even more consistent with Title IX, the First Amendment, and the Religious Freedom Restoration Act.

Section 106.12(b) as proposed and as included in these final regulations does not burden students as the recipient must still invoke the exemption. Indeed, a recipient must still demonstrate that it is an educational institution which is controlled by a religious organization and that the application of Title IX or its implementing regulations would not be consistent with the religious tenets of such organization. The student does not bear the burden with respect to the religious exemption.

The Department also disagrees that a complaint is placed on hold while the Department considers a recipient's religious exemption. The Department processes complaints in the normal course of business and will consider any religious exemption in the normal course of an investigation just as it considers other exemptions under Title IX during an investigation. Accordingly, a student will not suffer from any delays in the Department's processing of a complaint as a result of the revisions to § 106.12(b).

There also should not be any delays with respect to the recipient's processing of a student's complaint such as a formal complaint under §§ 106.44 and 106.45. Section 106.44(a) requires a recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States to respond promptly in a manner that is not deliberately indifferent. Section 106.12(b) clarifies that a recipient does not need to submit a statement in writing to the Assistant Secretary to assert a religious exemption before asserting an exemption and, thus, there is no need for the Department to intervene or delay any

complaint of sex discrimination, including a formal complaint of sexual harassment, that the recipient is processing to determine whether the recipient qualifies for a religious exemption.

Students should not be blindsided and may always inquire about the application of Title IX and its implementing regulations to the recipient's Title IX Coordinator, to the Assistant Secretary, or both. Additionally, a recipient that is an educational institution must be controlled by a religious organization in order to assert an exemption under Title IX, 20 U.S.C. 1681(a)(3), and students likely will know whether the educational institution is controlled by a religious organization.

The Department reiterates that the burden remains on the recipient to establish and assert a religious exemption to Title IX, 20 U.S.C. 1681(a)(3). Congress expressly requires postsecondary institutions that receive Federal student financial aid through the programs authorized by Title IV of the Higher Education Act of 1965, as amended, to make certain reports, including reports to the Department. The Department's regulations, implementing the Clery Act, address the reporting requirements that Congress enacted. Congress, however, did not require educational institutions to report a religious exemption to the public or to the Department under Title IX, and the Department declines to impose any burden on the constitutional rights of recipients of Federal financial assistance that Congress did not impose. Additionally, as previously explained, the First Amendment and the Religious Freedom Restoration Act may prohibit any such additional burdens.

Changes: None.

Comments: One commenter objected to any form of assurance letter being sent by OCR, on the basis that such a process caused an undue entanglement with religion. The commenter suggested

that the statute simply apply on its own terms, without the need for OCR to closely scrutinize the tenets of a religious educational institution.

Discussion: The Department appreciates feedback on the proposed rule. The process of applying to OCR for an assurance letter is entirely optional, and nothing in the final regulations requires a school to obtain an assurance letter prior to invoking a religious exemption. The Department therefore sees no entanglement problem in allowing recipients to request an assurance letter, and generally avoids scrutinizing or questioning the theological tenets or sincerely held religious beliefs of a recipient that invokes the religious exemption in Title IX.[1727]

Changes: None.

Comments: Several commenters asserted that the final regulations ought to be changed such that recipients are not entitled to religious exemptions under Title IX. Some commenters stated that the topic of religious exemptions might not be a significant one, and that it was unclear how many recipients had truly avoided an investigation or finding under Title IX due to a religious exemption. The commenter suggested that instead of modifying the regulations, the better course would be to study the issue further and determine how many recipients had successfully invoked a religious exemption to avoid a Title IX compliance issue in the last three to five years.

Discussion: The Department appreciates the feedback on § 106.12(b) but does not believe it is necessary to examine OCR records to report on how many recipients have successfully invoked a religious exemption under Title IX. This is because the Title IX statute provides a religious exemption for recipients, and the Department cannot eliminate the religious exemption in the Title IX statute through its regulations. In any event, the final regulations codify longstanding

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[1727] 20 U.S.C. 1681(a)(3).

OCR practices, and both the final regulations and OCR practice are consistent with the Title IX statute.

Changes: None.

Comments: A commenter suggested that part of the process ought to be a publication of a book by OCR that contains the full list of recipients that have obtained an assurance letter. Some commenters suggested, apart from a book, that OCR ought to publish on its website a list of all recipients that have obtained a religious exemption assurance letter. Another commenter suggested that OCR at least require recipients to inform a student who has filed a complaint that the recipient has invoked a religious exemption, particularly if no assurance letter has been previously requested. These measures, asserted commenters, would increase transparency for students and employees who may attend or work for educational institutions that maintain exemptions from Title IX.

Discussion: The Department appreciates the feedback on the proposed rule. When OCR receives a complaint involving a recipient that invokes a religious exemption, OCR will proceed in accordance with OCR's Case Processing Manual, including with respect to notifying a complainant that the recipient has invoked a religious exemption. OCR's current practice does not require OCR to keep a complainant apprised of developments in an ongoing investigation of a recipient, and the Department has not proposed any procedural changes to the manner in which it processes complaints in this notice-and-comment rulemaking so as to give the public notice to comment on such a proposal. A complainant currently receives the opportunity to appeal the Department's determination with respect to a complaint or the dismissal of a complaint and may

raise any concerns about a recipient's religious exemption as well as other matters on appeal.[1728] The Department does not wish to treat a religious exemption, which Title IX provides and which the Department is required to honor under Title IX and in abiding by the First Amendment and the Religious Freedom Restoration Act, differently than any other exemption from Title IX that a recipient may invoke. Title IX provides exemptions other than a religious exemption in 20 U.S.C. 1681(a) (e.g., exemptions for membership policies of social fraternities or sororities, father-son or mother-daughter activities, scholarship awards in "beauty" pageants). The Department does not notify a complainant of a recipient's invocation of other exemptions provided in Title IX when the Department is processing a complaint and declines to do so for a religious exemption. Nothing in the final regulations prevents a recipient from informing the complainant of its invocation of a religious exemption. The Department notes that any person may direct an inquiry about the application of Title IX to a particular recipient to the recipient's Title IX Coordinator, the Assistant Secretary, or both, pursuant to § 106.8(b)(1).

On the subject of OCR publishing a book, list of names, or copies of the assurance letters that have been provided to recipients that address a recipient's eligibility for a religious exemption, the Department often posts such correspondence on the OCR website. Additionally, such documents are subject to Freedom of Information Act requests, and attendant rules regarding public disclosure of commonly-requested documents. The Department does not believe that publishing a book or a list of names of recipients that have asserted eligibility for a

[1728] U.S. Dep't. of Education, Office for Civil Rights, *Case Processing Manual* § 307 Appeals, https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf.

religious exemption is necessary, and the final regulations do not address that issue, one way or another.

Changes: None.

Comments: Some commenters stated that they would prefer the Department to at least encourage recipients to post information about Title IX religious exemptions on the recipient's website, so that people who are actively looking for that information can find it easily. Other commenters suggested that a recipient maintaining a religious exemption ought to be compelled to publish such information in their materials and policies, i.e., a student handbook, or a website.

Discussion: The Department generally does not include in its regulations specific types of advice or encouragement for recipients and believes that the Title IX statute and § 106.12 appropriately guide recipients as to the scope and application of the religious exemption under Title IX.

The Department does not require recipients to publish any exemptions from Title IX under 20 U.S.C. 1681(a)(3) that may apply to the recipient and does not wish to single out the religious exemption for special or different treatment. The Department believes that the requirements in these final regulations provide sufficient transparency. As previously stated, § 106.8 requires all recipients to notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient of its notice of non-discrimination on the basis of sex as well as its grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond. Additionally, § 106.8(b)(2)(ii) provides that a recipient must not use or distribute a publication stating that the recipient treats applicants, students, or employees

differently on the basis of sex except as such treatment is permitted by Title IX or these final regulations. Accordingly, students and prospective students should receive adequate notice of the recipient's non-discrimination statement as well as its grievance procedures and grievance process regarding sex discrimination, including sexual harassment, and such notice is consistent with due process principles. Such transparency helps guard against any misunderstandings, irrespective of whether a school asserts a religious exemption.

The religious exemption in Title IX, 20 U.S.C. 1681(a)(3), applies to an educational institution which is controlled by a religious organization, and students and prospective students likely will know whether an educational institution is controlled by a religious organization so as not to be surprised by a recipient's assertion of such a religious exemption. Additionally, the Department also notes that under § 106.8(b)(1) any person can inquire about the application of Title IX to a particular recipient by inquiring with the recipient's Title IX Coordinator, the Assistant Secretary, or both.

Changes: None.

Comments: Some commenters suggested that the religious exemptions language be altered, to carve out conduct that would be considered a crime. Other commenters suggested that the Department should clarify how a school that maintains a religious exemption ought to interact with a school that does not maintain a religious exemption, if an incident involves two students, one from each type of school. Specifically, a commenter asked whether a school with a religious exemption has a duty to cooperate with another school that was investigating a Title IX incident involving one of its students. Another commenter asked the Department to clarify whether a recipient that invoked a religious exemption still had the duty to provide the full extent of the grievance procedures in § 106.45.

Discussion: The Department appreciates these nuanced questions about how recipients can comply with the final regulations under specific fact patterns. Generally, religious exemptions cannot be invoked to avoid punishment for criminal activity, and absent a specific example, the Department believes asserting a religious exemption to avoid punishment for a crime is unrealistic under Title IX. In any event, the Department does not punish recipients for criminal activity. The Department enforces the non-discrimination mandate in Title IX, which prohibits discrimination on the basis of sex.

With respect to the other factual scenarios that commenters present, the Department and OCR are willing to provide technical assistance to recipients who seek answers to individual factual circumstances, or to stakeholders who may file complaints against recipients eligible for religious exemptions, but we do not believe it is appropriate to attempt to answer these questions at this stage and without the benefit of a complete set of facts.

As with any regulation under Title IX, including § 106.45, an educational institution that is controlled by a religious institution is exempt from Title IX or its implementing regulations only to the extent that Title IX or one of its implementing regulations would not be consistent with the religious tenets of such organization.

Changes: None.

Comments: One commenter suggested a minor revision to § 106.12(b) to make clear that any future claims of institutional religious exemption under the proposed regulations are not predetermined by the scope or nature of any prior claims submitted in writing to the Assistant Secretary: ". . . whether or not the institution had previously sought assurance of ~~the~~ *an* exemption from the Assistant Secretary *as to that provision or any other provision of this part.*"

Discussion: The Department agrees with the reasoning behind this change and changes "the" to "an" as the commenter suggested. The Department does not believe the commenter's other suggested phrase, "as to that provision or any other provision of this part" is necessary to adequately explain the scope and application of this provision.

Changes: The word "the" has been changed to "an" in the final sentence of § 106.12(b) of the final regulations.

Comments: One commenter suggested that the Department ought to go beyond the proposed rule, and promulgate a definition for what it means to be "controlled by a religious organization," so that recipients and the public would know which institutions are in fact eligible for religious exemptions, since there has been confusion previously. Additionally, the commenter asked that the definition take account of and be consistent with Supreme Court case law interpreting the Establishment Clause of the First Amendment.

Discussion: Although the Department appreciates this feedback, it declines to make any changes to these final regulations because the scope of proposed changes to § 106.12 was limited by the Department's proposal to change § 106.12(b) but not subsection (a). The Department decided to address what it means to be controlled by a religious organization for purposes of the religious exemption in Title IX through a subsequent notice of proposed rulemaking.[1729] The Department will continue to offer technical assistance regarding compliance with these final regulations.

Changes: None.

[1729] 85 FR 3190.

Directed Questions[1730]

Directed Question 1: Application to Elementary and Secondary Schools

Comments: Some commenters commended the proposed rules for including elementary and secondary schools, suggesting that their inclusion would have a positive impact on these schools for Title IX purposes. Another commenter asserted that elementary and secondary schools, too, have sexual harassment issues that they must confront; it is not only a problem in postsecondary institutions. One commenter asserted that it was good to have different Title IX approaches for elementary and secondary schools as opposed to postsecondary institutions, since some procedures are appropriate for postsecondary institutions, but may not work for elementary and secondary schools; the commenter pointed to live hearings for postsecondary institutions but no hearing requirement for elementary and secondary schools as a good example of recognizing the differences between elementary and secondary education (ESE) and postsecondary education (PSE) contexts. Another commenter argued that elementary and secondary schools need flexibility to address sexual harassment issues that arise involving younger students.

Discussion: The Department appreciates this feedback on the proposed rules. The Department agrees with commenters that some procedures are more appropriate for postsecondary institutions but not for other recipients, including elementary and secondary schools, and the final regulations reflect such differences. For example, § 106.30 defines "actual knowledge"

[1730] The Department addresses comments submitted in response to the NPRM's Directed Questions 3-4, and 6-9, throughout sections of this preamble to which such directed questions pertain. For example, Directed Question 3 inquired about applicability to the proposed rules to employees, and comments responsive to that directed question are addressed in the "Section 106.6(f) Title VII and Directed Question 3 (Application to Employees)" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble.

more broadly in elementary and secondary schools and § 106.45(b)(6)(ii) does not require live hearings or cross-examination procedures for recipients who are not postsecondary institutions.

Changes: We have revised § 106.30 defining "actual knowledge," to include notice to any elementary and secondary school employee; and we have clarified the language in § 106.45(b)(6)(ii) to more expressly state that unlike postsecondary institutions, elementary and secondary schools are not required to hold hearings as part of the grievance process.

Comments: Some commenters argued that the proposed rules ought to make additional distinctions between ESE students and PSE students. These distinctions, commenters asserted, should include removing the presumption of non-responsibility for students accused of sexual harassment in ESE contexts. Commenters argued that schools at the ESE level ought to be able to presume, in some cases, that a student is responsible for sexual harassment, or at least that no presumption ought to exist in any direction. Commenters argued that this was necessary because schools need to react to time-sensitive situations and exclude accused students or employees from the school atmosphere without having to go through the extensive grievance procedures contemplated by the proposed rule. Commenters also suggested that offering supportive measures was often time-sensitive, such that a full grievance process is not appropriate. Other commenters supported significantly abbreviating the grievance procedures, on the basis that a full process was unworkable at the ESE level. Some commenters expressed concern that younger students would be put at a higher risk for sexual violence, because they might not know the types of touching that are appropriate or inappropriate to come forward to the designated school employee on their own.

Discussion: The Department appreciates this feedback. The Department agrees that schools must have effective tools for responding to allegations of sexual harassment, and the final regulations

protect this interest. The final regulations are designed to promote predictability and a clear understanding of every recipient's legal obligations to respond to sexual harassment incidents, including promptly offering supportive measures to a complainant (i.e., a person alleged to be the victim of sexual harassment) whenever any ESE employee has notice of sexual harassment or allegations of sexual harassment. One of the ways in which these final regulations differentiate between ESE and PSE students is recognizing that ESE students cannot reasonably be expected to report sexual harassment only to certain school officials, or even teachers, and that ESE recipients and their employees stand in a special relationship regarding their students, captured by the legal doctrine that school districts act *in loco parentis* with respect to authority over, and responsibility for, their students. Thus, the final regulations (at § 106.30 defining "actual knowledge") trigger an ESE recipient's response obligations any time an ESE employee has notice of sexual harassment. These final regulations obligate all recipients to promptly reach out to each complainant (i.e., a person alleged to be the victim of conduct that could constitute sexual harassment, regardless of who actually witnessed or reported the sexual harassment) and offer supportive measures, under § 106.44(a). These final regulations (at § 106.6(g)) also expressly acknowledge the importance of respecting the legal rights of parents or guardians to act on behalf of students in a Title IX matter, including but not limited to the choice to file a formal complaint asking the school to investigate sexual harassment allegations. These final regulations define "supportive measures" in § 106.30 in a manner that gives ESE recipients wide discretion to quickly, effectively take steps to protect student safety, deter sexual harassment, and preserve a complainant's equal educational access. As discussed in the "Supportive Measures" subsection of the "Section 106.30 Definitions" section of this preamble, supportive measures cannot "unreasonably burden" the respondent but this does not mean that supportive measures

cannot place *any* burden on a respondent, so actions such as changing a respondent's class or activity schedule may fall under permissible supportive measures, and supportive measures must be offered without waiting to see if a grievance process is eventually initiated or not. Recipients also retain the authority to remove a respondent from education programs or activities on an emergency basis if the respondent presents an imminent threat to the physical health or safety of any individual, under § 106.44(c). We also reiterate that many actions commonly taken in the ESE context are not restricted under these final regulations; while a recipient may not punish or discipline a respondent without complying with the § 106.45 grievance process, actions such as holding an educational conversation with a respondent, explaining to the respondent in detail the recipient's anti-sexual harassment policy and code of conduct expectations, and similar actions are not restricted unless paired with actions that are punitive, disciplinary, or unreasonably burdensome to the respondent.

We disagree that a presumption of non-responsibility[1731] is less important for respondents in the ESE context than in the PSE context, because the presumption serves to reinforce that a recipient must not treat a respondent as responsible for Title IX sexual harassment unless such allegations have been proved or otherwise resolved under a process that complies with § 106.45, but as discussed above, this leaves wide flexibility for recipients to address the need for complainants' equal educational access, protect safety, and deter sexual harassment, while a grievance process is pending or without any grievance pending.

Changes: None.

[1731] For further discussion see the "Section 106.45(b)(1)(iv) Presumption of Non-Responsibility" subsection of the "General Requirements for § 106.45 Grievance Process" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble.

Comments: Many commenters argued that the grievance procedures in the NPRM generally do not work well for ESE recipients. Commenters argued that schools need to take swift action in the ESE setting, since young children are at particular risk of further harm. Commenters also argued that live hearings with cross-examination should not occur where young children are involved. The prospect of an employee or the employee's advisor cross-examining a student in cases where a school opted to allow live hearings troubled some commenters. Some stated that prior written notice should not be required at the ESE level for every investigative interview. Commenters stated that these were flaws in the proposed rules that stemmed from the Department not adequately considering how differences in structure and populations affect Title IX enforcement, as between ESE and PSE contexts.

Commenters contended that the extensive due process protections in the proposed rules would have the consequence of making school proceedings more intimidating for victims. They stated that setting up what amounts to an expressly adversarial process between students at ESEs is inappropriate. Some commenters argued that even referring to students as "complainants" and "respondents" had the unfortunate effect of creating litigation-like settings in ESE schools, and argued that the proposed rules would require significantly more process than what is required by the Supreme Court.[1732] Commenters also stated that students themselves will be confused by the proposed rules, and many will need to hire legal counsel in order to fully understand their rights. Commenters argued that sexual harassment incidents disproportionately affect Black students and transgender students, so the proposed rules would hurt them especially.

[1732] Commenters cited: *Goss v. Lopez*, 419 U.S. 565 (1975).

Some commenters argued that cases at the ESE level should never be subject to a clear and convincing evidence standard of evidence, yet the proposed rules would allow a recipient to choose that standard for resolving allegations of sexual harassment. Some stated that schools, especially underfunded schools, would not be able to afford many of the evidence-sharing provisions of the proposed rules, or the requirement that the investigator be a different person than the person who adjudicates a claim of sexual harassment. Commenters argued that many schools would be destroyed by having to comply with the proposed rules. Some commenters objected to the requirement that every determination regarding responsibility for sexual harassment needed to be accompanied by specific findings and a written report, arguing that such a burden was too onerous for ESE schools. Some contended that poorer schools needed to rely on the single investigator model – as opposed to separate individuals being the Title IX Coordinator, the investigator, and the decision-maker for discipline – and that the proposed rules are unworkable at the ESE level. Other commenters contended that having to explain why each question is or is not asked during a hearing, if it occurs, will be cumbersome and unnecessary.

Aside from the issue of financial burden, some commenters argued that the proposed rules were likely to cause confusion for school personnel, many of whom are not lawyers and who are not trained to administer or prepare for adversarial proceedings. The commenters argued that school officials will often make mistakes, and that confidence in the system will deteriorate to the point that students will opt not to report instances of sexual harassment. Commenters argued that the proposed rules insufficiently consider that schools know best how to handle their own students, and that imposing these burdens is not necessary to resolve claims of sexual harassment.

Some commenters argued that even if recipients were able to implement the new grievance procedures properly, there would still be negative consequences for students and schools. For instance, some commenters argued that the grievance procedures are subject to manipulation, especially when students with financial resources are able to take advantage of the procedures against other students who may lack similar resources. Other commenters suggested that frequent dissatisfaction with the processes or with outcomes would lead to litigation in court. These commenters also argued that full compliance with these final regulations at the ESE level will be expensive and would outweigh any savings.

Other commenters took issue with the informal resolution provisions of the proposed rules, stating that mediation is never appropriate at the ESE level, particularly if there are few requirements surrounding the content of the mediation or if the underlying allegation involves sexual assault. Commenters stated that since the informal resolution process can end the investigation into allegations of sexual harassment, it is problematic to rely on a student's willingness to object to informal resolution – and to insist on the formal grievance procedures – to adequately cause the school to respond to sexual harassment. Other commenters stated that forms of informal resolution like mediation are inherently traumatic for victims of sexual harassment, and some argued that mediation generally utilizes "rape myths" and "victim-blaming language" that ought to be avoided.

Many commenters wanted the Department to expand the scope of the individuals whose knowledge could give rise to a school's duty to respond to sexual harassment. Some commenters expressed concern that students do not know who might have authority to institute corrective measures and who does not, per the scope of the proposed rules. Some commenters suggested that at least mandatory reporters should be covered. Other commenters argued that regardless of

who receives information about sexual harassment, the appropriate response is a "trauma-informed" response, such that the person who alleges sexual harassment ought to be believed from the outset.

The net of all of these issues, argued commenters, was that educational environments and learning would suffer. Schools would have difficulty effectively responding to sexual harassment, and preventing future incidents, asserted commenters. Commenters contended that the proposed rules would discourage young vulnerable students from reporting instances of sexual harassment, out of fear that they might have to endure lengthy and onerous procedures while trying to still maintain their academic progress.

Discussion: The Department appreciates this feedback. The Department is promulgating consistent, predictable rules for recipients who must respond to allegations of sexual harassment, and has balanced the strong need to protect students from sexual harassment and the need to ensure that adequate processes are in place. The Department agrees with commenters who stated that the types of school personnel to whom notice should charge a recipient with "actual knowledge" in the ESE context should be expanded. As discussed in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section and the "Actual Knowledge" subsection of the "Section 106.30 Definitions" section of this preamble, we have revised the final regulations to provide that notice to any elementary or secondary school employee triggers the ESE recipient's response obligations.

Within the confines of these final regulations, recipients may adjust their procedures to minimize the amount of resources that must be spent with respect to each allegation of sexual harassment. The final regulations allow recipients the discretion to facilitate an informal

resolution process,[1733] and permit each recipient to conduct the grievance process under time frames the recipient has designated as reasonable for an ESE environment.[1734] For emergencies posing imminent risks to any individual's safety recipients may, consistent with the terms of the final regulations, invoke emergency removal procedures.[1735]

The Department disagrees that the final regulations are unworkable in the ESE environment, or that they will destroy recipients who must abide by them. Instead, the final regulations offer significant flexibility to recipients, while still maintaining the appropriate balance between a recipient's duty to respond to allegations of sexual harassment and its duty to ensure due process protections that benefit both complainants and respondents.[1736] Additionally, the Department expects that significant efficiencies will result, and the cost to implement required procedures will be reduced, as students, employees, and school personnel interact with consistent and predictable rules. To the extent that a recipient needs the advice of legal counsel to understand its duties, it will be easier for counsel to advise them on the requirements of concrete rules published in regulations than on Department guidance that does not represent legally binding obligations. What may be a cumbersome new procedure at first may soon become routine, and reduce confusion, as a recipient responds to all of its Title IX formal complaints with specific procedures. At the same time, many recommendations and best

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[1733] Section 106.45(b)(9) allows recipients to facilitate informal resolution of formal complaints, except as to allegations that an employee sexually harassed a student. We understand that some commenters, including some recipients, do not believe that informal resolution is appropriate at all in the ESE context, or is not appropriate for sexual assault allegations, and the final regulations allow each recipient to choose whether to offer any informal resolution processes at all.

[1734] Section 106.45(b)(1)(v).

[1735] Section 106.44(c).

[1736] For further discussion see the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section and "Role of Due Process in the Grievance Process" section of this preamble.

practices found in Department guidance remain viable policies and procedures for recipients while also complying with these final regulations, so the Department anticipates that not all recipients will find the need to change their current Title IX policies and procedures wholesale. For further discussion of the similarities and differences among these final regulations and Department guidance documents, see the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section and "Role of Due Process in the Grievance Process" section of this preamble.

As to live hearings with cross-examination, we have clarified the language in the final regulations to emphasize that ESE recipients are not required to use a hearing model to adjudicate formal complaints of sexual harassment under these final regulations. Moreover, if an ESE recipient chooses to use a hearing model, that recipient does not then need to comply with the provisions in § 106.45(b)(6)(i), which applies only to postsecondary institution recipients. For further discussion see the "Section 106.45(b)(6)(ii) Elementary and Secondary School May Require Hearing and Must Have Opportunity to Submit Written Questions" subsection of the "Hearings" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble. Nothing prevents schools from counseling students as to how the grievance procedures will work, or aiding and assisting the parties, on an equal basis, with additional supports as they go through the process. Additionally, many provisions of the final regulations require only that schools provide an equal opportunity to the parties, leave the recipient flexibility to the extent that a recipient would prefer to make the grievance process less formal or intimidating for students. We have also added § 106.6(g) in the final regulations, acknowledging the legal rights of parents or guardians to act on behalf of complainants,

respondents, or other individuals with respect to exercising rights under Title IX, including participation in a grievance process.

The Department disagrees that the final regulations will deter reporting, since having consistent, predictable rules for Title IX proceedings will likely make them less intimidating for ESE students and their parents, and students or employees may gain confidence in a process that expressly allows the complainant to choose whether reporting leads only to supportive measures or also leads to a grievance process.[1737] Indeed, the Department believes that having predictable rules will encourage reporting by students or their parents, and ensure that students and employees who allege sexual harassment will not have to wonder how they will be treated upon reporting. As described in the "Deliberate Indifference" subsection of the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, we have significantly revised § 106.8 and § 106.44(a) to emphasize that reporting sexual harassment is the right of any complainant (or third party, including a complainant's parent) and recipients must offer supportive measures to every complainant (i.e., person alleged to be the victim of sexual harassment), regardless of whether a grievance process is also initiated against a respondent.

The Department also disagrees that parties with significant financial resources will be able to manipulate the grievance process in an unjust manner any more than any other Title IX grievance procedures established in response to Department guidance, since the final regulations provide for meaningful participation of both parties at every stage in a grievance process. The grievance process is designed for students (including, as legally applicable, parents acting on

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[1737] Section 106.44(a); § 106.30 (defining "formal complaint").

behalf of their children)[1738] to navigate without legal representation, though every party has the right to an advisor of choice who may be, but need not be, an attorney.[1739] The Department believes that one way to mitigate the possibility of a party unfairly using financial resources is to grant both complainants and respondents strong procedural rights (including the right to assistance and advice from an advisor of the party's choosing) as they engage in the process.

The Department agrees that schools themselves know best how to engage with their students, and recipients are encouraged to use their discretion and expertise within the confines of the final regulations. This includes what training to give to ESE employees regarding reporting sexual harassment to the Title IX Coordinator (knowing that notice to any ESE employee triggers the recipient's response obligations under these final regulations), what training to give the Title IX Coordinator with respect to circumstances that might justify the Title IX Coordinator deciding to sign a formal complaint in situations where the complainant (and complainant's parent, as applicable) does not want the recipient to investigate allegations, which supportive measures may be appropriate in certain circumstances, what time frames to designate for completion of a grievance process, the use of age-appropriate explanatory language in the written notices that must be sent to parties under § 106.45, what standard of evidence to apply to resolving formal complaints, whether to use the Title IX Coordinator as the investigator or separate those roles, whether to use informal resolution, whether to offer grounds for appeal in addition to those required under § 106.45, the selection of remedies for a complainant where a respondent is found responsible for sexual harassment, and the choice of disciplinary sanctions

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[1738] Section 106.6(g).
[1739] Section 106.45(b)(5)(iv).

against a respondent who is found responsible. The foregoing illustrations of discretion that ESE recipients possess is in addition to the ability of ESE recipients to address conduct that does *not* meet the definition of sexual harassment as defined in § 106.30, as well as other types of student misconduct, outside the confines of these final regulations; these final regulations apply only when the conditions of § 106.44(a) are present (i.e., an ESE employee has notice of conduct that could constitute sexual harassment as defined in § 106.30, that occurred in the recipient's education program or activity, against a person in the United States). The § 106.45 grievance process is a required part of the recipient's response only when the recipient is in receipt of a formal complaint (as defined in § 106.30), which must either be filed by a complainant (i.e., the person alleged to be the victim of sexual harassment, or a parent or guardian legally entitled to act on that person's behalf) or signed by the Title IX Coordinator. In the absence of a formal complaint, the recipient's response must consist of offering supportive measures designed to preserve the complainant's equal access to education, as well as to protect the safety of all parties or deter sexual harassment. The Department does not believe that the final regulations present unduly burdensome, much less insurmountable, obstacles for ESE recipients to fulfill every recipient's obligation to supportively and fairly address sexual harassment in a recipient's education programs or activities.

The Department disagrees that informal resolution is never appropriate for ESE institutions, or that ESE recipients may never use it in the context of allegations of sexual assault. In these cases, the final regulations provide adequate limitations and protections for parties

regarding the use of informal resolutions, and we reiterate that the final regulations do not mandate that any recipient offer or facilitate information resolution processes.[1740]

For the reasons explained in the "Section 106.45(b)(7)(i) Standard of Evidence and Directed Question 6" subsection of the "Determinations Regarding Responsibility" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble, the Department disagrees that the clear and convincing evidence standard of evidence is never appropriate in the ESE setting, such that no ESE recipient should ever be able to adopt that standard to resolve formal complaints of sexual harassment.

Changes: None.

Comments: Commenters argued that students should not have to wait weeks, if not months, for adjudications of and responses to their allegations of sexual harassment. Lack of timely resolution would be made worse, some commenters argued, by the fact that the grievance process can be delayed for law enforcement investigations. Commenters argued that because nearly all sexual harassment allegations in the ESE context will require law enforcement intervention, the proposed rules would result in frequent, significantly delayed processes in the ESE context.

Discussion: The Department appreciates this feedback and discusses these concerns in the "Section 106.45(b)(1)(v) Reasonably Prompt Time Frames" subsection of the "General Requirements for § 106.45 Grievance Process" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble. We reiterate here that the final regulations do not require a recipient to delay a Title IX grievance process while a law

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[1740] Section 106.45(b)(9).

enforcement investigation is pending; rather, § 106.45(b)(1)(v), only permits a recipient to provide for short-term delays or extensions of the recipient's own designated, reasonably prompt time frame for conclusion of the grievance process, when such short-term delay or extension is based on "good cause," and that provision gives as an example of good cause, concurrent law enforcement activity. "Good cause" under these final regulations would not justify a long or indefinite delay or extension of time frames for concluding the Title IX grievance process, regardless of whether a law enforcement investigation is still pending.

Additionally, we reiterate that under § 106.44 a recipient's prompt response to every complainant (once a recipient is on notice that a complainant has been victimized by sexual harassment) is triggered with or without the filing of a formal complaint and without awaiting the conclusion of a grievance process if a formal complaint is filed. We therefore disagree that the § 106.45 grievance process poses a risk of undue delay for any complainant in the ESE context to expect and receive a prompt, supportive response from the ESE recipient designed to restore or preserve the complainant's equal educational access.

Changes: None.

Comments: Commenters argued that the proposed rules' definition of "sexual harassment" would be problematic for ESE populations. These commenters stated that young teens are particularly vulnerable to sexual harassment, but that the standard for determining whether a school has a duty to act – whether conduct was severe, pervasive, and objectively offensive – is too high a bar for ESE students. In this vein, commenters stated that ESE students will be traumatized from repeated incidents of sexual misconduct that do not rise to the level of the § 106.30 definition of sexual harassment. Other commenters noted that because this definition mirrors the standard for private rights of action in civil suits, the proposed rules would have the

consequence of leading more people to court. The commenters argued that if one of the goals of the proposed rules is to reduce the amount of litigation involving Title IX, they do the opposite.

Discussion: The Department appreciates this feedback, but for the reasons explained in the "Sexual Harassment" subsection of the "Section 106.30 Definitions" section of this preamble and in the "Definition of Sexual Harassment" subsection of the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, the Department believes that the § 106.30 definition of sexual harassment is appropriate for application in elementary and secondary schools. We reiterate that under these final regulations, recipients remain free to address misconduct that does not meet that definition under State laws or a recipient's own code of conduct, and as to such misconduct these final regulations (including the general response obligations in § 106.44 and the grievance process in § 106.45) do not apply. For reasons discussed throughout this preamble, including in the "Litigation Risk" subsection of the "Miscellaneous" section of this preamble, the Department believes that these final regulations may have the benefit of reducing litigation, because these final regulations adopt the Supreme Court's *Gebser/Davis* framework for addressing sexual harassment, yet adapt that framework in a manner that places on recipients specific legal obligations to support complainants that are not required in private Title IX lawsuits, and do so in a manner that we believe also ensures that the recipient's response meets constitutional requirements of due process of law and respect for First Amendment rights (which public schools owe to students and employees) and concepts of fundamental fairness that private schools owe to students and employees. Thus, we believe that implementing these final regulations may have the ancillary benefit of reducing litigation arising from school responses to Title IX sexual harassment.

Changes: None.

Comments: Commenters argued that schools will be confused when trying to balance certain Federal rights with other ones, in cases where there is tension. Commenters argued that the proposed rules did not adequately discuss what should happen when one of the students involved in allegation of sexual harassment is a student with a disability and has rights under the IDEA or Section 504. One commenter stated that under the IDEA, school districts serve students from the age of three to the age of 21, so providing for one-size-fits-all policies, even just for students with a disability, might not be developmentally appropriate. Other commenters argued that the proposed rules may be in tension with rape shield laws, or that, at least, school personnel will have difficulty navigating the issues if there is ambiguity.

Discussion: The final regulations do not supersede the IDEA, Section 504, or the ADA. The final regulations provide significant flexibility for recipients, and recipients may utilize this flexibility in challenging cases, including where a recipient must comply with both these final regulations, and applicable disability laws. Additionally, the final regulations provide complainants with rape shield protections, and deem questions and evidence regarding a complainant's prior sexual behavior irrelevant (unless such questions or evidence are offered to prove that someone other than the respondent committed the alleged conduct, or if it concerns specific incidents of sexual behavior with the respondent and is offered to prove consent). These concerns are further addressed in the "Section 106.45(b)(6)(ii) Elementary and Secondary School Recipients May Require Hearing and Must Have Opportunity to Submit Written Questions" subsection of the "Hearings" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble.

Changes: None.

Comments: Some commenters stated that they were concerned about the proposed rules creating a two-tiered system of complaints, which would be particularly challenging at the ESE level. The commenters argued that some allegations would rise to the level of sexual harassment contemplated by the proposed rules and would therefore trigger a school's duty to respond and go through the grievance procedures. Other conduct, stated commenters, might be sexual in nature, and even severe or pervasive or objectively offensive – but not all three – and thus not trigger a duty to respond, and not trigger any need to go through the grievance procedures. But this conduct might still be prohibited by a school's code of conduct, noted commenters, and a school could still discipline students for code of conduct violations. Commenters thought this would pose an awkward, confusing process for both students who allege unwelcome conduct occurred, and for students who were accused of unwelcome conduct.

Discussion: As discussed above and throughout this preamble, these final regulations define sexual harassment that triggers a recipient's response obligations to mean any of three types of misconduct (i.e., *quid pro quo* harassment by an employee, severe and pervasive and objectively offensive unwelcome conduct that denies a person equal educational access, or any of the four Clery Act/VAWA sex offenses – sexual assault, dating violence, domestic violence, or stalking). The Department believes that drawing a distinction between actionable sexual harassment under Title IX, and other misconduct that may be unwelcome but does not interfere with a person's equal educational access (such as offensive speech protected by principles of free speech and academic freedom), helps a recipient reach the difficult balance between upholding the non-discrimination mandate of Title IX while comporting with constitutional rights and principles of

fundamental fairness.[1741] As explained in the "Sexual Harassment" subsection of the "Section 106.30 Definitions" section of this preamble, Federal non-discrimination laws such as Title IX (as interpreted under Department guidance) and Title VII (under which a standard of "severe or pervasive" sexual harassment applies) have long utilized *some* threshold measure of when misconduct rises to the level of being actionable under the Federal non-discrimination law (e.g., when a school must respond under Title IX, or an employer must respond under Title VII). The Department's use in these final regulations of the Supreme Court's *Davis* formulation of actionable sexual harassment as *one of three* categories of misconduct defined as actionable sexual harassment leaves recipients discretion to address other misconduct as the recipient deems appropriate (or as required under State laws), while focusing Title IX enforcement on responding to conduct that jeopardizes a person's equal educational access. That response must support a complainant while being fair to both parties, including by offering supporting measures to a complainant and refraining from punishing a respondent without following a fair grievance process. The Department views this flexibility as a strength of these final regulations, rather than to the detriment of recipients or their students and employees. While this may create two different sets of procedures for recipients, this is a natural consequence of having to comply with a Federal non-discrimination laws such as Title IX, which focuses on denial of equal educational access and does not cover all types of student misconduct, and appropriate enforcement of which may require processes that are above and beyond processes a school uses to address other types of student misconduct.

Changes: None.

[1741] *See* the "Role of Due Process in the Grievance Process" section of this preamble.

Comments: Commenters suggested that if anything, ESE schools should provide more due process for respondents than PSE institutions, and not less, because students must generally attend ESE schools as a matter of compulsory State laws regarding education, whereas there is no compulsory education at the postsecondary level; commenters shared personal stories of themselves (or family members) being accused of sexual harassment as high school students and urged the Department to provide high school students with strong due process protections. One commenter alleged that ESE institutions are dominated by teachers' unions on the left side of the political spectrum, and are therefore trained to believe all accusers, such that accused students cannot expect to get fair treatment unless it is mandated by Federal law. One other commenter argued that whatever the proposed rules provide, they should offer additional protections to parties who are students, as opposed to employees, given that there is no right or obligation related to having a job, but there are compulsory attendance rules for schools.

One other commenter stated that the proposed rules do not account for schools that want to eschew the adversarial process in most cases and focus instead on practices generally referred to as "restorative justice." These practices, asserted commenters, reduce implicit bias and protect school climate better than pure disciplinary models.

Discussion: The Department believes that the final regulations protect due process for students and employees at both the ESE and PSE levels.[1742] The final regulations effectively require that schools provide adequate due process protections to all students, irrespective of whether school personnel themselves are ideologically supportive of such rights, and at the same time require schools to respond supportively to protect complainants' equal educational access. Additionally,

[1742] *See* the "Role of Due Process in the Grievance Process" section of this preamble.

the final regulations establish sufficient rights for ESE students to adequately defend themselves from accusations of sexual harassment, for example through the right to inspect and review all evidence directly related to the allegations including exculpatory evidence, whether obtained by a party or other source, the right to review the investigative report containing the recipient's summary of relevant evidence, the right to an advisor of choice, and the right to pose written questions and follow-up questions to the other party and witnesses prior to a determination regarding responsibility being reached. At the same time, the foregoing procedural rights are granted equally to complainants, resulting in a truth-seeking grievance process that provides due process protections for all parties.

Nothing in the final regulations prevents recipients from facilitating informal resolution processes, including what commenters referred to as restorative justice processes, within the confines of § 106.45(b)(9).

Changes: None.

Comments: Many commenters argued that the Department's Directed Question 1 was itself flawed, because it asked whether different rules ought to apply to different institutions that are ESE or PSE institutions, while many ESE students interact with PSE institutions in a variety of ways. Commenters noted that some PSE institutions run daycares, elementary and secondary school sporting enrichment programs, host high-school students for events, and even enroll high-school students in dual-enrollment courses at the PSE level. Several community colleges commented to say that they had numerous ESE students enrolled in their courses, and that many of these students came onto their campuses physically during the day. The schools argued that it would be confusing to use certain procedures designated only for the PSE recipients when minors – and perhaps even young children who were simply enrolled in daycare at the institution

– were involved in an allegation of sexual harassment. Some commenters noted that it was theoretically possible to have two minors who attend high school but who are dual-enrolled in college courses as parties to an investigation. In that case, asserted commenters, a school would have to use its own institution's grievance procedures, despite the students being minors, which commenters argued cannot be what the proposed rules intended.

Discussion: The Department agrees with commenters who suggested that no system will perfectly distinguish individuals who ought to be subject to more sophisticated procedures in every instance of alleged sexual harassment, but that distinguishing between ESE and PSE recipients is valuable as a proxy. These final regulations require a recipient to respond to sexual harassment whenever the recipient has notice of sexual harassment that occurred in the recipient's own education program or activity, regardless of whether the complainant or respondent is an enrolled student or an employee of the recipient.[1743] The manner in which a recipient must, or may, respond to the sexual harassment incident may differ based on whether the complainant or respondent are students, or employees, of the recipient. For example, if a complainant is not an enrolled student but attends a sports camp at the institution, the type of supportive measures reasonably available to help that complainant may differ from supportive measures that would assist an enrolled student. As another example, if the respondent is not enrolled or employed by the institution but commits sexual harassment in the recipient's education program or activity, the recipient may in its discretion (via the Title IX Coordinator

[1743] Section 106.44(a) (general response obligations of a recipient); § 106.30 (defining "complainant" to mean "an individual" without restricting the definition to a student or employee); § 106.30 (defining "respondent" to mean "an individual" without restricting the definition to a student or employee); § 106.30 (defining "formal complaint" and stating that a formal complaint may be filed by a complainant who is participating, or attempting to participate, in the recipient's education program or activity at the time of filing the formal complaint).

signing a formal complaint) initiate a grievance process against that respondent,[1744] yet must still offer supportive measures to the complainant. Conversely, if the respondent is not enrolled or employed by the institution, the recipient may, in its discretion, dismiss a formal complaint filed by the complainant against that respondent,[1745] and again, must still offer supportive measures to the complainant. While the Department understands that many students are dual-enrolled, and that some students in ESE are over the age of majority and some students in PSE are minors, we believe that these final regulations appropriately set forth legal obligations for all recipients to respond supportively to complainants and fairly to both complainants and respondents, and that the concept of an ESE recipient, or a PSE recipient, needing to take into account the ages of its students is neither unfamiliar nor infeasible for ESE and PSE recipients.

With respect to concerns that complainants who are minors may suffer sexual harassment in a PSE institution's education program or activity and thus the PSE institution would be applying grievance procedures to a formal complaint filed by that complainant, including procedures that are more difficult for minors to navigate in and participate in (for example, appearing at a live hearing and being subjected to cross-examination), these final regulations contain protections that mitigate the potential for re-traumatization of all complainants at a live hearing. For instance, § 106.45(b)(6)(i) states that, at the request of either party, the recipient must provide for the live hearing (including cross-examination) to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see

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[1744] Section 106.30 (defining "formal complaint" as a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent); § 106.44(b)(1) (requiring a recipient to follow the § 106.45 grievance process in response to any formal complaint and to meet all § 106.44(a) obligations which include offering the complainant supportive measures).

[1745] Section 106.45(b)(3)(ii) (permitting discretionary dismissal of a formal complaint in specified instances, including where the respondent is no longer enrolled or employed by the recipient).

and hear the party or the witness answering questions; forbids parties from personally questioning each other; and expressly states that before any party must answer a cross-examination question the decision-maker must first determine whether the question is relevant. Moreover, a complainant need not be subjected to cross-examination at a PSE institution's live hearing, so long as the decision-maker does not rely on any statement of that complainant in reaching a determination regarding responsibility.[1746] Nothing in these final regulations precludes a recipient from training its investigators or decision-makers in best practices for interviewing and questioning minors, so long as such training also meets the requirements for training of Title IX personnel set forth in § 106.45(b)(1)(iii). These provisions help ensure that cross-examination (which may seem daunting especially for a minor) is conducted in a reasonable, respectful, truth-seeking manner. These final regulations provide additional protections that are especially helpful for a minor student navigating a grievance process, whether conducted by an ESE institution or a PSE institution; for example, § 106.45(b)(5)(iv) allows each party to select an advisor of choice who may be, but need not be, an attorney, while § 106.6(g) recognizes the legal right of a parent to act on a complainant's behalf throughout the grievance process.

Changes: None.

Comments: Some commenters argued that the proposed rules ought to be changed to contemplate different categories of ESE students, and therefore distinguish between allegations of sexual harassment that occur at elementary schools, middle schools, and high schools.

[1746] Section 106.45(b)(6)(i).

Discussion: As discussed in the "Role of Due Process in the Grievance Process" section of this preamble, consistency and predictability are important goals of these final regulations, balanced with the recognition that the type of due process owed may be different in particular situations, which the Department has concluded include the difference between the ESE and PSE context.[1747] However, different processes for preschool, elementary school, middle school, and high school would significantly reduce the end goal of providing recipients, students, and employees with a consistent, predictable framework for recipient responses to Title IX sexual harassment. Within the framework of the final regulations, recipients retain significant discretion to employ age-appropriate rules and approaches (so long as such discretionary rules apply equally to complainants and respondents).[1748]

Changes: None.

Comments: Commenters asserted that the proposed rules ought to be modified to state expressly that students can always rely on their parents or guardians for assistance as they proceed through the Title IX process at their school.

Discussion: Nothing in the final regulations prevents students from relying on their parents or guardians for assistance or selecting a parent or guardian as an advisor of choice during a grievance process. Indeed, where parents or guardians have a legal right to act on behalf of a student, including during a grievance process, the final regulations expressly respect such right, and where a parent has the legal right to act on their child's behalf, the parent may accompany

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[1747] For example, the final regulations require postsecondary institutions to use a live hearing model for Title IX sexual harassment adjudications, while ESE recipients need not use any kind of hearing. § 106.45(b)(6)(i)-(ii).
[1748] The introductory sentence of revised § 106.45(b) states that any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in § 106.30, must apply equally to both parties.

their child throughout the grievance process in addition to an advisor of the party's choice.[1749] The Department expects that for many students, the participation of a parent or guardian in the grievance process will be a function of their underlying legal rights as parents or guardians, and the final regulations respect, and do not alter, those parental or guardianship rights.

Changes: None.

Comments: One commenter suggested that in the ESE setting, schools should have the duty only to investigate and draft a report and recommendation, but then provide the report and recommendation to an outside neutral party. That way, asserted the commenter, school personnel would not have to adjudicate the final result and potential disciplinary consequences of the Title IX process.

Discussion: The final regulations are designed for school officials to perform the functions of investigators and decision-makers without the need to hire outside contractors. The final regulations do not preclude a recipient from outsourcing its investigative and adjudicative responsibilities under these final regulations, but the Department declines to require recipients to do so, and the recipient remains responsible for compliance with these final regulations whether a recipient meets its obligations by using its own personnel or by hiring outside contractors.

Changes: None.

Comments: Commenters suggested that the final regulations should include robust training requirements for school personnel, especially with respect to the differences between ESE and PSE institutions. Other commenters suggested that school personnel undergo trauma-informed training, such that they would better be able to observe symptoms of sexual harassment.

[1749] Section 106.6(g); § 106.45(b)(5)(iv).

Discussion: Recipients must, under § 106.45(b)(1)(iii), ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process receive certain training, including on the definition of sexual harassment, the scope of the recipient's education program or activity, how to conduct an investigation and grievance process, including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias, and (as to investigators and decision-makers) how to determine issues of relevance. While these training materials must not rely on sex stereotypes and must promote impartial investigations and adjudications of sexual harassment, recipients may use their discretion to adopt additional components to training, including materials describing the impact of trauma.

Changes: None.

Comments: Commenters stated that the proposed rules would likely be in tension with numerous State laws that codify certain procedures before students can be disciplined, particularly if the discipline is suspension or expulsion. Commenters asserted this would have unpredictable consequences, such as schools perhaps having to conduct two separate investigatory or grievance procedures, in order to comply with both the proposed rules and State law. Commenters asserted that having to conduct two separate processes would be awkward, confusing, and potentially in conflict with one another. Some suggested as a solution adding a waiver requirement, so that the Secretary could permit schools to opt out of certain grievance procedures. Other commenters suggested a safe harbor provision, such that a school in compliance with State law need not separately comply with the proposed rules.

Discussion: The Department appreciates this feedback but declines to make any changes to the final regulations in response to these comments. Recipients ought, to the maximum extent

possible, seek to comply with all State and local laws, consistent with the final regulations. To the extent that a conflict cannot be resolved, the final regulations control. For further discussion of conflict with State laws, see the discussion in the "Section 106.6(h) Preemptive Effect" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble. For reasons explained in the "Role of Due Process in the Grievance Process" section of this preamble, the Department has determined that the provisions in § 106.45 constitute the important procedures needed to ensure that investigations and adjudications of Title IX sexual harassment allegations are fair, reliable, and viewed as legitimate, to effectuate the non-discrimination mandate of Title IX – an important Federal civil rights law. As to student or employee misconduct that does not constitute Title IX sexual harassment, these final regulations do not prescribe what kind of disciplinary procedures a recipient must or may use. The Department does not view this potential for "two separate processes" as a negative consequence of these final regulations; rather, these final regulations appropriately confine their application only to sex discrimination in the form of sexual harassment, and leave other misconduct under the purview of States and local schools.

Changes: None.

Comments: Some commenters asked whether the grievance procedures varied based on who the complainant was, who the respondent was, or which institution was conducting the process. These commenters also asked what should occur if there are multi-party allegations, and the school must interact with individuals of different grade levels. One commenter described a hypothetical situation of a professor in a PSE setting who teaches ESE students, perhaps as part of a dual-enrollment program. In the hypothetical, one of the ESE students accuses the professor of sexual harassment, but refuses to participate in cross-examination at a live hearing, since the

proposed rules contemplate that procedure only for PSE institutions. The commenter asked if the school must discount the allegation, find the professor non-responsible for the accusation, and simply drop the issue, ignoring the possibility that the professor may then sexually harass other students.

Discussion: The obligations of a recipient are tied to whether it is an ESE or a PSE institution, not to the individual parties involved in a specific allegation of sexual harassment. Whether sexual harassment involves two individuals or more is not relevant to the question of which procedures apply; however, in response to commenters who wondered how multi-party situations could be addressed, the final regulations add § 106.45(b)(4) giving recipients discretion to consolidate formal complaints where allegations arise from the same facts and circumstances, so that a single grievance process might involve multiple complainant and/or multiple respondents. Where sexual harassment is alleged in the education program or activity of a PSE institution, § 106.45(b)(6)(i) requires the recipient to adjudicate the allegations by holding a live hearing, with cross-examination conducted by party advisors (including a recipient-provided advisor if a party appears at the live hearing without an advisor of choice). That provision instructs the decision-maker not to rely on statements of a party who chooses not to appear or be cross-examined at the live hearing; however, the revised provision also directs the decision-maker not to draw any inference about the determination regarding responsibility based on the refusal of a party to appear or be cross-examined. Thus, a recipient is not required to "drop the issue" or required to reach a non-responsibility finding whenever a complainant refuses to appear or be cross-examined; rather, the decision-maker may proceed to objectively evaluate the evidence that remains (excluding the non-appearing party's statements) and reach a determination regarding

responsibility.[1750] Further, a recipient must offer supportive measures to a complainant regardless of whether the complainant signs a formal complaint initiating a grievance process or refuses to participate in a grievance process, and nothing in the final regulations precludes a recipient from providing supportive measures designed to deter sexual harassment regardless of the outcome of a grievance process. Under § 106.44(d), a recipient may place a non-student employee-respondent on administrative leave during pendency of a grievance process, ensuring that regardless of the outcome of the grievance process the recipient may separate an employee from contact with students, in the recipient's discretion.

Changes: None.

Comments: Some commenters asked for more guidance about how ESE students should pose questions to each other during the grievance process, and how ESE students should be expected to respond, and whether a parent or advisor could help them craft responses. One commenter suggested that the proposed rules ought to expressly provide that a school should take account of the English proficiency of the parties involved in a sexual harassment complaint. Another commenter suggested that the final regulations should address instances where a young student alleges sexual harassment, but their parent is unsupportive or uninvolved in the student's life and thus does not adequately help the student through the process.

One commenter suggested that all cases of sexual harassment involving an ESE institution ought to begin with informal resolution processes to avoid the allegedly lengthy and

[1750] For further discussion of the consequences of a party or witness refusing or failing to appear at a live hearing or refusing to submit to cross-examination, see the "Hearings" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble.

onerous grievance processes. Another commenter suggested that a school ought to have a duty to appoint an advocate or trauma-informed counselor for every student alleging sexual harassment.

Other commenters suggested that some provisions be clarified. For instance, commenters suggested that it be unambiguously expressed that live hearings are not required at the ESE level. Commenters also suggested an unambiguous provision about emergency removal being acceptable where a school determines that an imminent threat to health or safety exists in an ESE school. Another commenter suggested that parental rights should be more clearly spelled out than in the proposed regulations. One commenter suggested that OCR issue sub-regulatory guidance to aid ESE institutions in understanding the final regulations.

Discussion: As discussed in the "Section 106.45(b)(6)(ii) Elementary and Secondary School Recipients May Require Hearing and Must Have Opportunity to Submit Written Questions" subsection of the "Hearings" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble, we have revised § 106.45(b)(6)(ii) in line with commenters' request to more clearly state that an elementary and secondary school recipient is not required to hold hearings to adjudicate formal complaints, and the aforementioned preamble discussion explains that if an ESE recipient does choose to hold a hearing (live or otherwise), these final regulations do not prescribe the procedures that must occur at such a hearing held by an ESE recipient (e.g., cross-examination need not be provided), and that preamble discussion also addresses commenters' concerns and questions about what the written submission of questions process must, and may, consist of under § 106.45(b)(6)(ii).

As noted previously, we have added § 106.6(g) to expressly acknowledge the legal rights of parents or guardians to act on behalf of parties during a Title IX grievance process. Where a young student's parent is unsupportive or unable to assist the student, the student is still entitled

to an advisor of choice (under § 106.45(b)(5)(iv)) and nothing in the final regulations precludes a recipient from adopting a policy of offering to provide an advisor to students, as long as such a policy makes a recipient-offered advisor equally available (on the same terms) to complainants and respondents, per the revised introductory sentence of § 106.45(b). As noted previously, nothing in the final regulations precludes a recipient from training its Title IX personnel in trauma-informed approaches as long as such training also complies with the requirements in § 106.45(b)(1)(iii).

The final regulations expressly acknowledge that recipients may need to adjust a grievance process to provide language assistance for parties; see § 106.45(b)(1)(v).

For reasons discussed in the "Informal Resolution" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble, we decline to require parties to attempt informal resolution prior to commencing the grievance process; we believe that the parties should only engage in informal resolution when that choice is the result of each party's voluntary, informed, written consent.[1751] We reiterate that a parent or guardian's legal right to act on behalf of a complainant or respondent extends to every aspect of a grievance process, which would include deciding whether to voluntarily consent to participate in informal resolution.

The Department believes that § 106.44(c) authorizing emergency removals of respondents who pose an imminent threat to the physical health or safety of one or more individuals appropriately addresses the need for ESE recipients to respond quickly and

[1751] We have revised § 106.45(b)(9) regarding informal resolutions to preclude a recipient from offering or facilitating informal resolution to resolve allegations that an employee sexually harassed a student.

effectively to emergency risks that arise out of sexual harassment allegations. That provision applies equally to all recipients, including ESE recipients.

The Department will offer technical assistance to recipients, including ESE recipients, regarding implementation of these final regulations. However, for reasons described in the "Notice and Comment Rulemaking Rather than Guidance" section of this preamble, the Department believes that legally binding regulations will be more effective than Department guidance with respect to enforcing recipients' Title IX obligations.

Changes: None.

Comments: One commenter stated that the proposed rules create a separate process for one type of discrimination but do not impose the same requirements for other types of discrimination, and elementary and secondary school districts already have age appropriate procedures in place to respond to claims of all types of discrimination.

One commenter asserted that postsecondary institutions have significantly more resources than elementary and secondary schools and argued that the proposed rules should be tested at the postsecondary level prior to implementation in elementary and secondary schools.

One commenter asserted that the proposed rules are problematic in the elementary and secondary school context because many of the school districts in the commenter's State are small, with one administrator acting as Title IX Coordinator, who is typically the school district superintendent. The commenter stated that decisions regarding responsibility for behavioral violations and disciplinary actions, however, are typically left to school principals who are directly accountable for students. The same commenter asserted that implementing the proposed rules will be costly for small school districts, which will need to train additional staff and contract with third-party investigators.

Discussion: These final regulations specifically address sexual harassment as a form of sex discrimination and are based on the premise that sexual harassment must be addressed through a specific grievance process, whether or not that process is also applied with respect to other types of discrimination. The "prompt and equitable" grievance procedures described in § 106.8 must be used to resolve complaints of sex discrimination, while the grievance process in § 106.45 must be used to resolve allegations of sexual harassment in formal complaints. The Department's regulations under Title VI describe the process for addressing discrimination based on race, color, and national origin. Different types of discrimination may require a different process, and a recipient is not required to address discrimination on the basis of race (for instance, under Title VI) in the same manner as sexual harassment under these final regulations implementing Title IX.[1752]

The Department disagrees that all elementary and secondary school districts have age-appropriate procedures to respond to allegations of sexual harassment as well as all other types of discrimination. Numerous commenters described experiences with ESE recipients who have not responded supportively and/or fairly to sexual harassment allegations, and the Department seeks to hold ESE recipients accountable for meeting legally binding response obligations under these final regulations.

We disagree that all postsecondary institutions have more resources than elementary and secondary schools. The Department notes that these final regulations apply to smaller and larger postsecondary institutions. The Department disagrees that these final regulations should be tested

[1752] For further discussion see the "Different Standards for Other Harassment" subsection of the "Miscellaneous" section of this preamble.

in postsecondary institutions before being applicable to elementary and secondary schools because the final regulations have different requirements for postsecondary institutions than for elementary and secondary schools where appropriate, and require all recipients to respond supportively and fairly to sexual harassment in recipients' education programs or activities. Testing these final regulations at postsecondary institutions will not necessarily result in a better outcome for elementary and secondary schools. There also should be some uniformity or similarity among recipients, whether elementary and secondary schools or postsecondary institutions, in addressing the same type of sex discrimination in the form of sexual harassment. The Department disagrees that these final regulations are unduly burdensome for smaller elementary and secondary schools. The Department does not require any recipient to use third-party investigators or otherwise to hire contractors to perform a recipient's investigation and adjudication responsibilities under these final regulations. Any recipient, irrespective of size, may use existing employees to fulfill the role of Title IX Coordinator, investigator, and decision-maker, as long as these employees do not have a conflict of interest or bias and receive the requisite training under § 106.45(b)(1)(iii). These final regulations provide essential safeguards for complainants and respondents, and these safeguards should not be sacrificed due to concerns of administrative burden or financial cost. We note throughout this preamble areas in which the Department has revised these final regulations to relieve administrative burdens where doing so preserves the intention of important provisions of the grievance process (for example, § 106.45(b)(5)(vi) removes the requirement that evidence subject to the parties' inspection and review be electronically sent to parties using a file sharing platform that restricts downloading and copying, and now permits the evidence to be sent either in electronic format or hard copy).

The Department is not aware of any State or local laws that directly conflict with these final regulations and discusses preemption and conflicts with State laws in greater detail in the "Section 106.6(h) Preemptive Effective" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble.

Changes: None.

Directed Question 2: Application Based on Type of Recipient or Age of Parties

Comments: Numerous commenters stated that the proposed rules appropriately distinguished between ESE and PSE institutions, as opposed to distinguishing between students based on age. Some commenters noted that it would be difficult for schools to apply different procedures to different students, and it would be especially confusing when the students were different ages, such as 17 and 18. Commenters asserted that for multi-party allegations where both minors and adults are involved as both complainants or respondents, it would be hard for schools to know which policies to apply.

Many commenters stated that once a student attends a PSE institution, the student should be treated as an adult for the purpose of the proposed rules. Some commenters cited FERPA in support of this proposition, contending that FERPA recognizes instances where "a student has reached 18 years of age or is attending an institution of postsecondary education." Other commenters suggested that no system was perfect, but that using the institution that the student attends or employee works at is at least a rough proxy for which procedures should apply. One commenter asserted that since the real risk posed by the distinction between procedural regimes is having young children subject to procedures that are most effective for more sophisticated parties, the safer approach is to distinguish by institution, not age, since very few young children will be in a college setting. One commenter cited the varying school climates between ESE and

PSE institutions as another reason that the distinction worked as a rough proxy for sophisticated parties. One commenter stated that it would do little good for the final regulations to distinguish parties by age, since the commenter argued that even two people who are over 18 can be in vastly different positional relationships to one another, in terms of power, authority, or mental development.

Discussion: We appreciate the feedback offered by commenters, and the Department agrees that given the options, it is preferable to distinguish between the types of institution that are involved in a sexual harassment allegation rather than try to distinguish based on the ages of the parties involved. While no dividing line will ever be perfect, we expect that the line that the Department has chosen will minimize the situations where young students are subject to procedures conducted by a PSE institution, and we reiterate that even the most rigorous procedures required in PSE institutions (i.e., live hearings with cross-examination) may be applied in a manner that seeks to avoid retraumatizing any complainant, including a complainant who is underage.[1753]

Changes: None.

Comments: Some commenters responded to the NPRM's Directed Question 2 by disagreeing with the approach taken in the proposed rules, stating that it would be preferable to distinguish students and applicable grievance procedures by age, rather than the institution with jurisdiction over the incident. These commenters suggested that age, combined with maturity level, is the best way to determine whether a student ought to be subject to more sophisticated grievance procedures. Some commenters asserted that students who are under age 18 might be more likely

[1753] For further discussion see the "Hearings" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble.

to rely on their parents or guardians, who may be able to assist them with the process, whereas students over age 18 may not have the same ability.

Other commenters defended the use of age as a dividing line, stating that some very young students go to college if they advance swiftly through elementary and secondary school. Commenters also stated that students who are over age 18 have vastly different mental maturity and developmental abilities than those under age 18, although commenters did say that some individuals with neuro-developmental disabilities who are over age 18 should not be subject to cross-examination.

Other commenters asserted that it would be strange to have teachers and other employees at ESE institutions receive fewer due process rights than PSE employees, given that these individuals may need access to the same grievance procedures to ensure a fair hearing. For instance, the commenter suggested that it was anomalous to offer a professor the right to have their advisor cross-examine a complainant who was 17 years old, but enrolled in college, whereas a teacher accused by an 18 year old senior in an ESE setting would have no such right. Indeed, where two employees at an ESE institution are involved, commenters asserted, it is not clear why the parties are not entitled to the full breadth of the grievance procedures, since both are presumably sophisticated parties.

Discussion: The Department appreciates this feedback and acknowledges that any dividing line may lead to anomalous results in some cases. We believe, however, that the final regulations can best ameliorate those situations by structuring the distinction in certain procedural requirements as between ESE and PSE institutions, rather than by the ages of involved parties. Nothing in the final regulations, however, prevents schools from, for example, holding live hearings at the ESE level when both parties are employees or over age 18. We agree with commenters who stated

that requiring an institution to vary its procedures based on the ages of the parties would likely lead to undue confusion, particularly where the parties are of different ages, or where multi-party allegations occur. We note that § 106.6(g), acknowledging the legal rights of parents and guardians to act on behalf of parties in a Title IX grievance process, does not differentiate between when a parent or guardian's rights apply to an ESE student versus a PSE student, except to recognize that application of parental rights must also be consistent with FERPA.

Changes: None.

Comments: Commenters stated that informal resolution is not appropriate at the ESE level, especially in cases involving a teacher who is accused of sexual harassment. Since adults sometimes groom their victims for sexual abuse, commenters argued that it would be inappropriate and harmful to permit a teacher to escape the grievance process by going through mediation or another informal resolution process when the "choice" to participate in informal resolution may not be truly voluntary on the part of the young victim.

Discussion: The Department is persuaded by commenters' concerns that grooming behaviors make ESE students susceptible to being pressured or coerced into informal resolution processes, and we have revised § 106.45(b)(9) to preclude all recipients from offering or facilitating informal resolution processes to resolve allegations that an employee sexually harassed a student.

Changes: As discussed elsewhere in this preamble, we have revised § 106.45(b)(9)(iii) to prohibit ESE recipients (or any other recipients) from providing an informal resolution process to resolve allegations that an employee sexually harassed a student.

Comments: Some commenters stated that the proposed rules should be revised to more consciously address students who are dual-enrolled in high school and college. Commenters asserted, for instance, that the PSE procedures (i.e., live hearings with cross-examination) should

not apply to students who are minors, even if they are dual-enrolled in postsecondary institutions. Other commenters argued that the final regulations should be changed to focus more on age distinctions, but only for specific processes, such as cross-examination, which some commenters asserted would be fine for students over age 18. Some commenters suggested that a PSE institution ought to at least have the flexibility to apply the ESE grievance procedures for instances where all of the parties were dual-enrolled, or where all of the parties were minors. Some commenters responded to the directed question by suggesting even further breakdowns of students; for example, that the full grievance procedures should only apply to students who are adults and who are in a PSE setting; another set of procedures should apply to students in grades four through 12; and another set of procedures should apply to students in grades three and below.

Other commenters responded to the directed question by proposing other modifications to the proposed rules. One commenter suggested that PSE schools be able to adopt separate policies for individuals who are in their education program or activity, but who are not students or employees. These might include, according to the commenter, students who are merely enrolled at the PSE institution for athletic camp, 4-H programs, daycare students, or other individuals who are not taking normal college courses at the PSE institution. The commenter suggested that this was particularly appropriate where State law might already address these situations, such as when a daycare is operated on a PSE campus.

Discussion: The Department appreciates this feedback but declines to make any changes to the final regulations based on these comments. In these final regulations, we seek to balance competing interests to adequately make Title IX processes consistent, predictable, and understandable for all parties, at all types of educational institutions, as well as in the context of

recipients who operate education programs or activities but are not educational institutions (for example, some museums and libraries are recipients of Federal financial assistance covered under Title IX). The commenters' suggestions would involve making further distinctions between students, than the differences acknowledged in the final regulations between ESE and PSE recipients. The more exceptions that are made to what is largely a uniform rule, the less likely it is that students and employees will know what to expect with respect to reporting sexual harassment and their school's response to such a report, including what a grievance process will look like if a formal complaint is filed, and it could become more difficult for recipients to apply these final regulations in a consistent, transparent manner. The distinctions the final regulations do make between elementary and secondary schools, and postsecondary institutions, are those distinctions that the Department believes result in a consistent, transparent set of rules appropriately modified to take into account the generally younger ages of students in elementary and secondary schools.[1754]

Changes: None.

Directed Question 5: Individuals with Disabilities

Comments: While some commenters stated that the proposed rules adequately accounted for issues related to the needs of students and employees with disabilities, many commenters raised concerns and objections based on obstacles students with disabilities currently face in the context of Title IX proceedings, and expressed general opposition on the ground that the proposed rules

[1754] For example, see the discussion in the "Hearings" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble regarding use of a live hearing model for adjudications in postsecondary institutions but not mandating hearings (live hearings or otherwise) for elementary and secondary schools or other recipients that are not postsecondary institutions.

fail to take into account the different needs, experiences, and challenges of students with disabilities. A few commenters suggested that the Department seek the counsel of, and defer to, organizations and professionals well-versed in issues faced by individuals with disabilities, so that the needs of individuals with disabilities are accommodated in all phases of a Title IX process.

Several commenters stated that students with invisible disabilities such as ADHD (attention-deficit/hyperactivity disorder), autism, and anxiety disorder, do not currently receive the resources and supports specific to their unique needs during Title IX proceedings. Some commenters presented personal stories of how their disabilities, or those of their children or students they know, were not accommodated during Title IX investigations and hearings. Some commenters were concerned about a recipient's apparent discretion to provide appropriate reasonable accommodations individuals with disabilities during the investigation and adjudication process. Some commenters stated that their disability, or the disability of their child, would make the grievance process too difficult to undergo, and would result in fewer people with disabilities being able to report, which may even lead to more suicides.

Some commenters believed the proposed rules failed to consider the need for accommodations for respondents with disabilities, particularly those on the autism spectrum, and that it is important that communications with those students are made in a manner that is clearly understandable to those students. Commenters asserted that many respondents with disabilities are not informed or aware that their rights under disability law also are available to them in a Title IX disciplinary proceeding. One commenter suggested, for example, that all Title IX-related communications, such as e-mails, should have a bold print statement of protection for students with disabilities. Commenters noted that effective communication is essential to protect

the rights of respondents who have disabilities, particularly communication disorders such as autism, nonverbal learning disorders, and expressive and receptive language disorders. Commenters stated that such students often lack appropriate social skills, do not understand nonliteral language, desperately want to "fit in," are terrified of persons with authority, are quick to apologize for fear of "getting in trouble" and generally can be very manipulated as they are very misunderstood, and that these factors may lead to unfairly holding such students responsible for sexual harassment when a student may not actually be responsible.

Several commenters stated that there is inadequate coordination between Title IX offices and disability services offices when a student with an invisible disability becomes involved in a Title IX proceeding, as either a complainant or a respondent. Often, commenters stated, students are unaware of either the necessity of receiving accommodations from disability services or of the necessity of waiving their privacy rights to allow the two offices to communicate. Some commenters stated that institutions of higher education should coordinate with their offices of disability services to identify students with disabilities who are involved in Title IX proceedings (while respecting student privacy rights), and should disseminate Title IX information in ways that are accessible to all students (including ensuring that websites are accessible and that information is provided in plain language for students with intellectual disabilities). Commenters asserted that failure of a student to access disability services can result in the complainant or respondent being placed at a distinct disadvantage during the Title IX proceedings. Some commenters suggested that one way to connect the university's disability services with the Title IX office might be to have students who may need accommodations provide advance permission for a disability office to consult with a disciplinary office (including a Title IX office) should the

student be subjected to a disciplinary proceeding, thereby alerting the Title IX office to the student's disability and ensuring the student's disability rights are protected.

Discussion: The Department appreciates that some commenters believed that the proposed rules adequately accounted for issues faced by students and employees with disabilities, and understands the concerns from other commenters that the final regulations should more fully and expressly account for the needs, experiences, and challenges of students with disabilities. The Department appreciates that many stakeholders representing the interests of individuals with disabilities participated in the public comment process, and appreciates the opportunity here to emphasize the importance of recipients complying with all applicable disability laws when meeting obligations under these final regulations.

The Department understands that a grievance process may be difficult to undergo for many students, regardless of disability status, and that such a process may be more challenging to navigate for individuals with disabilities. In response to commenters' concerns, we have revised § 106.44(a) to require recipients to offer supportive measures as part of a prompt, non-deliberately indifferent response any time a recipient has notice of sexual harassment or allegations of sexual harassment against a person in the United States, in the recipient's education program or activity. This prompt response must include the Title IX Coordinator promptly contacting the complainant (i.e., the person alleged to be the victim of conduct that could constitute sexual harassment, regardless of who reported the sexual harassment to the recipient) to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. The process for offering supportive

measures after considering the complainant's wishes is an interactive process that is not unlike the interactive process that the ADA requires. By ensuring that each complainant is offered supportive measures regardless of whether the reported incident results in a grievance process, more complainants, including individuals with disabilities, can feel safe reporting without fearing that a report automatically leads to participation in a grievance process.[1755]

The Department appreciates the descriptions from commenters of the importance of clear communication with students with disabilities, particularly those on the autism spectrum, and the importance that students understand that their rights under disability laws apply during a Title IX proceeding. The Department appreciates the opportunity to emphasize here that recipients must meet obligations under these final regulations while also meeting all obligations under applicable disability laws including the IDEA, Section 504, and the ADA. With respect to the intersection between these Title IX final regulations, and disability laws under which the Department has enforcement authority, the Department will continue to offer technical assistance to recipients.

The Department acknowledges commenters' concerns noting that a student with a disability may need to interact with separate offices within a recipient's organizational structure (e.g., a disability services office, and a Title IX office). The Department emphasizes that recipients must comply with obligations under disability laws with respect to students, employees, or participants in a Title IX reporting or grievance process situation, regardless of the recipient's internal organizational structure. These final regulations, which concern sexual harassment, do not address a recipient's obligations under the ADA and do not preclude

[1755] Supportive measures are also available for respondents. *See* § 106.30 (defining "supportive measures" to include services provided to respondents); § 106.45(b)(1)(ix) (ensuring that parties are informed of the type of supportive measures available to complainants and respondents).

recipients from notifying students involved in a Title IX grievance process that the students may have rights to disability accommodations.

To the extent that disability accommodations may overlap with supportive measures or remedies required under Title IX, the Department notes that if an accommodation involves a Title IX supportive measure or remedy, the final regulations specify that the Title IX Coordinator is responsible for the effective implementation of such supportive measures (§ 106.30 defining "supportive measures") and remedies (§ 106.45(b)(7)(iv) as added in the final regulations). These requirements are intended, in part, to ease the burden on a student in need of the supportive measure or remedy to receive the needed service especially when doing so involves coordination of multiple offices within the recipient's organizational structure (for example, when a supportive measure involves changing a dorm room assignment and doing so through the housing office, and a student with a disability needs to ensure a housing unit modified to accommodate a disability, or when a remedy involves re-taking an exam and doing so through an academic affairs office).

Changes: We have revised § 106.44(a) to require recipients to offer supportive measures as part of a prompt, non-deliberately indifferent response to sexual harassment, and to require the recipient's Title IX Coordinator to promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. Section 106.45(b)(7)(iv) now provides that Title IX Coordinators are responsible for the effective implementation of remedies.

Comments: Some commenters expressed concern that the proposed rules would harm students with disabilities and make them more invisible and vulnerable to sexual abuse because they might not know the types of touching that are appropriate or inappropriate to come forward to the designated school employee on their own.

Several commenters stated that students with disabilities that limit their ability to communicate may find it even more difficult to discuss incidents of a sexual nature. People with significant intellectual disabilities may not understand what is happening or have a way to communicate the sexual assault to a trusted person. Some commenters expressed concern that the proposed rules would isolate students with disabilities because a recipient's disability office may no longer be required to report a sexual assault.

Some commenters stated that the proposed rules discriminate against survivors with developmental disabilities, who are more vulnerable to sexual abuse and that such a disability might prevent such individuals from being able to communicate with school officials and provide evidence for their case. For example, commenters suggested, a student with a disability may only be comfortable communicating sensitive issues to their own teacher(s), and in some cases may only be able to communicate with appropriately trained special education staff. Other students, commenters asserted, with less significant disabilities, may realize they are being assaulted, but do not know they have a right to say no. In addition, they are rarely educated about sexuality issues (including consent) or provided assertiveness training. Even when a report is attempted, such students face barriers when making statements to police because they may not be viewed as credible due to having a disability. Some people with intellectual disabilities also have trouble speaking or describing things in detail, or in proper time sequence. Other commenters stated that people with disabilities may also face challenges in accessing services to make a

report in the first place; for example, someone who is deaf or deaf-blind may face challenges accessing communication tools, like a phone, to report the crime or get help.

Discussion: The Department appreciates commenters' concerns that students with disabilities may have challenges comprehending the types of touching that are inappropriate or understanding they have a right to say "no," identifying when they have been sexually harassed, or communicating about an incident, and concerns that some students with disabilities are more vulnerable to sexual abuse than peers without the same disabilities. While the Department does not control school curricula and does not require recipients to provide instruction regarding sexuality or consent, nothing in these final regulations impedes a recipient's discretion to provide educational information to students. Although the Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault, a recipient's definition of consent should not violate any disability laws, and the Department will continue to enforce the disability laws that it is authorized to enforce. The Department also wishes to emphasize that a recipient's obligation to respond to sexual harassment incidents does not depend on the reporting complainant using specific or particular language to describe an experience that may constitute Title IX sexual harassment. The Supreme Court has noted that whether conduct rises to the level of actionable harassment depends on a "constellation of surrounding circumstances, expectations, and relationships" including but not limited to "the ages of the harasser and the victim . . . ."[1756] Similarly, recognizing whether a student has disclosed a Title IX sexual harassment incident includes taking into account any disability the reporting student may have that may affect how that student describes or communicates about the incident.

[1756] *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999) (internal citations omitted).

In response to commenters concerned that younger students, whether because of age, development, or disability, reasonably cannot be expected to report to a school's Title IX Coordinator, the final regulations expand the definition of a recipient's actual knowledge to include notice to any elementary or secondary school employee. Thus, in an elementary or secondary school context, the school's response obligations are triggered when, for instance, an employee in the school's disability office, or the teaching aide of a student with disabilities, has notice of a Title IX sexual harassment incident. These final regulations therefore expand the pool of school employees to whom any complainant, including a student with a disability, may disclose sexual harassment and expect the school to respond as required under Title IX, whether the student reports to a particular employee due to feeling more comfortable or due to only being able to communicate with special education staff.

With respect to commenters' concerns that individuals with certain disabilities may face challenges accessing communication tools, such as a phone or website, when trying to report a Title IX sexual harassment incident, the Department reiterates that recipients must meet obligations under these final regulations while also meeting all obligations under applicable disability laws including the IDEA, Section 504, and ADA, including with respect to accessibility of websites and services. With respect to the intersection between the Title IX final regulations and disability laws under which the Department has enforcement authority, the Department will continue to offer technical assistance to recipients.

Changes: We have revised § 106.30 to expand the definition of "actual knowledge" to include notice to any employee of an elementary or secondary school.

Comments: Commenters stated that the proposed rules seemed concerned with the rights and needs of respondents with disabilities (for instance, by expressly referencing the IDEA and ADA

in the emergency removal provision in § 106.44(c) that applies to removing a respondent), but not with the rights and needs of students with disabilities who are sexually harassed, and commenters stated that these students face unique challenges that would be intensified if the proposed rules were implemented.

Commenters asserted that some disabilities may put people at higher risk to be victims of crimes like sexual assault or abuse, for example because someone who needs regular assistance may rely on a person who is abusing them for care, and may be more likely to suffer physical and mental illnesses because of violence. Other commenters noted that students with disabilities already face unfair challenges such as removal from classes because of disproportionate discipline.

Commenters also stated that people hold negative stereotypes about students with disabilities (such as being child-like for life, or sexually deviant) that make Title IX proceedings more difficult. Commenters stated that students with disabilities are less likely to be believed when they report and often have greater difficulty describing the harassment they experience, and that students with disabilities who also identify as members of other historically marginalized and underrepresented groups, such as LGBTQ individuals or persons of color, are more likely to be ignored, blamed, and punished when they report sexual harassment due to harmful stereotypes that label them as "promiscuous."

Discussion: To the extent that some commenters misconstrue the final regulations to consider only the rights and needs of students with disabilities who are accused of sexual harassment and not the unique challenges facing students with disabilities who are sexually harassed, the Department appreciates the opportunity to clarify that recipients must comply with all disability laws protecting the rights and accommodating the needs of students (and employees) with

disabilities regardless of whether such students (and employees) are complainants or respondents in a Title IX sexual harassment situation. The Department also notes that § 106.44(a) has been revised to require recipients to provide supportive measures as part of its prompt and non-deliberately indifferent response to sexual harassment, and the Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. All complainants, including complainants with disabilities, will receive the benefit of supportive measures under § 106.44(a).

The Department acknowledges that some disabilities may put people at greater risk of being sexually assaulted or abused and that individuals with disabilities may be more likely to suffer physical or mental illness due to violence. The final regulations prescribe a consistent framework for a recipient's response to Title IX sexual harassment for the benefit of every complainant, including individuals with disabilities and other demographic populations who may be at higher risk of sexual assault than the general population.

To the extent that commenters accurately describe negative stereotypes applied against students with disabilities, and particularly against students with disabilities who are also students of color or LGBTQ students, the final regulations expressly require recipients to interact with every complainant and every respondent impartially and without bias. A recipient that ignores, blames, or punishes a student due to stereotypes about the student violates the final regulations. We have revised § 106.45(b)(1)(iii) prohibiting Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolutions, from having conflicts of interest or bias

against complainants or respondents generally, or against an individual complainant or respondent, by requiring training that also includes "how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias." No complainant reporting Title IX sexual harassment should be ignored or met with judgment or disbelief, and the final regulations obligate recipients to meet response obligations impartially and free from bias. The Department will vigorously enforce the final regulations in a manner that holds recipients responsible for acting impartially without bias, including bias based on an individual's disability status.

In further response to commenters' concerns that harmful stereotypes may also lead a recipient to unfairly punish students with disabilities reporting sexual harassment allegations, the Department has added § 106.71(a) to expressly prohibit retaliation and specifically stating that charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX or its implementing regulations, constitutes retaliation. This section is intended to draw recipients' attention to the fact that punishing a complainant with non-sexual harassment conduct code violations (e.g., "consensual" sexual activity when the complainant has reported the activity to be nonconsensual, or underage drinking, or fighting back against physical aggression) is retaliation when done for the purpose of deterring the complainant from pursuing rights under Title IX. The Department notes that this provision applies to respondents as well.

Changes: We have revised § 106.45(b)(1)(iii) to include in the required training how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and

bias. Additionally, we have added § 106.71(a), prohibiting retaliation and stating that charging an individual with a code of conduct violation that does not involve sexual harassment but arise out of the same facts or circumstances as sexual harassment allegations, for the purpose of interfering with rights under Title IX, constitutes retaliation.

Comments: Some commenters asserted that even in the higher education context cross-examination would inhibit individuals with disabilities from receiving equal access to the process. These commenters asserted that the proposed rules made no exception for individuals with disabilities who would require a reasonable modification of the live cross-examination requirement in order to testify in the proceeding, so the required live cross-examination would place undue burden on individuals with various types of disabilities or force recipients to violate Section 504 or the ADA. For example, individuals with psychiatric disabilities such as post-traumatic stress disorder, social anxiety disorder, or generalized anxiety disorder are at particular risk of having their symptoms exacerbated by such a live cross-examination process, potentially causing serious harm to their wellbeing and their ability to function in interpersonal and academic environments.

Additionally, commenters stated, individuals with various other disabilities, especially those who utilize various verbal and nonverbal communication methods and/or who have disabilities impacting their receptive or expressive language, may also feel undue pressure of needing to present details as evidence in such a time-constrained environment.

Discussion: The Department reiterates that recipients must meet obligations under these final regulations while also meeting all obligations under applicable disability laws including the IDEA, Section 504, and ADA. It is unnecessary to specify as an "exception" to the live hearing requirements in § 106.45(b)(6)(i) that recipients must also comply with disability laws. The

Department notes that § 106.45(b)(1)(v) expressly contemplates that good cause for temporary delays or limited extensions of time frames relating to a grievance process may include "the need for language assistance or accommodation of disabilities." With respect to the intersection between the Title IX final regulations and disability laws under which the Department has enforcement authority, the Department will continue to offer technical assistance to recipients.

Changes: None.

Comments: Some commenters argued that the proposed rules fail to recognize the difference between the procedural requirements elementary and secondary school students have under the IDEA and how Title IX, the ADA, and Section 504 each distinctively require equal educational opportunity for all students with disabilities at all levels (elementary, secondary, and postsecondary institutions that receive Federal funds). Some commenters asserted that many students will be denied access to free appropriate public education (FAPE) under the IDEA if bullying is carved out of the definition of sexual harassment, and that school districts should have the flexibility to investigate allegations of sexual harassment and impose disciplinary consequences in accordance with school district policies, as well as to determine what additional supports and services may be necessary to ensure a safe and welcoming environment for all students. Other commenters stated that an incident under Title IX may also trigger a need for an individualized education plan (IEP) team to meet to discuss behavior modifications.

Some commenters requested that the final regulations clarify that segregation of elementary and secondary school students with disabilities from classroom settings should be rare and only allowed when in compliance with IDEA; that recipients must be made aware that a student with a disability does not have to be eligible for FAPE in order to be protected under the disability laws; and that, although IDEA may have additional requirements to provide FAPE,

recipients must not be misled into thinking there are different standards for elementary and secondary school and postsecondary education environments when it comes to equal access to educational opportunities.

Discussion: The Department reiterates that recipients, including elementary and secondary schools and postsecondary institutions, must meet obligations under the final regulations while also meeting all obligations under applicable disability laws including the IDEA, Section 504, and ADA. With respect to the intersection between these Title IX final regulations, and disability laws under which the Department has enforcement authority, the Department will continue to offer technical assistance to recipients. Recipients' obligation to comply both with these final regulations and with disability laws applies to all aspects of responding to a Title IX sexual harassment incident including investigation, discipline, and segregating elementary and secondary school students with disabilities from classroom settings. Nothing in these final regulations precludes or impedes a recipient from determining what services may be necessary to ensure a safe, welcoming environment for all students.

The Department does not fully understand the commenter's concern that bullying will be "carved out" of the definition of Title IX sexual harassment. Section 106.30 defining sexual harassment for Title IX purposes does not reference bullying or carve it out. To the extent that conduct understood as "bullying" is also conduct on the basis of sex that meets the definition in § 106.30, such conduct is also Title IX sexual harassment. Additionally, these final regulations expressly prohibit retaliation in § 106.71, and to the extent that "bullying" constitutes retaliation as defined in § 106.71(a), such conduct is strictly prohibited.

Changes: None.

Comments: Some commenters asserted that students with disabilities are improperly accused and mistreated in Title IX hearings in the elementary and secondary school and college settings, where their due process rights are often ignored, and they are not treated equitably. One commenter expressed concern that the grievance procedures outlined in the proposed rules rely heavily on a written communication modality, which may mean that individuals with communication disorders and disabilities, may not have access to the complaint process and suggested that the proposed rules should be revised to include other modalities, such as oral, manual, augmentative and alternative communication (AAC) techniques, and assistive technologies, that allow individuals with disabilities and individuals who rely on AAC technology to use unaided systems such as gestures, facial expressions, or sign language, or they may use basic aided systems including picture boards or high-tech aided systems such as speech-generating devices. Several commenters expressed concern that § 106.45(b)(7) (prescribing what a written determination regarding responsibility must include) does not adequately protect students with disabilities.

Some commenters stated that institutions of higher education should coordinate with their offices of disability services to identify students with disabilities who are involved in Title IX proceedings (while respecting student privacy rights), and disseminate Title IX information in ways that are accessible to all students (including website accessibility, and provided in plain language for students with intellectual disabilities). Commenters stated that electronic file sharing may create barriers for students with disabilities to review the materials confidentially, and that the proposed rules require documents in writing and other processes that are not accessible to many students with disabilities.

Commenters stated that the final regulations should require recipients to be on notice that they must consider the unique needs of students with disabilities throughout the entire Title IX process, not just during an emergency removal determination (referring to § 106.44(c)). Some commenters specifically requested that recipients be instructed to provide training to any officials involved in Title IX proceedings (including any faculty or staff with reporting obligations under Title IX, and, per some commenters, campus police officers and per other commenters, all elementary and secondary school employees) that explicitly includes information about how to meet the needs of students with disabilities, the various ways in which students with invisible disabilities may behave as a complainant or respondent in a Title IX proceeding, and the intersection of Title IX, the ADA, and the IDEA. Similarly, commenters requested that the final regulations require schools to ensure that pre-existing resource guides for students involved in Title IX proceedings also include specialized resources for students with invisible disabilities.

Other commenters stated that institutions for higher education are not providing their faculty and staff with the necessary training for them to identify and accommodate the unique needs of students with invisible disabilities if one of these students were to become involved in a Title IX proceeding, as either a complainant or respondent. These commenters argued that as to prevention, due process, and supportive measures, there are numerous advantages in recognizing and addressing the intersection between students with disabilities and sexual harassment, both for alleged perpetrators and alleged victims.

Commenters asserted that failure of a student to access disability services can result in the complainant or respondent being placed at a distinct disadvantage during the Title IX proceedings. Commenters suggested that one way to connect the university's disability services

with the Title IX office might be to have students who may need accommodations to provide advance permission for a disciplinary office to consult with the disability office, should the student be subjected to a disciplinary proceeding, thereby alerting the Title IX office of the student's disability and ensuring the student's disability rights are protected. Other commenters suggested that the Title IX office should provide all students with a notification form at the beginning of the process informing the student that if the student has a documented disability, the student may have the right to accommodations during the Title IX process, for example by modifying a university's enrollment intake form to include the option: "If you are ever a party in any disciplinary proceeding on campus, do you give permission for the discipline officers to be given information about your disability and for the disability office to be notified?" Related to that waiver, some commenters requested that the Department instruct each school to properly inform students of their right to inform their parents about their involvement in a Title IX proceeding, and any additional ramifications that may arise from their decision to waive their confidentiality rights so as to ensure that any students exercise of such a waiver is done in an informed manner.

Commenters also stated that the Department should expand the proposed rules to provide explicit support for complainants and respondents with disabilities, for example by allowing the presence of a "support person" separate and apart from the student's Title IX advisor. Some commenters requested that the final regulations specify that recipients have an affirmative duty to communicate the nature of the allegation and inquire whether a person needs an accommodation in a way that people with an intellectual disability can understand and respond, and that campus police enforcing Title IX must be trained on how to interact with students with disabilities in ways that are not harmful to the learning environment.

Some commenters stated that at small institutions of higher education there is a conflict of interest if the Title IX investigator is also the ADA compliance officer, which diminishes the protection of students with disabilities.

Some commenters stated that many colleges' and universities' Title IX offices do not have accessible facilities for students.

Some commenters requested the Department consider how allowing parties to review even evidence the investigator deems irrelevant (§ 106.45(b)(5)(vi)) could result in disclosure of private disability-related information.

Some commenters requested that other specific disability accommodations be described in the final regulations including:

- accessible formatting of all written and recorded based documentation based upon the person's individually specific needs;
- adding language about accessible formatting of materials distributed by the recipient regarding Title IX information and relevant local resources;
- the live hearing portion of this document should account for individuals with disabilities by guaranteeing accessible technology when separate room and same room hearings are conducted;
- requiring recipients to offer reasonable accommodations to complainants who are unable to submit a written complaint due to, for example, a physical disability;
- acknowledging that disability-related accommodations may be necessary for any part of the proceeding that requires use of technology (such as the evidence review (§ 106.45(b)(5)(vi)) and testimony provided via video (§ 106.45(b)(6)(i)).

Discussion: To the extent that commenters asserted that students with disabilities are improperly accused of Title IX violations due to the accused person having a disability, the Department notes that the definition of Title IX sexual harassment includes an element that the allegations constitute conduct that is "objectively offensive," and that the Supreme Court has stated that application of the "severe, pervasive, and objectively offensive" portion of the definition "depends on a constellation of surrounding circumstances, expectations, and relationships . . . including, but not limited to, the ages of the harasser and the victim . . . ."[1757] The Department believes that any disability of the person accused (or of the person making the allegation) is also part of the "surrounding circumstances" to be taken into consideration when evaluating whether conduct meets the definition of sexual harassment. Even when conduct committed by a respondent with a disability constitutes sexual harassment (e.g., because the conduct constitutes sexual assault, or because the conduct is severe, pervasive, and objectively offensive), the Department does not second guess whether the recipient imposes a disciplinary sanction on a respondent who is found responsible for sexual harassment, and thus recipients have flexibility to carefully consider the kind of consequences that the recipient believes should follow in a situation where a respondent with a disability unintentionally committed conduct that constituted sexual harassment, perhaps not realizing the effect of the conduct on the victim. For example, the recipient could determine that counseling or behavioral intervention is more appropriate than disciplinary sanctions for a particular respondent. (We note that in such a circumstance, the complainant is still entitled to remedies designed to restore or preserve the complainant's equal educational access.)

[1757] *Davis*, 526 U.S. at 651 (internal quotation marks and citations omitted).

To the extent that commenters have observed, or believe, that students with disabilities accused of sexual harassment often have their due process rights ignored, the final regulations do not permit disciplinary sanctions against any respondent for Title IX sexual harassment without the recipient first following the § 106.45 grievance process, which incorporates fundamental principles of due process.

In response to the commenter's concern that the grievance process relies heavily on a written communication modality, the Department reiterates that recipients must meet obligations under these final regulations while also meeting all obligations under applicable disability laws including the IDEA, Section 504, and ADA. Recipients' obligations to comply both with these final regulations and with disability laws applies to all aspects of responding to a Title IX sexual harassment incident including throughout the § 106.45 grievance process.

The Department is unsure what commenters mean by asserting that § 106.45(b)(7)(ii) (prescribing what a written determination regarding responsibility must include) does not adequately protect students with disabilities; this provision, along with § 106.45 in its entirety, applies equally to any party in a grievance process including individuals with disabilities, and recipients are required to comply with § 106.45(b)(7)(ii) and to comply with applicable disability laws, including with respect to accessibility of written materials. Similarly, recipients must comply with § 106.45(b)(5)(vi) requiring recipients to send evidence to the parties while also complying with legal obligations under disability laws. The Department revised § 106.45(b)(5)(vi) to specifically provide that the recipient may provide the party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy format, and recipients should provide such evidence in a format that complies with any applicable disability laws.

The Department appreciates commenters urging the Department to put recipients on notice that recipients must comply with applicable disability laws in all aspects of a Title IX response including throughout the grievance process, and not only with respect to removals under § 106.44(c), and the Department takes this opportunity to emphasize to recipients that such compliance is required.

The Department declines to impose new requirements through these final regulations that recipients train employees on how to meet the needs of students with disabilities or training on recognizing the way students with invisible disabilities may behave as a complainant or respondent in a Title IX proceeding, or on the intersection of Title IX, the ADA, and the IDEA, or to provide resource guides that include specialized resources for students with invisible disabilities. Nothing in these final regulations precludes a recipient from providing employee training with respect to students with disabilities. In response to commenter's concerns about bias against various groups (including bias stemming from negative stereotypes), we have revised § 106.45(b)(1)(iii) to require Title IX Coordinators, investigators, decision-makers, and persons who facilitate an informal resolution process to be trained on how to serve impartially and avoid conflicts of interest and bias; such impartiality and avoidance of bias protect all parties including individuals with disabilities. As to questions regarding the intersection of Title IX, the ADA, and IDEA, the Department will continue to offer technical assistance to recipients who must comply with multiple laws under which the Department has enforcement authority.

The Department acknowledges commenters' concerns noting that a student with a disability may need to interact with separate offices within a recipient's organizational structure (e.g., a disability services office, and a Title IX office). The Department emphasizes that recipients must comply with obligations under disability laws with respect to students,

employees, or participants in a Title IX reporting or grievance process situation, regardless of the recipient's internal organizational structure. These final regulations, which concern sexual harassment, do not address a recipient's obligations under the ADA and do not preclude recipients from notifying students involved in a Title IX grievance process or at the beginning of any Title IX process that the students may have rights to disability accommodations.

With respect to allowing a "support person" to accompany a person with a disability during a grievance process, apart from an advisor of choice under § 106.45(b)(5)(iv), recipients must comply with any disability laws that require such an accommodation, and § 106.71(a), which requires recipient to keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as permitted by FERPA, required by law, or as necessary to conduct the grievance process. Thus, a recipient may be required under disability laws to permit a person with a disability to be accompanied throughout a grievance process by a support person, in addition to the party's advisor of choice. Similarly, nothing in these final regulations precludes a recipient from affirmatively inquiring of each party whether any disability accommodation is needed, and recipients must comply with applicable legal obligations under disability laws including Child Find mandates under the IDEA.

The Department notes that § 106.45(b)(1)(iii) prohibits conflicts of interest on the part of Title IX Coordinators, investigators, decision-makers, or persons who facilitate informal resolution processes; however, the Department declines to prematurely judge whether or not a Title IX Coordinator also serving as a school's ADA compliance officer presents a prohibited

conflict of interest because such a determination is fact-specific. The Department will offer technical assistance to recipients regarding compliance with the final regulations.

The Department reiterates that recipients must comply with applicable disability laws in all aspects of a Title IX response including with respect to intake of reports and formal complaints, written communications with complainants and respondents, review of evidence under § 106.45(b)(5)(vi), and holding a live hearing with parties in separate rooms or holding live hearings virtually using technology in postsecondary institutions under § 106.45(b)(6)(i). With respect to the intersection between these Title IX final regulations, and disability laws under which the Department has enforcement authority, the Department will continue to offer technical assistance to recipients.

Changes: The Department has revised § 106.45(b)(1)(iii) to include in the required training how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. The Department revised § 106.45(b)(5)(vi) to provide that recipients must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and we have removed the reference to a file sharing platform.

Comments: Some commenters stated that recipients should be expected to carefully analyze their data on complainants and respondents with disabilities, and consider that information with respect to disproportionate outcomes and discipline for students by disability, race, sexual identity, sexual orientation, age, and other important demographics.

Discussion: The Department does not disagree that analyzing data about a recipient's Title IX grievance processes could provide the recipient with useful information that could help the recipient self-evaluate the fairness and effectiveness of its processes as well as the impact on various demographics of the recipient's educational community. The Department, however,

declines to burden recipients with the obligation to collect and analyze such data in these final regulations, the scope of which was defined by the Department's proposals in the NPRM. These final regulations do not prohibit a recipient from engaging in such self-study or collecting data that will be useful for an assessment. The Department believes that these final regulations provide robust protections for complainants and respondents and that by complying with these final regulations, recipients will not discriminate on the basis of sex and will provide equal access to its education program or activities such that any self-assessment is not required in order to appropriately enforce Title IX, though self-assessment may be a valuable tool for recipients to undertake in the recipient's discretion.

Changes: None.

Miscellaneous

Executive Orders and Other Requirements

Comments: Some commenters expressed concerns about the process for commenting electronically, both in terms of how the Department processed comments it received electronically and the functionality of the electronic system for submitting public comments, regulations.gov. With respect to how the Department processed comments, some commenters contended that the Department, in the NPRM, committed to posting, before the comment period ended, all of the public comments it received. One of these commenters referred to Administrative Conference of the United States (ACUS) recommendation 2018-6 (see 84 FR 2139) that encouraged agencies to allow access to comments already received to help inform others who are developing comments on the same proposed rule. With respect to the electronic commenting process, at least one commenter stated that the technical problems that regulations.gov experienced during the comment period prevented them from accessing the

proposed rules as a reference for informing their public comment and that, consequently, there was a question as to the fairness of the commenting process.

Some commenters expressed concern that the manner in which people must submit their comments is discriminatory, for example by race, class, educational status, ability status, and more. Commenters argued that the process for submitting public comments assumes that people write in English-Standardized English, leaving no room for dialects and vernaculars like African American Vernacular English, much less non-English languages, and assumes that people have a detailed understanding of the law and can comprehend the inaccessible way in which the proposed regulations were written.

Discussion: The Department did not commit to electronically posting all of the comments it received *before the comment period closed*, and there is no legal requirement to do so. The language the commenter referred to is language we use in all of our NPRMs designed to inform interested parties that we provide avenues for review of all public comments, but that language did not specify that all comments received (and not yet posted) would be available to review on regulations.gov before the comment period closed. The ACUS recommendation the commenter cited explicitly qualifies that an agency should post comments during the comment period "to the extent this is possible." Reviewing and processing comments before they are posted takes time and resources, and the Department did so as expeditiously as possible.

Regarding the concern that the NPRM was not available on regulations.gov on February 13-14 because of a server failure, the NPRM was available on regulations.gov from November 29, 2018, through February 12, 2019, and on February 15, the day when the comment period reopened. The Department originally provided a 60-day comment period for its proposed regulations that began on November 29, 2018, and the Department extended the comment period

for two days until January 30, 2019,[1758] and also reopened the comment period for one day on February 15, 2019.[1759] We note that the outage the commenter referred to did not last for the entirety of February 13 and 14 and that www.regulations.gov was available for significant parts of both days. Additionally, the NPRM was available on other websites for viewing to help inform the development of comments, such as www.federalregister.gov and the Department's website, on February 13-14, 2019. The comment period for the proposed rules spanned a total of 63 days, which is longer than the 60-day comment period referenced in section 6(a) of Executive Order 12866.

The Department followed applicable legal requirements for the manner in which public comments were submitted. The Department reviewed and considered comments submitted by any person regardless of race, class, educational status, ability status, or any other characteristic. The Department reviewed and considered comments regardless of whether a comment utilized language reflecting various dialects or vernaculars and regardless of whether a comment evidenced a detailed understanding of the law.

Changes: None.

Comments: At least one commenter stated that the Department failed to consult with the Department of Justice, the Small Business Administration (SBA), small entities, Native American tribes, and State and local officials pursuant to various laws and policies. Specifically, the commenter stated that Executive Order 12250 required the Department to obtain approval from the Attorney General before we published the NPRM. The commenter also stated that the

[1758] 84 FR 409.
[1759] 84 FR 4018.

Department did not transmit a copy of the NPRM to the SBA's Office of Advocacy ("SBA Advocacy") which is required under § 603(a) of the Regulatory Flexibility Act. The commenter also claimed that the Department did not use of any of the reasonable techniques required under 5 U.S.C. 609(a) to assure that small entities have been given an opportunity to participate in the rulemaking. Similarly, the commenter stated that the Department did not consult with tribal officials under § 5(a) of Executive Order 13175, which the commenter believed was required because the NPRM proposed to regulate when and how tribally-operated schools will investigate and adjudicate complaints of sexual harassment. Lastly, the commenter stated that the Department did not consult with State and local officials as required under executive order. This commenter referenced a process that the Department allegedly used in 2000 to provide interested State and local elected officials opportunities for consultation through a biweekly electronic newsletter and to provide the National School Boards Association and others with opportunities for consultation through a listserv notification. The commenter stated that there was no language in the NPRM suggesting the Department complied with its internal process. In addition, the commenter stated that Executive Order 13132 requires the Department to consult with elected State and local officials "early in the process of developing the proposed regulation" under § 6(c)(1), and to publish a federalism summary impact statement under § 6(c)(2).

Discussion: The Assistant Attorney General for Civil Rights reviewed the proposed rules and approved the NPRM to be published in the *Federal Register* in accordance with Executive Order 12250. Additionally, SBA Advocacy had the opportunity to review the NPRM and submitted a public comment, which we have addressed in this preamble, specifically in the "Regulatory Flexibility Act" subsection of the "Regulatory Impact Analysis" section of this document. Furthermore, 5 U.S.C. 609(a) applies only if a rule has a significant economic impact on a

substantial number of small entities, and we have certified that this rule does not have such an impact. Even if § 609(a) applied, that section provides that one of the five techniques available to provide small entities the opportunity to participate in the rulemaking is to publish the proposed rules in publications likely to be obtained by small entities. We published the NPRM in the *Federal Register* and specifically provided small entities the opportunity to comment on the proposed regulations. With regard to Native American tribal consultation, we note that the comment we received was not from a Native American tribe or from a representative of a Native American tribe. Nevertheless, section IV of the Department's Consultation and Coordination with American Indian and Alaska Native Tribal Governments policy,[1760] provides that the Department will conduct tribal consultation regarding actions that have a substantial and direct effect on tribes. The policy lists specific programs that serve Native American students or that have a specific impact on tribes and provides that for those programs, regulatory changes or other policy initiatives will often affect tribes, but for other programs that affect students as a whole, but are not focused solely on Native American students, the Department will include Native American tribes in the outreach normally conducted with other stakeholders who are affected by the action. Here, the action affects all students and entities in the U.S. equally and is not specifically impacting only tribes. Thus, Native American tribes had the same opportunity to comment on the proposed rules as other stakeholders.

As previously noted in the "General Support and Opposition for the Grievance Process in § 106.45" section and the "Section 106.44(c) Emergency Removal" subsection of the

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[1760] U.S. Dep't. of Education, Consultation and Coordination with American Indian and Alaska Native Tribal Governments Policy ("Tribal Governments Policy") 2, https://www2.ed.gov/about/offices/list/oese/oie/tribalpolicyfinal.pdf.

"Additional Rules Governing Recipients' Responses to Sexual Harassment" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this preamble, at least one commenter stated that schools receiving funds from the Bureau of Indian Affairs are required to provide greater due process protections for students pursuant to Part 42 of Title 25 of the Code of Federal Regulations than what these final regulations require. Part 42 of Title 25 "govern[s] student rights and due process procedures in disciplinary proceedings in all Bureau-funded schools" and sets forth specific due process procedures and protections for all disciplinary proceedings in these schools.[1761] The Department applauds the Bureau of Indian Affairs for requiring robust due process protections in disciplinary proceedings for students in Bureau-funded schools. To the extent that the regulations governing Bureau-funded schools may include due process protections that exceed what these final regulations require, such additional due process protections do not contradict these final regulations. There is no direct conflict between what these final regulations require and what the regulations governing Bureau-funded schools require, and nothing prevents a Bureau-funded school from complying with both these final regulations and the regulations in Part 42 of Title 25. Accordingly, these final regulations "would [not] have a substantial direct effect on Indian educational opportunities" such as to necessitate consultation with tribes under section IV of the Department's Consultation and Coordination with American Indian and Alaska Native Tribal Governments policy.[1762]

The same commenter who supported the Department's proposal for increased due process protection asserted that all students, and not just Native American students, should

[1761] 25 CFR 42.1.
[1762] Tribal Governments Policy at 2.

receive the due process protections required for Bureau-funded schools and suggested that not providing more robust due process protections may violate Title VI. The Department appreciates the commenter's concern but notes that Title IX does not apply only to students in schools, whether elementary and secondary schools or postsecondary institutions. Not all recipients of Federal financial assistance are schools; recipients covered under Title IX include, for instance, museums and libraries that operate education programs or activities. Additionally, these final regulations specifically address sexual harassment and do not affect all student disciplinary proceedings. Title IX applies to all education programs or activities that receive Federal financial assistance,[1763] and impacts students, employees, and third parties. These final regulations provide the most appropriate due process protections for a wide variety of recipients and individuals whom Title IX affects. The Department is not discriminating based on race, color, or national origin in promulgating these final regulations, but is requiring due process protections that will affect students, employees, and third parties in an education program or activity of recipients that may, for example, include schools, libraries, museums, and academic medical centers, among other types of recipients.

Some commenters' suggestion that Executive Order 13132, 64 FR 43255 (Aug. 10, 1999), requires the Department to have consulted with State and local officials before issuing the NPRM is inaccurate. That Order's goal was "to guarantee the Constitution's division of governmental responsibilities between the Federal government and the states" and to "further the policies of the Unfunded Mandates Reform Act."[1764] The purpose of the Unfunded Mandates

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[1763] 20 U.S.C. 1681(a).
[1764] 2 U.S.C. 1501 *et seq*.

Reform Act is, in its own words, "to end the imposition, in the absence of full consideration by Congress, of Federal mandates on State, local, and tribal governments without adequate Federal funding, in a manner that may displace other essential State, local, and tribal governmental priorities."[1765] In other words, when the Federal government imposed an *unfunded* mandate on the States (including local governments) and tribal governments carrying federalism implications and had effects on State and local laws, this Order required the Federal government to consult with State and local authorities. However, these final regulations are entirely premised as a condition of receiving Federal funds, and the recipient has the right to forgo such funds if the recipient does not wish to comply with these final regulations. Additionally, this Order states: "*To the extent practicable* and permitted by law, no agency shall promulgate any regulation that has federalism implications, that imposes substantial direct compliance costs on State and local governments, *and* that is not required by statute" unless the agency takes a few steps.[1766] The use of "and" as well as "to the extent practicable" indicate that each of these requirements must be met before the agency is compelled to take those additional steps. These final regulations do not *compel* a recipient to accept Federal financial assistance. Moreover, these final regulations are consistent with Title IX and other Federal statutory provisions. Thus, Executive Order 13132 may not apply to these final regulations. But even if it were applicable here, the Department has complied with it by carefully considering and addressing comments from State and local officials and issuing, through this preamble, a federalism summary impact statement.

[1765] 2 U.S.C. 1501(2).
[1766] Executive Order 13132, § 6(b) (emphasis added).

Finally, Executive Order 13132 does not provide a specific method to consult with State and local officials, and the Department is not required to use a bi-weekly electronic newsletter or listserv to provide opportunities for consultation with State and local officials or any other entity. Instead, the Department has carefully considered and addressed comments from State and local officials in promulgating these final regulations.

Changes: None.

Comments: Some commenters stated that the Department's NPRM did not disclose enough of its scientific and technical findings and studies it relied on, which prevented the public from having the opportunity to assess the accuracy of the Department's methodology and conclusions. These commenters asserted that, in this respect, the Department violated the Administrative Procedure Act ("APA"), 5 U.S.C. 701 *et seq.*, and Executive Order 13563. Specifically, these commenters stated that the NPRM's Regulatory Impact Analysis (RIA) mentioned that the Department examined public Title IX reports and investigations at 55 IHEs nationwide and drew some conclusions from this analysis but the Department did not specify which 55 IHEs were the subject of this review or make the reports publicly available. These commenters had a similar objection to the reference in the NPRM's RIA to a sample of public Title IX documents reviewed by the Department because the Department did not make those documents available for review by the public during the comment period. According to these commenters, the failure to specify this information made it impossible for members of the public to determine whether any of the information was erroneous or whether the conclusions the Department drew from this review may be improper. These commenters had similar objections to the NPRM's RIA discussion of different simulations of its model, including various footnotes within the RIA without making any of those models or the underlying data used to develop those models

publicly available. These commenters believed that the NPRM's Initial Regulatory Flexibility Analysis (IFRA) similarly failed to disclose information it referred to in two places: (1) the Department's prior analyses that showed that enrollment and revenue are correlated for proprietary institutions; and (2) the Department's analysis of a number of data elements available in the Integrated Postsecondary Education Data System (IPEDS). Additionally, these commenters stated that the NPRM's RIA and IRFA did not ascertain or account for the potential inaccuracy of some data the Department relied on, namely, the Civil Rights Data Collection (CRDC) and Clery Act data, which the commenters stated have accuracy deficiencies. According to the commenters, the Department's reliance on this data without acknowledgement of the shortcomings for this purpose conflicts with the Department's responsibilities under its Information Quality Act (IQA) Guidelines.

Discussion: With respect to the analysis of the Title IX reports from 55 IHEs, the reports we reviewed are publicly available from IHEs' websites and were not determinative of any assumptions or methodologies used within the NPRM's RIA. As clearly discussed in the NPRM, the Department was concerned that the data available from the U.S. Senate Subcommittee on Financial and Contracting Oversight report may have only captured a subset of incidents that would otherwise be captured in the definition of "sexual assault" in the proposed rule. Our review of these reports confirmed that IHEs appeared to be including a much wider range of offenses in their Title IX enforcement than simply those that might be reasonably categorized as "sexual violence" by the subcommittee report. Members of the public did not need to review these specific reports to assess the veracity or reasonableness of that analysis. Indeed, a review of any Title IX report could have provided insight into whether it was likely that "sexual misconduct" and "sexual violence" were interchangeable terms and whether the former term

subsumed activities not captured under the latter. In addition, our review informed our assumption that incidents of sexual misconduct only represented half of all current Title IX investigations. Again, members of the public did not need access to the specific reports we reviewed to ascertain the quality of this assumption. A review of any Title IX reports or their own experiences in enforcing Title IX would have provided insight into whether this assumption was reasonable. As discussed in the NPRM, the Department reasonably concluded that the term "sexual violence" used in the Subcommittee report was likely a subset of all incidents of "sexual misconduct" and that incidents of "sexual misconduct" were a subset of all incidents investigated under Title IX. The documents reviewed served only to independently validate those logical conclusions.[1767] In light of the public availability of the data, any interested party had the opportunity to assess the logic presented in the NPRM for the decisions regarding how to code the data. Further, if the general public disagreed with our decision regarding how to code the data, the analysis provided alternative impact analyses that would have resulted from a different set of decisions regarding how to code those data in Table 1 from our Sensitivity Analysis in the NPRM. Finally, we note that the Title IX "reports" referenced in the NPRM's RIA at 83 FR 61485 and the Title IX "documents" referenced at 83 FR 61487 are the same documents.

With respect to the models and underlying data that we used in the NPRM's RIA, we referenced the underlying data, such as the U.S. Senate Subcommittee on Financial and Contracting Oversight report. The footnotes in this discussion of the NPRM's RIA explained the formulas and methods we used to make our calculations. We did not employ any calculations

[1767] 83 FR 61485.

that we did not explain in the text of the document. We believe that the NPRM's RIA included the specificity necessary to allow others to reproduce our analysis and test our conclusions.

With respect to the NPRM's IRFA and our reference to our prior analyses, we explained later in that section that our prior analyses were based on our review of revenue and enrollment figures (including Carnegie Size Definitions, IPEDS institutional size categories, and total FTE) from IPEDS data. Revenue and enrollment data are publicly available through IPEDS, so any interested party was capable of analyzing this data and offering evidence to challenge our conclusion that enrollment and revenue are correlated for proprietary institutions. The NPRM's IRFA also referred to a prior rulemaking docket ED-2017-OPE-0076i, as a resource for the public to find more information on the Department's previous research on proprietary institutions.

With respect to our use of CRDC and Clery Act data, we used the most appropriate data to which we have access. In addition, we specifically invited public comment on other data sources that would help inform our rulemaking. Specifically, we compared the Clery Act data to the U.S. Senate Subcommittee on Financial and Contracting Oversight report to try to understand how the number of investigations is correlated with the various types of IHEs. As described in the NPRM, this analysis informed our estimates that the proposed regulations would decrease the number of investigations conducted per year. Ultimately, the Clery Act data, data from the Subcommittee report, and our logic and assumptions were made public for review. The public had ample opportunity to challenge those assumptions and provide alternative analyses. The CRDC data served the same purpose but as a tool for estimating the number of investigations within LEAs. We are not aware of data that is more reliable than the CRDC and Clery Act data

that we could have used to inform our analysis, and no commenters provided us with an alternative high-quality comprehensive data source.[1768]

Changes: None.

Comments: One commenter stated that this rulemaking should not be exempt from Executive Order 13771 because the cost savings are inaccurate and exaggerated.

Discussion: As a result of the revisions to the proposed regulations, we agree that Executive Order 13771 applies to these final regulations and provide our revised economic analysis in support of this conclusion in the "Regulatory Impact Analysis" section of this preamble.

Changes: The Department provides a revised economic analysis in the "Regulatory Impact Analysis" section of this preamble, which includes the application of Executive Order 13771 to these final regulations.

Comments: One commenter asserted that the law requires the Department to analyze the distributional effects of the proposed rules and that the Department did not provide this analysis. This commenter believed that if the Department analyzed distributional effects, it would have found that the proposed rules would widen existing inequities for groups that already face considerable challenges, namely young people, women, pregnant or parenting students, undocumented students, students of color, individuals with disabilities, and LGBTQ students.

Discussion: We note that the commenter cited, as support for its comment, a congressional bill from 2012 that has not been passed into law. Nevertheless, the NPRM's RIA analyzed how the

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[1768] Although the Department may designate certain classes of scientific, financial, and statistical information as influential under its Guidelines, the Department does not designate the information in the Regulatory Impact Analysis in these final regulations or in its NPRM as influential and provides this information to comply with Executive Orders 12866 and 13563. U.S. Dep't. of Education, Information Quality Guidelines (Oct. 17, 2005), https://www2.ed.gov/policy/gen/guid/iq/iqg html.

proposed rules would impact different types of institutions. We provided significant detail on the different impacts the proposed rules would have on two-year institutions as compared to four-year institutions and large institutions as compared to small institutions. We appreciate the concern about distributional effects among the different types of students, but it is unclear how these final regulations would have a differential impact on the types of students the commenter mentioned, for the purposes of our cost-benefit analysis. We note that the proposed rules, and these final regulations, treat all students equally with respect to age, sex, pregnancy or parenting status, citizenship or legal residency status, race and ethnicity, disability status, sexual orientation, and gender identity. The Department explained that the NPRM's RIA was not attempting to quantify the economic effects of sexual harassment or sexual assault because the NPRM's RIA analysis was limited to the economic effects of the proposed regulations.[1769]

Changes: None.

Comments: At least one commenter argued that the NPRM is unlawful because 20 U.S.C. 1098a (§ 492 of the Higher Education Act of 1965, as amended ("HEA")) requires the Department to engage in negotiated rulemaking for the proposed regulations, which it did not do. In that section, Congress used the phrase "pertaining to this subchapter" when describing regulations for which negotiated rulemaking was required. Because the proposed regulations would affect all institutions that receive funds under Title IV of the HEA, commenters argued they are regulations "pertaining to" Title IV, for which negotiated rulemaking is required. One commenter proposed that the Department undergo a negotiated rulemaking, simplify the NPRM,

[1769] 83 FR 61462, 61485.

and appoint a committee of practitioners (excluding lawyers and special interest groups) to discuss best practices and make recommendations.

Commenters also argued that the HEA's master calendar requirement (20 U.S.C. 1089(c)(1)) should apply to these regulations, meaning that regulations that have not been published by November 1 prior to the start of the award year will not become effective until the beginning of the second award year after such November 1 date, July 1. One commenter also stated that they had submitted a Freedom of Information Act (FOIA) request with respect to the Department's interpretations of this and the negotiated rulemaking requirement and asserted that the Department did not respond in a satisfactory manner. This commenter contended that this unsatisfactory response prejudiced the commenter's ability to make arguments on these points, and that the comment period should be reopened after the Department fully responds.

Discussion: The negotiated rulemaking requirement in section 492 of the HEA applies only to regulations that implement the provisions of Title IV of the HEA, all of which relate to student financial aid programs or specific grants designed to prepare individuals for postsecondary education programs. Specifically, Title IV contains seven parts: (1) Part A – Grants to Students at Attendance at Institutions of Higher Education; (2) Part B – Federal Family Education Loan Program; (3) Part C – Federal Work-Study Programs; (4) Part D – William D. Ford Federal Direct Student Loan Program; (5) Part E – Federal Perkins Loans; (6) Part F – Need Analysis; and (7) Part G – General Provisions Relating to Student Financial Assistance Programs.

The requirements of section 492 do not apply to every Department regulation that impacts institutions of higher education; instead, they apply exclusively to regulations that implement Title IV of the HEA, in other words, that "pertain to" Title IV of the HEA. They do not apply to programs authorized by other titles of the HEA, such as the discretionary grant

programs in Title VI, or the institutional aid programs in Titles III and V, all of which impact many institutions that also participate in the Title IV student aid programs. Title IX is not part of the HEA, rather it is part of the Education Amendments of 1972, and provides, generally, that no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.[1770] Further, we believe the notice and comment rulemaking process for these final regulations was appropriate and adequate and that public comment provided the Department with the recommendations of practitioners and experts, and decline to undertake the negotiated rulemaking process suggested by one commenter.

Similarly, the Title IV master calendar requirements do not apply to the Title IX regulations. The HEA provides that "any regulatory changes initiated by the Secretary affecting the programs under [Title IV] that have not been published in final form by November 1 prior to the start of the award year shall not become effective until the beginning of the second award year after such November 1 date."[1771] While the Department has acknowledged that these Title IX regulations would impact institutions that participate in the Title IV student assistance programs, among others, that impact does not trigger the master calendar requirement. The requirement applies exclusively to regulations that affect Title IV programs. Title IX is not a "program under title IV."

Finally, we note that the sufficiency of the Department's response to any individual FOIA request is beyond the scope of this rulemaking, and decline to comment on the content of such a

[1770] 20 U.S.C. 1681(a).
[1771] 20 U.S.C. 1089(c)(1).

request or its relationship to these final regulations. Since, as explained above, the HEA's negotiated rulemaking and master calendar requirements are inapplicable to these regulations, it was unnecessary to discuss them in the NPRM in order to ensure the public's meaningful ability to comment.

Changes: None.

Comments: Commenters argued that the proposed regulations would create inconsistencies between the Department's approach to Title IX and that of the over 20 other agencies that enforce Title IX. They stated that more than 20 of those other agencies adopted their identical final Title IX regulations in 2000 based on a common NPRM. Because the Department's new NPRM would depart from the common rule and other agencies may choose to maintain their existing regulations, commenters asserted that institutions could be subjected to conflicting obligations, and the Department itself could face difficulties in handling complaints. The commenters noted that the Regulatory Flexibility Act, Executive Order 12866, and Executive Order 13563 all require coordination between agencies and work to reduce inconsistencies. Further, one commenter cited examples of why it is not sufficient to predict or expect that other agencies will amend their Title IX regulations to comport with the Department's revisions. For instance, they pointed to the Department's single-sex Title IX regulations, which were adopted in 2006 but with which other agencies have yet to come into conformance.

Discussion: The Department understands the importance of cross-agency coordination, and the effect such coordination can have on stakeholders. While the Department cannot control what actions other agencies take to ensure this coordination with respect to their regulations, we have taken the necessary steps to effectuate such coordination for these final regulations. The specifics

of other rulemaking proceedings, while perhaps instructive, do not have direct bearing on this rulemaking proceeding.

As commenters acknowledged, the Department included in the NPRM an initial regulatory flexibility analysis (IRFA). As discussed above, consistent with the requirements of Executive orders 12866 and 13563, the Department coordinated with other agencies by sharing the proposed regulations with the Office of Management and Budget (OMB) prior to publication of the NPRM. Through the interagency review process, OMB provided other Federal agencies, including SBA Advocacy and agencies that also administratively enforce Title IX, an opportunity to review and comment on the proposed regulations before they were published. This process is designed to avoid regulations that are inconsistent, incompatible, or duplicative with those of other agencies, and to promote coordination among agencies. Additionally, as noted above, the Assistant Attorney General for Civil Rights reviewed the proposed regulations and approved them to be published in the *Federal Register* in accordance with Executive Order 12250.

Changes: None.

Comments: Some commenters asserted that the proposed regulations will not withstand judicial scrutiny because they were developed under a pretextual rationale and are thus arbitrary and capricious. These commenters refer to public statements made by several Administration officials that they say demonstrate that those officials harbor sexist and discriminatory beliefs which motivated the content of the proposed regulations. The commenters say that this, together with the lack of data and lack of reasoned explanation for departure from past practice, makes it apparent that the proposed regulations are a pretext for implementing discriminatory policy. For instance, one commenter stated the Department had not produced any evidence to support its

belief that these measures are needed to address sex-based discrimination, or even any evidence that sex-based discrimination exists against respondents in Title IX proceedings.

Discussion: In order to permit meaningful review of an agency decision, an agency must disclose the basis of its action.[1772] The Department is doing so through the rulemaking process for this agency action. Neither the Department, nor the Administration, nor its officials, have acted in bad faith or exhibited improper behavior with respect to these Title IX regulations.

Instead, the Department has been clear about our reasons for the changes we proposed in the NPRM, and revisions made in these final regulations, to Title IX implementing regulations. As explained more thoroughly in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section, we seek to better align Title IX implementing regulations with the text and purpose of Title IX and Supreme court precedent and other case law, which will help to ensure that recipients understand their legal obligations, including what conduct is actionable as sexual harassment under Title IX, the conditions that activate a mandatory response by recipients, and particular requirements that such a response must meet so that recipients protect the rights of their students to access education free from sex discrimination. Recognizing that every situation is unique, we wish to ensure that schools provide complainants with clear options and honor the wishes of the complainant (i.e., the person alleged to be the victim) about how a recipient should respond to the situation. Where a complainant elects to file a formal complaint alleging sexual harassment, we intend for the final regulations to ensure that a recipient's investigation be fair and impartial, applying strong procedural protections for both parties, which will produce more reliable factual outcomes,

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[1772] *See Dep't. of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019).

furthering Title IX's non-discrimination mandate consistent with constitutional protections and fundamental fairness.

The Department believes that it has provided all the data required to be included in the NPRM.[1773] We received over 124,000 public comments on the proposed regulations. We have reviewed and considered those comments and have made changes to the proposed regulations, reflected in these final regulations and discussed throughout this preamble, in response to many of those comments.

The Department collected extensive anecdotal evidence through this notice-and-comment rulemaking that demonstrates the provisions in these final regulations are appropriate to address sex discrimination in the form of sexual harassment. Personal stories from both complainants and respondents are anecdotal evidence that the Department received through public comment. Complainants generally would like recipients to provide supportive measures, at a minimum, and to allow complainants to retain some control over the response to any report of sexual harassment. Some complainants are also concerned that biased school-level Title IX proceedings have deprived complainants of due process protections. Similarly, many respondents specifically requested a grievance process with robust due process protections prior to the imposition of disciplinary sanctions.

Changes: None.

Comments: Some commenters asserted that various provisions of the NPRM violate the Administrative Procedure Act ("APA"), 5 U.S.C. 701 *et seq.*, because they reflect a departure from past Department regulations, guidance, policies or practices, without adequate reasons,

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[1773] 83 FR 61464.

explanations, or examination of relevant data. Commenters cited various legal authorities to substantiate an agency's responsibility to explain the basis for its decision making, particularly when changing position on a given issue. They asserted that the NPRM is arbitrary and capricious and will not receive *Chevron* deference. One commenter stated that the Department failed to explain which stakeholders were consulted on particular issues, and why their views on any change were persuasive.

Commenters stated that the NPRM offered only conclusory statements for its dramatic changes in the Department's longstanding interpretation of Title IX as expressed in Department guidance documents. Commenters argued that the Department failed to provide "adequate reasons" or "examine relevant data" to support its proposed regulations. Commenters argued that this also was illustrated by the data relied on in the NPRM's RIA; commenters asserted that the Department predicated its cost calculations on limited data sets – like the CRDC and the Clery Act data sets – that have significant quality issues, explicitly acknowledged data constraints in developing its cost baseline, and provided an incomplete and unconvincing outline of the costs and benefits resulting from the implementation of the proposed regulations. According to the commenters, these facts indicate that the Department failed to provide the necessary "rational connection" between the underlying facts and its decision to engage in its proposed rulemaking.

Commenters also contended that the Department failed to consider reliance interests. Commenters stated that students and educational institutions have relied on the previous standards, expressed in Department guidance, to vindicate their statutory rights and to set their disciplinary procedures, respectively.

Discussion: We agree with commenters that an agency must give adequate reasons for its decisions, and that when an agency changes its position, it must display awareness that it is

changing position and show that there are good reasons for the new policy. In explaining its changed position, an agency must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account. In such cases it is not that further justification is demanded by the mere fact of policy change, but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.[1774] On the other hand, the agency need not demonstrate that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better.[1775]

Throughout the NPRM and this document, we provide such reasons, discussion, and justification for our changes, both from the status quo and from the NPRM. These reasons, discussions, and justifications address, as appropriate, data cited by commenters. In the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, we discuss in particular our reasoning for adopting – but adapting for administrative enforcement – the Supreme Court's three-part framework describing the conditions that trigger a recipient's obligation to respond to sexual harassment, including the definition of actionable sexual harassment, the actual knowledge requirement, and the deliberate indifference standard. We discuss rationale for, and changes to, the § 106.45 grievance process in the "Role of Due Process in the Grievance Process" section of this preamble. We understand that recipients have relied on our prior guidance and discuss these and other changes from the

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[1774] *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009)).

[1775] *Fox*, 556 U.S. at 515. An agency's interpretation must also comport with procedural and substantive requirements in order to receive *Chevron* deference. *See United States v. Mead Corp.*, 533 U.S. 218, 227 (2001); *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984).

Department's past guidance in the foregoing and other applicable sections throughout this preamble.

With respect to the comments about the Clery Act and CRDC data, as discussed in more detail above, we used the most appropriate data to which we had access. The costs and benefits of these final regulations, and our detailed analysis in determining them, are discussed in the "Regulatory Impact Analysis" section of this preamble.

The NPRM discussed the various stakeholders the Department heard from in developing the proposed regulations (83 FR 61463-61464), and in developing these final regulations and revising the NPRM the Department considered the input of the over 124,000 comments we received on the NPRM. All of these stakeholders' and commenters' views were considered in development of the NPRM and these final regulations, and their input was taken into account with respect to each issue addressed in these final regulations.

Changes: None.

Length of Public Comment Period/Requests for Extension

Comments: Several commenters requested for the NPRM comment period to be extended, stating that commenters needed additional time to make their views known. Some commenters asked that the Department also publicize the extension of the comment period. One commenter stated that the law requires a minimum 60-day public comment period but did not specify which law imposed that requirement. Another commenter stated that the public comment period coincided with many colleges' winter breaks. In addition to asking for an extension of the comment period, one commenter asked that the Department schedule public hearings at schools and colleges campuses throughout the country to encourage additional input from students, teachers, administrators, and advocates. One commenter argued that the Department

inappropriately limited public commentary on the proposed regulations and failed to extend the comment period, making the proposal arbitrary and capricious under the Administrative Procedure Act ("APA"), 5 U.S.C. 701 *et seq*. One commenter thanked the Department for allowing a lengthy comment period on this significant NPRM.

Discussion: The Department published the NPRM in the *Federal Register* on November 29, 2018 (83 FR 61462), for a 60-day comment period, with a deadline of January 28, 2019. Following technical issues with the Federal eRulemaking portal, the Department extended the public comment period for an additional two days, through January 30, 2019, to ensure that the public had at least 60 days in total to submit comments on the Department's NPRM using that portal (84 FR 409). In an abundance of caution, to the extent that some users may have experienced technical issues preventing the submission of comments using the Federal eRulemaking Portal, the Department again reopened the comment period for one day, on February 15, 2019 (84 FR 4018). The Department also publicized each of the two extensions on its website, prior to their publication in the *Federal Register*.

The APA does not mandate a specific length for an NPRM comment period, but states that agencies must "give interested persons an opportunity to participate" in the proceeding.[1776] This provision has generally been interpreted as requiring a "meaningful opportunity to comment."[1777] Executive Order 12866 states that a meaningful opportunity to comment on any proposed regulation, in most cases, should include a comment period of not less than 60 days.[1778]

[1776] 5 U.S.C. 553(c).
[1777] *E.g.*, *Asiana Airlines v. F.A.A.*, 134 F.3d 393, 396 (D.C. Cir. 1998) (internal citations omitted).
[1778] Exec. Order No. 12866, Section 6(a); *see also* Exec. Order 13563, Section 2(b).

Case law interpreting the APA generally stipulates that comment periods should not be less than 30 days to provide adequate opportunity to comment.[1779]

In this case, commenters had 60 days, with extensions of time to account for the potential effects of technical issues, to submit their comments. The Department received over 124,000 public comments, many of which addressed the substance of the proposed regulations in great detail, indicating that the public in fact had ample opportunity to participate in the proceeding. Although some of the 60-day period overlapped in part with many colleges' winter breaks, students were able to submit comments regardless of whether school was in session. The Department believes it provided sufficient, meaningful opportunity for the public to comment on the proposed regulations, and that the public in fact did meaningfully participate in this rulemaking.

Changes: None.

Conflicts with First Amendment, Constitutional Confirmation, International Law

Comments: First, a group of commenters argued that the NPRM is unlawful because it violates the First Amendment rights of institutions. Traditionally, these commenters contended, academic institutions have retained the freedom to determine for themselves "'on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'"[1780] As a result, the commenters argued, the NPRM infringes upon the First Amendment rights of institutions of higher education to determine their Title IX policies and procedures with

[1779] *See, e.g.*, *Nat'l Retired Teachers Ass'n v. U.S. Postal Serv.*, 430 F. Supp. 141, 147 (D.D.C. 1977).
[1780] Commenters cited: *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (quoting The Open Universities in South Africa 10-12).

sufficient latitude and autonomy because the proposed rules lack a compelling governmental interest and/or are not sufficiently narrowly tailored.

Second, some commenters suggested that Secretary Elisabeth DeVos lacks the authority to issue the NPRM and to promulgate the final regulations because Vice President Michael Pence cast the deciding vote to confirm the Secretary after the Senators were equally divided on her confirmation;[1781] they contended that the Vice President is not constitutionally authorized to break a tie for a cabinet member's confirmation, thereby rendering Secretary DeVos' Senate confirmation itself invalid and rendering her actions legally unauthorized.

Third, some commenters contended that the NPRM violates the United States' international law obligations, including the International Covenant on Civil and Political Rights ("ICCPR"), which prohibits discrimination on the basis of sex, and its commitments under the 2030 Agenda for Sustainable Development ("Sustainable Development Goals" or "Goals").

Discussion: First, we appreciate some commenters' concerns that the NPRM transgresses upon recipients' First Amendment rights and share commenters' commitment to the importance of interpreting Title IX in a manner that respects constitutional rights, including the rights of recipients under the First Amendment. However, we disagree that the NPRM, or the final regulations, impermissibly infringe on recipients' First Amendment rights. These final regulations do not address what a recipient may teach or how the recipient should teach. These final regulations also do not dictate who may be admitted to study or who may be permitted by a recipient to teach. When a recipient follows a grievance process that complies with § 106.45 and

[1781] Commenters cited: U.S. Senate, Vote: On the Nomination (Confirmation Elisabeth Prince DeVos, of Michigan, to be Secretary of Education), Feb. 7, 2017.

finds a respondent responsible for sexual harassment, these final regulations do not second guess whether or how the recipient imposes disciplinary sanctions on the respondent. Indeed, these final regulations expressly provide in § 106.44(b)(2) that the Assistant Secretary will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient, or otherwise evidence of discrimination under Title IX by the recipient, solely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence. Accordingly, recipients retain discretion as to determinations of responsibility for sexual harassment, and the Department expressly defers to a recipient's judgment with respect to disciplinary action against a respondent whom the recipient has determined to be responsible for sexual harassment. These final regulations do not impact a recipient's decisions about who to admit to study, who to hire to teach, or what curricula a recipient uses for instructional materials. Even with respect to disciplinary action, these final regulations only apply to how a recipient responds to alleged sexual harassment as defined in § 106.30, and not to how a recipient might respond (including with disciplinary action) to alleged misconduct that does not constitute sex discrimination in the form of sexual harassment under Title IX. Recipients also may determine who may be admitted to study and teach at their schools and who may remain to study and teach at their schools through disciplinary sanctions, with respect to both sexual harassment and non-sexual harassment misconduct. We have revised § 106.45(b)(3)(i) to clarify that any dismissal of a formal complaint of sexual harassment or any allegations therein does not preclude action under another provision of the recipient's code of conduct. Thus, recipients remain free to address conduct that is not covered under Title IX and these final regulations. These final regulations also clearly provide in § 106.6(d)(1) that nothing in Part 106 of Title 34 of the Code of Federal Regulations requires a recipient to restrict rights

that would otherwise be protected from government action by the First Amendment of the U.S. Constitution, and recipients are not required to infringe upon the First Amendment rights of students and employees.

As an initial matter, commenters did not (and could not) claim an absolute First Amendment right of an academic institution to conduct its Title IX proceedings however it wishes. Title IX proceedings have long been part of the largely-undisputed regulatory framework.[1782] As a result, this NPRM has not suddenly crossed a line making suspect its First Amendment validity. These final regulations are the product of compliance with rulemaking under the Administrative Procedure Act ("APA"), 5 U.S.C. 701 *et seq.*, including robust public comment. Furthermore, neither Title IX nor the final regulations governs the recipients' *speech* but only their *conduct* in exchange for their accepting Federal financial assistance. But even if commenters were to argue that the NPRM infringes on recipients' freedom of *association*, that argument would fail because compelling governmental interests and narrowly tailored means to achieve those interests may qualify that right. Similarly, the recipient's freedom to define and engage with its campus with respect to sexual harassment and assault is also subject to qualification. It is not an absolute right, and these final regulations, furthering the purposes underlying Title IX, appropriately qualify it.

[1782] 34 CFR 106.8(b) has for decades required recipients to "adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints" of sex discrimination under Title IX. Department guidance has, since 1997, considered sexual harassment a form of sex discrimination under Title IX to which those prompt and equitable grievance procedures must apply, and has since 2001 interpreted the "prompt and equitable grievance procedures" in regulation to mean investigations of sexual harassment allegations that provide for "Adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence." 2001 Guidance at 20.

Controlling precedents demonstrate the foregoing. The Supreme Court has never held that the right to punish or exclude non-member students and employees by potentially harming their future careers and reputations is an unfettered right of speech or association. In *Roberts v. United States Jaycees*,[1783] the Supreme Court held that the freedom of association could be limited "by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." Likewise, in *Boys Scouts of America v. Dale*, the Supreme Court permitted the Boy Scouts to exclude LGBTQ *members* as an exercise of the Scouts' freedom of speech but only if their exclusion was largely necessary for the group to advocate a particular viewpoint: "[t]he freedom of expressive association . . . could be overridden by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[1784] In the Title IX context, though, students and employees are not "members" in the conventional sense and their inclusion does not therefore infringe on an institution's freedom of speech or of association.[1785] The NPRM, furthermore, has justified a compelling governmental interest in providing respondents accused of serious misconduct with a fair, truth-seeking grievance process, which is a pillar of the American legal tradition, and the final regulations further that interest in a manner that equally elevates the compelling governmental interest in ensuring that recipients provide remedies to victims of sexual harassment, ensures that complainants also benefit from the strong procedural protections set forth in the § 106.45 grievance process, and requires recipients to offer

[1783] 468 U.S. 609, 623 (1984).
[1784] 530 U.S. 640, 647-48 (2000).
[1785] *Id*.

supportive measures to complainants with or without the filing of a formal complaint that initiates a grievance process. These interests are intertwined, since due process protections benefit both parties by permitting the parties to meaningfully participate in the grievance process and increase the accuracy of outcomes, thereby ensuring that complainants victimized by sexual harassment receive remedies designed to restore or preserve equal access to education while also ensuring that respondents are not treated as perpetrators of sexual harassment deserving of separation from educational opportunities unless that conclusion is the result of a fair, truth-seeking process. Yet another reason the right to exclude is not as strong here as it was deemed to be in *Dale* is that if a group excludes a member because of the member's status, the member is not ruined for life and no one will hold that against the excluded party. But if an inferior – typically, a student or employee – ends up being excluded because of an opprobrious moral failing like a sexual harassment violation, their prospects are ruined for a long time, perhaps for life. Similarly, if a recipient wrongfully determines that a complainant was not victimized by sexual harassment and on that basis does not provide remedies, the victim may suffer loss of educational opportunities that may derail the victim's education and future for a long time, perhaps for life. This, too, affirms the final regulations' compelling interest in protecting the integrity of a Title IX grievance process against a First Amendment challenge.

The language the commenters cite from Justice Frankfurter's concurrence in *Sweezy* – some institutional latitude to determine "on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study" – that only Justice Harlan joined and that did not command controlling effect, is also inapposite on its own terms.[1786] Those

[1786] *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (Frankfurter, J., concurring).

were not Justice Frankfurter's words or even words he was quoting as having authoritative force. He was merely quoting in passing an excerpt from *Open Universities in South Africa 10-12, A statement of a conference of senior scholars from the University of Cape Town and the University of the Witwatersrand, including A. v. d. S. Centlivres and Richard Feetham, as Chancellors of the respective universities*.[1787] For First Amendment purposes, Justice Frankfurter specifically refused to equate a State legislative inquiry into the contents of the appellant's lecture and into his knowledge of the Progressive Party and its members, with the Open Universities excerpt.[1788] Further, Justice Frankfurter pointed out that *certain specific kinds of* "inroads on legitimacy must be resisted at their incipiency."[1789] This was non-binding *dictum* in the concurrence and has no bearing on the final regulations at hand.[1790]

In *Keyishian v. Board of Regents of the University of the State of New York*,[1791] the Supreme Court stated: "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." The final regulations intentionally protect academic freedom by carefully adopting and adapting the *Davis* standard in the second prong of conduct defined as sexual harassment in § 106.30, as explained in the "Sexual Harassment" subsection of the "Section 106.30 Definitions" section of this preamble.

[1787] *See id.*
[1788] *See id.*
[1789] *Id*.
[1790] *See*, *e.g.*, *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006) ("[W]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.").
[1791] 385 U.S. 589, 603 (1967).

The most analogous case here is *Rumsfeld v. Forum for Academic and Institutional Rights, Inc*.[1792] *Rumsfeld* suggests that the final regulations are consistent with the First Amendment. There, the Supreme Court upheld the Federal Solomon Amendment, which had conditioned law schools' receipt of Federal financial assistance on their giving equal access to military recruiters on par with all other recruiters when institutions instead wished to send a message of disapproval of military policies on social issues. In fact, the "message" inherent in the law schools' refusal to let the military recruiters in was stronger in many respects than any "message" that a recipient can assert here. Nonetheless, the *Rumsfeld* Court determined that "the compelled speech [t]here [wa]s plainly incidental to the . . . [Solomon] Amendment's regulation of conduct."[1793] So it is here; Congress has determined through passage of Title IX that recipients of Federal financial assistance must not permit sex discrimination to deprive any person of educational opportunities; with respect to sexual harassment as a form of sex discrimination, the Supreme Court has interpreted Title IX to require recipients to respond to sexual harassment that occurs between its students, and employees, under certain conditions, and the Department has determined that appropriate adoption, with adaptations, of the Supreme Court's framework effectuates Title IX's non-discrimination mandate consistent with constitutional rights (including free speech, academic freedom, and due process of law) and consistent with fundamental fairness. Furthermore, like the conduct at issue in *Rumsfeld*, the conduct here is not so "inherently expressive" that it deserves First Amendment protection.[1794] There is nothing particularly expressive about a recipient's desire to deny parties to a Title IX proceeding

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[1792] 547 U.S. 47 (2006).
[1793] *Id.* at 62.
[1794] *Id*. at 64-66.

sufficient due process protections before reaching determinations regarding responsibility. In the same way that the law schools' First Amendment freedom of expressive association was not violated in *Rumsfeld*, here too recipients' freedom to expressively associate with students and employees is not violated. It is true that under *Rumsfeld*, the freedom of expressive association protects against laws that make "group membership less attractive" because such laws adversely "affect[] the group's ability to express its message."[1795] But that is not the case here because the final regulations strive to ensure that a fair process will make the institution more attractive, or at least not *less* attractive, because the institution will be responsible for clearly, transparently, and fairly responding to sexual harassment allegations (including by always offering supportive measures to a complainant regardless of whether sexual harassment allegations are ever investigated or proved through a grievance process). Accordingly, the Department disagrees with commenters' argument that the final regulations infringe on the First Amendment rights of recipients, including academic freedom.

Second, we disagree with commenters' concerns that Secretary DeVos might not be constitutionally empowered to issue the NPRM or the final regulations because the Vice President lacked the constitutional prerogative to cast the tie-breaking vote to confirm the Secretary. Because the Vice President *is* constitutionally empowered to cast the tie-breaking vote in executive nominations, President Donald J. Trump's nomination of Secretary DeVos properly was confirmed by the United States Senate; and Secretary DeVos therefore may function as the Secretary of Education. Article I, Section 3, cl. 4 of the Constitution did confer on the Vice President the power to break ties when the Senators' votes "be equally divided." Secretary

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[1795] *Id*. at 69.

DeVos' service as the United States Secretary of Education has therefore been lawful; no pall of constitutional doubt on account of her confirmation is cast on Secretary DeVos' service.

A commenter largely relies on one piece of scholarship to advance this claim.[1796] But that source principally concerns the Vice President's power to break Senate ties on *judicial* nominations, not Executive ones. Morse does not develop robustly an argument about the latter. Moreover, Morse acknowledges there is nothing "conclusive" about Executive nominations, and argues only that Vice Presidents are without constitutional authority to break ties in judicial nominations.[1797] Morse cites three examples from 1806 (Vice President George Clinton voted to confirm John Armstrong as the Minister to Spain), 1832 (Vice President Calhoun cast a tie-breaking vote that defeated the nomination of Martin Van Buren as Minister to Great Britain), and 1925 (Vice President Charles G. Dawes almost cast the tie-breaking vote to confirm President Calvin Coolidge's nominee for attorney general), respectively.[1798] But even the evidence in this source points to the fact that the Vice President was always considered to hold the tie-breaking vote for Executive nominations (indeed for all Senate votes). Particularly the nineteenth century examples do seem to show that historically Vice Presidents have enjoyed this widely-acknowledged power.[1799] Due to this time period's chronological proximity to the Constitution's ratifying generation, this is strong evidence that the original public meaning of the Constitution, left undisputed by intervening centuries of practice, confers the power of breaking Senate ties in executive nominations on Vice Presidents.

[1796] *See* Samuel Morse, *The Constitutional Argument Against the Vice President Casting Tie-Breaking Votes in the Senate*, 2018 CARDOZO L. REV. *DE NOVO* 142 (2018) (herein, "Morse," "the source" or "the article").
[1797] *See d.* at 151.
[1798] *See id.* at 150-51.
[1799] *See id*. at 143-44 fn.4.

As for the argument that the placement of this power in Article I, which generally deals with Congress, meant the power was limited to the legislative votes, this misconceives the context in which the provision exists: that section concerns length of Senate tenure, the roles of congressional personnel, and the Senate's powers, including that of trying impeachments.[1800] It is not limited to what the Senate can accomplish but rather encompasses matters about *who* in the Senate gets to do what, concerning all Senate business. In this section of Article I, the Vice President, *as President of the Senate*, accordingly is given the power to break ties. This was the most logical section in which to put this prerogative of the Vice President. And given how the power to cast tie-breaking votes is left open-ended, the most natural inference is that it applies to *all* Senate votes in *all* Senate business. Consequently, this evidence refutes the commenter's claim about Secretary DeVos' confirmation because: (1) this section in Article I simply concerned the functions and prerogatives of the Senate and its various officers, including the Vice President's general tie-breaking authority; and (2) that the Senate's power to try impeachments is included in the same section means that this section is just as applicable to Executive nominations as to anything else (that neither the commenter nor the article is challenging).[1801] This analysis shows that Morse's argument, and transitively that of the commenter, is flawed.

Furthermore, one commenter's reference to Senator King's statement in 1850 as supporting a view that could lead anyone in the present day to conclude Secretary DeVos's Senate confirmation is invalid is unhelpful because the overwhelming weight of text and history

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[1800] *See generally* U.S. CONST. art. I, § 3.
[1801] *But see* Morse 144, 146.

is against the merits of this pronouncement. Even at that time, King appears to have been one of a handful of people, if that, to express this view. It was not a widely accepted view, before or after.

Finally, a commenter's citation to John Langford's *Did the Framers Intend the Vice President to Have a Say in Judicial Appointments? Perhaps Not*[1802] and the reference to the Federalist Papers also misconceive the constitutional text, design, and history. To be sure, Alexander Hamilton in *The Federalist No. 69* does contrast the New York council at the time,[1803] with the Senate of the national government the Framers were devising ("[i]n the national government, if the Senate should be divided, no appointment could be made").[1804] The commenter's overall point is unpersuasive. As an initial matter, the Federalist Papers were persuasion pieces to convince the People (as sometimes addressed to "The People of New York," etc.) to accept the Constitution. Therefore, while the Papers supply a framework and understanding closely linked to the Constitution's text by some of the authors of that text, it does not supplant the original public meaning of that text itself. Moreover, all *The Federalist No. 69* refers to is that the President *himself* may not cast the tie-breaking vote in the Senate. The *Vice* President, however, may do so, for he is *not* the Executive.

For much of our Nation's history, including when the Equally Divided Clause was written as part of the original Constitution, the President and the Vice President could be from different parties and fail to get along. This Clause gave the Vice President some power and

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[1802] John Langford, *Did the Framers Intend the Vice President to Have a Say in Judicial Appointments? Perhaps Not*, BALKANIZATION (Oct. 5, 2018).
[1803] *See* "The Federalist No. 69," at 389 (Alexander Hamilton) (Clinton Rossiter ed., Mentor 1999) (1961) ("[I]f the [New York] council be divided, the governor can turn the scale, and confirm his own nomination.").
[1804] *Id.*

authority independent of the President. There is an important context behind this. Prior to the Twelfth Amendment's adoption, the Vice Presidency was awarded to the presidential candidate who won the second most number of votes, regardless of which political party he represented.[1805] In the 1796 election, for instance, voters chose the Federalist John Adams to be President.[1806] But they chose Thomas Jefferson, a Democratic-Republican, as the election's runner-up, so Jefferson became Adams' Vice President.[1807] Under the Twelfth Amendment, however, usually Presidents and Vice Presidents are elected on the same ticket. But this does not change the Equally Divided Clause, preserving the Vice President's authority to break Senate ties for executive and other nominations. As a result, any argument to the contrary necessarily ignores the constitutional text, design, and history.

Langford and the commenter at issue also misunderstand what Hamilton actually said in *The Federalist No. 76*, which was: "A man disposed to view human nature as it is . . . will see sufficient ground of confidence in the probity of the Senate, to rest satisfied, not only that it will be impracticable to the Executive to corrupt or seduce a majority of its members, but that the necessity of its co-operation, in the business of appointments, will be a considerable and salutary restraint upon the conduct of that magistrate."[1808] Langford reads this to mean that Alexander Hamilton was saying the Executive needs a majority of the voting Senators present to confirm nominations.

[1805] *See* U.S. CONST. amend. XII.
[1806] *See* Jerry H. Goldfeder, *Election Law and the Presidency*, 85 FORDHAM L. REV. 965, 974-75 (2016).
[1807] *See id.*
[1808] "The Federalist No. 76," at 395 (Alexander Hamilton) (Clinton Rossiter ed., Mentor 2003).

Langford's interpretation wrongly conflates the necessary with the sufficient, for Hamilton was saying only that it will *suffice* for a President to get a nominee confirmed with a majority of the Senate, not that he *needs* a Senate majority to get his nominee confirmed. This is all the more so because Senators may *abstain* from voting, so not every Senator will necessarily be voting. Doubtless Hamilton knew this because the Constitution gives the Senate the power to decide its own rules, including quorum, *see* U.S. CONST. art. I, § 5, cl. 1, 2, and therefore, a President need not even "corrupt or seduce" a majority of the *full* Senate, *The Federalist No. 76*; all he needs is a majority of the *voting* Senators. Thus, Hamilton's phrasing indicates not precision but a common parlance. It is, accordingly, too slender a reed (outside the constitutional text, at that) for Langford to base much of his thesis on, providing no support for the commenter's argument.

Langford is also incorrect in saying that "the Framers situated the Senate's 'advice and consent' powers in Article II, not Article I," where the Equally Divided Clause is located, means that the Vice President's tie-breaking power does not apply to nominations. This argument fails because, as noted earlier, it made more sense for the original Constitution's drafters and the ratifying generation to name the Vice President's tie-breaking power right in the same section of Article I when they were spelling out that he would be the President of the Senate. It is a limitation on his role as President of the Senate as well as his prerogative. Article II, by contrast, says what the President can do; and as already noted, when the original Constitution was ratified, the President and the Vice President were two different and often conflicting entities. Langford assumes the modern view that President and Vice President work hand in hand; that was not the original Constitution's presupposition, explaining why Langford's argument (and the commenter's) is flawed.

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Langford is also wrong to suggest that because "the Framers explicitly guarded against a closely divided Senate by requiring a two-thirds majority of Senators present to concur in order to consent to a particular treaty," this might show that: "Perhaps the Framers assumed the default rule [of the Vice President's tie-breaking power] would apply whereby a tie goes to the Vice President; perhaps, instead, the Framers meant to provide for the possibility of a divided Senate, in which case the nomination would fail." However, the real reason for these placements is simple and has been alluded to earlier: the Treaty Clause belongs in Article II because the President is the first mover on treaties; the Senate's role is reactive. Also, the Vice President is a different actor from the President under the Constitution. This placement, therefore, has nothing to do with the Vice President's tie-breaking power, which remains universally applicable across Senate floor votes. And even Langford is inconclusive about the reason for this placement and structure of keeping the Treaty Clause separate from the Equally Divided Clause.

Therefore, the Constitution permits the Vice President to cast the tie-breaking vote for executive nominations. Vice President Pence constitutionally cast the tie-breaking vote to confirm President Trump's nomination of Secretary DeVos. The Secretary is a constitutionally appointed officer functioning in her present capacity and suffers from no want of authority to issue the NPRM or to promulgate the final regulations on this or any other matter pertaining to the Department of Education.

Third, we appreciate some commenters' concerns that the NPRM and the final regulations run afoul of the United States' international law obligations, including the ICCPR and the Sustainable Development Goals, but we disagree with those contentions.

With respect to the ICCPR, both the text of Title IX and the goals and procedures the final regulations operationalize are similar to the ICCPR. As background, the ICCPR is a

covenant professing to adhere to the principle that the "inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."[1809] Monitored by the United Nations Human Rights Committee, the ICCPR is a multilateral treaty the United Nations General Assembly adopted in 1966, though it did not come into force until 1976. It is true that Article 2 of the ICCPR prohibits sex discrimination, but so does Title IX. To the extent there is any difference between what is expected under the ICCPR and what is expected under Title IX with respect to prohibiting sex discrimination, the Secretary must follow Title IX because when the United States Senate ratified the ICCPR, one of its formal reservations was that Article 2 "of the Covenant [is] not self-executing."[1810]

This is in keeping with controlling Supreme Court precedent because while a treaty (such as the ICCPR) "may constitute an international commitment, it is not binding domestic law unless Congress has enacted statutes implementing it or the treaty itself conveys an intention that it be 'self-executing' and is ratified on that basis."[1811] Under *Foster* and *Medellín*, a treaty is "equivalent to an act of the legislature," and therefore self-executing, when it "operates of itself without the aid of any legislative provision."[1812] Even if such intention were manifest in the ICCPR's text, the Senate's reservation would make short work of it. It follows that Article 2, which is the Covenant's principal relevant provision, is not binding on the United States. By contrast, the Department is directed and authorized by Congress to effectuate Title IX's non-discrimination mandate, pursuant to 20 U.S.C. 1682.

[1809] Preamble, ICCPR.
[1810] *See* Principle III(1), U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992).
[1811] *See Medellín v. Texas*, 552 U.S. 491 (2008) (citing *Foster v. Neilson*, 2 Pet. 253, 314 (1829), overruled on other grounds, *United States v. Percheman*, 7 Pet. 51 (1833)).
[1812] *Foster,* 2 Pet. at 314.

On the merits, too, the commenter's argument is unavailing. The ICCPR's Article 2 states:

> 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
> 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
> 3. Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Neither the commenter nor the ICCPR's text nor still the commenter's recent submission to the United Nations Human Rights Committee ("UNHRC")[1813] explains how Title IX or the NPRM deviate from the ICCPR commitment into which the United States, along with its reservations, has entered. This submission contends that the NPRM and the likely final regulations "weaken[] protections for students who have experienced sexual harassment and assault in numerous ways, including by raising the standard of evidence required to 'clear and convincing,' narrowing the definition of sexual harassment, and by requiring schools to begin the investigation procedure with the presumption that the alleged perpetrator is innocent."[1814] The commenter's submission continues: "The adoption of these guidelines will result in more limited protections for adolescent girls, who are already disproportionately likely to experience sexual violence."[1815]

Endeavoring to justify those arguments, the commenter further states: "The adoption of these regulations will also limit the United States' ability to reach Sustainable Development Goals targets 5.2 (eliminate all forms of violence against all women and girls in the public and private spheres, including trafficking and sexual and other types of exploitation) and 16.2 (end abuse, exploitation, trafficking and all forms of violence against and torture of children)."[1816] But this contention is unavailing because the record cultivated by the NPRM and these final

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[1813] *See* Letter from Yasmeen Hassan, Global Exec. Director, Equality Now, Dr. Ghada Khan, Network Coordinator, U.S. End FGM/C Network, & Jessica Neuwirth Co-President, ERA Coalition to Gabriella Habtrom, Human Rights Committee Secretariat, Office of the United Nations High Commissioner for Human Rights (Jan. 14, 2019).
[1814] *Id.*
[1815] *Id.*
[1816] *Id.*

regulations already explains why the goal or the effect of the final regulations is not to remove women's protections and expose them to violence or to do anything short of ending "abuse, exploitation, trafficking and all forms of violence against and torture of children."[1817] There is no evidence that the final regulations permit or facilitate any of these abhorrent forms of misconduct.

There is prominent international human rights case law from various tribunals demonstrating that children's physical integrity and lives deserve protection; this precept occupies a role of *opinio juris* (opinion of law by prominent scholars and jurists) in international law.[1818] When a government fails to investigate such abuses, such failure may give rise to violations of the child's and family's rights.[1819] But it does not trump the text of the salient instrument, and combined with the fact that the United States reserved certain objections, those *other* international law sources do not dictate what the United States must do. The final regulations will protect complainants by requiring recipients to offer supportive measures designed to restore or preserve the complainant's equal educational access irrespective of whether the recipient also investigates the complainant's sexual harassment allegations, and regardless of whether the respondent accused of sexually harassing the complainant is ever proved responsible or disciplined. When a recipient does investigate sexual harassment allegations in a Title IX grievance process, the final regulations ensure that both complainants and respondents receive strong, clear procedural rights in a fair, truth-seeking grievance process,

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[1817] *Id.*
[1818] *See Mapiripán Massacre v. Colombia,* Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 134 (15 Sept. 2005); *Okkalı v. Turkey*, No. 52067/99, Eur. Ct. H.R. (2006); *Stoica v. Romania*, no. 42722/02, Eur. Ct. H.R. (2008).
[1819] *See Leydi Dayan Sánchez v. Colombia*, Report, Inter-Am. Ct. H.R. No. 43/08 (23 July 2008); *Case of the "Street Children" (Villagran-Morales et al.) v. Guatemala,* Judgment, Inter-Am. Ct. H.R. (May 26, 2001).

and if the respondent is found responsible the recipient must effectively implement remedies for the complainant. Nothing in the United States' international obligations prevents the achievement of these objectives set forth under the final regulations.

As a result, the commenter's suggestions for the UNHRC Secretariat to ask the United States regarding the ICCPR, are unnecessary because the final regulations will optimize "protections for students who have experienced sexual violence" and the final regulations remains "in line with international human rights standards."[1820] Furthermore, "students in secondary schools," under the final regulations, will continue to be "offered a safe educational environment in which schools are held accountable for failure to respond to incidents of sexual harassment and violence."[1821]

As for the Sustainable Development Goals, the United States is not legally obligated to abide by them because the United States never has assented to them – consent is the essential predicate for most international law norms to be binding on a sovereign nation – and they do not occupy the status of customary international law.[1822] Customary international law "may originate 'in custom or comity, courtesy or concession,'" and "[being] 'part of our law, . . . must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as

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[1820] Letter from Yasmeen Hassan, Global Exec. Director, Equality Now, Dr. Ghada Khan, Network Coordinator, U.S. End FGM/C Network, & Jessica Neuwirth Co-President, ERA Coalition to Gabriella Habtrom, Human Rights Committee Secretariat, Office of the United Nations High Commissioner for Human Rights 7 (Jan. 14, 2019).
[1821] *Id*.
[1822] *See generally Oliva v. U.S. Dep't. of Justice*, 433 F.3d 229, 233-34 (2d Cir. 2005); *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 939 (D.C. Cir. 1988); *see also* Andrew Guzman, *The Consent Problem in International Law* 5 (Berkeley Program in Law and Economics Working Paper, 2011); Anthony Aust, *Handbook of International Law* 4 (2005) ("[International law] is based on the consent (express or implied) of states."); Laurence R. Helfer, *Nonconsensual International Lawmaking*, 2008 UNIV. OF ILL. L. REV. 71, 72 (2008) ("For centuries, the international legal system has been premised on the bedrock understanding that states must consent to the creation of international law."); United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development* (2015).

questions of right depending upon it are duly presented for their determination.'"[1823] Drafted in September 2015, the Goals cannot be customary international law because they have not, "over the long passage of years grow[n] 'by the general assent of civilized nations, into a settled rule of international law.'"[1824]

Even on the merits, though, the Goals are consistent with the final regulations. The Goals pledge that, by 2030, "[a]ll forms of discrimination and violence against women and girls will be eliminated, including through the engagement of men and boys."[1825] Nothing in the final regulations promotes, perpetuates, or tolerates any "form[] of discrimination and violence against women and girls," and indeed strives to "eliminate[]" "[a]ll forms of [sex] discrimination."[1826] That is the objective of Title IX and the final regulations. These final regulations do not violate any of the United States' international law obligations or, for that matter, norms or principles.

Consequently, the final regulations are consistent with the United States' international law obligations.

Clery Act

Background

The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act ("Clery Act"), 20 U.S.C. 1092(f), applies only to institutions of higher education that receive Federal student financial aid through the programs authorized by Title IV of the Higher Education Act of 1965, as amended ("HEA"). The Clery Act uses the term "victim."[1827]

[1823] *Oliva v. U.S. Dep't. of Justice*, 433 F.3d 229, 233 (2d Cir. 2005) (quoting *The Paquete Habana*, 175 U.S. 677, 694, 700 (1900)).
[1824] *Id.* (quoting *The Paquete Habana*, 175 U.S. at 694).
[1825] United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development* (2015).
[1826] *Id*.
[1827] 20 U.S.C. 1092(f).

Accordingly, this section of the preamble in which the Department responds to comments about the intersection of these final regulations with the Clery Act, uses the term "victim" in discussing the Clery Act and its implementing regulations. The Clery Act requires institutions of higher education to disclose campus crime statistics and security information about certain criminal offenses, including sexual assault, that occur in a particular geographic area, including the public property immediately adjacent to a facility that is owned or operated by the institution for educational purposes.[1828] VAWA[1829] amended the Clery Act to require institutions of higher education to report information about additional criminal offenses, including domestic violence, dating violence, and stalking.[1830]

VAWA included several amendments to the Clery Act that may be relevant to some parties implicated in a report of sexual harassment or a grievance process to resolve allegations of sexual harassment under Title IX and these final regulations. For example, the Clery Act, as amended by VAWA, requires that students and employees receive written notification of available victim services including counseling, advocacy, and legal assistance, as well as options for modifying a victim's academic, living, transportation, or work arrangements.[1831] The Clery Act also requires institutions of higher education to notify victims of their rights, including their right to report or not report a crime of sexual violence to law enforcement and campus authorities.[1832]

[1828] 20 U.S.C. 1092(f)(1)(F); 20 U.S.C. 1092(f)(6)(A)(iv).
[1829] PL 113-4.
[1830] 20 U.S.C. 1092(f)(6)(A)(i); 20 U.S.C. 1092(f)(7).
[1831] 20 U.S.C. 1092(f)(8)(B)(vii).
[1832] 20 U.S.C. 1092(f)(8)(C).

The Department promulgates these final regulations under Title IX and not under the Clery Act. These final regulations apply to all recipients of Federal financial assistance, and these recipients include many parties that are not institutions of higher education, receiving Federal student financial aid under Title IV of the HEA. For example, these final regulations apply to elementary and secondary schools, which are not subject to the Clery Act. These final regulations do not change, affect, or alter any rights, obligations, or responsibilities under the Clery Act. These final regulations only concern a recipient's rights, obligations, and responsibilities under Title IX. Accordingly, the Department will not respond to any comments that solely concern compliance with the Clery Act and its implementing regulations because such comments go beyond the scope of the NPRM to promulgate regulations under Title IX.[1833]

Comments, Discussion, and Changes

Comments: One commenter expressed concern that § 106.45(b)(1)(vi) (Describe Range of Sanctions) conflicts with the Clery Act, which requires institutions to include a complete list of sanctions that may be imposed following an institutional disciplinary proceeding to support transparency in adjudications, and suggested that recipients should be required to provide a complete list of sanctions, not a range. Without such transparency, the commenter argued, there could be inconsistency in sanctioning, a distrust of the process, as well as confusion among recipients regarding the requirements under the Clery Act and the Department's Title IX regulations.

Discussion: If the Clery Act applies to an institution, the institution must, under 34 CFR §668.46(k)(1)(iii), provide a list of sanctions that the institution may impose following an

[1833] 83 FR 61462.

institutional disciplinary proceeding based on an allegation of dating violence, domestic violence, sexual assault, or stalking. Such a list also satisfies the requirement in § 106.45(b)(1)(vi) to describe the range of sanctions that a recipient may impose on a respondent, and the Department has revised § 106.45(b)(1)(vi) to state that a recipient must describe the range of sanctions or provide a list of sanctions. Through this revision, the Department clarifies that a list of sanctions or a description of the range of sanctions satisfies § 106.45(b)(1)(vi). These final regulations apply to elementary and secondary schools in addition to postsecondary institutions. The Department believes it is appropriate for elementary and secondary schools and other recipients to retain discretion in imposing sanctions in cases involving sexual harassment, and requiring a recipient to describe the range of sanctions will help ensure that the parties know the sanctions that are appropriate in different circumstances, which could arise from a finding of responsibility. The requirements of the Clery Act were designed to fit the population, environment, and traditional processes used by institutions of higher education. The other recipients of Federal funds subject to the Title IX requirements have different populations, environments, and processes. The Department does not believe it is appropriate to prohibit recipients from crafting unique sanctions designed to specifically address the circumstances of a particular formal complaint as long as recipients stay within the range of sanctions described in their policies. Accordingly, the Department will continue to allow recipients to describe the range of possible sanctions and acknowledges that listing all possible sanctions is also permissible.

The Department further notes that the Clery Act regulations in § 668.46(k)(1)(iv) require an institution to describe "the range of protective measures that the institution may offer to the victim following an allegation of dating violence, domestic violence, sexual assault, or stalking."

Unlike the regulations implementing the Clery Act, these final regulations require that a recipient describe only the range of remedies that the recipient may implement following any determination of responsibility. The term "remedies" in these final regulations refers to measures that a recipient provides a complainant after a determination of responsibility for sexual harassment has been made against the respondent, as described in § 106.45(b)(1)(i). Section 106.45(b)(1)(i) provides that "remedies may include the same individualized services described in § 106.30 'supportive measures'; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent." To better align the requirement to describe the range of remedies with the revisions with respect to sanctions in § 106.45(b)(1)(vi), the Department revised § 106.45(b)(1)(vi) to provide that a recipient may either describe the range of possible remedies or list the possible remedies.

The Department does not believe it serves the purposes of title IX to limit the type of "supportive measures," as defined in § 106.30, that a recipient may provide and, thus, a recipient may describe the range of supportive measures, or list the possible supportive measures. A recipient retains discretion to tailor supportive measures to a party's unique circumstances and may not foresee or anticipate all possible supportive measures.

Changes: The Department revised § 106.45(b)(1)(vi) to state that a recipient may describe the range of possible sanctions and remedies or list the possible sanctions and remedies that the recipient may implement following any determination of responsibility.

Comments: Some commenters expressed general concern with the proposed rules and asserted that they were inconsistent with the Clery Act without providing additional details. Some commenters noted that while the Department acknowledged that Title IX and the Clery Act's jurisdictional schemes may overlap in certain situations, the Department failed to explain how

institutions of higher education should resolve the conflicts between the two sets of rules when addressing sexual harassment and claimed that these different sets of rules would likely create widespread confusion for schools.

Some commenters expressed concern that the proposed rules conflict with congressional intent regarding the appropriate level of due process and fairness, which the commenters contended was set forth by Congress in the Clery Act. One commenter asserted that Congress specifically defined what due process rights it demands for campus adjudications of sexual assault in the Clery Act and nowhere did Congress manifest an intent that the Department should consider the elevated due process protections for respondents outlined in the proposed rule.

Another commenter stated that the Department enacted the Clery Act regulations following a negotiated rulemaking process designed to implement Congress's intent. The commenter argued that in its Clery Act regulations the Department did not interpret the phrase "prompt, fair, and impartial investigation and resolution" in the Clery Act to require any of the elevated due process protections for respondents contained in the proposed Title IX rules and further noted that the Department disagreed with comments on the proposed Clery Act regulations arguing that the regulations eliminated essential due process protections. The commenter asserted that in response to such comments, the Department stated that the Clery Act statute and regulations require that the proceedings be fair, prompt, and impartial to both parties and be conducted by officials who receive relevant training and noted that in such cases, institutions are not making determinations of criminal responsibility, but are determining whether the institution's own rules have been violated. The commenter argued that the Department's interpretation of Title IX in the proposed rules is incompatible with its Clery Act regulations and the relevant Clery Act rulemaking process, which demonstrates that the

Department's Title IX rulemaking is arbitrary and capricious and an attempt by the Department to circumvent its own regulations and the clear intent of Congress with respect to procedural due process in campus sexual assault proceedings.

Discussion: Although the commenters allude to conflicts between the regulations implementing the Clery Act, and these final regulations implementing Title IX, they did not identify a true specific conflict. The Department acknowledges that its Clery Act regulations overlap with these final regulations and impose different requirements in some circumstances. It has always been true that some recipients that are subject to both the Clery Act regulations and the Title IX regulations must comply with both sets of regulations. The Department has long interpreted Title IX to apply to incidents of sexual harassment and, through guidance, has provided its views of how Title IX applies to prohibit sexual harassment. Even before the proposed regulations, institutions of higher education raised concerns that the Department has not been clear about how requirements under Title IX interact with requirements under the Clery Act. The Department has consistently stated that institutions of higher educations must comply with both Title IX and the Clery Act and provided guidance in the past. These final regulations more formally and clearly address the obligations of a recipient under Title IX than the Department's past guidance.

Contrary to creating confusion, the Department is addressing the intersection of the Clery Act and Title IX through these final regulations. Sexual harassment for purposes of Title IX means conduct on the basis of sex that meets the definition of sexual assault, dating violence, domestic violence, and stalking in the Clery Act. By aligning the definition of sexual harassment in § 106.30 with the Clery Act, the Department is attempting to resolve confusion or perceived conflicts about a recipient's obligations under Title IX and how these obligations may overlap with some of the conduct that the Clery Act requires.

The Department disagrees that these final regulations conflict with the level of due process and fairness, which the commenters contended was set forth by Congress in the Clery Act. Congress stated in 20 U.S.C. 1092(f)(8)(B)(iv)(I)(aa) that an institution's proceedings must provide a "prompt, fair, and impartial investigation and resolution." The Department's regulations implementing the Clery Act adhered to the plain meaning of the statute and establish requirements sufficient for purposes of the Clery Act. Congress, however, did not set forth any parameters for the due process that the Department should require under Title IX to prohibit sex discrimination in a recipient's education program or activity. The due process protections that the Department requires in these final regulations are designed to address sex discrimination, specifically sexual harassment, in a recipient's education program or activity for both parties, and not just the respondent. A complainant who chooses to file a formal complaint will benefit from a transparent grievance process under § 106.45 that provides both an investigation and a hearing.

The Clery Act is part of Title IV of the HEA, which requires the Department to use negotiated rulemaking procedures in most cases. Congress does not require negotiated rulemaking to promulgate regulations implementing Title IX. The Department used notice-and-comment rulemaking to promulgate these final regulations in accordance with the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, and that process was not arbitrary and capricious. The fact that there are differences between these final regulations and the regulations implementing the Clery Act do not render these final regulations arbitrary and capricious.

The purpose of Title IX, which is to prohibit sex discrimination in a recipient's education program or activity, is different than the purpose of the Clery Act, which is to require disclosure of certain campus security policies and campus crime statistics. Additionally, Title IX is a

condition of receipt of Federal financial assistance, whereas the Clery Act is a condition of receipt of Federal student financial aid for students at institutions of higher education. The Department may legally impose different conditions as requirements for different types of funding.

Changes: None.

Comments: Some commenters asserted that the proposed rules conflict with the Clery Act's requirements regarding geographic jurisdiction and coverage of conduct that occurs off-campus, online, and outside of the United States. One commenter found the Department's failure to follow the Clery Act rules regarding geographic jurisdiction especially problematic in light of the fact that the proposed Title IX rules repeatedly cite and rely on the Clery Act regulations and argued that the Department cannot pick and choose which parts of the Clery Act are applicable to Title IX.

One commenter asserted that pursuant to the Clery Act, complainants alleging incidents of sexual assault, dating violence, domestic violence, and stalking, regardless of location, must be given information about off-campus resources as well and questioned why complainants are treated differently under the proposed Title IX rules. Some commenters argued that the response requirements in the Clery Act are not limited to Clery geography. These commenters noted that the Clery Act regulations require institutions to have a policy statement explaining the process and procedure for disclosures of sexual assault (and three other crimes) and asserted that the statement would apply whether the offense occurred on or off campus. The Clery Act final regulations further require institutions to follow the procedures described in their statement regardless of where the conduct occurred. In contrast, the commenters argued, the proposed Title IX rules requiring recipients to adopt policy and grievance procedures apply only to exclusion

from participation, denial of benefits, or discrimination on the basis of sex occurring against a person in the United States.

The commenters argued that the geographic limitations in the proposed Title IX rules conflict with the Department's traditional interpretation, which required institutions to respond to harassment or violence that could limit participation in educational programs or activities wherever they occurred in the world, if the covered institution is in the United States. According to these commenters, the geographic limitations in the proposed Title IX rules are inconsistent with the way the Department has interpreted geographic jurisdiction under the Clery Act, and the proposed geographic limitation will have a significant impact on the access of some students to their education and lead to confusion among institutions.

Discussion: These final regulations do not conflict with the Department's regulations concerning Clery geography. Although these final regulations may apply to some incidents of sexual harassment that occur on areas included in an institution's Clery geography, these final regulations are promulgated under Title IX, which prohibits discrimination on the basis of sex in a recipient's education program or activity against a person in the United States. These final regulations are consistent with the statutory limitations that Congress applied to Title IX, 20 U.S.C. 1681. The Department is not "picking and choosing" which obligations from the Clery Act to incorporate in these Title IX final regulations. The Department is acknowledging that some conduct covered under Title IX also is covered under the Clery Act.

These regulations apply more broadly than the Clery Act insofar as these regulations apply to recipients of Federal financial assistance that are not institutions of higher education whose students receive Federal student financial aid. The Department does not believe it is appropriate to impose on all recipients of Federal financial assistance the same obligations that

recipients of Federal student financial aid have. Many recipients of Federal financial assistance such as elementary and secondary schools have never been subject to the requirements of the Clery Act and its geography and forcing them to comply with such requirements as a condition of Federal financial assistance is inappropriate for various reasons. For example, elementary and secondary schools generally are more limited in the geographic scope of their educational activities. The requirement to report crimes described in the Clery Act that occur on Clery geography is not as helpful in the elementary and secondary school context as it is in the postsecondary institution context. Many students attend public elementary and secondary schools that they are assigned to attend and do not have a choice as to which school to attend. Students at postsecondary institutions usually have more options as to which college or university to attend and learning about Clery/VAWA crimes that occur on Clery geography or the nearby geographic area of the institution may help them choose which institution is best for them and help raise awareness of the types and frequency of crimes at or near a particular institution.

The Department does not agree that the Clery Act requires the "disclosure" of sexual assault. The Department acknowledges that the Clery Act and its implementing regulations require a postsecondary institution receiving Federal student financial aid, to report the number of incidents of sexual assault, dating violence, domestic violence, and stalking, among other crimes, that occur on Clery geography. The Department also acknowledges the Clery Act may require a postsecondary institution to issue a timely warning in certain circumstances.

The Department acknowledges that some of the requirements in the Clery Act are not limited to crimes that occur on Clery geography. However, the Clery Act does not provide that an institution's obligations regarding an incident that occurred on campus are necessarily the same as its obligations to an incident that occurred off campus. The Department's Clery Act

regulations provide in § 668.46(b)(11)(vii) that the institution will have "[a] statement that, when a student or employee reports to the institution that the student or employee has been a victim of dating violence, domestic violence, sexual assault, or stalking, whether the offense occurred on or off campus, the institution will provide the student or employee a written explanation of the student's or employee's rights and options, as described in paragraphs (b)(11)(ii) through (vi) of this section." This regulation does not state that the institution must provide students or employees with the exact same rights and options, irrespective of where the offense occurred.

The Department appreciates the commenter who noted the differences between the Clery Act and Title IX and agrees that each statute has a different purpose. For the reasons explained more thoroughly in the "Adoption and Adaptation of the Supreme Court's Framework to Address Sexual Harassment" section, the Department is adopting and adapting the rubric in the Supreme Court's decisions in *Gebser* and *Davis*. The Department is faithfully administering the requirements in Title IX that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[1834] The Department explains its interpretations of "no person in the United States," "education program or activity," and other elements of Title IX in the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this preamble. The only specific geographic limitation that these final regulations respect is a limitation that Congress imposed in Title IX by requiring the sex discrimination to be against a person in the United States. No other specific, geographic limitations exist in Title IX, and a recipient with actual knowledge of sexual harassment in its

[1834] 20 U.S.C. 1681(a).

education program or activity against a person in the United States must respond promptly and in a manner that is not deliberately indifferent.[1835]

The Department disagrees with the commenters' claim that these final regulations will lead to confusion. Imposing all the requirements in the Department's regulations under the Clery Act on recipients of Federal financial assistance would result in greater confusion, especially for recipients who have never had to comply with the Department's regulations implementing the Clery Act.

Changes: None.

Comments: Some commenters expressed general concerns with the lack of coverage for off-campus sexual harassment noting that especially at the higher education level, many students live away from home and are likely to explore high-risk situations away from campus. These commenters argued that the proposed changes ignore the reality of the degree to which off-campus sexual harassment impacts a student who is forced to see their harasser on campus daily. These commenters asserted that schools should be required to provide services to students who are assaulted off-campus when the violence interferes with their education and schools should be required to discipline perpetrators who assault students off-campus, especially when the perpetrator is a student of the institution and recommended that the Department refer to the Clery Act rules on geographic jurisdiction.

Some commenters expressed concern that the Clery Act requires institutions of higher education to report certain incidents of dating violence, domestic violence, stalking, and sexual assault that occur in certain off-campus locations and notify all students who report such

[1835] Section 106.44(a).

incidents of their rights regardless of whether the offense occurred on or off-campus, but the proposed Title IX rules limit the ability of institutions of higher education to take action to address such incidents. Commenters concluded that § 106.45(b)(3) undermines the Clery Act's mandate and creates a perverse system in which institutions would have to report incidents of sexual assault that occur off-campus in order to comply with the Clery Act, but would be required by the Department under Title IX to dismiss these complaints instead of investigating them. One commenter asserted that this would allow perpetrators to engage in sexual misconduct with impunity and prevent institutions from taking action to address incidents of sexual misconduct that impact survivors' access to education. Another commenter asserted that since institutions of higher education are required to report incidents of sexual assault, dating violence, domestic violence, and stalking that occur in noncampus buildings and locations under the Clery Act, these institutions have acquired actual knowledge of such incidents, which, the commenter argued, cannot be ignored.

The commenter argued that this conflict between the Clery Act and the proposed Title IX rules would allow schools to ignore off-campus sexual harassment even while reporting and having actual knowledge of these incidents which would likely lead to lawsuits over the inaction of the institutions.

Discussion: These final regulations require a recipient to respond to sexual harassment that occurs in its education program or activity, irrespective of whether the sexual harassment occurs on or off campus. For the reasons set forth earlier, it is imprudent to impose all requirements in the regulations implementing the Clery Act including requirements regarding Clery geography on recipients who are not subject to the Clery Act.

The Clery Act requirements that institutions include certain off-campus incidents in crime statistics and provide certain information and opportunities to victims of incidents of dating violence, domestic violence, stalking, and sexual assault that occur in certain off-campus locations do not contradict these final regulations. As previously noted, the Clery Act regulations do not state that the institution must provide students or employees with the exact same rights and options, irrespective of where the offense occurred. The mandatory dismissal in § 106.45(b)(3)(i) also does not conflict with the Department's regulations implementing the Clery Act. In these final regulations the Department is clarifying that a recipient must dismiss an allegation of sexual harassment in a formal complaint in certain circumstances and that such a dismissal under these final regulations does not preclude action under another provision of the recipient's code of conduct. If recipients would like to address conduct that these final regulations do not address, recipients may do so.

The Department agrees that if a recipient has actual knowledge of sexual harassment, the recipient must respond promptly in a manner that is not deliberately indifferent if the sexual harassment occurred in a recipient's education program or activity against a person in the United States. The Department notes that under these final regulations, a recipient may be required to respond to incidents that occur off campus. Whether sexual harassment occurs in an education program or activity requires a different analysis than whether sexual assault, domestic violence, dating violence, or stalking occur on campus or off campus. Section 106.44(a) provides that for the purposes of §§ 106.30, 106.44, and 106.45, education program or activity includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which sexual harassment includes, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary

institution. As discussed in the "Litigation Risk" subsection of the "Miscellaneous" section of this preamble, the Department believes that these final regulations may have the effect of decreasing litigation arising out of a recipient's responses to sexual harassment.

Changes: None.

Comments: Some commenters raised general concerns that excluding study abroad programs does not reflect the current reality where many institutions across the United States have campuses and educational programs across the world and whose study abroad programs are offering an important component of the educational programs available to students. These commenters stated that schools should be required to provide services to students who are assaulted in a study abroad program when the violence interferes with their education and schools should be required to discipline perpetrators who assault students off-campus, especially when they are a student of the institution and recommended that the Department refer to the Clery Act rules on geographic jurisdiction for study abroad programs. One commenter argued that by not covering study abroad programs under Title IX the Department was creating a scenario in which a U.S. institution is required to have institutional policies to address incidents of sexual assault in a campus residence hall at an abroad location of the institution under the Clery Act, but such policies would need to be independent of the Title IX process even though it would address the same conduct. The commenter argued that this undermines the ability of the Title IX Coordinator to implement a consistent response to sex discrimination and identify patterns that could put individuals and the community at risk and creates a need for separate processes to address the same behavior, in direct opposition to the stated goal of the proposed Title IX rules to streamline processes and create more efficient systems.

Discussion: The Department appreciates the commenter's concerns about study abroad programs. As explained elsewhere in this preamble, the Department interprets Title IX as prohibiting discrimination on the basis of sex against persons in the United States. The Department notes that recipients of Federal financial assistance may respond to reports of sexual harassment that occur abroad, including in study abroad programs. The Department, however, cannot require a recipient to do so under Title IX. The Department also is not requiring recipients to adopt different processes to address conduct that these regulations do not address. In the interest of efficiency, a recipient may use, but is not required to use, the processes and procedures in these final regulations to address conduct that these final regulations do not address.

Changes: None.

Comments: One commenter who represents a system of postsecondary institutions raised specific concerns regarding the conflict in geographic jurisdiction between the Clery Act and the proposed Title IX rules related to Greek letter organizations at such institutions. The commenter explained that under prior OCR interpretations, institutions would be required to take action if the incidents disclosed at Greek letter housing could limit access to education, regardless of the level of oversight of the group. Under the Clery Act, analogous sexual assault crimes might be reported if they occurred at Greek letter housing, but only if the house was owned or controlled by a student organization that is officially recognized and the deed or lease would have to be held by the organization, as private homes and businesses are not included. The commenter argued that the Clery Act definition is inconsistent with the proposed Title IX rules and expressed concern that this conflict will create confusion among institutions. The commenter expressed additional concerns that some institutions may be incentivized to no longer recognize

Greek letter associations or reduce their recognition so that they would not be considered a program or activity based on the tests drawn from cases included in the proposed Title IX rules. The commenter argued that recognizing such associations can come with requirements such as mandatory insurance, risk management standards, and training requirements, which can reduce incidents of sexual harassment and assault so there are reasons for the Department to incentivize such recognition.

Discussion: The Department agrees that with respect to Greek letter organizations, recipients of Federal financial assistance may have different obligations under these final regulations, implementing Title IX, than under the regulations implementing the Clery Act. These obligations, however, do not present a conflict, and the commenter does not identify any specific conflict with respect to Greek letter organizations.

The Department recognizes that each recipient may have a different arrangement with Greek letter associations active at its institution and that the application of these final regulations will differ based upon the relationship between the recipient and the Greek letter association. Whether the Greek letter association is an education program or activity of the recipient will depend on the relationship between the recipient and the Greek letter association. These final regulations provide clarity and not confusion as to what an education program or activity includes, as § 106.44(a) states that for purposes of §§ 106.30, 106.44, and 106.45, an education program or activity includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. The Department acknowledges that many but not all Greek letter associations are student organizations that own or control a building. As

more fully explained in the "Section 106.44(a) 'education program or activity'" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this preamble, recipients may dictate the terms under which they recognize student organizations that own or control buildings, and the reference in § 106.44(a) to "buildings owned or controlled by a student organization that is officially recognized by a postsecondary institution" as part of a recipient's "education program or activity" for purposes of responding to sexual harassment under these final regulations, includes buildings that are on campus and off campus. By contrast, the Clery Act's definition of noncampus property excludes from Clery geography "a fraternity or sorority house that is located within the confines of the campus on land owned by the institution."[1836] The Department does not intend to encourage or discourage recipients from recognizing Greek letter associations, and each recipient must determine what its relationship should be with Greek letter associations. However, where a postsecondary institution does choose to officially recognize a Greek letter association, buildings owned or controlled by that fraternity or sorority are part of the postsecondary institution's education program or activity under these final regulations.

Changes: None.

Comments: One commenter claimed that while the Department indicated that the proposed language regarding emergency removals in § 106.44(c) tracks the Clery Act regulation at 34 CFR 668.46(g), in fact the corresponding Clery Act provision says nothing about the process owed to respondents subject to an interim suspension, and courts have held that due process

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[1836] 34 CFR 668.46 (definition of noncampus building or property); U.S. Dep't. of Education, Office of Postsecondary Education, *The Handbook for Campus Safety and Security Reporting*, 2-18 to 2-19 (2016), https://www2.ed.gov/admins/lead/safety/handbook.pdf.

required under an interim suspension is less elaborate than during a full hearing. One commenter stated that the Clery Act does not prescribe what analytical procedures should be used to determine if an emergency exists, it asks institutions to determine that process for their institution and then disclose that process in institutional policy and in their annual security reports. When such an emergency is confirmed, the Clery Act requires the institution to inform the campus community of the nature of the emergency and what actions they should take to protect themselves. The commenter argued that applying this construct to Title IX makes it seem as though the Department is asking the institution to apply the Clery Act standards to a Title IX process without considering or providing guidance on the implications of such changes to Clery-required emergency notification policies or practices.

Some commenters requested clarification regarding how institutions should utilize the referenced Clery standard, "immediate threat to the health or safety of students and employees occurring on the campus" to determine whether a student should be removed from campus. One commenter expressed concern that without additional guidance or directives, this requirement makes it unclear how/to whom/when such circumstances would apply and how and by whom these requirements should be carried out so as to complement, as opposed to interfere with, an institution's established emergency notification policy and procedures under the Clery Act. The commenter stated that the proposed Title IX rules require that an individual be given an opportunity to challenge the institution's emergency removal immediately following their removal. The commenter asserted that a successful appeal of an emergency removal would require the institution to determine that its own process for assessing an immediate threat to the health or safety of the campus community was flawed, which would influence Clery Act enforcement as well. The commenter expressed concern that without more clarity and

consultation with the Department's Clery Act Compliance Division, separate parties on campus could be making separate analyses on the presence or absence of an immediate threat to the health or safety of the campus community – one in relation to an emergency removal and the other in relation to the institution's obligations to determine whether a threat exists and its impact on the broader community – resulting in potential conflicts across departments and creating significant challenges for the Department in assessing an institution's compliance with Title IX and the Clery Act.

One commenter appreciated the ability for schools to remove a respondent that may be a threat to the complainant or the broader campus community, but believed additional clarification was needed as to what elements need to be included in the assessment. The commenter asked for more specific information including whether there are specific assessment tools that are recommended, what does assessment look like, who conducts this assessment, what conduct or behavior would constitute a broader threat, whether it is a standard threat assessment, what constitutes the process for a "challenge," and who hears that challenge. For example, the commenter inquired whether the person who hears the challenge must be someone separate from the Title IX Coordinator, investigator, decision maker, or appeals person, whether "removal" includes removal from all "programs/activities," such as extra-curricular activities like athletics; and if so, whether such a removal impacts who conducts the assessment, and to whom a "challenge" should be made. The commenter also noted that the Clery Act requires institutions to alert their campus communities to certain crimes in a manner that is timely and will aid in the prevention of similar crimes. Warnings are issued regarding criminal incidents to enable people to protect themselves. Warnings are issued after an assessment is conducted to determine if the crime that has occurred represents a serious or continuing threat to the campus community. The

commenter asked whether it is the Department's intention to require institutions to conduct a similar assessment before initiating the emergency removal of a respondent.

Discussion: The Department noted in the NPRM that the language about an immediate threat to the health or safety of students appears in § 668.46(g) but did not intend to imply that the proposed regulations would have any effect on § 668.46(g) or its application. The Department acknowledges that the emergency removal provision in § 106.44(c) of these final regulations is different than the emergency notification provision in § 668.46(g) of the Clery Act regulations. The Department clarifies here that an institution that is subject to the Clery Act does not need to send an emergency notification each time an institution removes a respondent under § 106.44(c). Whether an institution needs to issue a timely warning is governed under the regulations implementing the Clery Act, and these final regulations do not address the conditions (i.e., Clery crime, Clery geography) that may require a recipient to issue a timely warning. The Department also notes that similar language about health or safety emergencies appears in §§ 99.31(a)(10) and 99.36 of the regulations implementing FERPA, and the Department revised the emergency removal provision in § 106.44(c) to better align with the health and safety emergency exception in the FERPA regulations, §§ 99.31(a)(10) and 99.36. Even though the Department uses similar language in the regulations implementing the Clery Act and FERPA, the Department is not requiring recipients to use the same analysis in Clery or in FERPA to determine whether an emergency removal may be appropriate under § 106.44(c). The Department defers to a recipient to conduct an individualized safety and risk analysis to determine whether an immediate threat to the physical health or safety of any student or other individual exists under § 106.44(c). The emergency removal process under § 106.44(c) is a separate process than the process that an institution uses to determine whether there is a threat that requires a timely warning or an

emergency notification under the Clery Act, and a recipient may determine that there is a sufficient threat to justify an emergency removal under the Title IX regulations but not to require a timely warning or an emergency notification under the Clery Act regulations. Similarly, a recipient may determine that the circumstances justify issuing a timely warning or emergency notification but not an emergency removal. Section 106.44(c) leaves recipients with flexibility to decide who conducts the individualized safety and risk analysis, and who hears any post-removal challenge. Requiring a post-removal challenge opportunity under § 106.44(c) does not create a conflict with a recipient's obligation under the Clery Act. Neither a recipient's decision to invoke emergency removal under § 106.44(c), nor the outcome of a respondent's post-removal challenge, alters a recipient's obligations under the Clery Act regulations.

The recipient has discretion as to whether to remove the respondent from all of its education programs or activities or only some education programs and activities, and as long as a recipient is not deliberately indifferent with respect to whether an emergency removal is an appropriate response to sexual harassment under § 106.44(a), the Department will not second guess the recipient's decision. The Department also defers to a recipient as to who hears a respondent's challenge to a decision to remove the respondent. A Title IX Coordinator, investigator, or decision-maker may have a role in the emergency removal process as long as such a role does not result in a conflict of interest with respect to the grievance process as prohibited in § 106.45(b)(1)(iii). The Department does not require that a recipient use the grievance process in § 106.45 to address an emergency removal and will defer to a recipient's process as long as the recipient provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. For further discussion of the emergency removal provision, see the "Section 106.44(c) Emergency Removal" subsection of

the "Additional Rules Governing Recipients' Responses to Sexual Harassment" section of this preamble.

Changes: None.

Comments: Some commenters raised concerns about conflicts between language in the proposed Title IX rules related to advisors of choice and cross-examination and the Clery Act. One commenter argued that the Clery Act reflects congressional intent regarding providing advisors and cross-examination in campus conduct processes and the proposed Title IX rules conflict with that intent. The commenter stated that congressional intent was clear from the language in the Clery Act, and the Department reasonably interpreted "advisor of their choice" to mean that an institution could not ban a participating student from choosing an attorney. The commenter stated, however, that the Department itself indicated that it did not believe that the statutory language in the Clery Act permitted it to require institutions to provide legal representation to a party in a situation in which one party has legal representation and the other party does not and in the Clery Act final regulations the Department stated that it would not impose such a burden on institutions absent clear and unambiguous statutory authority. The commenter asserted that the commenter could find no statutory authority in Title IX for the Department to require advisors of choice to be provided to students at no cost. The commenter argued that if the Department could find no such authority in the Clery Act, which mentions advisors of choice, there can similarly be no such authority in Title IX, which does not reference advisors or attorneys, and which has not previously been interpreted by the Department to require institutions to provide such representation. Thus, the commenter claimed, because there is no authority or evidence that providing or not providing advisors has a disparate impact based on gender, such a requirement is therefore arbitrary and capricious under the law. The commenter similarly claimed that there is

no statutory authority under Title IX to support a requirement that institutions allow advisors to participate in investigations and adjudications under Title IX and the Department could have, and did not, at least make an argument that the Clery Act required advisors to be permitted to participate in such proceedings.

Discussion: Contrary to the commenter's assertions, these final regulations do not require a recipient to provide legal representation for the parties. The Department is clarifying in §§ 106.45(b)(2)(i)(B), 106.45(b)(5)(iv) and 106.45(b)(6)(i) that an advisor may be, but is not required to be, an attorney. The Department's position that an advisor does not need to be an attorney is consistent with the regulations implementing the Clery Act. In the preamble to the final regulations published October 20, 2014, implementing changes to the Clery Act, the Department stated: "We do not believe that [the Clery Act] permits us to require institutions to provide legal representation in any meeting or disciplinary proceeding in which the accused or the accuser has legal representation but the other party does not. Absent clear and unambiguous statutory authority, we would not impose such a burden on institutions."[1837] The Department's position has not changed with respect to the Clery Act, and these final regulations do not require institutions to provide legal representation to either the complainant or the respondent.

As previously stated, the Clery Act has a different purpose than Title IX, and the Clery Act applies to recipients of Federal student financial aid and not recipients of Federal financial assistance. Although the Clery Act does not require that an advisor be permitted to conduct cross-examination of witnesses testifying at a proceeding, the Department believes that for postsecondary institutions, cross-examination by a party's advisor is the best approach to

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[1837] 79 FR 62774.

assessing allegations of sexual harassment when a formal complaint is filed under these final regulations. The "Section 106.45(b)(6)(i) Postsecondary Institution Recipients Must Provide Live Hearing with Cross-Examination" subsection of the "Hearings" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section in this preamble fully explains the Department's position regarding the requirement that an advisor be permitted to conduct cross-examination on behalf of a party during a hearing at a postsecondary institution. Under these final regulations, a postsecondary institution is not required to provide an advisor to a party for any purpose other than for cross-examination during the live hearing. Providing an advisor to a party who does not have an advisor for the purpose of cross-examination during a hearing prevents parties from directly cross-examining each other.

Changes: The Department has revised §§ 106.45(b)(2)(i)(B), 106.45(b)(5)(iv) and 106.45(b)(6)(i) to specify that the advisor may be, but is not required to be, an attorney.

Comments: Some commenters expressed concern that the requirement that institutions allow for cross-examination by an advisor of choice in sexual harassment cases under Title IX that are also within the Clery Act's definition of sexual assault conflicts with the Clery Act regulations. The commenters noted that the Clery Act regulations explicitly allow institutions to establish restrictions regarding the extent to which the advisor of choice may participate in the proceedings, as long as the restriction applies to both parties, including prohibiting them from conducting or participating in direct cross-examination. At least one commenter stated that in the preamble to the Clery Act final regulations, the Department responded to concerns that advisors of choice may interfere with the process and make the investigation and adjudication of cases more legalistic and take it further away from the educational model. According to this commenter, the Department made several clear statements that institutions may restrict an

advisor's role, such as by prohibiting the advisor from speaking during the proceeding, addressing the disciplinary tribunal, or questioning witnesses. This commenter contended that the Department's regulations, implementing VAWA, clearly allow colleges and universities to prohibit advisors, including attorneys, from participating in any way, including prohibiting them from conducting or participating in direct or cross-examination. One commenter asserted that the establishment of advisors of choice in the Clery Act was designed to ensure that both parties receive individualized support throughout the process and asserted that this individual is designed to play a supportive role to the complainant or respondent. The commenter stated it was unclear why the Department chose to incorporate this Clery Act requirement into the proposed Title IX rules, particularly if such an advisor would then be expected to conduct a cross-examination. The commenter argued that incorporating this Clery Act requirement into the proposed Title IX rules and requiring that person to conduct cross-examination could lead to people who are untrained, or at best, with limited training offered to them by the institution performing a role they were never intended to perform under the existing Clery Act regulations and creates a destructive process for all parties involved.

Discussion: There is no conflict between the regulations implementing the Clery Act and these final regulations implementing Title IX with respect to an advisor conducting cross-examination on behalf of a party. The regulations implementing the Clery Act in § 668.46(k)(2)(iii)-(iv) are similar to these final regulations and require that an institution provide an accuser and the accused with the same opportunities to have others present during any institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice and requires that an institution not limit the choice of advisor or presence for either the accuser or the accused. Under § 668.46(k)(2)(iv), an institution may

establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as these restrictions apply equally to both parties. Section 106.45(b)(5)(iv) contains almost the same language as § 668.46(k)(2)(iii)-(iv) with minor revisions to clarify that the advisor may be, but is not required to be, an attorney. Unlike the regulations implementing the Clery Act, these final regulations require that postsecondary institutions provide an advisor to the parties for the purpose of conducting cross-examination at the hearing. This requirement does not conflict with the Clery Act regulations, as this requirement applies to both parties. As previously noted, the Department may impose different requirements on recipients of Federal financial assistance with respect to Title IX, which prohibits sex discrimination, than on recipients of Federal financial student aid with respect to the Clery Act. The Department's rationale for requiring that postsecondary institutions provide an advisor to the parties for the purpose of cross-examination at the live hearing or allow a party to have an advisor who conducts cross-examination at the live hearing is more fully explained in the "Section 106.45(b)(6)(i) Postsecondary Institution Recipients Must Provide Live Hearing with Cross-Examination" subsection of the "Hearings" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble.

Nothing in these final regulations precludes a recipient from preventing an advisor from being disruptive, and a recipient may implement rules about appropriate conduct at an interview, meeting, hearing, etc., to require all participants to behave in an orderly manner. Advisors may continue to provide support to the parties, and an advisor's role is not limited to an adversarial role. Institutions also are welcome to provide training to advisors on cross-examination. The Department fully acknowledges that the role of advisors under these final regulations, implementing Title IX, differs in some respects from the rules relating to advisors under the

Department's Clery Act regulations. However, the rules regarding advisors under both sets of regulations are consistent with each other and do not preclude a recipient from complying with both. The Department does not believe that any such differences, including the requirement to perform cross-examination, will lead to a destructive process and believes that this requirement will lead to a fair, impartial process that will help assess allegations of sexual harassment, as defined in § 106.30.

Changes: None.

Comments: One commenter asserted that the requirements in the proposed Title IX rules related to the standard of evidence are inconsistent with the language in the Clery Act final regulations. The commenter stated that in the Clery Act final regulations, the Department allowed institutions to select between the preponderance of the evidence standard and the clear and convincing evidence standard without an emphasis on one standard over the other or challenges to implementing the chosen standard. The commenter further stated that in response to comments on the proposed Clery Act rules that the Department should require the clear and convincing evidence standard because this standard better safeguards due process, the Department stated that an institution can comply with both Title IX and the Clery Act by using a preponderance standard. The commenter expressed concern that the Department's proposed Title IX rules put significant bounds on when the preponderance of the evidence standard can be used versus the clear and convincing evidence standard with a clear intent to push recipients to use the clear and convincing evidence standard, which they argue is a reversal of previous Department policy without any explanation other than that campus conduct processes are not the same as civil litigation. The commenter further argued that the Department has not previously contended that the campus conduct process must hold the same level of process as a lawsuit in Federal court,

and it is clear this was never Congress's intent based on the language in the Clery Act final regulations.

Discussion: Under these final regulations, the Department will allow recipients to adopt either a preponderance of the evidence standard or a clear and convincing evidence standard. The Department does not emphasize one standard over another and is not moving forward with its proposal to require that a recipient adopt the same standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction. The only requirement in § 106.45(b)(7) is that recipients use the same standard of evidence for complaints against students as it does for complaints against employees, including faculty. As explained in more detail elsewhere in this preamble and in the "Section 106.45(b)(1)(vii) Describe Standard of Evidence and Directed Question 6" subsection of the "General Requirements for § 106.45 Grievance Process" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble, requiring a higher standard of evidence for a student's formal complaint against an employee than a student's formal complaint against another student is unfair, especially in light of the power deferential between a student and an employee such as a faculty member.

The Department disagrees that it is imposing the same level of process that a Federal district court requires. For example, these final regulations do not contain a comprehensive set of rules of evidence. Neither party may issue a subpoena to gather information from each other or the recipient for purposes of the grievance process under § 106.45. Congress's intent in enacting the Clery Act is not particularly relevant in determining what Title IX requires to prohibit discrimination on the basis of sex in a recipient's education program or activity against a person in the U.S.

Changes: None.

Comments: One commenter expressed support for § 106.45(b)(7) (Determinations Regarding Responsibility) because the requirement to share information about sanctions imposed on the respondent is consistent with both FERPA and the requirements under the Clery Act, for crimes of violence and nonforcible sex offenses.

Some commenters expressed general concerns with some requirements in the proposed Title IX rules on the grounds that they violate complainants' rights to privacy and disagreed with the Department's assertion that these requirements track language in the Clery Act. Some of these commenters noted that the Clery Act requires an institution to maintain as confidential any accommodations and protective measures provided to the victim.

One commenter expressed concern that § 106.45(b)(7) conflicts with § 668.46(k)(2)(v), implementing the Clery Act. The Clery Act regulations clarify that the disclosure of the "result" to the victim must include information on any sanctions imposed and the rationale for the results and sanction. Several commenters suggested that § 106.45(b)(7) should be modified to mirror the Clery Act. One commenter requested to know what the purpose of generally tracking the Clery Act language is in sections such as Section 106.45(b)(7).

Several commenters argued that Section 106.45(b)(7) should align completely with the Clery Act, including requiring that an institution maintain as confidential any accommodations or protective measures provided to the victim.

One commenter noted the differences between what the Clery Act requires to be included in a written determination regarding responsibility and what the proposed Title IX rules require and expressed concern that the proposed Title IX rules exceed what is required by the Clery Act. The commenter asserted that the additional content that must be included in the written

determination regarding responsibility under Title IX are burdensome, repetitive, and unnecessary, particularly given the requirements that the parties have already been provided the investigative report.

Some commenters expressed specific concerns with § 106.45(b)(7) which requires recipients to create and make available to the complainant information that includes the determination regarding responsibility, disciplinary sanctions imposed on the respondent, and remedies provided to the complainant and aspects of § 106.45(b)(7) which requires that the recipient's written determination, which is provided to both parties, include, among other things, any remedies provided by the recipient to the complainant designed to restore or preserve equal access to the recipient's education program or activity. The commenters asserted that it is a violation of the complainant's privacy to include information about remedies and supportive measures and, as such, that information should not be included in the recipient's report nor disclosed to the respondent and that disclosure of such information about supportive measures and remedies provided to the complainant violated, among other things, the Clery Act. The commenters stated that compliance with Title IX's mandate to prohibit discrimination based on sex is not served in any fashion by informing a respondent of the remedies and supportive measures that a complainant received and disclosing such information is also unconnected to the Department's stated purpose of assuring compliance with proper procedure. The commenters argued that the Department's assertion in the preamble that the language in the proposed regulations that the written determination include information on any remedy given to the complainant and be provided to both parties generally tracks the language of the Clery Act regulations is inaccurate because the Clery Act does not permit the disclosure of confidential student information. The commenters noted that while the Clery Act requires that the

complainant and respondent receive notification of the result of the disciplinary proceeding, defined as "any initial, interim and final decision by any official or entity authorized to resolve disciplinary matters within the institution," there is no provision in the Clery Act for providing information about supportive measures or remedies provided to the complainant. Moreover, the commenters argued that in the preamble to the Clery Act final regulations the Department stated that while institutions may need to disclose some information about a victim to a third party to provide necessary accommodations, institutions may disclose only information that is necessary to provide the accommodations or protective measures and should carefully consider who may have access to this information to minimize the risk to a victim's confidentiality. To alleviate these concerns, the commenters recommended that the Department remove any requirement to include information regarding remedies and supportive measures accessed by the complainant from the requirements related to documentation of the recipient's response to a Title IX complaint and instead follow FERPA and the Clery Act for the confidentiality of such information.

Discussion: The Department appreciates the comments in support of these final regulations. Some commenters mistakenly thought that the proposed regulations require a recipient to share the supportive measures that a complainant receives with the respondent. Neither the proposed regulations nor these final regulations require a recipient to share with the complainant or respondent any supportive measures that either party receives. The definition of supportive measures in § 106.30 clearly states: "The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures." Accordingly, a recipient is required to maintain confidentiality with respect to supportive

measures as long as such confidentiality does not impair the ability of the recipient to provide the supportive measures. Similarly, a recipient is required to maintain records of supportive measures under § 106.45(b)(10)(C)(ii), and these records, unlike training materials as specified in § 106.45(b)(10), are not publicly available. The Department, thus, maintains the confidentiality of the parties with respect to supportive measures.

There also is no conflict between § 668.46(k)(2)(v), implementing the Clery Act, and § 106.45(b)(7) regarding a written determination regarding responsibility. There are many similarities between these two provisions. For example, under both the Clery Act and these final regulations, both parties receive written notification of the results of the hearing simultaneously.

These final regulations in § 106.45(b)(7) have been revised to clarify that for purposes of Title IX, the result includes the sanctions for the respondent and whether remedies will be provided by the recipient to the complainant. The Department agrees with commenters who noted that a respondent does not need to know the specific remedies that a complainant receives to restore or preserve equal access to the recipient's education program or activity. For example, if the recipient changed a complainant's housing arrangements as part of the remedy, there is no reason for the respondent to know about this change. Both parties, however, will know whether the recipient will provide remedies to the complainant but not what these exact remedies are. The Department states in § 106.45(b)(7)(ii)(E) that the parties must be informed in writing of "the result as to each allegation, including a determination regarding responsibility, any sanctions the recipient imposes on the respondent, and whether remedies will be provided by the recipient to the complainant designed to restore or preserve access to the recipient's education program or activity." These final regulations do not differ from the Clery Act regulations in requiring that both parties be notified of the result of any disciplinary proceeding.

The Department acknowledges that these final regulations implementing Title IX, may require information in the written determination that the Clery Act regulations do not require, such as the findings of fact supporting the determination under § 106.45(b)(7)(ii)(C). (The Clery Act regulations in §§ 668.46(k)(2)(v)(A) and 668.46(k)(3)(iv) require that both parties receive written notification of the results of the hearing simultaneously and specify that the results of the hearing include any initial, interim, or final decision as well as the rationale for the result and the sanctions.) Parties should know the findings of fact that support a determination regarding sexual harassment. As explained in more detail in the section "Determinations Regarding Responsibility" of this preamble, the Department believes § 106.45(b)(7) serves the important function of ensuring that both parties know the factual basis for the outcome of the grievance process. Requiring decision-makers to provide findings of fact helps verify whether the decision-maker is exercising independent judgment and making an evaluation free from bias. As previously explained, the Department may deviate from the Clery Act regulations, which apply to recipients of Federal student financial aid, in these Title IX final regulations, which apply to recipients of Federal financial assistance. The Department explains its rationale for adopting these requirements for a written determination pursuant to Title IX in the "Determinations Regarding Responsibility" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble.

The Department has revised the proposed regulations to include a provision regarding retaliation in § 106.71(a) that requires a recipient to keep the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness,

except as may be permitted by the FERPA statute or regulations or as required by law or to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder. This provision helps ensure confidentiality and addresses some of the commenter's concerns.

These final regulations are consistent with FERPA, and FERPA applies fully to Title IX proceedings under these final regulations. The commenter does not explain how these final regulations deviate from FERPA, and the Department interprets its regulations under FERPA to be fully consistent with these final regulations. The Department notes that its revision to require the written determination to state whether a complainant will receive remedies and not what remedies the complainant receives aligns with FERPA. As explained in greater detail in the section on FERPA, the specific remedies that a complainant receives are part of the complainant's education records and need not be disclosed to the respondent. The final regulations revise § 106.45(b)(7)(iv) to state that the Title IX Coordinator is responsible for effective implementation of remedies, thereby indicating that where a written determination states that the recipient will provide remedies to a complainant, the complainant can then communicate separately with the Title IX Coordinator to discuss the nature of such remedies.

Changes: The Department revised the proposed regulations to include a provision regarding retaliation in § 106.71(a) that requires a recipient to keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute or regulations or as required by law or to the extent necessary to carry out the purposes of 34 CFR part 106, including the

conduct of any investigation, hearing, or judicial proceeding arising thereunder. The Department also revised § 106.45(b)(7)(ii)(E) to state that the parties must be informed in writing of the result as to each allegation, including any sanctions the recipient imposes on the respondent and whether remedies will be provided by the recipient to the complainant. The Department further revised § 106.45(b)(7)(iv) to provide that the Title IX Coordinator is responsible for the effective implementation of remedies.

Comments: One commenter expressed concern with the proposed rules defining sexual assault as defined by the Clery Act. The commenter asserted that the Clery Act defines sexual assault as carnal knowledge of another person and does not define consent, which the commenter argued is a necessary component of sexual activity. The commenter further stated that failing to include affirmative consent buys into rape myths including that silence is consent.

Some commenters expressed concerns regarding the requirement in the proposed Title IX rules that supportive measures be non-punitive, non-disciplinary, and pose no unreasonable burden on the other party noting that there is no similar requirement in the Clery Act. The commenters specifically mentioned changes to the respondent's class or residence following the filing of a formal complaint or a mutual restriction on contact between the parties as examples of accommodations that are fairly routine, but which may be prohibited under the proposed Title IX rules. The commenters asserted because there are no such restrictions on accommodations for survivors in the Clery Act, there should be no such restrictions on supportive measures under Title IX. One commenter also noted that the Clery Act does not limit accommodations to only those that are reasonably available and designed to preserve or restore access to the school's program. A commenter also expressed concern that the requirement that the supportive services be provided somehow in relation to a complaint conflicts with the Clery Act requirements that

victims not be required to file any kind of report to be entitled to interim protective measures and accommodations.

One commenter asserted that the Clery Act even more directly requires that recipients minimize the burden on complainants rather than worrying about the burden on respondents and noted that the definition of supportive measures in the proposed Title IX rules is particularly problematic because the proposed Title IX rules also require that respondents be presumed not responsible. Some commenters expressed specific concerns that requiring respondents be presumed not responsible conflicts with the fair and impartial investigation required by the Clery Act, which requires that an institution make no predetermination in favor of either the complainant or respondent. These commenters asserted that this requirement in the proposed Title IX rules explicitly requires that recipients presume complainants are lying, thereby denying sexual misconduct victims the equitable, impartial treatment throughout grievance procedures to which they are entitled under Title IX and the Clery Act and would erode any confidence in the processes and institutions.

Discussion: The Department appreciates the commenter's concern about the definition of consent with respect to sexual assault and intentionally does not require recipients to adopt a particular definition of consent. The Department added language in § 106.30 to clarify that the Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault. Accordingly, recipients may adopt their own definition of consent. The Department is not buying into any "rape myths" by not endorsing a particular definition of consent and is giving recipients the discretion to adopt a definition that it deems appropriate. Allowing a recipient to adopt its own definition of consent also helps avoid any conflict with State or local laws that may require a recipient to adopt a particular definition of consent.

The Department acknowledges that there are differences between the Clery Act regulations, and these final regulations implementing Title IX. Contrary to the commenter's assertions, the Department does not require a complainant to file a formal complaint before considering whether to provide supportive measures. The Department clarifies in § 106.44(a) that a recipient must offer supportive measures to a complainant irrespective of whether the complainant files a formal complaint. The Clery Act regulations are silent in this regard and do not require such consideration unless the complainant requests accommodations. The Clery Act regulations at § 668.46(b)(11)(v) provide that the institution must have "[a] statement that the institution will provide written notification to victims about options for, available assistance in, and how to request changes to academic, living, transportation, and working situations or protective measures [and that t]he institution must make such accommodations or provide such protective measures if the victim requests them and if they are reasonably available, regardless of whether the victim chooses to report the crime to campus police or local law enforcement." The Department notes that this Clery Act regulation does not require any recipient to impose any accommodations that are disciplinary and punitive. The commenter is also mistaken that the Title IX regulations prohibit a recipient from providing a no-contact order. Both the proposed Title IX regulations[1838] and these final regulations allow for mutual restrictions on contact between the parties as stated in § 106.30, and § 106.30 does not expressly prohibit other types of no-contact orders such as a one-way no-contact order. Any supportive measures, however, must be non-disciplinary, non-punitive, and must not unreasonably burden the other party, under § 106.30.

[1838] 83 FR 61496.

Additionally, a sanction for a respondent may consist of or include a one-way no-contact order that only prohibits the respondent from contacting the complainant.

The Department does not agree with the commenter's belief that the definition of supportive measures in these final regulations is particularly problematic in light of the presumption of non-responsibility for the respondent prescribed in § 106.45(b)(1)(iv). The definition of supportive measures in § 106.30 requires any supportive measures to be non-punitive and non-disciplinary because the respondent should receive due process through a grievance procedure under § 106.45 before the imposition of any sanctions or discipline, as stated in § 106.44(a). The presumption of non-responsibility does not provide any advantage to the respondent over the complainant and certainly does not require a recipient to believe that a complainant is lying. This presumption only helps ensure that a respondent is not treated as responsible prior to being proved responsible (subject to exceptions stated under these final regulations, such as § 106.44(c) emergency removal or § 106.44(d) administrative leave applied to a non-student employee-respondent). As discussed in the "Section 106.45(b)(1)(iv) Presumption of Non-Responsibility" subsection of the "General Requirements for § 106.45 Grievance Process" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble, the presumption does not allow, much less require, a recipient to presume that a respondent is truthful or credible. Notwithstanding the presumption of non-responsibility, credibility determinations cannot be based on a party's status as a complainant or respondent, and recipients must reach determinations without prejudging the facts at issue and by objectively evaluating all relevant evidence.[1839] Changes: The Department

[1839] Section 106.45(b)(1)(ii).

clarifies in § 106.44(a) that a recipient must offer supportive measures to a complainant irrespective of whether the complainant files a formal complaint.

Comments: Some commenters expressed general concern that the proposed Title IX rules would tilt investigation procedures in favor of the respondent and have unclear time frames for investigations and thus conflict with the Clery Act requirement that investigations be "prompt, fair, and impartial."

Discussion: These final regulations do not tilt the investigation procedures in favor of the respondent and certainly do not allow a recipient to delay an investigation. The Department notes that the Clery Act and its implementing regulations do not include a specific time frame for an investigation. The Department has revised § 106.44(a) to clarify that when a recipient has actual knowledge of sexual harassment in its education program or activity against a person in the U.S., the recipient must respond "promptly." These final regulations also provide in § 106.45(b)(1)(v) that a recipient must designate reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution process(es) if the recipient offers informal resolution process(es). Accordingly, these final regulations are consistent with the requirement in the Clery Act and its implementing regulations that investigations must be prompt, fair, and impartial.

Changes: The Department has revised § 106.44(a) to clarify that when a recipient has actual knowledge of sexual harassment in its education program or activity against a person in the U.S., the recipient must respond "promptly."

Comments: One commenter expressed concern that the definition of actual knowledge in the proposed Title IX rules, which limits the categories of employees to whom notice constitutes actual knowledge on the part of the institution, conflicts with the sections of the Clery Act that

overlap in this area. The commenter asserted that this is especially cause for concern because the proposed Title IX rules adopt the Clery Act definition of sexual assault. The commenter argued that establishing requirements for an institution to respond to allegations of sexual harassment merely so they are not found deliberately indifferent does not exonerate institutions from complying with the Clery Act's requirement to respond to reports of sexual assault. As a result, institutions would be compelled to develop parallel processes for reporting, investigating, adjudicating, and providing supportive measures for some cases, which does not align with the Department's stated goal of wanting to streamline Title IX to make the existing response efforts more effective and less burdensome.

Some commenters asserted that adopting "actual knowledge" will enable institutions to combine the mandatory reporter lists from Title IX and the Clery Act and will eliminate confusion over who is a mandatory reporter for what conduct. Another commenter stated that under the Clery Act, Campus Security Authorities (CSAs) are defined by the Department as the very wide-ranging group of individuals whose campus role gives them "significant responsibility for student and campus activities" and thus the responsibility to report crimes reported to them. The commenter stated that there is not a perfect overlap between CSAs and responsible employees under existing Title IX guidance, and there is sexual harassment which is actionable under Title IX but which does not rise to the level of a Clery-reportable crime, but the commenter argued that it is incoherent to say that if an individual has such significant responsibility for student and campus activities that they put the institution on notice of Clery-reportable crimes, that they do not also put the institution on notice of Title IX-actionable harassment, especially when the same behavior spans both categories. The commenter argued that one of the reasons that the Department has taken this approach in the Clery context is that

CSAs under the Clery Act are regularly and highly trained in the intricacies of their reporting responsibilities and determining precisely the elements of incident and geography that compose a Clery-reportable incident and event in the Daily Crime Log. It is not left to untrained and undertrained individuals to make these determinations, whereas removing the responsible employee designation for Title IX does precisely that. One commenter asserted that the proposed rules regarding employees obligated to report directly conflicts with the Clery Act without providing additional reasons regarding the commenter's reasons for believing such a conflict exists. The commenter expressed concern that many students do not feel safe reporting incidents to university administrators and would feel safer disclosing information to a resident advisor or trusted faculty member and having responsible employees on college campuses ensures that students are at least contacted by the Title IX office to ensure they know there are supportive resources available to them.

Discussion: The Department disagrees that "actual knowledge" as defined in § 106.30 and referenced in § 106.44(a) conflicts with the Clery Act and its implementing regulations. The Department defines "actual knowledge" in § 106.30 as notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator, to any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school.[1840] The Department disagrees that this definition limits the categories of employees to whom notice charges an elementary and secondary school recipient

[1840] For discussion of the actual knowledge definition and requirement, see the "Actual Knowledge" subsection of the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section, the "Actual Knowledge" subsection of the "Section 106.30 Definitions" section, and the "Section 106.44(a) 'actual knowledge'" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this preamble.

with actual knowledge, because under revised § 106.30 defining "actual knowledge," notice to *any* employee of such a recipient riggers the recipient's response obligations. The Department does not believe the § 106.30 definition of "actual knowledge" is limiting as to postsecondary institutions. The reference in § 106.30 to an "official of the recipient who has authority to institute corrective measures on behalf of the recipient" does not limit the categories of postsecondary employees to whom notice might trigger the postsecondary institution's response obligation, because the institution may in its discretion designate and grant authority to specific categories of employees to institute corrective measures on its behalf, thereby assuring that such employees' knowledge of sexual harassment or alleged sexual harassment conveys actual knowledge to the recipient. The final regulations allow each recipient to make such determinations taking into account the recipient's unique educational environment, including which employees the recipient's students may expect to be required to report disclosures of sexual harassment to the Title IX Coordinator, versus any of the recipient's employees in whom students at postsecondary institutions may benefit from confiding sexual harassment experiences without triggering a mandatory report to the Title IX Coordinator.

The Department acknowledges that there are different requirements in the Clery Act and its implementing regulations. The obligations that recipients have under these final regulations and under the regulations implementing the Clery Act differ in some respects, but there is no inherent conflict between the two statutory schemes or their respective implementing regulations. The Department agrees with a commenter that compliance with these final regulations does not necessarily equate with compliance with the Clery Act regulations. The Department disagrees, however, that institutions would need a different grievance process than the process in § 106.45 to respond to allegations of sexual assault, domestic violence, dating violence, or stalking under

these regulations implementing Title IX and under the Clery Act regulations because § 106.30 expands the definition of sexual harassment to include dating violence, domestic violence, and stalking under the Clery Act. Additionally, these final regulations clarify in § 106.45(b)(3) that dismissal of a formal complaint because the conduct does not fall under Title IX jurisdictional requirements does not preclude a recipient from addressing the conduct through the recipient's own code of conduct. Nothing in the final regulations prevents a recipient from using the same grievance process required under § 106.45, to address other misconduct.

The Department also disagrees that there is any conflict between these final regulations and the definition of campus security authorities (CSAs) under the Clery Act regulations. If a campus security authority is an official of the recipient who has authority to institute corrective measures on behalf of the recipient with respect to sexual harassment or allegations of sexual harassment, then notice of sexual harassment or allegations of sexual harassment to that official constitutes actual knowledge. If a campus security authority, however, does not have authority to institute corrective measures on behalf of the recipient with respect to sexual harassment or allegations of sexual harassment, then notice of sexual harassment or allegations of sexual harassment to that official would not constitute actual knowledge to the recipient. The Department's 2001 Guidance referred to "responsible employees" in the Title IX context, but the Department no longer adheres to the rubric of "responsible employees" adopted in the 2001 Guidance. Instead, the Department is adopting a definition of actual knowledge in § 106.30 and a deliberate indifference standard in § 106.44(a). The Department notes that there have always been differences with respect to who may constitute a responsible employee under the Department's Title IX guidance, including the 2001 Guidance, and who constitutes a CSA under

the Department's Clery Act regulations. Postsecondary institutions have long experience working with these requirements and are familiar with these differences.

Under these final regulations, postsecondary institutions have more discretion (than under Department guidance) to determine which employees, other than the Title IX Coordinator, have authority to institute corrective measures on behalf of the recipient, and that is independent of whether such employees are CSAs under the Clery Act. Institutions may determine that all of their CSAs are officials who have the authority to institute corrective measures on behalf of the recipient with respect to sexual harassment or allegations of sexual harassment. It is very likely that at least some of an institution's CSAs have authority to institute corrective measures on behalf of the recipient for purposes of the conduct defined as "sexual harassment" under § 106.30. For example, if a resident advisor has authority to institute corrective measures with respect to sexual harassment or allegations of sexual harassment on behalf of the recipient, then notice to that resident advisor conveys actual knowledge to the recipient under these final regulations, which is a separate inquiry from whether that resident advisor is a CSA under the Clery Act regulations. A CSA has crime reporting obligations under the Clery Act. If a CSA is also an official with authority to institute corrective measures as to sexual harassment, then under these final regulations, notice of sexual harassment to that CSA requires the institution's prompt response, whether or not the sexual harassment disclosed to that CSA constitutes a Clery Act crime that must be reported for Clery Act purposes. If a CSA is not an official with authority to institute corrective measures as to sexual harassment, then these final regulations allow the postsecondary institution to choose whether that CSA must report sexual harassment to the Title IX Coordinator or may remain a confidential resource for the postsecondary institution recipient's students (and employees) instead of being required to report the sexual harassment to

the Title IX Coordinator. Even if the institution designates certain CSAs as confidential resources for Title IX purposes, CSAs may still be required to report sexual harassment (when the conduct also consists of a Clery crime) for Clery Act purposes, which does not require the CSA to divulge the student's name or identity.

The "mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient" under § 106.30 of these final regulations. Nothing in these final regulations precludes a recipient from giving more employees or officials the requisite authority to institute corrective measures with respect to sexual harassment or allegations of sexual harassment. Similarly, nothing in these final regulations precludes a recipient from training more employees or officials about how to report sexual harassment.

Changes: None.

Comments: While supportive of the Department's views on the importance of allowing parties to access evidence, one commenter was concerned that the way in which the access is provided is limited. The commenter stated that this provision is problematic because on many occasions one party has unrestricted access to some or all of the evidence while the other does not. The commenter asserted that only allowing one party access to versions of the records that would, for example, allow them to search materials would create a significant procedural disadvantage and violate the Clery Act, and would be inconsistent with the proposed Title IX rule requirement that the parties have equal access to the records.

One commenter asserted that the Clery Act permits an institution to withhold irrelevant or prejudicial evidence from both parties, with the understanding that such evidence will not be

brought into the investigation/decision-making process, while the proposed Title IX rules at 106.45(b)(5)(vi) require that all evidence be disclosed, regardless of whether the investigator or decision-maker intends to rely on the information. The commenter argued that not only does the proposed Title IX language conflict with the Clery Act, it also has the potential for harmful information to be presented to both parties, regardless of relevancy. For example, commenters asserted, past victimization and mental health records of both involved parties may be brought into investigations and the decision-making process and be the subject of review and scrutiny by the opposing party, causing irreparable harm. Additionally, commenters argued, with students knowing that all evidence gathered will be brought into an investigation, it will significantly impair the university's ability to gather relevant information and cause students to not want to file a complaint or participate in the formal process.

Commenters also discussed other potential conflicts with the Clery Act. One commenter asserted that the definition of complainant, which states that a complainant is the direct victim of the sexual misconduct reported, prevents third-parties from intervening and conflicts with the Clery Act's requirement that institutions of higher education respond properly to all reports of sexual violence and thwarts efforts to get students to intervene when they know their friends are experiencing sexual harassment but are too afraid to come forward.

One commenter expressed concern that 106.45(b)(2) in the proposed Title IX rules does not mention that complainants are entitled to protection from retaliation regardless of whether their complaints are successful, as long as they acted in good faith and noted that the Clery Act requires institutions' sexual misconduct policies to include prohibition of retaliation.

One commenter expressed concern that the proposed definition of sexual harassment, that is unwelcome conduct "on the basis of sex" conflicts with the definitions of sexual harassment in

the Clery Act which defines sexual harassment to include conduct based on gender or perceived gender.

One commenter stated that under the Clery Act, mediation would be considered a proceeding; therefore, all Clery Act requirements related to disciplinary procedures would still apply regardless of whether such proceedings are considered informal under Title IX.

Discussion: The commenter mistakenly asserts that parties would not have equal access to the records under the proposed or final Title IX regulations. Like the proposed regulations,[1841] these final regulations specifically provide in § 106.45(b)(5)(vi) that the recipient must provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to the conclusion of an investigation. Additionally, prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format, and the parties must have at least ten days to submit a written response, which the investigator will consider prior to completion of the investigative report. Accordingly, the parties will have equal access to evidence under these final regulations.

The Department disagrees that the Clery Act regulations require an institution to exclude irrelevant or prejudicial evidence. Pursuant to § 668.46(k)(3)(i)(B)(3), an institution must "provide[] timely and equal access to the accuser, the accused, and appropriate officials to any

[1841] 83 FR 61498.

information that will be used during informal and formal disciplinary meetings and hearings." There is no conflict between this provision and the provision in § 106.45(b)(5)(vi), requiring that a recipient provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint. A party's mental health records or other sensitive information is not always directly related to the allegations raised in a formal complaint. Additionally, these final regulations do not require a party to submit mental health records or other treatment records as part of the grievance process under § 106.45. If a party chooses to submit such sensitive records and they are directly related to the allegations raised in a formal complaint, the party will have notice that the other party will have the opportunity to review and inspect such records. This requirement should not chill reporting and is essential to a fair, impartial hearing in which both parties have access to the evidence that may be used to prove or disprove the allegations raised in a formal complaint.

Nothing in these final regulations prevents a bystander or someone who witnesses sexual harassment from reporting such sexual harassment to the Title IX Coordinator or other official who has authority to institute corrective measures on behalf of the recipient. When a person makes a report of sexual harassment to such an official, the recipient has actual knowledge. Pursuant to § 106.44(a), if a recipient has actual knowledge of sexual harassment in its education program or activity against a person in the United States, the recipient must respond promptly in a manner that is not deliberately indifferent. Accordingly, these final regulations do not preclude a recipient from responding to a report of sexual harassment simply because someone other than the person who experienced the sexual harassment reports it to the Title IX Coordinator or another official.

The Department appreciates the comment about retaliation and agrees that these final regulations should address retaliation. Accordingly, the Department has included a retaliation provision in these final regulations. The retaliation provision in these final regulations, § 106.71 states in relevant part: "No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the individual has made a report or complaint, testified, assisted, participated, or refused to participate in any manner in an investigation, proceeding, or hearing under this part." This retaliation provision protects all persons who may be involved in a report, investigation, proceeding, or hearing under these final regulations.

Contrary to the commenter's assertions, the Clery Act regulations do not define sexual harassment. The Clery Act regulations provide definitions of sexual assault, dating violence, domestic violence, and stalking, and none of these definitions refer to gender identity. These final regulations refer to sex because Title IX, 20 U.S.C. 1681, expressly prohibits discrimination "on the basis of sex."

The Department is not implementing the Clery Act or revising the Clery Act regulations in these final regulations. The Department's Office of Postsecondary Education may provide technical assistance as to whether mediation may be a disciplinary proceeding that requires procedures under § 668.46(k) of the Clery Act regulations. With respect to these final regulations, the Department notes that most mediations do not require a standard of evidence or an investigation, and under these final regulations, both parties must provide voluntary, written consent to an informal resolution process under § 106.45(b)(9)(ii).

Changes: None.

Comments: A number of commenters requested modifications to the proposed rules. Several commenters referenced the requirement in 106.45(b)(7)(i)-(ii) of the proposed Title IX rules requiring that recipients create, make available to the complainant and respondent, and maintain for a period of three years records of any sexual harassment investigation, the results of that investigation, any appeal from that investigation, and all training materials relating to sexual harassment. The commenters suggested that instead of the proposed three-year period of retention, the Department instead require that such records be maintained for a period of seven years which is the period of retention required under the Clery Act.

One commenter expressed opposition to the notion that the Title IX Coordinator is the only person that can receive information sufficient to put an institution of higher education on notice. The commenter was concerned that limiting notice to the Title IX Coordinator removes the responsibility to train employees and otherwise implement compliant policies and creates an environment easily manipulated so that the institution would never have notice sufficient to create liability. To address these concerns, the commenter recommended that the Department coordinate reporting and knowledge requirements under Title IX with the Clery Act with the caveat that individuals who are "victim advocates" should be excluded from reporting. The commenter argued that aligning the list of individuals for reporting and notice under Title IX and the Clery Act would align two Federal laws and also clarify for students who has a duty to report knowledge of sexual harassment and simplify for institutions of higher education who among their faculty and staff have a duty to report what. This commenter recommended that persons classified under the proposed Clery/Title IX aligned reporting list be responsible for following campus protocols, informing students of who is qualified to receive a formal complaint, and

notifying campus officials of becoming aware of the harassment without instigating a formal complaint.

One commenter asserted a general conflict with the Clery Act mandates for CSAs and the proposed rules, stating that it is reasonable to assume that if a student went to a school official and disclosed having experienced sexual violence they would be provided with resources, since it is a school's duty to keep students safe on campus. To address this concern, the commenter recommended that the Title IX regulation be consistent with the Clery Act and require schools to publicize what individuals are classified as mandated reporters on a campus and any information that is shared to a mandated reporter (or CSA) should result in supportive measures being offered to the person who makes a report.

Discussion: The Department agrees with commenters who recommended a seven-year record retention period to align with the Clery Act regulations. Accordingly, the Department has revised § 106.45(b)(10) to require a seven-year retention period. Although the record retention period under these final regulations does not have to be the same as the record retention period under the regulations implementing the Clery Act, the Department believes it would be helpful to provide consistency and simplicity in this regard.

Contrary to the commenter's assertions, these final regulations do not require an individual to report sexual harassment only to the Title IX Coordinator. Any official who has authority to take corrective action on behalf of a recipient has actual knowledge, and a recipient with actual knowledge of sexual harassment in its education program or activity against a person in the U.S. must respond promptly and in a manner that is not deliberately indifferent under § 106.44(a).

The Department appreciates the comments about campus security authorities and does not assume that every campus security authority has authority to institute corrective measures on behalf of a recipient with respect to sexual harassment or allegations of sexual harassment. If a recipient chooses to designate that all campus security authorities have such authority, then a recipient may do so. The Clery Act requirement to have campus security authorities, however, does not apply in the elementary and secondary school context and adopting that terminology in these title IX rules will cause confusion for recipients that are not postsecondary institutions that receive Federal student financial aid. Additionally, the obligations under the Clery Act and its regulations are different than Title IX and its regulations, and creating a "Clery/Title IX aligned reporting list" requires that the same people be responsible for two different sets of regulatory requirements and obligations, which may be confusing. For example, the Clery Act and its regulations apply to some conduct such as burglary and arson that is not considered sexual harassment under the Title IX final regulations, and similarly, Title IX and its regulations may apply to some conduct that is not a Clery crime. Having a Title IX Coordinator who is specially trained to handle allegations of sexual harassment pursuant to § 106.45(b)(1)(iii) is important. A Title IX Coordinator performs unique functions that a Clery Act Coordinator and other persons who are responsible for compliance with the Clery Act do not perform, and anyone may report sexual harassment to the Title IX Coordinator.

Although the Department does not require recipients to provide supportive measures in response to any report made to a campus security authority or a mandated reporter at a postsecondary institution, the Department has revised these final regulations to require a recipient to offer supportive measures in response to a report of sexual harassment, if the recipient has actual knowledge of sexual harassment in an education program or activity of the

recipient against a person in the U.S. pursuant to § 106.44(a). As previously explained, a recipient may choose to give all of its campus security authorities authority to institute corrective measures on behalf of the recipient with respect to sexual harassment or allegations of sexual harassment. With respect to the elementary and secondary context, notice to any employee of the elementary and secondary school conveys actual knowledge to the recipient under § 106.30.

Changes: The Department has revised § 106.45(b)(10) to require a seven-year record retention period. The Department also revised these final regulations to require a recipient to offer supportive measures to a complainant, if the recipient has actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the U.S. pursuant to § 106.44(a).

Comments: One commenter expressed concern that actual knowledge as defined under the proposed Title IX rules is too narrow and would provide an incentive for institutions to discourage employees, whom students may reasonably believe have the authority to take corrective action, from communicating reports of sexual harassment or assault to the Title IX Coordinator. The commenter asserted that the individuals to whom notice would constitute actual knowledge under the proposed Title IX rules is inconsistent with the Clery Act. For example, the commenter argued, a student could report a rape to an athletic coach who is a CSA under the Clery Act and the institution would then be required to include the reported crime in its crime statistics, and may even issue a timely warning to the campus community under the Clery Act, but then deny actual knowledge of the rape for Title IX purposes if the student does not then duplicate their initial report to the Title IX Coordinator. To address these concerns, the commenter recommended that the Department expand the definition of actual knowledge to

include anyone who otherwise has the duty to report crimes to the institution for State and/or Federal law purposes.

Discussion: The Department defines "actual knowledge" in § 106.30 as notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school. In elementary and secondary schools, if any employee of an elementary and secondary school has notice of sexual harassment or allegations of sexual harassment as described in the definition of "actual knowledge" in § 106.30, such notice conveys actual knowledge to a recipient and requires a recipient to respond to any alleged sexual harassment in a recipient's education program or activity against a person in the U.S. Accordingly, if an athletic coach is an employee of an elementary and secondary school, then that coach would have actual knowledge if the coach has notice of sexual harassment or allegations of sexual harassment as defined in § 106.30.

With respect to postsecondary institutions, the Department does not assume that all campus security authorities (CSAs) have the authority to institute corrective measures on behalf of a recipient with respect to sexual harassment or allegations of sexual harassment, and as discussed previously, these final regulations give postsecondary institutions discretion to decide to authorize certain employees in a manner that makes those employees "officials with authority" as described in § 106.30, and to decide that other employees should remain confidential resources to whom a student at a postsecondary institution might disclose sexual harassment without automatically triggering a report by the employee to the Title IX Coordinator. With respect to the commenter's hypothetical about a timely warning, a recipient that issues a timely warning also creates actual knowledge of sexual harassment because the timely warning would

go to the entire campus community, including to officials who have the authority to institute corrective measures on behalf of the recipient. A recipient with actual knowledge of sexual harassment in its education program or activity against a person in the U.S. must respond promptly and in a manner that is not deliberately indifferent under § 106.44(a).

Changes: None.

Comments: Another commenter agreed that the Title IX Coordinator, investigator, or decision-maker should be fair and impartial, but was concerned that the language in § 106.45(b)(1)(iii) is confusing and does not provide administrators or students with a clear, defined, understandable standard. The commenter also stated that although the Department indicated that the proposed rules are based on the Clery Act, the language in the Clery Act is limited to addressing a conflict of interest or bias for or against the accuser or accused while the proposed Title IX rule seeks to address conflict of interest or bias generally, as well as on an individual basis. To address this concern, the commenter recommended that the standard be revised to more clearly define the standard expected, e.g., require that any individual designated by a recipient as a Title IX Coordinator, investigator, or decision-maker not have a personal bias or prejudice for or against complainants or respondents generally, and not have an interest, relationship, or other consideration that may compromise, or have the appearance of compromising, the Title IX Coordinator's, investigator's, or decision-maker's judgement with respect to any individual complaint or respondent.

One commenter expressed several concerns and requested clarification regarding conflicts of interest and bias. The commenter stated that § 106.45(b)(1)(iii) is similar, although somewhat broader, than the Department's Clery Act regulations by requiring that proceedings be "[c]onducted by officials who do not have a conflict of interest for or against either party." The

commenter expressed concern that without a clear definition of "conflict of interest" or "bias" and in light of other confusing and conflicting aspects of the proposed rules, institutions will have difficulty implementing this requirement. The commenter also noted that to overcome the presumption that campus decision-makers are free of bias in Title IX litigation, courts require proof that a campus official had an actual bias against the party because of that party's sex, and the discriminatory actions flowed from that actual sex-based bias. The commenter expressed concern that absent additional clarification, the proposed rules suggest a reversal of the judicial presumption that campus decision-makers are free of bias. The commenter also asserted that the proposed rules would open the door to numerous claims that undermine the honesty in campus proceedings. The commenter stated that litigants in Title IX cases commonly argue that campus disciplinary officials were biased or conflicted because of their research agenda or pro-victim advocacy, but that the Department indicated in the Clery Act final regulations that a party could not support a claim of bias under § 668.46(k)(3)(i) based on an allegation that "ideologically inspired people dominate the pool of available participants" in a sexual misconduct proceeding, which is similar to holdings from Federal courts. The commenter was concerned that the proposed rules offer no clarity as to whether the Department would accept such claims, which the commenter described as frivolous. The commenter further stated that the proposed rules do not clearly indicate whether the Department will consider an official's holding of two or more roles in the conduct process to be *per se* proof of bias or conflict of interest. The commenter stated that small community colleges, in particular, have limited staff resources to investigate and adjudicate campus sexual misconduct and stated that if the Department intends to prohibit any overlap in responsibilities among the Title IX Coordinator, investigator, or decision-maker, it must make that intention clear. The commenter expressed concern that such a rule would

provide due process protections exceeding those required by Federal and State courts and will strain already limited resources. Finally, the commenter expressed concern that the lack of clarity in the proposed rules regarding bias and conflicts of interest could impede efforts to bring trauma-informed practice to campus disciplinary proceedings. The commenter stated that the Clery Act regulations require annual training for officials, and several States mandate trauma-informed training for campus officials who respond to sexual assault. The commenter further noted that although courts generally reject arguments that trauma-informed practice constitutes a form of sex discrimination in favor of reporting individuals, the lack of clarity in the proposed rules could lead to further litigation in the future.

Discussion: The Department appreciates the commenter's concerns and acknowledges that § 668.46(k)(3)(i)(C) of the Clery Act regulations requires a prompt, fair, and impartial proceeding that is "[c]onducted by officials who do not have a conflict of interest or bias for or against the accuser or the accused." These final regulations in § 106.45(b)(1)(iii) require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. The Department is not including the Clery Act language in these regulations. The Department believes that if a Title IX Coordinator, investigator, decision-maker, or person who facilities an informal resolution process has a conflict of interest or bias for or against complainants or respondents generally, then that conflict or bias will affect the grievance process under § 106.45. Although the requirement regarding conflict of interest and bias may go beyond what some courts require, the Department is committed to providing a fair, impartial process to address sexual harassment under Title IX. Eliminating conflicts of interest and bias from the

grievance process under § 106.45 is important to help insure a fair, impartial process. The Department further notes that in the preamble to the final regulations, implementing the changes to the Clery Act, made by VAWA, the Department responded to commenters who asked whether § 668.46(k)(3)(i)(C) may address "situations in which inappropriately partial or ideologically inspired people dominate the pool of available participants in a proceeding."[1842] The Department responded that "without more facts we cannot declare here that such scenarios present a conflict of interest, but if they did, § 668.46(k)(3)(i)(C) would prohibit this practice."[1843] In these final regulations implementing Title IX, the Department more clearly states that a conflict of interest or bias may be for or against complainants or respondents generally or an individual complainant or respondent for purposes of Title IX.

The Department further notes that the Clery Act regulations do not further elaborate on what may constitute a conflict of interest or bias and further declines to do so in these final Title IX regulations. Recipients of Federal student financial aid have been able to determine what constitutes a conflict of interest or bias without definitions in the regulations implementing the Clery Act. Recipients of Federal financial assistance also enjoy some discretion to determine what may constitute a specific conflict of interest or bias with respect to the unique factual circumstances in a report of sexual harassment.

The Department appreciates the commenter's concerns about whether an official may serve in dual roles, and these final regulations specify when serving in dual roles is prohibited. For example, the decision-maker who makes a written determination regarding responsibility

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[1842] U.S. Dep't. of Education, Office of Postsecondary Education, Final Regulations Implementing Changes to the Clery Act Made by VAWA, 79 FR 62752, 62775 (Oct. 20, 2014).
[1843] *Id*.

cannot be the same person as the Title IX Coordinator or the investigator under § 106.45(b)(7). The Department clarifies in these final regulations that the decision-maker for an appeal cannot be the Title IX Coordinator or any investigator or decision-maker that reached the determination regarding responsibility pursuant to § 106.45(b)(8)(iii).

Recipients have discretion to train Title IX personnel in trauma-informed approaches or practices, so long as all requirements of these final regulations are met. A trauma-informed approach or training on trauma-informed practices may be appropriate[1844] as long as such an approach or training is consistent with § 106.45(b)(1)(iii), which requires recipients to train Title IX personnel (i.e., Title IX Coordinators, investigators, decision-makers, persons who facilitate informal resolutions) to serve impartially, without prejudging the facts at issue, using materials free from reliance on sex stereotypes, and requires Title IX personnel to avoid conflicts of interest and bias for or against complainants or respondents generally or an individual complainant or respondent.

Changes: None.

Comments: One commenter requested clarification regarding what is included in supportive measures under Title IX, especially given potential conflicts with the Clery Act. The commenter questioned whether supportive measures under Title IX would be defined to include victim advocacy, housing assistance, academic support, disability service, health and mental health service, legal assistance as they have in the past and requested clarification regarding whether

[1844] *E.g.*, Jeffrey J. Nolan, *Fair, Equitable Trauma-Informed Investigation Training* (Holland & Knight updated July 19, 2019) (white paper summarizing trauma-informed approaches to sexual misconduct investigations, identifying scientific and media support and opposition to such approaches, and cautioning institutions to apply trauma-informed approaches carefully to ensure impartial investigations).

anti-retaliation measures are available. The commenter also noted that under the Clery Act, institutions must provide victims with written notification of their option to request changes in their academic, living, transportation, and working situations, and they must provide any accommodations or protective measures that are reasonably available once the student has requested them, regardless of whether the student has requested or received help from others or whether the student provides detailed information about the crime and questioned how this would be resolved in light of potential conflicts with the proposed Title IX rules and the limitations on the types of supportive measures institutions may provide under Title IX (e.g., non-punitive, non-disciplinary, not unreasonably burdensome to other party).

One commenter stated that § 106.30 defines complainant as "an individual who has reported being the victim of conduct that could constitute harassment, or on whose behalf the Title IX Coordinator has filed a formal complaint, " while the Clery Act uses the word "victim" throughout. The commenter requested clarification regarding the difference in language.

Discussion: The Department appreciates the commenter's concerns regarding supportive measures and disagrees that these final regulations conflict with the Clery Act regulations with respect to supportive measures. The Department notes in its definition of supportive measures in § 106.30 that supportive measures may "include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absences, increased security and monitoring of certain areas of the campus, and other similar measures." Supportive measures must be non-disciplinary and non-punitive individualized services under § 106.30. The Clery Act regulations do not require supportive measures to be disciplinary or punitive. Additionally, the Department revised these final regulations to require a

recipient to offer supportive measures to a complainant in response to a report of sexual harassment in the recipient's education program or activity against a person in the United States under § 106.44(a). A recipient's Title IX Coordinator also must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. These revisions clarify a recipient's obligation with respect to supportive measures.

With respect to the concern about retaliation, the Department added a provision in § 106.71 to prohibit retaliation, and this provision is explained in more detail in the section on "Retaliation" subsection of the "Miscellaneous" section in this preamble.

The Department acknowledges that both the Clery Act and its implementing regulations include the term "victim," while these final regulations include and define the term "complainant." The Department again notes that the purpose of the Clery Act differs from the purpose of Title IX. The Clery Act generally concerns the disclosure of campus security policy and campus crime statistics, and the term "victim" is appropriate in the context of crime or criminal activity. Title IX concerns discrimination on the basis of sex, and these final regulations specifically address sex discrimination in the form of sexual harassment.

The Department defines a complainant as "an individual who is alleged to be the victim of conduct that could constitute sexual harassment" under § 106.30 and uses the word "victim" in that context. Under these final regulations, a recipient has an obligation to respond to a report of sexual harassment that occurs in its education program or activity against a person in the United States, irrespective of whether the complainant chooses to file a formal complaint.

Defining a complainant as a person who has been alleged to be the victim of conduct that could constitute sexual harassment aligns better with a recipient's obligations to respond to such a report under Title IX. Accordingly, the term "complainant" is more appropriate for the structure and purpose of these final regulations to address sexual harassment under Title IX. The Department explains its decision to remove the phrase "or on whose behalf the Title IX Coordinator has filed a formal complaint" from the definition of complainant in § 106.30 as explained in the "Complainant" subsection of the "Section 106.30 Definitions" section of this preamble.

Changes: The Department has included a provision in § 106.71 to prohibit retaliation for the purpose of interfering with any right or privilege secured by Title IX or these final regulations or because the individual has made a report or complaint, testified, assisted, participated, or refused to participate in any manner in an investigation, proceeding, or hearing under these final regulations. The Department also has revised these regulations to require a recipient to offer supportive measures to a complainant in response to a report of sexual harassment in the recipient's education program or activity against a person in the United States under § 106.44(a), irrespective of whether a complainant files a formal complaint. Pursuant to § 106.44(a), a recipient's Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.

Different Standards for Other Harassment

Comments: Some commenters argued that the NPRM is arbitrary and capricious under § 706 of the Administrative Procedure Act[1845] ("APA") because it singles out sexual harassment for special rules, including procedural rules, while other forms of harassment such as racial discrimination under Title VI and disability discrimination under Section 504, are treated differently. The commenters contended that the fact that the Department does not require elaborate grievance procedures under Title VI or Section 504 undercuts any rationale the Department has for proposing the § 106.45 grievance process under Title IX.

Discussion: The Department disagrees that the NPRM or these final regulations are arbitrary and capricious under the APA due to the differences in the way the final regulations address sex discrimination under Title IX and the Department's regulations addressing concerning racial and disability discrimination, respectively, under other statutes.

The APA does not require the Department to devise identical or even similar rules to eliminate discrimination on the bases of sex, race or disability (or of any other kind), and commenters do not identify any legal obligation of that nature. The APA states, in relevant part, that "[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." 5 U.S.C. 706(2)(A). This test inquires whether the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made," and "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of

[1845] *See* 5 U.S.C. 701 *et seq*.

judgment."[1846] Furthermore, agency "action" is statutorily defined as "the whole or a part of *an* agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."[1847] The statutory text's placement of the modifier "an" indicates the APA is concerned with evaluating distinct final agency actions in their *individual* capacity rather than the collective whole of an agency's actions. Moreover, no textual or structural indicator, nor legislative history,[1848] contradicts this inference. Therefore, § 706(2)(A), incorporating § 551(13), is geared toward *individual* agency actions, not the whole corpus of *all or all possibly similar* agency actions.

This means that § 706(2)(A) does not require one agency action under one statute to be consistent with another agency action under a different statute. That makes sense because a contrary interpretation of § 706(2)(A) would require consistency between (and among) even *inter*-agency regulations; and potentially would render one agency's regulations arbitrary and capricious simply because they differ from *another* agency's regulations. That might happen in the guise of arguing that no matter what, the Federal government is the regulatory promulgator. But this is not what the APA effectuates, as "Congress . . . does not, one might say, hide elephants in mouseholes."[1849] If Congress were to take this dramatic step of opening up agency

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[1846] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) (internal quotations marks and citations omitted).
[1847] 5 U.S.C. 551(13) (emphasis added to show singularity of final agency action).
[1848] *See Lawson v. FMR LLC*, 571 U.S. 429, 459-60 (2014) (Scalia, J., concurring in principal part and concurring in judgment) ("Reliance on legislative history rests upon several frail premises. First, and most important: That the statute means what Congress intended. It does not. . . . Second: That there was a congressional 'intent' apart from that reflected in the enacted text. . . . Third: That the views expressed in a committee report or a floor statement represent those of all the Members of that House [or of the President]."); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56-58 (2012) ("[T]he [statute's] purpose must be derived from the text, not from extrinsic sources such as legislative history or an assumption about the legal drafter's desires.") .
[1849] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

regulations for any kind of comparative review by the courts, its "textual commitment [would have] be[en] a clear one."[1850]

While the APA has at times been interpreted to render agency regulations, notably interpretive rules, arbitrary and capricious, and thus *ultra vires*, because they conflict with the regulation promulgated by the same agency that the new rule was *interpreting*, as *Gonzales v. Oregon*[1851] typifies, that principle does not apply to inter- or even intra-agency regulations deriving their delegations from *different* statutes. In addition to this major difference with *Gonzales*, this NPRM – unlike the interpretive rule struck down in *Gonzales* – "would [not] substantially disrupt the [Title VI and Section 504] regime[s]." *Id*. at 254. The NPRM and the final regulations will have no impact whatsoever on the Title VI and Section 504 regimes, much less undermine those regimes. Consequently, while an agency regulation might be arbitrary or capricious in and of itself, it ordinarily cannot be so just because it differs somewhat from another regulation of the same agency stemming from different statutory provisions. Moreover, while agency authority is not unlimited, an agency's discretion in this regard is expansive, for the arbitrary and capricious standard is a high bar that mere disagreement with the agency's action will not satisfy.[1852]

All this is true for practical reasons too, because a contrary principle would wreak havoc on agency behavior regulating discrimination (and much else) in at least three fundamental respects. It would deny agencies latitude to *gradually* promulgate regulations governing different

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[1850] *Id.*
[1851] 546 U.S. 243, 255-58 (2006).
[1852] *See Assoc. of Data Processing Serv. Orgs., Inc. v. Bd. of Govs. of the Fed. Res. Sys*., 745 F.2d 677, 684 (D.C. Cir. 1984).

subject matters under different statutes. Moreover, it would raise gratuitous questions about whether to "equalize up" or "equalize down" the regulations across wide swaths of statutory regimes. And it would fail to account for the reasonable premise that the Federal government and its agencies are entitled to move cautiously, when they elect to do so at all, because of potentially significant differences between how different statutes address different subject matters and the impact that too expeditious a shift might have on the field.

Illustratively, here the three different statutes noted by commenters address sex, racial, and disability discrimination, and these three subject matters raise complex questions of evidentiary standards, definitions, grievance procedures, remedies, and more. Treating them as interchangeable would, among other things, strip the Federal government of a studious, careful approach to studying the impact of one set of regulations attending one subject matter before transposing them to *other* regulations concerning a *different* subject matter. Such an extreme and gratuitous step ought not to be taken lightly nor foisted on an agency.

The statutory texts attending Title VI, Title IX, and Section 504 give no indication that regulations arising from any of them must, or even may, serve as APA comparators for either or both of the others. Because that comparison would be an extraordinary act of intervention in the process of agency rulemaking, presumably Congress would have spoken clearly and unambiguously to that effect, for it does not hide momentous, law-altering "elephants" in statutory "mouseholes," and certainly not tacitly or silently.[1853] Congress, though, has done no such thing in this instance. Instead, Congress included specific statutory exemptions to Title IX that do not exist in Title VI or Section 504. For example, Congress included specific statutory

[1853] *Whitman*, 531 U.S. at 468.

exemptions to Title IX such as an exemption for educational institutions training individuals for military services or the merchant marine,[1854] for father-son or mother-daughter activities at an educational institution,[1855] and for pageants in which participation is limited to individuals of one sex only.[1856] Such exemptions indicate congressional recognition that prohibition of sex discrimination under Title IX is not necessarily identical to prohibition of discrimination based on race, or disability, under other non-discrimination statutes. As a further, similar example, Department regulations implementing Title IX have, since 1975, required recipients each to designate one or more employees to coordinate the recipient's efforts to comply with Title IX;[1857] no corresponding regulatory requirement exists in the Department's Title VI regulations, yet the fact that the Department's Title IX implementing regulations differ in such a manner from the Department's Title VI regulations has not rendered the Title IX regulations invalid under the APA or on any other basis.

Structural safeguards already in place ensure there is some consistency across various agency regulations stemming from different statutory regimes. The Department and other agencies submit their regulations to the inter-agency review process facilitated by the Office of Management and Budget (OMB) under Executive Order 12866 so that other agencies are consulted and can provide their input.

Consequently, the differences in the way the final regulations address sexual harassment as a form of sex discrimination under Title IX and the Department's regulations concerning

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[1854] 20 U.S.C. 1681(a)(4).
[1855] 20 U.S.C. 1681(a)(8).
[1856] 20 U.S.C. 1681(a)(9).
[1857] *See* 34 CFR 106.8(a); these final regulations at § 106.8(a) retain, clarify, and strengthen the requirement that each recipient designate at least one Title IX Coordinator.

racial and disability discrimination, respectively, under other statutes do not suggest that the NPRM or these final regulations exceeds the Department's authority under, or otherwise violates, the APA.

Changes: None.

Spending Clause

Comments: Some commenters argued that the Legislative Vesting Clause in Article I of the Constitution – "All legislative Powers herein granted shall be vested in a Congress of the United States," U.S. CONST. art. I, § 1, cl. 1 – requires that Congress may not delegate to the Department (indeed, to any agency) the power to implement regulations pertaining to specific subject matters. Commenters also argued that Congress has made no delegation to the Department that would allow the Department to promulgate regulations concerning sexual harassment and assault on campuses, because Title IX pertains to discrimination, not to harassment.

Second, some commenters argued that the NPRM exceeds the Federal government's constitutional authority under the Spending Clause, *see* U.S. CONST. art. I, § 8, cl. 1, because the mandatory procedures set out in the NPRM may constitute unconstitutional conditions. For example, at least one commenter asserted that the Department should not mandate specific grievance procedures because what process is due in each particular case may differ depending on the circumstances. These commenters contended that the NPRM improperly alters the essence of the bargain struck between the government and funding recipients long after the terms were finalized and the NPRM cannot form part of a true mutual agreement. These commenters also asserted that the proposed rules are not a true agreement between the parties whom the terms of the proposed rules purport to bind – including every student in a federally funded institution – because students have no say in this agreement.

One commenter argued that the Department cannot erode the First Amendment rights of academic institutions to determine who may be admitted to study and who may be permitted to continue to study through a fair process to determine responsibility and to sanction in a way that both educates the student as to the consequences of their actions and deters further similar deleterious activity. This commenter contended that the First Amendment or other constitutional rights of recipients do not automatically yield just because the action by the Federal government is declared to be taken under the Spending Clause.

Discussion: While we appreciate commenters' concerns, we disagree that the Department lacks the delegated authority to promulgate the final regulations. Certainly, commenters are correct that Article I of the U.S. Constitution provides, in the Legislative Vesting Clause, that "[a]ll legislative Powers *herein granted* shall be vested in a Congress of the United States."[1858] Article I then proceeds to enumerate Congress's authority on a power-by-power basis.[1859] It also means the only source of elasticity for congressional power is the Necessary and Proper Clause, authorizing Congress to "make all Laws which shall be necessary and proper for carrying into Execution the [enumerated] Powers."[1860]

This is why the early Supreme Court explained that Congress may not transfer to another branch "powers which are strictly and exclusively legislative."[1861] But, as the Supreme Court later recognized, the Constitution affords "Congress the necessary resources of flexibility and practicality [that enable it] to perform its function[s]."[1862] Congress, for instance, is permitted to

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[1858] U.S. CONST. art. I, § 1, cl. 1 (emphasis added).
[1859] *See generally* U.S. CONST. art. I.
[1860] U.S. CONST. art. I, § 8, cl. 18.
[1861] *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43.
[1862] *Yakus v. United States*, 321 U.S. 414, 425 (1944) (internal quotation marks omitted).

"obtain[] the assistance of its coordinate Branches," including by authorizing executive agencies implement the statutes passed by Congress, through agency regulations.[1863] With respect to "our increasingly complex society, replete with ever changing and more technical problems," the Supreme Court has reasoned that "Congress simply cannot do its job absent an ability to delegate power under broad general directives."[1864] As a consequence, the Supreme Court has held that a statutory delegation will be upheld under the Legislative Vesting Clause so long as Congress "lay[s] down by legislative act an *intelligible principle* to which the person or body authorized to [exercise the delegated authority] is directed to conform."[1865] This "intelligible principle" doctrine, which represents a delicate constitutional balance between no congressional delegation whatsoever and delegation with complete abandon, is the backbone of much of the Federal administrative state today.[1866] Congress does, of course, set forth various statutory restrictions on how and under which circumstances the agencies may operationalize congressional will through an agency's implementing regulations.[1867] But the precedent is clear that Congress constitutionally may delegate to the Department the power to implement regulations pertaining to specific subject matters. Congress has done so with respect to Title IX, in 20 U.S.C. 1682.

Agencies, such as the Department, are creatures of congressional will; an agency's powers to act must emanate from Federal law.[1868] Congress, in enacting Title IX, *has* conferred that power on the Department. The appropriate place to start is the statutory text, for "[u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary

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[1863] *Mistretta v. United States*, 488 U.S. 361, 372 (1989).
[1864] *Id.*
[1865] *Id*. (internal quotation marks and citation omitted; emphasis added).
[1866] *Mistretta*, 488 U.S. at 372.
[1867] *See*, *e.g*., Administrative Procedure Act, 5 U.S.C. 701 *et seq*.
[1868] *See Stark v. Wickard*, 321 U.S. 288, 309 (1944).

meaning."[1869] As has been noted, Title IX's text, 20 U.S.C. 1681(a) (emphasis added), states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]"

The Department's authority to regulate sexual harassment in a recipient's education program or activity as a form of sex discrimination pursuant to Title IX, is clear. The Supreme Court has noted that "[t]he *express* statutory means of enforc[ing] [Title IX] is administrative," as "[t]h[at] statute directs Federal agencies that distribute education funding to establish requirements to effectuate the non-discrimination mandate, and permits the agencies to enforce those requirements through 'any . . . means authorized by law,' including ultimately the termination of Federal funding."[1870] The Supreme Court has held that sexual harassment is a form of sex discrimination under Title IX.[1871] The Department's prerogative of implementing Title IX with respect to recipient responses to sexual harassment as a form of sex discrimination is authorized by statute, approved of by the Supreme Court, and warrants deference.

As to the assertion that the Department's authority to regulate under Title IX does not extend to ensuring that a Title IX grievance process contains procedural rights and protections for complainants and respondents, we explain throughout this preamble and especially in the "Role of Due Process in the Grievance Process" section that the Department interprets and enforces Title IX (and indeed, any law under the Department's regulatory purview) consistent

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[1869] *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006) (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)).
[1870] *Gebser v. Lago Vista Ind. Sch. Dist*., 524 U.S. 274, 280-81 (1998) (quoting 20 U.S.C. 1682) (emphasis added).
[1871] *See id.* at 283 (affirming "the general proposition that sexual harassment can constitute discrimination on the basis of sex under Title IX").

with the U.S. Constitution, including constitutional rights to due process of law. The Department has the authority to address through regulation the manner in which recipients respond to sexual harassment to further Title IX's non-discrimination mandate consistent with constitutional due process, has done so in these final regulations, and these final regulations are thus consistent with the separation of powers doctrine.

The Department also disagrees that the proposed regulations, or final regulations, exceed the Federal government's constitutional authority under the Spending Clause. To be sure, legislation enacted under Congress's Spending Clause power is "much in the nature of a contract: in return for Federal funds, the States agree to comply with federally imposed conditions."[1872] As a result, courts when construing such statutes "insis[t] that Congress speak with a clear voice," for – as is true for contracts generally – here too "[t]here can . . . be no knowing acceptance [of the terms of *this* statutory contract] if a State is unaware of the conditions [the statute imposes] or is unable to ascertain what is expected of it."[1873] But the Supreme Court held that recipients may be liable for monetary damages in Title IX lawsuits under a judicially implied private right of action, because while Title IX is in the nature of a contract, under Congress's Spending Clause authority, recipients have been on notice since enactment of Title IX that the statute means that no recipient may engage in intentional discrimination on the basis of sex – and knowing about and ignoring sexual harassment in the

[1872] *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).
[1873] *Id*. (emphasis added).

recipient's education program or activity constitutes the recipient committing intentional sex discrimination.[1874]

Undoubtedly, "Congress may use its spending power to create incentives for States to act in accordance with Federal policies."[1875] That said, "when 'pressure turns into compulsion,'" such as undue influence, coercion or duress—"the legislation runs contrary to our system of federalism."[1876] Federal statutes enacted under the Spending Clause "do not pose this danger when a State [or a private entity] has a *legitimate choice* whether to accept the Federal conditions in exchange for Federal funds."[1877] When determining whether a Spending Clause program constitutes "economic dragooning" (impermissible),[1878] or "'relatively mild encouragement'" (permissible),[1879] the Supreme Court asks whether the recipient is left with a "real option" to refuse the Federal offer.[1880] If, for instance, State recipients have established an elaborate, decades-long setup to administer Medicaid funding, a Federal directive threatening all of it if some new terms were not complied with would exceed Congress's Spending Clause authority.[1881] But if a State will lose five percent of Federal highway funds if the State does not raise the minimum drinking age, that is within Congress's spending power.[1882] As a general rule of thumb, Federal policy enacted through the Spending Clause as a backdoor when Congress's other enumerated powers do not so permit is disfavored. Other restrictions on the Federal

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[1874] *See Franklin v. Gwinnett Co. Pub. Sch.*, 503 U.S. 60, 74-75 (1992); *see also* the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble.
[1875] *Nat'l Fed'n of Ind. Bus. v. Sebelius*, 567 U.S. 519, 577-78 (2012).
[1876] *Id*. (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).
[1877] *Id.* at 579 (emphasis added).
[1878] *Id*. at 582.
[1879] *Id*. at 580-81 (quoting *South Dakota v. Dole*, 483 U.S. 203, 211 (1987)).
[1880] *Sebelius*, 567 U.S. at 582.
[1881] *See id.* at 575-85.
[1882] *See Dole*, 483 U.S. at 211-12.

government's Spending Clause authority are that it must be in pursuit of "the general welfare;" be stated unambiguously; that conditions on Federal grants must be related "to the Federal interest in particular national projects or programs;" and that it not violate any other constitutional provision.[1883]

The final regulations are consistent with all the limitations on the Spending Clause authority of the Federal government. Indeed, this entire notice-and-comment rulemaking process provides the notice the Spending Clause, as construed in *Pennhurst*, requires.[1884] To start, the final regulations do not change the fundamental aspects of the bargain struck between the government and funding recipients because these final regulations advance rather than curtail the core purposes of Title IX, and they represent a true mutual agreement under which recipients understand that the government requires operation of education programs or activities free from sex discrimination. This agreement has, for decades, been clearly understood to include a recipient's obligation to adopt and publish grievance procedures for the prompt and equitable resolution of student and employee complaints of sex discrimination.[1885] The background principles of Title IX and the APA, including the Department's authority to regulate as it has in this area, have been known to every recipient since passage of Title IX. Additionally, to this point, the final regulations are not a coercive "gun to the head" of the recipients or the States because recipients are perfectly free to refuse Title IX-centric Federal financial assistance;[1886] the recipients or States have not been operating under a promise or expectation of such funds being

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[1883] *Id.* at 207-08 (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion)).
[1884] *See Pennhurst*, 451 U.S. at 17.
[1885] 34 CFR 106.8(b) originally promulgated by HEW (the Department's predecessor) in 1975, and the similar requirement modified in the final regulations at § 106.8(c).
[1886] *Sebelius*, 567 U.S. at 581.

given in perpetuity; and there is no hint of compulsion on the recipients or States. Moreover, there is no suggestion the Department lacks the power to promulgate the final regulations through the Commerce Clause or Section 5 of the Fourteenth Amendment, so there is no possibility of the Spending Clause being used as a back door to achieve a Federal mandate on unwilling actors. Additionally, these final regulations undoubtedly advance the general welfare, are stated unambiguously and clearly, apply to the national concern of fairness to those affected by allegations of sexual harassment and assault in schools, colleges, and universities, and do not violate – indeed they further – other constitutional provisions such as equal protection of the laws, due process of law, and the First Amendment.

The Department acknowledges that different procedural due process protections may be required in different situations. As more fully explained in the "Role of Due Process in the Grievance Process" section, the Department does not mandate the same grievance process for elementary and secondary schools as for postsecondary institutions because the Department recognizes that due process is a "flexible" concept dictated by the demands of a "particular situation,"[1887] and that addressing sexual harassment as a form of sex discrimination in elementary and secondary schools may present different demands than addressing sexual harassment as a form of sex discrimination in postsecondary institutions. The grievance process provided in these final regulations is adapted for a particular situation, namely to address sexual harassment as a form of sex discrimination.

The Department acknowledges that these final regulations essentially constitute the terms of a contract between the Department and the recipient of Federal financial assistance. The

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[1887] *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (internal citations omitted).

Department does not enter into a contract or agreement with every student in a school that receives Federal financial assistance. Such an argument is absurd because such an argument would render the student and not the school responsible for fulfilling the non-discrimination mandate in Title IX. The Department disagrees though that students have "no say" in this agreement because any student may submit a comment during the public comment period for the Department to consider. Accordingly, every student had the opportunity to essentially be a part of the negotiation, and commenters who identified as students submitted comments.

The Department also is not encroaching upon the First Amendment rights of recipients as more fully explained in the "Conflicts with First Amendment, Constitutional Confirmation, International Law" subsection of the "Miscellaneous" section of this preamble. Recipients remain free to determine who may be admitted to study and who may be permitted to continue to study at elementary and secondary schools or at postsecondary institutions. The Department has repeatedly stated through its NPRM and in this preamble that it will not second guess the disciplinary decisions made by school administrators.[1888] One of the reasons that the Department chooses to adopt and adapt the deliberate indifference standard from *Davis* is the Supreme Court developed this standard to interpret Title IX in a manner that leaves room for flexibility in the schools' disciplinary decisions and does not place courts in the position of second-guessing school administrators' disciplinary decisions.[1889] The grievance process in § 106.45 does not demand a particular outcome and is simply a process designed to assess allegations of sexual harassment as a form of sex discrimination. A recipient still has significant discretion within the

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[1888] 83 FR 61466.
[1889] *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 648 (1999).

grievance process in § 106.45. For example, as previously noted in this preamble, a recipient may adopt reasonable rules of decorum or order to govern live hearings under this paragraph, provided that such rules apply equally to all participants and are consistent with this section. Additionally, these final regulations expressly state in § 106.6(d)(1) that nothing in Title IX implementing regulations requires a recipient to restrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution.

For all these reasons, the NPRM and these final regulations are within the Federal government's Spending Clause authority.

Changes: None.

Litigation Risk

Comments: At least one commenter stated that there is a nationwide trend of increased filings of sexual harassment and assault claims, and argued that therefore, it is reasonable to anticipate that because the Department has narrowed its jurisdiction under Title IX, the Nation will see both an increase in Title IX complaints in civil and criminal courts, as well as an increase in costly lawsuits alleging non-Title IX causes of action.[1890] Several commenters asserted that the proposed rules will expose recipients to a greater risk of litigation from both complainants seeking redress for sex discrimination and respondents seeking to overturn a recipient's finding of responsibility.

[1890] *See* Jamie D. Halper, *In Wake of #MeToo, Harvard Title IX Office Saw 56 Percent Increase in Disclosures in 2018, Per Annual Report*, THE HARVARD CRIMSON (Dec. 14, 2018); U.S. Equal Employment Opportunity Commission, *EEOC Releases Preliminary FY 2018 Sexual Harassment Data* (Oct. 4, 2018) (stating "charges filed with the EEOC alleging sexual harassment increased by more than 12 percent from fiscal year 2017").

Discussion: These final regulations do not address or alter any party's right to sue a recipient under various causes of action that may arise from a recipient's response to alleged sexual harassment. The Department, however, disagrees that as a result of these final regulations, there will be an increase in Title IX complaints in civil and criminal courts and in costly lawsuits alleging non-Title IX causes of action and believes that these regulations may result in decreased litigation. These final regulations align Title IX administrative enforcement more closely with the rubric that the Supreme Court adopted in Title IX cases[1891] while mandating that recipients support alleged victims of sexual harassment in ways that go beyond what the Supreme Court's private lawsuit framework requires, while prescribing a standardized grievance process consistent with due process of law and fundamental fairness. These final regulations therefore provide greater clarity to a recipient of its obligations under Title IX and may decrease litigation based on claims that the recipient responded inadequately to protect an alleged victim, or denied a respondent due process of law or fundamental fairness in investigations or adjudications of sexual harassment allegations. For example, a recipient that complies with § 106.44(a) and § 106.44(b)(1), which includes but goes beyond the Supreme Court's deliberate indifference liability standard, will promptly offer a complainant supportive measures when the recipient has actual knowledge of sexual harassment in its education program or activity against a person in the United States – whether or not the recipient also investigates and adjudicates the complainant's allegations of sexual harassment. More specifically, under § 106.44(a), the Title IX Coordinator must promptly contact the complainant (i.e., the person alleged to have been

[1891] For further discussion see the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble.

victimized by sexual harassment) to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. If such a recipient was then sued by the complainant for providing a deliberately indifferent response, the recipient would at least be able to argue that it did not respond in a manner clearly unreasonable in light of the known circumstances because the recipient considered a complainant's wishes with respect to supportive measures, offered supportive measures, and informed a complainant of the process for filing a formal complaint (and, under § 106.44(b)(1), the recipient would be obligated to investigate allegations in a formal complaint if the complainant exercised the option of filing a formal complaint). Similarly, a recipient that follows a the grievance process that complies with § 106.45 will provide robust due process protections to both the complainant and respondent that satisfy constitutional guarantees and, thus, may defend against allegations that it deprived a the respondent (or the complainant) of due process of law. The Department therefore believes that these final regulations may have the effect of decreasing litigation arising from how recipients respond to sexual harassment.

Changes: None.

Comments: One commenter stated that the Department did not evaluate the impact of the proposed regulations on recipients' legal budgets. One commenter stated that, in a United Educators (UE) study of 305 reports of sexual assault from 104 colleges and universities between 2011 and 2013, more than one in four reports resulted in legal action, costing schools about $200,000 per claim, with 84 percent of costs resulting from claims brought by survivors and other harassment victims and that another UE study of reports of sexual assault during 2011-

2015 found that schools lost about $350,000 per claim, with some losses exceeding $1 million and one reaching $2 million.

One commenter asserted that if students experiencing sexual harassment are no longer able to seek relief through their school or through OCR's complaint resolution system, more lawsuits will be filed, and not just under Title IX. Another commenter argued that any savings schools made because of the Department's rule changes will be eclipsed by the funds institutions will expend to defend the same accusations of Title IX violations in Federal and State courts. If the Department's Title IX regulations align with the standards used by Federal courts for money judgments in private lawsuits under Title IX, the commenter argued that there would no longer be any advantage for complainants to seek agency-level redress from OCR over the court system, especially since under the proposed rules complainants would not be able to obtain money damages from a recipient as a remedy ordered by OCR for a recipient's violation of Title IX regulations. The commenter cited a United Educators study in which the insurance company analyzed 1,000 claims in cases of Title IX litigation and found that, in just 100 of those cases, judgments and attorney's fees cost $21.8 million. United Educators reported that the cost on average is $350,000 per case. The commenter argued that, using those numbers, a mere 1,050 additional cases would completely wipe out any savings from even the highest savings number estimated by the NPRM's Regulatory Impact Analysis (RIA). The commenter argued that considering the detailed requirements and the gray areas of the proposed rules, 1,050 additional cases filed over the course of the same ten-year period referenced in the NPRM's RIA should be considered a low estimate. One commenter asserted that the proposed rules would also expose schools to significant potential Title VII liability due to the conflicts between Title VII and the

proposed rules' requirements, and possible liability under contradictory State, local, or tribal laws.

Discussion: The Department's RIA in the NPRM and its Regulatory Impact Analysis (RIA) in these final regulations address the costs of attorneys for recipients.[1892] The Department notes that each recipient may choose to use attorneys to advise a recipient on compliance with these final regulations but is not required to do so. As discussed previously, the Department believes that litigation may decrease as a result of these final regulations. As discussed previously, these final regulations impose on recipients more obligations to support complainants, and protect due process rights of all parties, than what the Supreme Court has required in private actions under Title IX; thus, we disagree that complainants (or respondents) will find "no advantage" or no difference in seeking redress of a recipient's alleged Title IX under the Department's administrative enforcement standards, versus under the Supreme Court's framework for judicial enforcement. For reasons discussed in the "Section 106.3(a) Remedial Action" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble, we have revised the proposed rules' revision to existing 34 CFR 106.3(a) such that under the final regulations, § 106.3(a) removes the NPRM's reference to monetary damages as a potential remedy that the Department may seek when administratively enforcing Title IX and its implementing regulations.

The Department disagrees that these final regulations conflict with any obligations that a recipient may have under Title VII, as explained in greater detail in the "Section 106.6(f) Title VII and Directed Question 3 (Application to Employees)" subsection of the "Clarifying

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[1892] *See, e.g.*, 83 FR 61494.

Amendments to Existing Regulations" section of this preamble. Similarly, the Department is not aware of any State, local, or tribal laws or rules that directly conflict with these final regulations. The Department addresses any such possible conflicts in more detail in the "Section 106.6(h) Preemptive Effect" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble.

Changes: We have revised § 106.3(a) to remove reference to damages as a possible remedy ordered by the Assistant Secretary when investigating a recipient for violations of Title IX or its implementing regulations, referring instead to the Department's authority to enforce Title IX pursuant to 20 U.S.C. 1682.

Comments: One commenter applauded the proposed rules as being long overdue but asserted that smaller schools will "suffer inordinately" under the proposed rules because the burden and costs of compliance would be more deeply felt by small schools, and small schools would serve as focal points for legal challenges to the implementation of these Title IX regulations.

Discussion: The Department disagrees that smaller schools will "suffer inordinately" in complying with these final regulations, and the RIA in this document expressly addresses the effect of the final regulations on small entities. As explained in the "Regulatory Flexibility Act" subsection of the "Regulatory Impact Analysis" section of this preamble, we do not believe that these final regulations would place a substantial burden on small entities, including small elementary and secondary schools and small postsecondary institutions. Moreover, as discussed in the "Role of Due Process in the Grievance Process" section of this preamble, we do not believe that students (including complainants, and respondents) should receive fewer protections aimed at furthering Title IX's non-discrimination mandate consistent with constitutional due process or fundamental fairness, depending on the size of their school. While the RIA estimates

the cost burden of these final regulations, these final regulations are motivated by fulfilling the important mandate of Title IX to prohibit sex discrimination, including in the form of sexual harassment, consistent with the U.S. Constitution and fundamental fairness, and we believe that the benefits of these final regulations outweigh the compliance costs likely to result.

Changes: None.

Effective Date

Comments: A number of commenters stated that the NPRM needed an effective date to allow recipients to implement policy changes, training, procedures, etc. to come into compliance with the provisions in the final regulations. A few commenters asked that the final regulations not take effect in the middle of a school year. A few commenters requested a 90-day implementation window and requested that the Department issue the final regulations in the month of May so that the requested 90-day implementation window takes place over the summer, when recipients have more time and ability to address and implement the changes constructively; some of these commenters asserted that requiring changes to be made in the middle of a school year will raise problems with applying two different sets of rules to sexual misconduct incidents occurring in the same school year based on an arbitrary cut-off date. Some commenters expressed concern that the proposed regulations indicated no provision for a time period allowing for transition from previously established procedures to the new procedures required. A few commenters asserted the Department should set an effective date at least eight months after publication of the final regulations because that time frame would align with the Higher Education Act's master calendar. A few commenters argued that the changes necessary under the final regulations justify an effective date no earlier than three years after the date of publication of the final regulations; other commenters asserted that small institutions in particular will require an extended period of

time to come into compliance. At least one commenter suggested a two-phase effective date – one effective date as to the topics covered in § 106.44(a)-(b), and a second (later) effective date for the other provisions of the final regulations including § 106.45, on the basis that changing grievance procedures is more complicated and will take more time for the Department to adequately explain to recipients. Another commenter, a State coordinating body for higher education, requested that the Department consider State and institutional budget cycles, especially in light of possible tuition and fee increases needed to help cover costs of implementing the proposed regulations. The commenter recommended that the final regulations allow for an implementation period of no less than 18 months, which would allow institutions time to accommodate budget cycles and to request additional resources for the subsequent fiscal year. Another commenter requested that the Department allow at least 12 months for full implementation of new Title IX rules and regulations. One commenter requested that the Department not adopt an early effective date because that would be inconsistent with the Department's recent approach to regulations that require less significant program changes; the commenter noted that the Department allowed schools until July 2019 to comply with the 2014 Gainful Employment regulation and the 2016 Borrower Defense regulation, and the commenter asked that the Department adopt a similar compliance period for the Title IX regulation.

Some commenters requested that the Department clarify the standing of the 2001 Guidance once the final regulations become effective, and at least one commenter stated that the proposed regulations could be improved by clearly rescinding all the Department's prior guidance documents regarding the subject of sexual harassment. Another commenter stated that the proposed regulations will have the unintended impact of altering the 2001 Guidance policies and practices that districts have implemented for nearly two decades. One commenter

specifically asked the Department to clarify whether the final regulations will rescind and replace the 2001 Guidance, which addresses retaliation, and noted that confusion about the status of the 2001 Guidance limits the public's ability to effectively comment on the NPRM because it prevents an understanding of the full extent of the changes to the administrative scheme.

Discussion: Under the Administrative Procedure Act ("APA"), 5 U.S.C. 701 *et seq.*, the effective date for the final regulations cannot be fewer than 30 days after the final regulations are published in the *Federal Register* unless special circumstances justify a statutorily-specified exception for an effective date earlier than 30 days from such publication. The Department has determined that no statutory exception justifies an effective date earlier than 30 days from publication of these final regulations. The Department has carefully considered commenters' concerns, including the concern to have sufficient time to prepare for compliance with these final regulations and the request to have these final regulations become effective during the summer when many recipients of Federal financial assistance that are schools are out of session.

In the ordinary course, the Department believes that 60 days would be sufficient for recipients to come into compliance with these final regulations. However, after the public comment period on the NPRM ended, and before publication in the *Federal Register* of these final regulations, on March 13, 2020, the President of the United States declared that a national emergency concerning the novel coronavirus disease (COVID-19) outbreak began on March 1, 2020, as stated in "Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak," Proclamation 9994 of March 13, 2020, *Federal Register* Vol. 85, No. 53 at 15337-38. The Department appreciates that exigent circumstances exist as a result of the COVID-19 national emergency, and that these exigent circumstances require great attention and care on the part of States, local governments, and recipients of Federal financial assistance. The

Department recognizes the practical necessity of allowing recipients of Federal financial assistance time to plan for implementing these final regulations, including to the extent necessary, time to amend their policies and procedures in order to comply.

In response to commenters' concerns about an effective date, and in consideration of the COVID-19 national emergency, the Department has determined that the final regulations are effective August 14, 2020. Recipients will thus have substantially more than the minimal 30 days to prepare for compliance with these final regulations. The Department recognizes that the length and scope of the current national emergency relating to COVID-19 is somewhat uncertain. But based on the information currently available to it, the Department believes that the effective date of August 14, 2020, adequately accommodates the needs of recipients, while fulfilling the Department's obligations to enforce Title IX's non-discrimination mandate in the important context of sexual harassment.

The Department appreciates the suggestions from commenters as to an appropriate length of time after publication of final regulations for the final regulations to become effective. As discussed in the "Executive Orders and Other Requirements" subsection of the "Miscellaneous" section of this preamble, these final regulations are not promulgated under the Higher Education Act and are not subject to the Master Calendar under that Act. The Department declines to align the effective date for the final regulations with the July 1 effective date of regulations under the Higher Education Act, including gainful employment and borrower defense to repayment regulations to which a commenter refers, because these final regulations concern improvement of civil rights protections for students and employees in the education programs and activities of all recipients of Federal financial assistance, not only those institutions to which the Higher Education Act applies. The Department notes that regardless of when the final regulations

become effective, some Title IX sexual harassment reports occurring within the same education program or activity within the same school year may be handled under the current Title IX regulations while others will be addressed under the requirements of the final regulations; this is not arbitrary, and occurs any time regulatory requirements are amended prospectively. The Department also declines other suggestions from commenters, including the creation of two separate effective dates for different provisions of the final regulations, because such an approach would create confusion rather than clarity. Additionally, some provisions in § 106.44 reference and incorporate requirements in § 106.45, and, thus, making § 106.44 effective before § 106.45 is not feasible. The Department cannot accommodate every recipient's budget cycle as each State may have a different fiscal year and budget cycle. The effective date of August 14, 2020 coincides with many schools' "summer break," so that recipients may finalize Title IX policies and procedures to comply with these final regulations during a time when many schools are "out of session" and will afford substantially greater opportunity to come into compliance than the statutory minimum, which is appropriate given the current challenges posed by the COVID-19 national emergency.

The Department notes that recipients have been on notice for more than two years that a regulation of this nature has been forthcoming from the Department, and recipients will have substantially more than the minimal 30 days to come into compliance with these final regulations, which become effective on August 14, 2020.[1893] During this transition period

[1893] U.S. Dep't. of Education, Office for Civil Rights, *Dear Colleague Letter* (Sept. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf (withdrawing the Department's 2011 Dear Colleague Letter and 2014 Q&A) ("The Department intends to implement such a policy [addressing campus sexual misconduct under Title IX] through a rulemaking process that responds to public comment.").

between publication of these final regulations in the *Federal Register*, and the effective date of August 14, 2020, the Department will provide technical assistance to recipients to assist with questions about compliance. The Department also will continue to provide technical assistance after these regulations become effective, including during the investigation of a complaint, a compliance review, or a directed investigation by OCR, if the recipient requests technical assistance.

On September 22, 2017, the Department expressly stated that its 2017 Q&A along with the 2001 Guidance "provide information about how OCR will assess a school's compliance with Title IX."[1894] The Department thus gave the public notice of how OCR will assess a school's compliance with Title IX until these final regulations become effective. The Department's NPRM also provided the public with notice of how the proposed regulations differ from the 2001 Guidance, and the Department explains departures taken in the final regulations from the 2017 Q&A, the 2001 Guidance, and also withdrawn guidance documents such as the 2011 Dear Colleague Letter, throughout this preamble.[1895] To the extent that these final regulations differ from any of the Department's guidance documents (whether such documents remain in effect or are withdrawn), these final regulations, when they become effective, and not the Department's guidance documents, are controlling.

Changes: The effective date of these final regulations is August 14, 2020.

[1894] 2017 Q&A at 1.

[1895] *E.g.*, the "Differences Between Standards in Department Guidance and These Final Regulations" subsection of the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section, and the "Similarities and Differences Between the § 106.45 Grievance Process and Department Guidance" subsection of the "Role of Due Process in the Grievance Process" section, of this preamble.

Retaliation

Section 106.71 Retaliation Prohibited

Comments: A few commenters commended the Department's proposed regulations as a reasonable means of reducing sex discrimination and explicitly guarding against unlawful retaliation; at least one commenter stated that the proposed rules' prohibitions against bias would make it difficult for recipients to engage in unlawful retaliation. In contrast, several commenters opposed the proposed regulations for not adequately addressing victims' fears of not being believed and for failing to protect complainants from retaliation for reporting. Commenters stated that under the proposed rules, schools might not do enough to prevent an assailant from retaliating against a survivor. Other commenters stated that many survivors who do not report cite fear of retaliation as one of the main reasons. Many commenters generally called for greater protections for victims to ensure that their alleged assailants cannot control victims with fear, intimidation, or embarrassment. Two commenters suggested that the proposed regulations do not go far enough in incentivizing schools to prohibit retaliation against students who report, noting that schools could and should do more to address toxic cultures or systemic problems among the student body. Several commenters included personal stories alleging they were retaliated against for reporting sexual harassment. Other commenters stated that, despite support for the proposed rules, following the Supreme Court's decisions in *Gebser* and *Davis* is inadequate because those decisions do not address retaliation and, as such, the Department should draw a clear delineation between retaliation claims and sexual harassment claims. This commenter asserted that the *Gebser*/*Davis* requirement that schools must be on notice of sexual harassment before they can be held accountable does not apply to retaliation and urged the Department not to accidentally risk imposing an actual notice requirement in the context of retaliation.

Several commenters suggested that the Department add a general prohibition of retaliation. Some commenters noted that retaliation is a serious concern for complainants when weighing whether to report and in deciding whether to participate in an investigation. Specifically, one commenter suggested that the final regulations adopt the language prohibiting retaliation from the withdrawn 2011 Dear Colleague Letter. A few commenters urged the Department to refer to its past guidance documents, which the commenters contended addressed retaliation more aptly than the current proposed rule. Many commenters noted that failing to include a clear prohibition on retaliation could chill reporting in the first place. One commenter requested that the final regulations contain an explicit provision protecting undocumented students from retaliatory immigration action similar to the provision in the withdrawn 2014 Q&A.

Several other commenters requested that if the final regulations are to include a provision regarding retaliation, then it should explicitly not protect those who make false allegations from any adverse consequences that result. One commenter, who has worked with survivors, sought clarification on whether schools will need to include language regarding false statements in their procedures and how false accusations should be determined. Some commenters cautioned that broad retaliation prohibitions can threaten free speech, and particularly the ability of the falsely accused to defend themselves. As such, commenters contended, any prohibition should include language clarifying that denying allegations does not constitute a violation of Title IX.

Several commenters sought clarity on how institutions were expected to handle retaliation claims under the proposed regulations. One commenter stated that if a student makes a formal complaint of sexual harassment, the proceedings would have to comply with § 106.45, but if the student alleged that they were retaliated against for filing the formal complaint, that

allegation of retaliation would then be handled through the Title IX grievance process under § 106.8. Another commenter inquired as to whether the grievance procedures that apply to alleged sex discrimination under § 106.8 would also apply where a complainant alleges retaliation for submitting a formal complaint of sexual harassment.

Discussion: The Department appreciates the commenters' concerns and suggestions regarding retaliation. Retaliation against a person for exercising any right or privilege secured by Title IX or its implementing regulations is never acceptable, and the Supreme Court has held that retaliation for complaining about sex discrimination is, itself, intentional sex discrimination prohibited by Title IX.[1896] The Department agrees with commenters that absent a clear prohibition of retaliation, reporting may be chilled. In response to these comments, the Department is adding § 106.71 to expressly prohibit retaliation. This retaliation provision contains language similar to the retaliation provision in § 100.7(e), implementing Title VI.

Under the retaliation provision in § 106.71(a) in these final regulations, no recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or its implementing regulations, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under Title IX and its implementing regulations. Complaints alleging retaliation may be filed according to the "prompt and equitable" grievance procedures for sex discrimination required to

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[1896] *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 183 (2005) (holding that "retaliation against individuals because they complain of sex discrimination is 'intentional conduct that violates the clear terms of the statute,' *Davis,* 526 U.S., at 642, 119 S. Ct. 1661, and that Title IX itself therefore supplied sufficient notice" that retaliation is itself sex discrimination prohibited by Title IX).

be adopted under § 106.8(c). If the person who is engaging in the retaliatory acts is a student or a third party and is not an employee of the recipient, a recipient may take measures such as pursuing discipline against a student who engaged in retaliation or issuing a no-trespass order against a third party to address such retaliation. This retaliation provision is purposefully broad in scope and may apply to any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, any witness, or any other individuals who participate (or refuse to participate) in any manner in an investigation, proceeding, or hearing under Part 106 of Title 34 of the Code of Federal Regulations. Accordingly, threatening to take retaliatory immigration action for the purpose of interfering with any right or privileged secured by Title IX or its implementing regulations may constitute retaliation, and additional language in the actual text of the final regulations to express this point is unnecessary. The Department acknowledges that persons other than complainants, such as witnesses may face retaliation, and seeks to prohibit retaliation in any form and against any person who participates (or refuses to participate) in a report or proceeding under Title IX and these final regulations.

The Department will hold a recipient responsible for responding to allegations of retaliation under § 106.71. The recipient's ability to respond to retaliation will depend, in part, on the relationship between the recipient and the individual who commits the retaliation. For example, if a respondent's friend who is not a recipient's student or employee and is not otherwise affiliated with the recipient threatens a complainant, then the recipient should still respond to such a complaint of retaliation to the best of its ability. Even though the recipient may not require the person accused of retaliation to participate in a recipient's equitable grievance

procedures under § 106.8(c), the recipient should process the complaint alleging retaliation in accordance with its equitable grievance procedures and may decide to take appropriate measures, such as issuing a no-trespass order.

The Department recognizes that retaliation may occur by punishing a person under a different code of conduct that does not involve sexual harassment but arises out of the same facts or circumstances as the report or formal complaint of sexual harassment. The Department also acknowledges that several commenters directed the Department to media articles documenting alleged incidents of such punishment against students reporting unwanted sexual conduct.[1897] Commenters cited research on sexual assault in the military, which found that fear of disciplinary action for collateral misconduct was a significant impediment to encouraging victims to come forward, and that some perpetrators explicitly told victims not to report or they would get the victim in trouble for collateral offenses, such as underage drinking.[1898] In order to address this particular form of retaliation, § 106.71(a) prohibits charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX or its implementing regulations. For example, if a recipient punishes a complainant or respondent for underage drinking, arising out of the same facts or circumstances as the report or formal complaint of sexual harassment, then such punishment constitutes

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[1897] *E.g.*, Tyler Kingkade, *When Colleges Threaten To Punish Students Who Report Sexual Violence*, THE HUFFINGTON POST (Sept. 9, 2015).
[1898] Commenters cited: Human Rights Watch, *Embattled: Retaliation Against Sexual Assault Survivors in the US Military* (2015).

retaliation if the punishment is for the purpose of interfering with any right or privilege secured by Title IX or its implementing regulations. If a recipient always takes a zero tolerance approach to underage drinking in its code of conduct and always imposes the same punishment for underage drinking, irrespective of the circumstances, then imposing such a punishment would not be "for the purpose of interfering with any right or privilege secured by" Title IX or these final regulations and thus would not constitute retaliation under these final regulations. The Department is aware that some recipients have adopted "amnesty" policies designed to encourage students to report sexual harassment; under typical amnesty policies, students who report sexual misconduct (whether as a victim or witness) will not face school disciplinary charges for school code of conduct violations relating to the sexual misconduct incident (e.g., underage drinking at the party where the sexual harassment occurred). Nothing in the final regulations precludes a recipient from adopting such amnesty policies. Section 106.71 does not create amnesty, but does prohibit charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, including any sanctions that arise from such charges, when such charges or resulting sanctions arise out of the same facts or circumstances as a report or complaint of sex discrimination, or report or formal complaint of sexual harassment, and when such charges or resulting sanctions are imposed "for the purpose" of interfering with the exercise of any person's rights under Title IX or these final regulations.

Additionally, § 106.71(a) requires that recipients keep the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witnesses confidential except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or its

implementing regulations, 34 CFR part 99, or as required by law, or to the extent necessary to carry out the purposes of the regulations implementing Title IX, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder. The Department realizes that unnecessarily exposing the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, may lead to retaliation against them and would like to prevent such retaliation.

The Department appreciates the commenter's concerns that the Department may "accidentally" impose the notice or actual knowledge requirement for sexual harassment adapted from the *Gebser/Davis* framework to a claim of retaliation. The Department acknowledges that the actual knowledge requirement in these regulations applies to sexual harassment and does not apply to a claim of retaliation; the Supreme Court has not applied an actual knowledge requirement to a claim of retaliation. No requirement of actual knowledge appears in § 106.71(a). These final regulations in § 106.44(a) clearly require a recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States to respond promptly in a manner that is not deliberately indifferent.

We agree with commenters who noted that a recipient may respond to an allegation of retaliation according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c). The retaliation provision in § 106.71(a) clarifies that a retaliation complaint may be filed with the recipient for handling under the "prompt and equitable" grievance procedures for resolving complaints of sex discrimination that a recipient is required to adopt and publish under § 106.8(c).

We appreciate concerns of commenters who feared that speech protected under the First Amendment may be affected, if a recipient applies an anti-retaliation provision in an erroneous manner. To address this concern, the Department added a provision in § 106.71(b)(1) to clarify that the Department may not require a recipient to restrict rights protected under the First Amendment to prohibit retaliation. The Department recognizes that the First Amendment does not restrict the activities of private elementary and secondary schools or private postsecondary institutions. The Department, however, is subject to the First Amendment and may not administer these regulations in a manner that violates or causes a recipient to violate the First Amendment. Accordingly, § 106.71(b)(1) states that the "exercise of rights protected under the First Amendment does not constitute retaliation," as defined in these final regulations.

The Department also understands the concerns of commenters that lying should not be protected and that any retaliation provision should explicitly exclude from protection those who make false allegations or false statements during a grievance process. Accordingly, § 106.71(b)(2) provides that charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under the regulations implementing Title IX does not constitute retaliation. Section 106.71(b)(2) also provides, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith. These provisions in § 106.71(b) make it clear that exercising rights under the First Amendment of the U.S. Constitution or charging an individual with a code of conduct violation for making a materially false statement in bad faith does not constitute retaliation. This regulatory provision is intended to permit (but not require) recipients to encourage truthfulness throughout the grievance process by reserving the right to charge and discipline a party for false statements made in bad faith,

while cautioning recipients not to draw conclusions that any party made false statements in bad faith solely based on the outcome of the proceeding. The final regulations, in § 106.45(b)(2)(B), continue to require that written notice of the allegations of a formal complaint must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process. The Department believes it is important for recipients to notify parties about any provisions in its code of conduct that prohibit knowingly making false statements or knowingly submitting false information during the grievance process, to emphasize the recipient's commitment to the truth-seeking nature of the grievance process, to incentivize honest, candid participation in it, and to caution both parties about possible consequences of lack of candor. Thus, under the final regulations, recipients retain flexibility and discretion to decide how a recipient wishes to handle situations involving false statements by parties, so long as the recipient's approach does not constitute retaliation prohibited under § 106.71.

The Department acknowledges that some commenters expressed a desire for the Department to return to recommendations regarding retaliation in its past guidance documents. We believe that the retaliation provision in these final regulations provides clearer, more robust protections than the recommendations in any of the Department's past guidance documents. For example, the 2001 Guidance stated that Title IX prohibits retaliation and that schools should prevent any retaliation against the complainant but did not define what constitutes retaliation, expressly address retaliation against other parties or witnesses, or address how recipients should respond to retaliation.[1899] The 2001 Guidance stated that "because retaliation is prohibited by

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[1899] 2001 Guidance at 17, 20.

Title IX, schools may want to include a provision in their procedures prohibiting retaliation against any individual who files a complaint or participates in a harassment inquiry."[1900] These final regulations specifically define retaliation, expressly state that the recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witnesses unless certain exceptions apply, specify that complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c), and expressly address retaliation in specific circumstances, including in circumstances in which speech and expression under the First Amendment are at issue. Similarly, the retaliation provision in these final regulations is more precise than the guidance provided on retaliation in the withdrawn 2014 Q&A which did not address retaliation in the form of a recipient imposing charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, including sexual harassment, did not address First Amendment issues, and did not address materially false statements made in bad faith during the course of a grievance proceeding.[1901] The 2014 Q&A prohibited retaliation but in a vague manner; although the 2014 Q&A provided that complainants, respondents, and others may report retaliation to the recipient, it did not specifically provide that complainants, respondents, and others may file a complaint alleging

[1900] *Id.*
[1901] 2014 Q&A at 42-43 (discussing retaliation).

retaliation under a recipient's grievance procedures for sex discrimination.[1902] The retaliation provision in these final regulations also is responsive to comments received about retaliation in this rulemaking. Aside from the 2001 Guidance, the Department's other guidance documents on this subject did not have the benefit of public comment. The Department's final regulations, unlike the Department's guidance documents, have the force and effect of law.[1903] The Department also notes that it expressly withdrew the 2011 Dear Colleague Letter and 2014 Q&A in a letter dated September 22, 2017, and no longer relies on these guidance documents.[1904] Accordingly, we are not adopting any of our prior policies on retaliation in these final regulations, but address retaliation in a comprehensive, clear manner through these final regulations.

Changes: The Department added § 106.71 to clarify that retaliation is prohibited. The Department will not tolerate any recipient or other person intimidating, threatening, coercing, or discriminating against any individual for the purpose of interfering with any right or privilege secured by Title IX or its implementing regulations, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under regulations implementing Title IX. Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or report or formal

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[1902] *Id*.
[1903] *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 97 (2015).
[1904] U.S. Dep't. of Education, Office for Civil Rights, *Dear Colleague Letter* (Sept. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf.

complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX or its implementing regulations, constitutes retaliation. The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute or regulations, 20 U.S.C. 1232g and 34 CFR part 99, as required by law, or to the extent necessary to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder. Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c). The exercise of rights under the First Amendment does not constitute retaliation. Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under the regulations implementing Title IX does not constitute retaliation; however, a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

Severability

Comments: None.

Discussion: We believe that each of the regulations discussed in this preamble would serve one or more important, related, but distinct purposes. Each provision provides a distinct value to the Department, recipients, elementary and secondary schools, institutions of higher education, students, employees, the public, taxpayers, the Federal government, and other recipients of Federal financial assistance separate from, and in addition to, the value provided by the other

provisions. To best serve these purposes, we include provisions in the final regulations to make clear that these final regulations are designed to operate independently of each other and to convey the Department's intent that the potential invalidity of one provision should not affect the remainder of the provisions.

Changes: The Department adds severability clauses at the end of each subpart of Part 106, Title 34 of the Code of Federal Regulations in §§ 106.9, 106.18, 106.24, 106.46, 106.62, and 106.72.

Regulatory Impact Analysis (RIA)

The Department received numerous comments on our estimates of the relative costs and benefits of the proposed rule. In response to those comments, the Department has reviewed our assumptions and estimates. Among other changes, we have added a new category of recipients, updated our assumptions regarding the number of investigations occurring annually, increased time burdens for certain activities, added new cost categories, and made other changes as a result of the revisions to the proposed regulations. As a result of these changes, the Department estimates these final regulations will result in net costs. We discuss specific comments and our responses below.

Costs of Sexual Harassment and Assault

Comments: One commenter asserted that, in addition to the significant, individual adverse effects to persons who experience sexual harassment, recipients stand to undergo increased absenteeism by students, student turnover, and conflict among students, as well as decreased productivity and performance, participation in school activities, and loss of respect for and trust in the institution. These effects, the commenter argued, also include damage to the institution's reputation. The same commenter added that the physical and mental health impacts of allowing sexual harassment to flourish, and failing to respond appropriately to sexual harassment, also

come at a high cost to recipients, for example, in the form of a free appropriate public education (FAPE) and disability services requirements. One commenter cited the statistic that about 34.1 percent of students who have experienced sexual assault drop out of college, which is higher than the overall dropout rate for college students. Additionally, about 40 percent or more of survivors experience post-traumatic stress disorder (PTSD), depression, and chronic pain following assaults, making them less likely to attend classes or participate in school programs. The commenter argued that, when students do not complete college, the tax dollars that help fund grants and subsidies are not being used efficiently. The commenter also predicted that schools with lower completion rates would have difficulty recruiting new students and retaining grants that fund their programs.

Another commenter expressed concerns that the proposed rules seek to decrease the number of Title IX investigations at each school, which would send a signal to students that neither their school nor the Department will address claims of sexual harassment. Based on this, the commenter predicted that schools would likely see a significant decrease in both application and enrollment rates if they are required to adopt the proposed rules.

Discussion: The commenters assume a causal relationship (without providing rigorous evidence) between the final regulations and a number of negative outcomes that does not necessarily exist or will ever materialize.

The Department does not include the costs associated with underlying incidents of sexual harassment and assault as (1) we have no evidence to support the claim that the final regulations would have an effect on the underlying number of incidents of sexual harassment and assault, (2) we have no evidence that these final regulations would exacerbate the negative effects of sexual harassment and assault, and (3) the provision of supportive measures as defined in the final

regulations may actually reduce some of the negative effects of sexual harassment and assault cited by commenters.

The Department does not have evidence to support the claim that the final regulations will have an effect on the underlying number of incidents of sexual harassment. The Department conducted an analysis on Clery Act data reported before and after the issuance of the 2011 Dear Colleague Letter to assess whether the 2011 Dear Colleague Letter had an effect on the underlying rate of sexual harassment, as well as to identify any corollaries that could inform our assumption regarding the final regulations. The analysis is included below. Acknowledging data quality limitations, the Department cannot conclude that the 2011 Dear Colleague Letter had an effect on the underlying rate of sexual harassment. The analysis is based on the best information available to the Department, but data quality limitations prevent a more rigorous analysis of the effects of the 2011 Dear Colleague Letter. Thus, there is insufficient evidence to determine conclusively whether the final regulations will have an effect on the underlying rate of sexual harassment.

We interpret the comment regarding FAPE to refer to eligibility for special education and related services under the IDEA and Section 504. We have no reason to believe that a recipient's compliance with these final regulations would alter a local educational agency's child find responsibilities or a child with a disability's right to a free appropriate public education (FAPE) under the IDEA or Section 504.

In the analysis, below, of the 2011 Dear Colleague Letter and data received pursuant to the Clery Act and its implementing regulations, we find no evidence or support that the final regulations will affect the underlying incidents of sexual harassment. We do not find evidence to reject the hypothesis that the 2011 Dear Colleague Letter had no effect on the underlying number

of incidents of sexual harassment and assault. Neither public comment nor internal deliberation yield sufficient evidence that the final regulations will affect the underlying incidents of sexual harassment. The bottom line is that the best available data (analysis of effects of the 2011 Dear Colleague Letter) is insufficient to yield any evidence or support that the final regulations will affect the underlying incidents of sexual harassment. We believe the analysis and its limitations support the claim that the Department has no rigorous evidence that the final regulations will have an effect on the underlying incidences of sexual harassment.

2011 Dear Colleague Letter Analysis – Data Sources

As noted in the NPRM and elsewhere in this notice, there is a general lack of high quality, comprehensive data on Title IX enforcement and incidents of sexual harassment and assault. The Department annually publishes data it receives under the Clery Act online.[1905] We compiled data from 2007 through 2013 on Forcible Sex Offenses.[1906] This period provides five years of data prior to release of the guidance and two years after release. After 2013, reporting categories changed, limiting a longer-term analysis. Specifically, beginning in 2014, institutions reported data on VAWA crimes rather than the previous categories of forcible sex offenses and non-forcible sex offenses. It is not clear how institutions viewed the relationship between the new and old categories and, absent further study, we do not think it prudent to assume that entities treated them interchangeably.

In using these data, we had to assume that Clery Act reports are uniformly correlated with the underlying rate of sexual harassment and assault. That is, we do not assume that Clery Act

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[1905] U.S. Dep't. of Education, *Download Data*, "Campus Safety and Security," https://ope.ed.gov/campussafety/.
[1906] Note: The number of Non-Forcible forcible Sex Offenses was too low and variable to allow reliable modeling.

data is totally comprehensive and captures all incidents of sexual harassment and assault, but we assumed it is correlated, meaning that the number of Clery Act reports increase and decrease in conjunction with increases and decreases in the underlying number of incidents of sexual harassment and assault. We note this is a major assumption and limitation of our analysis. Based on that assumption, if the 2011 Dear Colleague Letter affected the underlying rate of sexual harassment and assaults, we would anticipate a change in the number of Clery Act reports.

We believe the Clery Act data would generate poor estimates of the effect of the 2011 Dear Colleague Letter in the following circumstances:

1. The number of forcible sex offenses reported under the Clery Act are not uniformly correlated across years with the underlying number of incidents of sexual harassment and assault;
2. The 2011 Dear Colleague Letter changed the reporting behavior of victims of sexual harassment and assault;
3. The 2011 Dear Colleague Letter changed the reporting behavior of institutions under the Clery Act.

It is important to note that each of the above circumstances would not necessarily result in an inability to identify an effect of the 2011 Dear Colleague Letter. An inability to detect any effect in these circumstances (particularly 2 and 3) would actually require that the particular effects accrued in such a way that they were somehow otherwise offset in the underlying data (e.g., after the 2011 Dear Colleague Letter, victims were more likely to report incidents that occurred, but there was an overall decrease in the total number of incidents, resulting in no net change in the number of offenses reported).

2011 Dear Colleague Letter Analysis – Data Analysis[1907]

As an initial analysis, we examined the average number of reports per year during the pre-guidance and post-guidance periods. Across all locations, there were more reports in the post-guidance period as described in Table II below. While this analysis establishes that there were more reports in the post-2011 period, we cannot reject the null hypothesis that these differences were due to random variation.

In order to more fully examine the relationship between the 2011 Dear Colleague Letter and the number of Clery Act reports, we first analyzed aggregate data using the following regression:

(1) $FSO_t = \beta_0 + \beta_1 POST_t + \beta_2 t + \beta_3 t^2 + \beta_4 ENROLL_t + \varepsilon_t$

In the above equation, FSO_t represents the number of forcible sex offenses reported under the Clery Act in a given year t, $POST_t$ is a dummy variable for the post-2011 period, t is a variable for the untransformed year (e.g., 2012), $ENROLL_t$ is the total enrollment in a given year, and ε_t is an error term.

We allow for a quadratic relationship for t because the relationship between the year and the number of offenses reported is non-linear, as demonstrated in Figure I. A linear specification for the relationship between t and FSO_t would therefore fail to accurately reflect the relationship between the variables and inappropriately assign that variation to another variable, most likely $POST_t$. In geographies with no time-series effects, we would anticipate both t and t^2 to be non-significant. If the relationship is linear, we would expect only t^2 to be non-significant. We discuss the limitations of allowing for a quadratic relationship in the concluding section below.

[1907] Data was available and analyzed both in aggregate and at the individual campus level.

The equation was applied across each geography. Results are presented in Table III. While $POST_t$ is significant in the initial estimation for on-campus and noncampus geographies, it is no longer significant once covariates are added. Once we control for the baseline trend (i.e., pre-existing variation over time) and enrollment, $POST_t$ is not significant in any panel. As demonstrated in Panels C and D of Table III, we cannot establish any trend over time for either public property or total offenses. For on-campus and noncampus offenses, we can establish a trend over time, but it is not attributable to $POST_t$. As such, we cannot reject the null hypothesis using the aggregate data.

We note that the data used in this initial analysis are highly aggregated and Title IX enforcement occurs at the institution level. The Department annually collects data under the Clery Act at the individual campus level. Again, we used data on forcible sex offenses (as with the aggregate data) for the reasons outlined above. However, we also used data on the total number of robberies that were reported for each year. These data were used as a control for general trends in criminality on campus, particularly those that would be unlikely to be affected by a change in Title IX enforcement. Specifically, we want to ensure that any estimated change in the number of incidents of forcible sex offenses are not related to an overall change in the level of crime occurring on campus.

We compiled data for 7,938 campuses from 2007 through 2013 and merged those data with data from the Integrated Postsecondary Education Data System (IPEDS), including institutional control (i.e., public, private non-profit, private for-profit), level (i.e., less-than-two-year, two-year, four-year), and enrollment. Factors such as institutional control and level of institution are potentially relevant to any campus-level effects because those factors are highly correlated with other factors that are likely to affect the number of incidents and potential effects

of any change in Title IX enforcement. For example, students at four-year institutions are much more likely than those at two-year or less-than-two-year institutions to live on campus and conduct a greater proportion of their daily activities in an environment that could be construed as part of the institution's education program or activity. Further, compliance activities between public and private institutions may look different given the degree of oversight from State or local governments. Summary data of the total number of on-campus forcible sex offenses reported under the Clery Act from 2007 through 2013 are presented in Table IV below.

As with the aggregate data, we identify a clear non-linear relationship between the year and the number of forcible sex offenses reported under the Clery Act. See Figure II below.

Using this information, we then estimated the following equation:

(2) $$FSO_{ict} = \beta_0 + \beta_1 POST_t + \beta_2 t + \beta_3 t^2 + \beta_4 X_{ic} + \beta_5 ROB_{ct} + \beta_6 ENROLL_{it} + \varepsilon_{ict}$$

In Equation 2, FSO_{ict} represents the number of incidents of forcible sex offenses reported under the Clery Act on campus *c* of institution *i* in year *t*; $POST_t$ is a dummy variable for observations in the post-2011 period; *t* and t^2 allow for a quadratic relationship between the year and FSO_{ict}; X_{ic} is a vector of institutional characteristics including institutional control and level; ROB_{ct} represents the number of robberies reported under the Clery Act on campus *c* in year *t*; $ENROLL_{it}$ represents the number of students enrolled in institution *i* in year *t*; and ε_{ict} is an error term.

Estimates for Equation 2 are presented in Table V below. Columns 1 and 2 show a statistically significant positive effect of the 2011 Dear Colleague Letter on the number of forcible sex offenses reported under the Clery Act. However, once we allow for a quadratic specification for *t* in Column 3, we no longer identify any effects of $POST_T$. Indeed, when variables for institutional control and level are added in Column 4 and controls for overall level

of crime on campus and institutional enrollment are added in Columns 5 and 6, $POST_t$ is the only variable which does not have a significant relationship with FSO_{ICT}. Based on these results, we can say that the overall number of reported forcible sex offenses is increasing over time at an increasing rate (positive coefficient on t^2), private institutions tend to report fewer incidents of forcible sex offenses than public institutions (negative coefficients for dummy variables for private, non-profit and private, for-profit), four-year institutions report more forcible sex offenses than two-year and less-than-two-year institutions (negative coefficients on dummy variables for two-year and less-than-two-year), campuses with higher crime rates report more forcible sex offenses (positive coefficient on robbery), and institutions with higher enrollment report more forcible sex offenses (positive coefficient on enrollment). The only variable in the model which fails to explain any variation is $POST_t$.

The results with respect to $POST_t$ do not appear to be the result of low statistical power. The standard error on the term is relatively small and would detect significant effects of less than 0.08 offenses per year. Controlling for all of the other variables in the model, the coefficient for $POST_t$ is near zero. However, we continue to acknowledge limitations of the model as discussed below.

2011 Dear Colleague Letter Analysis – Conclusion and Limitations

Based on the analyses presented herein, we can find no basis on which to reject the null hypothesis (that is, to reject the contention that the 2011 Dear Colleague Letter had no effect on the underlying number of incidents of sexual harassment and assault). Given the information available, the Department has insufficient evidence to assume the final regulations will have an effect on the underlying rate of sexual harassment. We understand that any analysis of the 2011 Dear Colleague Letter could not definitively determine the effects of the final regulations on the

underlying incidents of sexual harassment due to the significant differences in these two sets of policies. We are presenting the 2011 Dear Colleague Letter analysis as a means to show the best possible information and analysis available to the Department, as well as the Department's limitations in assessing the effects of the final regulations on the underlying incidents of sexual harassment.

Potential limitations of our analysis include:

- Potential omitted variables. As depicted in Figures I and II, the number of forcible sex offenses reported under the Clery Act is non-linear over time, decreasing from 2007 through 2009 and then increasing again. This relationship was established before the release of the 2011 Dear Colleague Letter and continued thereafter. A linear specification to the model would ignore the underlying trends in the data and incorrectly attribute baseline variation to the 2011 Dear Colleague Letter, as evidenced in Column 2 of Table V. However, we did not interrogate what may have happened in 2009 that led to such a change in trend and the associated implications for the quality of the data or its suitability for the hypothesis-testing being attempted.
- Quality of Clery Act data. Our results might differ with different or higher quality data. An ideal data set would include information on each institution's pre- and post-2011 Dear Colleague Letter Title IX compliance framework as well as the actual number of incidents of sexual harassment and assault (and not only those reported by the institution under the Clery Act). It is widely understood that a large number of incidents of sexual harassment and assault go unreported to institutional or legal authorities and are therefore not captured in our data.

Further, if the implementation of the 2011 Dear Colleague Letter changed the reporting behaviors of either victims or institutions, then our analyses herein would be invalid.

- Correlation between Clery Act data and the underlying incidents of sexual harassment. Notwithstanding the preceding limitation of using Clery Act data, our analysis also assumes a correlation that we are unable to substantiate between Clery Act data and the underlying incidents of sexual harassment. This limitation is discussed at greater length above.
- Appropriateness of controls. Assuming that robberies represent a reasonable control for other criminal offenses on campus, despite the varying time trends across types of crime reported by the National Center for Education Statistics.[1908] Our analysis used an ordinary least squares specification, without additional augmentation (e.g., Tobit regression). However, we have no reason to believe that such a specification would have allowed us to make definitive conclusions about the potential effects of the final regulations.

[1908] Institute of Education Sciences, National Center for Education Statistics, "Fast Facts," https://nces.ed.gov/fastfacts/display.asp?id=804.

TABLE I
CLERY ACT REPORTS OF FORCIBLE SEX OFFENSES BY YEAR AND GEOGRAPHY

Geography	2007	2008	2009	2010	2011	2012	2013
On Campus	2,736	2,670	2,602	2,981	3,425	4,075	5,052
Non Campus	294	271	296	308	379	445	588
Public Property	448	329	366	331	394	429	376
Total	3,478	3,270	3,264	3,620	4,198	4,949	6,016

TABLE II
AVERAGE NUMMBER OF CLERY ACT REPORTS BY PERIOD

Geography	2007-2011 Average	2012-2013 Average	*p*
On Campus	2,883	4,564	0.15
Non Campus	310	517	0.19
Public Property	374	403	0.47
Total	3,3,566	5,483	0.15

Each p-value is for an F-test of the null hypothesis that the averages are the same across time periods.

FIGURE I
CLERY ACT REPORTS OF FORCIBLE SEX OFFENSES BY YEAR AND GEOGRAPHY

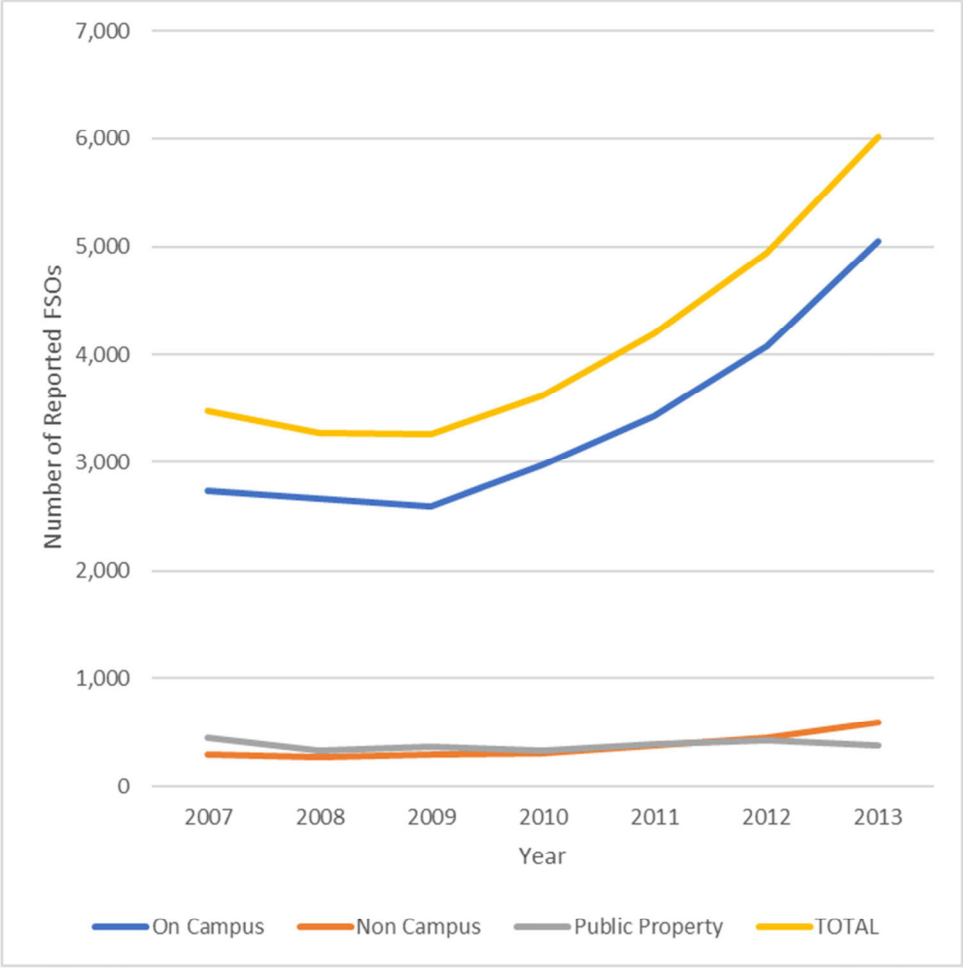

TABLE III
AGGREGATE DATA REGRESSION RESULTS BY CLERY GEOGRAPHY

Variable	(1)	(2)	(3)	(4)
		A. On Campus		
Post-2011	1681**	954	-85	-136
	(360)	(471)	(126)	(145)
Year	--	207	-447622**	-380702*
		(106)	(40376)	(89421)
$Year^2$	--	--	111**	95*
			(10)	(22)
Enrollment	--	--	--	-0.00
				(-0.83)
R^2	0.81	0.86	0.99	0.99
		B. Non Campus		
Post-2011	207**	114	-32	-27
	(49)	(67)	(26)	(34)
Year	--	27	-62688**	-69378*
		(15)	(8327)	(20837)
$Year^2$	--	--	16**	17*
			(2)	(5)
Enrollment	--	--	--	0.00
				(0.00)
R^2	0.78	0.88	0.99	0.99
		C. Public Property		
Post-2011	29	73	35.4	58
	(40)	(67)	(12)	(45)
Year	--	-13	-16230	-45713

		(15)	(35896)	(89678)
Year^2	--	--	4	11
			(9)	(22)
Enrollment	--	--	--	0.00
				(0.00)
R^2	0.10	0.23	0.28	0.32
		D. Total		
Post-2011	1376	-298	-622	363
	(1010)	(1509)	(2601)	(306)
Year	---	478	-138800	-143072
		(341)	(834473)	(1890451)
Year^2	---	--	35	356
			(208)	(470)
Enrollment	---	--	--	0.0028
				(0.0036)
R^2	0.27	0.51	0.56	0.63

*p<0.10 ** p<0.05

TABLE IV
TOTAL NUMBER OF FORCIBLE SEX OFFENSES REPORTED UNDER CLERY BY INSTITUTIONAL CONTROL AND LEVEL OF INSTITUTION, 2007-2013

	Level of Institution			
Control	four-year	two-year	Less than 2 year	TOTAL
Public	11,267	1,551	56	12,874
Private, non-profit	10,100	47	1	10,148
Private, for-profit	102	25	12	139
TOTAL	21,469	1,623	69	23,161

FIGURE II
AVERAGE NUMBER OF FORCIBLE SEX OFFENSES REPORTED PER CAMPUS BY YEAR

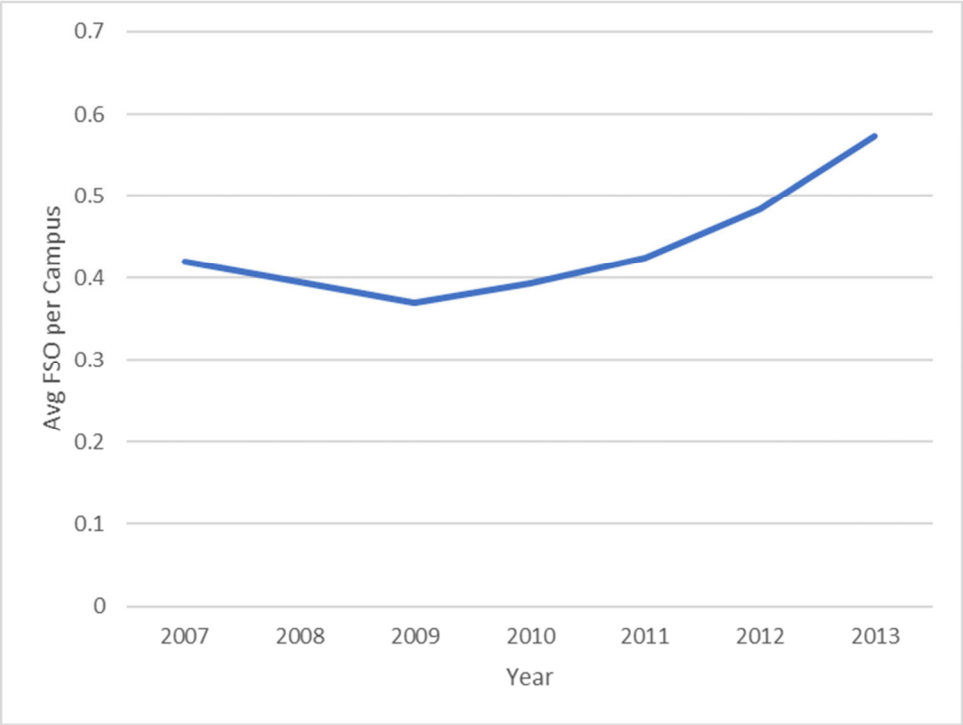

TABLE V
CAMPUS LEVEL DATA REGRESSION RESULTS

Explanatory Variable	(1)	(2)	(3)	(4)	(5)	(6)
Post-2011	0.13***	0.15***	-0.00	-0.00	0.01	0.01
	(0.02)	(0.03)	(0.04)	(0.10)	(0.04)	(0.04)
Year	--	0.01	-48.88***	-46.49***	-44.95***	-49.25***
		(0.01)	(13.49)	(13.08)	(12.62)	(12.53)
$Year^2$	--	--	0.01***	0.01***	0.01***	0.01***
			(0.00)	(0.00)	(0.00)	(0.00)
Private, non-profit (1=yes)	--	--	--	-0.47***	-0.33***	-0.14***
				(0.02)	(0.02)	(0.02)
Private, for-profit (1=yes)	--	--	--	-0.51***	-0.41***	-0.23***
				(0.02)	(0.02)	(0.02)
Two-year (1=yes)	--	--	--	-0.94***	-0.78***	-0.70***
				(0.02)	(0.02)	(0.02)
Less than two year (1=yes)	--	--	--	-0.75***	-0.62***	-0.47***
				(0.03)	(0.03)	(0.03)
Robbery	--	--	--	--	0.48***	0.45***
					(0.01)	(0.01)
Enrollment	--	--	--	--	--	0.00***
						(0.00)
R^2	0.00	0.00	0.00	0.06	0.13	0.14

*** $P<0.1$

Changes: None.

Comments: Other commenters cited studies that found that 34 percent of students who have experienced sexual assault drop out of college, a rate that is higher than the overall dropout rate

for college students.[1909] Commenters also asserted that research demonstrates that chronic absence from school is a primary cause of low academic achievement and a powerful predictor of which students will eventually drop out of school.[1910] Further, more than 40 percent of college students who were sexually victimized also reported experiences of institutional betrayal, which impacts their abilities to continue their education. One commenter argued that when students do not complete college, their lifetime earning potential is significantly reduced and, if most students take out student loans, then the lowered income potential would impact these students' ability to repay the loans they borrowed from the Federal government.

Other commenters asserted that some students may choose to transfer out of a hostile environment by opting to pursue their education at a different institution. However, there are costs associated with this strategy. Some commenters stated that the bulk of the upfront costs relate to credits that become 'stranded assets,' when the investment that students, families, and public institutions make to help students acquire skills is lost. These students will need additional credits in order to receive a degree – if they receive one at all – and will spend more time out of the labor market. One commenter cited a 2014 study, stating that the Department, itself, found that the average transfer student loses 27 earned credits after transferring.[1911] The commenter also cited the Government Accountability Office study that found that transfer students spend an

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[1909] Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18 JOURNAL OF COLL. STUDENT RETENTION: RESEARCH, THEORY & PRACTICE 2 (2015).
[1910] *See* U.S. Department of Education, *et al.*, *Key Policy Letters Signed by the Education Secretary or Deputy Secretary* 1 (Oct. 7, 2015) [archived information], https://www2.ed.gov/policy/elsec/guid/secletter/151007.html; Audrey Chu, *I Dropped Out of College Because I Couldn't Bear to See My Rapist on Campus*, VICE (Sept. 26, 2017) https://broadly.vice.com/en_us/article/qvjzpd/i-dropped-out-of-college-because-i-couldnt-bear-to-see-my-rapist-on-campus.
[1911] Institute of Education Sciences, National Center for Education Statistics, *Transferability of Postsecondary Credit Following Student Transfer or Coenrollment: Statistical Analysis Report* (August 2014), https://nces.ed.gov/pubs2014/2014163.pdf.

extra 0.25 years in school before graduating.[1912] Additionally, while pointing to a 2017 analysis from Complete College America, a commenter asserted that each additional year of schooling costs roughly $51,000 for students at two-year colleges and $68,000 for students at four-year colleges – and in both cases, the majority of those costs come from forgone earnings.

One commenter asserted that the Department failed to attempt to calculate the incremental costs of lost scholarships for those who receive lower grades as a result of sexual violence or other sexual harassment and defaults on student loans as a result of losing tuition and/or scholarships. Another commenter stated that, if a survivor defaults on a Federal student loan, they are restricted from future Federal financial aid, vulnerable to predatory lending in attempts to pay heavy debts, and unable to discharge their student loans in bankruptcy. In addition to lost education and professional growth, the commenter asserted, these losses lead to damaged credit that interferes with their ability to secure housing, employment, and even access utilities or a phone.

Discussion: While we appreciate the commenters' efforts to highlight the very real effects of sexual harassment and assault, the problems identified by the commenters largely arise from the underlying sexual harassment or assault rather than a recipient's response to that misconduct. As discussed above, the Department does not have evidence to assume these final regulations would have any effect on the underlying number of incidents of sexual harassment and assault. It is also not apparent that a recipient's response to sexual harassment and assault under these final regulations would be likely to exacerbate the negative effects highlighted by commenters.

[1912] Government Accountability Office, *Transfer Students: Postsecondary Institutions Could Promote More Consistent Consideration of Coursework by Not Basing Determinations on Accreditation* (October 2005), https://www.gao.gov/new.items/d0622.pdf.

Indeed, as described above, we believe it is likely that, if these final regulations were to have any marginal effect on those outcomes, it would be to reduce their negative impacts due to the mandatory offer of supportive measures in § 106.44(a). As such, we decline to add these costs to our estimates.

Changes: None.

Comments: Multiple commenters asserted that the costs for mental health services would largely fall on complainants because of their experience as a victim of sexual harassment and assault. One commenter reported that sexual assault survivors are three times more likely to suffer from depression, six times more likely to have PTSD, 13 times more likely to abuse alcohol, 26 times more likely to abuse drugs, and four times more likely to contemplate suicide.[1913] Several commenters asserted that women who are sexually assaulted or abused are more than twice as likely to experience PTSD, depression, and chronic pain as women who have not experienced such violence.[1914] One commenter reported that an estimated 40 percent of rape victims suffer from severe emotional distress which requires mental health treatment. Another commenter reported that survivors continue to report poorer health, utilize healthcare twice as much, and continue to pay increased health care costs even five years after their abuse has ended.[1915] Several commenters argued that the costs the NPRM shifts to complainants would, in turn, shift to health insurance companies, and society will ultimately bear such costs. Another commenter

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[1913] Feminist Majority Foundation, "Fast facts - Sexual violence on campus" (2018), http://feministcampus.org/wp-content/uploads/2018/11/Fast-Facts.pdf.

[1914] Anne B. Woods *et al.*, *The Mediation Effect of Posttraumatic Stress Disorder Symptoms on the Relationship of Intimate Partner Violence and IFN-γ Levels*, 36 AM. J. OF COMM. PSYCHOL. 1-2 (2005).

[1915] Amy E. Bonomi *et al.*, *Health Outcomes in Women with Physical and Sexual Intimate Partner Violence Exposure Intimate Partner Violence Exposure*, 16 JOURNAL OF WOMEN'S HEALTH 7 (2007); Amy E. Bonomi *et al.*, *Health Care Utilization and Costs Associated with Physical and Nonphysical-Only Intimate Partner Violence*, 44 HEALTH SERVICES RESEARCH 3 (2009).

stated that those who suffer sexual harassment and assault are more likely to require services from already over-burdened health and counseling services. The commenter argued that this will mean greater costs for government and taxpayers, since public colleges and universities rely, in part, on government and tax-payer support.

Several commenters reported that more than one-fifth of intimate partner rape survivors lose an average of eight days of paid work per assault. One commenter asserted that researchers found that women who experience dating violence in adolescence have lower starting salaries as adults than their counterparts and slower salary growth over time.[1916] Similarly, commenters reference other research that found that survivors experience job instability for up to three years after an abusive relationship has ended.[1917] The commenter stated that the costs from the economic ripple effect include $2,084 for forensic exams and $140 or more per counseling session when not offered by schools or covered by health insurance.[1918] The commenter cited a 2017 study which found that the average cost of a victim's sexual assault claim filed against a college or university was approximately $350,000.[1919]

[1916] Adrienne E. Adams *et al.*, *The Effects of Adolescent Intimate Partner Violence on Women's Educational Attainment and Earnings*, 28 JOURNAL OF INTERPERSONAL VIOLENCE 17 (2013).
[1917] Adrienne E. Adams *et al.*, *The Impact of Intimate Partner Violence on Low-Income Women's Economic Well-Being: The Mediating Role of Job Stability*, 18 VIOLENCE AGAINST WOMEN 12 (2012). One commenter conducted a study that found that survivors of sexual harassment and assault face an "economic ripple effect." Sara Shoener & Erika Sussman, *Economic Ripple Effect of IPV: Building Partnerships for Systemic Change* (2013), https://csaj.org/library/view/economic-ripple-effect-of-ipv-building-partnerships-for-systemic-change. *See also* Sara Shoener, *The Price of Safety: Hidden Costs and Unintended Consequences for Women in the Domestic Violence Service System* (Vanderbilt Univ. Press 2016).
[1918] Coreen Farris, *et al.*, *Enemy Within: Military Sexual Assault Inflicts Physical, Psychological, Financial Pain*, 37 RAND REV. 1 (2013); Farran Powell & Emma Kerr, *What You Need to Know About College Tuition Costs*, U.S. NEWS & WORLD REPORT (Sept. 18, 2019) ($5,150 of tuition per lost semester; the average U.S. university tuition in 2017-208 was $11,721.67 per semester), https://www.usnews.com/education/best-colleges/paying-for-college/articles/what-you-need-to-know-about-college-tuition-costs.
[1919] Halley Sutton, *Study Outlines Cost of Sexual Assault Litigation for Universities*, 14 CAMPUS SECURITY REPORT 2 (2017).

Many commenters asserted that the Department did not adequately consider certain costs that result from sexual harassment, including sexual assault. For example, numerous commenters reported that the lifetime costs of intimate partner violence include related health problems, lost productivity, and criminal justice costs, totaling an estimated $103,767 for women and $23,414 for men.[1920] Other commenters reported that the Centers for Disease Control and Prevention estimates that the lifetime cost of rape is $122,461 per survivor, resulting in an annual national economic burden of $263 billion.[1921] One commenter asserted that about one-third of the cost is borne by taxpayers, and more than half of this cost is due to loss of workplace productivity, and the rest is due to medical costs, criminal justice fees, and property loss and damage. Multiple commenters asserted that a single rape costs a victim between $87,000 to $240,776.[1922] Many commenters stated that the average cost of being a rape victim is approximately $110,000 according to the Children's Safety Network Economic and Insurance Resource Center. Comparatively, the average cost of being a robbery victim is $16,000, and the average cost of drunk driving is $36,000.

Discussion: We do not believe it would be appropriate to include estimates regarding the cost of incidents of sexual harassment or assault themselves in our calculation of the likely effects of this regulatory action.

[1920] *See* Cynthia Hess & Alona Del Rosario, Institute for Women's Policy Research, *Dreams Deferred: A Survey on the Impact of Intimate Partner Violence on Survivors' Education, Careers, and Economic Security* 8 (2018), https://iwpr.org/wp-content/uploads/2018/10/C474_IWPR-Report-Dreams-Deferred.pdf.
[1921] *See* Cora Peterson *et al.*, *Lifetime Economic Burden of Rape Among U.S. Adults*, 52 AM. J. PREV. MED. 6, 691, 698 (2017), https://stacks.cdc.gov/view/cdc/45804/cdc_45804_DS1.pdf.
[1922] *See* The White House Council on Women and Girls, *Rape and Sexual Assault: A Renewed Call to Action* (2014), https://www.knowyourix.org/wp-content/uploads/2017/01/sexual_assault_report_1-21-14.pdf; U.S. Dep't. of Justice, National Institute of Justice, *Research Report: Victim Costs and Consequences: A New Look* (1996), https://www.ncjrs.gov/pdffiles/victcost.pdf.

As described above, we have no evidence indicating that Federal Title IX guidance or regulation has an effect on the underlying number of incidents of sexual harassment and assault. To the extent that such effects are relevant to our evaluation of the likely costs of these final regulations, we note that supportive measures, as defined in § 106.30, are "offered . . . without fee or charge to the complainant or the respondent." As such, it could be reasonably argued that these final regulations would actually reduce costs for complainants, especially as § 106.44(a) requires recipients to offer supportive measures to a complainant as more fully explained in the "Section 106.44(a) Deliberate Indifference Standard" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section. Nonetheless, we decline to include such costs, as it is unclear the extent to which such services would be offered as part of supportive measures, the take-up rate on the part of complainants, or the amount of savings that would accrue to complainants as a result. We do, however, revise our cost estimates to include the cost of recipients offering supportive measures to complainants pursuant to § 106.44(a).

Changes: We revise our cost estimates to include the cost of recipients offering supportive measures to complainants pursuant to § 106.44(a).

Comments: Several commenters asserted that the RIA does not appear to account for the lost future tax revenue that would have been collected on the higher salaries of students who are afforded equal access to education free from discrimination, or the reduced future health care costs attributable to campuses that more effectively prevent sexual harassment and assault.

Discussion: We decline to include the costs identified by the commenters. The effects noted by the commenters are sufficiently temporally and causally distant from the implementation of the final regulations that it would be difficult and impractical to quantify. Further, the comments

assume that implementation of the final regulations will deny equal access to education to at least a subset of individuals, a proposition that we resoundingly reject.

Changes: None.

Comments: One commenter asserted that as the Department fails to justify its belief that there will be no quantifiable effect on the rate of underlying harassment, its conclusion about the impact on the underlying rate of sexual harassment is arbitrary and capricious. Moreover, the commenter argued the NPRM failed to consider the effect that its rules will have on perpetrators' incentives, suggesting that the Department has failed to consider relevant issues or factors and that the proposed regulations are arbitrary and capricious. The commenter cited research that shows that offenders are more likely to be deterred from, and thus less likely to engage in, undesirable behaviors when there is reasonable certainty of some kind of accountability. For instance, in the criminal context, an increase in the probability of being apprehended is associated with a decrease in the criminal activity itself.[1923] If, under the Department's proposed rules, an abuser can more easily avoid accountability because schools are not legally required to act, any likelihood of deterrence resulting from the possibility of facing consequences is lowered. The commenter argued that the RIA failed to account for the potential effects of the proposed regulations on perpetrators' incentives, which rendered this analysis arbitrary and capricious.

Discussion: As described above, we have articulated our rationale for not including the costs of sexual harassment or assault itself in our estimates. Further, we have provided additional analysis

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[1923] *See* Valerie Wright, The Sentencing Project, *Deterrence In Criminal Justice* (2010), https://www.sentencingproject.org/wp-content/uploads/2016/01/Deterrence-in-Criminal-Justice.pdf.

that supports our original decision. We do not believe that the exclusion of these costs is arbitrary or capricious.

Regarding "perpetrators' incentives," as noted elsewhere, and confirmed by our analysis of the 2011 Dear Colleague Letter, we do not believe that the behavior of perpetrators is driven by Title IX guidelines or regulations.

We further note that the examples cited by the commenter pertain to the criminal context rather than an administrative one, and it is likely that incentives operate differently across those two contexts.

Changes: None.

Comments: One commenter asserted that the Department needs to perform a more exhaustive cost-benefit and regulatory impact analysis. The commenter suggested that the Department ought to obtain empirical estimates of the depressed rates of positive findings of actual sexual harassment resulting from a requirement of cross-examination, the rates of likely reduction of reporting, the likely effects on under-deterrence of some classes of sexual harassment, and the costs of increased occurrences of sexual harassment. Another commenter, a non-profit that specializes in education law, asserted that the NPRM's cost-benefit analysis was not performed in good-faith, and the commenter called for the Department to start completely anew with a new set of assumptions that will reflect the actual effects of these regulations rather than a desire to minimize cost calculations as much as possible. Another commenter asserted that the Department has an obligation to incorporate an estimate of reduced sexual harassment and sexual assault reporting rates. The commenter asserted that the estimated baseline fails to recognize unreported assaults. One commenter cited a recent report by one university on campus assault that stated that a significant percentage of individuals who do not report stated it was not

reported because they did not think anything would be done about it (29.9 percent) or feared it would not be kept confidential (17.7 percent).[1924] The same study concluded that a significant number of victims who do not report felt embarrassed or ashamed (32.9 percent). Fewer victims of penetrative acts involving incapacitation felt nothing would be done about it (8.9 percent) or felt embarrassed (20.5 percent). Additionally, the survey found that roughly 50 percent of sexual violence occurred off campus. The commenter argued that the proposed regulations, by allowing schools to ignore sexual violence off campus, would ignore 50 percent of already reported incidences of sexual violence. The commenter wished to see the RIA account for these findings.

Discussion: We appreciate the commenters' feedback, but we do not see sufficient cause across the entirety of public comment to warrant establishing a new model. Where commenters have identified clear deficiencies or inaccuracies with our estimates related to the effects of the final regulations, we have adjusted our assumptions accordingly. We note that the model was not derived based on a desire to minimize costs, but rather to effectively capture the likely impacts of this regulatory action.

Regarding the impact of the final regulations and cross-examination on findings of responsibility, we are not aware of research establishing a clear causality or directionality in this relationship. Further, even if it were established that cross-examination reduced findings of responsibility in Title IX enforcement cases, it would not be immediately clear that such a reduction would be inherently negative. It is just as likely that such a reduction would be driven by a decrease in false positives (findings of responsibility where none exists) as a reduction in

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[1924] *See* The Association of American Universities, *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct: University of Virginia* (Westat 2015), https://ias.virginia.edu/sites/ias.virginia.edu/files/University%20of%20Virginia_2015_climate_final_report.pdf.

true positives (findings of responsibility where it exists). In fact, there is good reason to believe that cross-examination improves adjudicators' ability to effectively assess the results of an investigation.[1925]

As discussed elsewhere, the Department does not have any information to reliably suggest that the final regulations would result in a change in the number of incidents of sexual harassment and assault each year. However, our analysis takes into consideration an effect on the number of incidents that would result in a formal complaint. The NPRM assumed that a subset of investigations currently being conducted by recipients will result in reports (with supportive measures offered to the complainants) rather than formal complaints (although every complainant has the option of filing a formal complaint) and would, therefore, not trigger the grievance procedures described in § 106.45. We recognize that there are a number of reasons why a complainant may opt not to file a formal complaint and, in our view, our initial analysis took this effect into account.

Changes: None.

Comments: Another commenter asserted that the Department's estimate that the proposed rules will reduce the number of off-campus investigations by 0.18 is arbitrary and is generated without clear explanation. The commenter argued that the RIA failed to provide a complete accounting of all estimated costs and how the costs were determined. For example, the RIA does not state whether the salary rates are market rates or rates provided under the Federal GS Schedule, nor

[1925] *See* Nicole Smith, *The Old College Trial: Evaluating the Investigative Model for Adjudicating Claims of Sexual Misconduct*, 117 COLUMBIA L. REV. 4 (2017).

does it state whether the Federal revenue per full-time equivalent (FTE) is based on an inflation adjustment.

Discussion: We disagree. We fully explained the basis for that estimate in the NPRM.[1926] The estimate relied, in part, on the estimated number of investigations currently occurring and the relative number of incidents reported under the Clery Act that occur on campus and off campus.

Changes: None.

Overall Net Effects/Characterization of Savings

Comments: Regarding the Paperwork Reduction Act, one commenter asserted that the commenter's employer, a large non-profit, believes that the burden estimates are accurate, the quality and usefulness of the information collected is justifiable, and that the reporting burden is appropriately minimized.

Discussion: We appreciate the commenter's support for our estimates.

Changes: None.

Comments: One commenter stated that they could not understand how the Department arrived at its projected cost totals. The NPRM stated that the Regulatory Impact Analysis estimates "the total monetary 'cost-savings' of these regulations over ten years would be in the range of $286.4 million to $367.7 million"; however, the commenter could not find that cost savings figure reflected in the accounting statement. The commenter asked the Department to clarify how it arrived at its estimated total costs.

Discussion: We recognize that the discrepancy between the total cost figures and those included in the accounting statement could be confusing to some commenters. The cost savings

[1926] 83 FR 61487.

calculation of $286.4 to $367.7 million were calculated over a ten-year window. By contrast, the Accounting Statement included an annualized (per year) calculation of those same costs.

Changes: None.

Comments: Multiple commenters expressed concerns that the final regulations will increase operating costs for recipients. Several commenters asserted that the proposed procedural requirements will cost institutions more over time to implement than they currently pay in Title IX-related legal fees, settlements, and damage awards. One large State-coordinating body for higher education estimated the costs for implementing the proposed rules at $500,000 for institutions with few cases (0-4) to $1.8 million for institutions with many cases (up to 45). The range of costs was estimated per institution for implementation of investigation, hearing, and adjudication processes.

Discussion: We appreciate commenters concerns and note that, in fact, the estimates in the NPRM assumed that a subset of institutions would not experience any cost savings as a result of the proposed rules. In the NPRM, we assumed that 50 percent of institutions of higher education (IHEs) would not see any reduction in the number of Title IX investigations per year as a result of the proposed rule. Although our analytical model generates different estimates for costs than those cited by the commenter (lower estimates for institutions with few cases, higher estimates for institutions with many cases), we do not have sufficient information at this time to identify the source of these differences. However, we are concerned about the possibility that such burdens, where they do accrue, would be potentially difficult for recipients to bear. Based on the assumptions included herein, and discussed at further length in the Regulatory Flexibility Act section of this notice, we do not believe that such burdens would pose significant challenges for most institutions.

Changes: We have included additional information in the Regulatory Flexibility Act section to more clearly describe the likely magnitude of the effects of the final regulations on institutions of varying sizes.

Comments: Numerous commenters argued that the cost savings estimated by the NPRM's RIA is really just cost-shifting to complainants, respondents, and other parties. Several commenters asserted that the proposed rules would not reduce costs but simply shift costs from schools to the victims of sexual harassment. One commenter asserted that, by ignoring the NPRM's costs to complainants, the Department "entirely failed to consider an important aspect of the problem," which the commenter stated is a hallmark of arbitrary and capricious action. One commenter asserted that, while the Department acknowledged in the NPRM that 22 percent of survivors seek psychological counseling, it did not account for additional costs sexual harassment and assault survivors bear: 11 percent move residences and eight percent drop a class.

Discussion: We agree that it would be inappropriate to consider transfers of costs or burdens across entities or individuals as cost savings. However, the cost estimates in the NPRM did not do as the commenter suggested. Even so, the commenters' point is well taken that our estimates failed to take into account time burdens on complainants and respondents.

For example, our initial estimates of the time associated with a hearing assumed time and costs for the Title IX Coordinator, a decision-maker, and advisors, but did not include the time required on the part of complainants and respondents to participate in the hearing. Therefore, we have added burden associated with the participation of complainants and respondents throughout the cost estimates. For K-12 students, we assume costs at the Federal minimum wage. For students enrolled in postsecondary institutions, we assume median hourly wage for all workers ($18.58 per hour). These costs are intended to represent the opportunity cost associated with

devoting time to the particular activity measured as potential lost wages. Again, as discussed at length in the NPRM and elsewhere in this notice, the Department declines to include costs associated with underlying incidents of sexual harassment and assault in our estimate of the potential costs of this regulatory action as doing so would be inappropriate.

As previously explained, the Department also revised its cost estimates and has determined that the final regulations imposes net costs.

Changes: We have added two additional categories of individuals to our cost models: K-12 students and postsecondary students. We revised our cost estimates and have concluded that the final regulations impose net costs.

Comments: One commenter asserted that, under the proposed rules, schools will spend more time and resources engaging in a bureaucratic process instead of taking measures that would make the campus safer. The same commenter argued that publicly funded educational institutions should be allotting more time and resources to help tackle the issue of sexual misconduct and funds should be spent on better counseling, prevention measures, and implementing changes that will make schools safer such as lighting for walkways, sexual misconduct education, and specialized law enforcement services for survivors.

One commenter asserted that institutions with more resources, such as private universities and charter schools, will be able to make more robust commitments to cross-examination in Title IX hearings – such as keeping a law firm on retainer to act as advisors for complainants and respondents – resulting in inequity in how sexual harassment is addressed nationwide. Another commenter stated that some recipients under these new regulations will feel obligated to provide attorneys to protect students and ensure fairness, even if it is not mandated by the final

regulations, and the Department incorrectly underestimated the costs of retaining attorneys to serve as advisors.

Discussion: We agree with the commenter that a broad range of activities and efforts can be undertaken by recipients to address issues of sexual misconduct. Those activities and efforts though are better determined by recipients themselves based on their own local context. We revised § 106.44(a) to require recipients to offer supportive measures to complainants as part of their non-deliberately indifferent response to sexual harassment. Supportive measures, as defined in §106.30, are designed to restore or preserve equal access to the recipient's education program or activity. Section 106.44(a) requires the Title IX Coordinator to promptly contact a complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. As a result of these and other revisions, the Department has concluded that these final regulations impose net costs.

Regarding the differential response to these final regulations by different types of entities, we note that regulated entities often vary in their response to new rules. In the NPRM, we specifically discussed entities that, for a variety of reasons, opt to engage in activities above and beyond those required. At the postsecondary level, we assumed that approximately 45 percent of recipients fell into this group.[1927] Further, as noted elsewhere in this document, our initial estimates already assumed attorneys would serve as advisors.

[1927] *See* 83 FR 61486.

Changes: As a result of revisions to the proposed regulations, the Department revised its analysis and has determined that these final regulations impose net costs.

Comments: Several commenters argued that the Department's analysis both underestimates the cost of implementation and overestimates the savings. Commenters predicted that it is likely that the costs from the proposed rules would exceed any savings. One commenter asserted that the RIA never clearly relayed to the public that recipient-institutions covered by Title IX may be private education programs or other institutions such as museums, libraries, or science labs that have education programs and receive Federal financial assistance from the Department or other Federal agencies, such as the Department of Agriculture. The commenters asserted that the public should be aware of how broadly Title IX reaches across various institutions, and therefore, how great the scope of the costs will be.

Discussion: We agree that our initial analysis failed to account for recipients that are not LEAs or IHEs. Therefore, we conducted an analysis of the grants made by the Department in FY 2018. In that year, the Department made 15,266 awards to 8,324 entities. Of those, 537 were identified as "other" entities (e.g., museums, libraries, cultural centers, and other non-profit organizations). We have therefore added 600 additional entities to our analysis. We assume that approximately 90 percent of these entities will be in Group 1, as described in the NPRM, with an additional five percent in each of Groups 2 and 3. We note that we have no meaningful, systematic data on the number of incidents or investigations of sexual harassment occurring in these entities, though we note that many are small organizations devoted to providing technical assistance and outreach to

families and have very few employees. Given the lack of information, we assume a baseline of two investigations per year per entity with a reduction to one under the final regulations.[1928]

As previously explained, as a result of changes from the proposed regulations to these final regulations, we also have revised our analysis and concluded that the final regulations impose net costs.

Changes: We have added a new category of recipients to our model. As a result of revisions to the proposed regulations, the Department revised its analysis and has determined that these final regulations impose net costs.

Comments: One commenter asserted that the RIA violates Executive Order 12866, which requires agencies to assess all costs and benefits of a proposed rule "to the fullest extent that these can be usefully estimated," as the RIA fails to accurately estimate the true and full burden of the required policy changes.

Discussion: We disagree. The Department has made a good-faith effort to fully and accurately account for all costs and benefits likely to accrue as a result of this regulatory action and, as a result, we believe we have met our burdens under Executive Order 12866. We also have revised our analysis and have concluded that these final regulations are economically significant and impost net costs.

Changes: None.

Comments: One commenter asserted that the Department has touted the savings of $286.4-$367.7 million dollars as a "selling point" for these rule changes. And yet, in relation to the

[1928] For more information about the impact of this assumption on our estimates, see Table 5 in the Discussion of Costs, Benefits, and Transfers section below.

endowments of most private colleges, the commenter asserted that the budgets of public university systems and the Department's own request for $63 billion for FY 2019, show how the projected savings amount is a paltry sum.

Discussion: We agree that the savings calculated in the NPRM do not constitute a significant percentage of overall revenues for elementary and secondary schools and postsecondary institutions in this country. Additionally, as a result of revisions to the proposed regulations, we have revised our analysis and determined that the final regulations impose net costs.

Changes: We have revised our analysis and determined that the final regulations impose net costs.

Comments: Another commenter asserted that, if the estimated savings of $286.4 to $367.7 million were distributed evenly across the 23,000 total universities, colleges, elementary, and secondary school districts, the savings would total $1,598.69 per institution per year. In the commenter's view, this meager lump sum would not begin to cover the financial burden that the proposed rules would inflict upon institutions of higher education.

Discussion: We believe the commenter may have misunderstood the estimates presented in the NPRM. We anticipated net cost savings of approximately $286.4 to $367.7 million. That figure takes into account all increases and decreases in costs. Therefore, it is not necessary that the net cost savings figure be sufficient to cover cost increases, as such an analysis would double count costs. We believe the commenter mistook our calculations for gross cost savings, rather than net. We note that our final cost estimates reflect a net cost of between $48.6 and $62.2 million over ten years.

Changes: None.

Comments: Another commenter, a law school, whose students currently benefit from over $10 million in scholarship awards, stated that compliance with the proposed regulations will reduce the amount of aid the school will be able to pay to future students.

Discussion: We recognize that, to the extent recipients or parties realize costs as a result of the final regulations, they will need to identify sources of funding to cover those costs.

Changes: None.

Comments: Numerous commenters stated that the increase in requirements will cause schools to increase the funds they allocate for Title IX compliance. If they increase them, the cost will likely be passed onto students in the form of higher tuition or fees. If schools instead do not increase funding, they risk compliance gaps resulting from inadequate technology, staffing, or training. The commenters requested that the Department pay particular attention to the impact of the proposed rules on smaller institutions and to be sensitive to the measures that will increase costs.

Discussion: In accordance with the Regulatory Flexibility Act, we have reviewed the potential effects of this regulatory action on small entities. While we recognize that the burden on small entities may represent a larger proportion of their overall revenues, as discussed elsewhere, we do not believe that these final regulations impose an unreasonable burden on such entities.

The Department believes that addressing sex discrimination in the form of sexual harassment, including sexual assault, is of paramount importance and is worth the cost.

Changes: None.

Motivation for Rulemaking

Comments: Several commenters asserted that the NPRM's monetary savings comes at the unacceptable cost of stripping Title IX protections from many sexual harassment and assault

victims. They argue that the proposed changes undermine the purpose for which Title IX was designed. One commenter stated that cost-savings is an irrelevant consideration when it comes to the application of civil rights law. Another commenter argued that it is unethical to consider, much less draw up, economic estimates in such a matter of human well-being. The commenter argued that financial incentives should not determine how schools and universities handle sexual misconduct accusations. Another commenter stated, hyperbolically, that it would also save money if universities provided no education for women.

One commenter asserted that the cost-savings projections reflect fewer reports, not fewer assaults. Another commenter stated that the framework of these proposed regulations have an aim to reduce the financial cost of Title IX complaints through the mechanism of reducing the number of Title IX investigations, and therefore, Title IX protections available to students. Another commenter cited statistics that show approximately 61 percent of sexual assaults occur off campus. The commenter believed that the NPRM's requirement that schools investigate only on-campus or school-related incidents will reduce the number of sexual harassment and assault reports, but will also significantly impair colleges' ability to maintain a safe, non-discriminatory environment for all students. Moreover, the commenter argued that the on-campus requirement could function to enable predatory behavior off campus.

Other commenters asserted that, because sexual assault and other forms of sexual harassment are already vastly underreported, the Department should be working to combat the problems of underreporting and under-investigation instead of trying to reduce the number of investigations. One commenter pointed out that, even when students do report sexual harassment, schools often choose not to investigate their reports. The commenter cited a 2014 Senate Report, first cited by the Department, in which 21 percent of the largest private

institutions of higher education conducted fewer investigations of sexual violence than reports received with some of these schools conducting seven times fewer investigations than reports received.

Another commenter disputed the Department's prediction that the number of sexual harassment investigations would fall. The commenter asserted that the Department's focus on investigation outcomes ignores the prevalence of both sexual harassment and sexual assault and underreporting of both kinds of offenses on campuses.

Discussion: While we recognize the commenters' concerns with quantifying the effects of these regulations, which pertain to civil rights protections, we note that we are bound to do so by Executive Order. Further, in deciding among alternative approaches, the Department is bound to choose the option that maximizes benefits and minimizes costs. While discussing civil rights protections in such terms may cause discomfort for particular commenters, we are required to do so as part of the rulemaking process.

Although we may not have cited the statistics regarding the prevalence of sexual harassment and sexual assault cited by the commenters, we note that we cited statistics relevant to our estimates. We are not required under the Administrative Procedure Act, relevant Executive Orders, or OMB circulars, to cite all statistics regarding an underlying issue when conducting rulemaking. We do not believe citing other such statistics would have materially affected the public's ability to provide comment on the proposed regulations.

We agree that our estimates assumed a reduction in the number of Title IX investigations conducted by recipients each year for the reasons detailed in the NPRM. However, we strongly disagree that such an effect means that fewer students are protected by Title IX. As explained in more detail in the section "Section 106.44(a) 'education program or activity'" subsection of the

"Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this document, these final regulations align the scope of "education program or activity" with Supreme Court case law and the current statutory and regulatory definitions of "program or activity" in 20 U.S.C. 1687 and 34 CFR 106.2(h).

The Department revised § 106.44(a) to require recipients to offer supportive measures to complainants as part of recipients' non-deliberately indifferent response to sexual harassment. Even if a complainant chooses not to file a formal complaint to initiate the grievance process under § 106.45, including an investigation, the Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. The Department revised its analysis to account for such changes from the proposed regulations to the final regulations, and the Department concludes that these final regulations impose net costs.

Recipients may be required to respond to incidents that occur off campus under these final regulations, as off-campus incidents of sexual harassment are not categorically excluded in these final regulations.[1929] Title IX, 20 U.S.C. 1681(a), requires all recipients to address sex discrimination, including sexual harassment, in the recipient's education program or activity. Pursuant to § 106.44(a), a recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly

[1929] *See, e.g.*, the discussion in "Section 106.44(a) 'education program or activity'" subsection in "Section 106.44 Recipient's Response to Sexual Harassment Generally" section.

in a manner that is not deliberately indifferent. An "education program or activity" includes, but is not limited to, locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution, whether such a building is on campus or off campus. Accordingly, an education program or activity may be an on-campus program or activity or an off-campus program or activity. Recipients must respond to any allegation of sexual harassment against a person in the United States in its education program or activity, regardless of whether such education program or activity is on campus or off campus.

While we recognize that a large number of incidents of sexual harassment and sexual assault go unreported, we do not believe it is an appropriate Federal role to compel individuals to report those incidents. Rather, we believe it is important to ensure that when recipients do receive reports, they have clear policies and procedures in place to promote a safe and supportive environment while also ensuring due process protections are applied whenever the recipient investigates and adjudicates sexual harassment allegations. We believe that ensuring recipients respond to such reports in a consistent and supportive manner is the best way to support potential complainants and respondents. We believe that, absent these regulations, complainants would face a far more uncertain response from their school and have far less clarity regarding whether the school has actually met its burdens under Title IX. As noted elsewhere, the Department's primary goal in promulgating these regulations was never to reduce the number of investigations, but rather to ensure clear guidelines under Title IX for recipients to effectively address sexual harassment.

Changes: The Department concludes that these final regulations impose net costs.

The Department's Model and Baseline Assumptions

Comments: One commenter argued that the Department arbitrarily assumed a reduction in the number of off-campus investigations by IHEs of 0.18 per year. This commenter requested that the Department generate a more reliable figure with a clear explanation to justify the significant number of victims who can no longer seek Title IX recourse.

Discussion: The Department rejects the contention that its calculation of a reduction in the number of off-campus investigations by IHEs of 0.18 per year under the NPRM was arbitrary. As the preamble in the NPRM made clear, this calculation rested on a series of assumptions and data sources, which were clearly detailed. The reduction referenced by the commenter was based, in part, on assumptions about the current compliance structure across institutions of varying sizes and an assumption that Clery Act reports correlate with all incidents of sexual harassment.

All data that the Department relied upon is publicly available and was identified in the NPRM to ensure that the general public had the necessary information to assess the validity of our assumptions and estimates. Furthermore, the Department provided alternative estimates, detailed in the "Sensitivity Analysis" section, which were designed to ensure the public understood the likely effect of our particular assumptions on the overall magnitude of our final estimates. We acknowledge, as we did in the NPRM, that we do not have high-quality, comprehensive data on the current number of investigations being conducted by IHEs, and so the Department had to rely on estimates. This is why we previously requested that the general public provide us with any alternative data that they believed would more accurately capture the baseline.

Changes: As discussed elsewhere, the Department has revised its estimate of the baseline number of investigations currently occurring at IHEs to 5.70 and the estimated number of formal complaints occurring after implementation of the final regulations to 3.82.

Comments: A number of commenters voiced agreement with the RIA that the changes proposed by the NPRM are likely to result in a net cost savings for recipients. Some of these commenters pointed to the more than two hundred lawsuits that have been filed since the 2011 Dear Colleague Letter alleging lack of due process as well as sex discrimination against respondents. One commenter asserted that, at the time the comment was written, colleges had lost more than 90 such lawsuits, and the commenter predicted that the due process protections implemented by the changes to Title IX would result in additional cost savings for colleges in the form of averted litigation costs. Another commenter asserted that, because of the changes set forth by the NPRM, schools would be able to divert resources away from lawsuits and towards other uses that would more directly benefit students.

Discussion: We appreciate the support from some commenters.

Changes: None.

Comments: Numerous commenters asserted that reports and investigations will decrease under the proposed regulations because of additional obstacles to reporting and the costs of pursuing investigations. One commenter stated the RIA should estimate the rates for which sexual harassment and assault would increase and should also account for the burden of such increased rates on the parties. One commenter argued that sexual harassment and assault can be deterred, but the proposed rules would create obstacles to reporting sexual harassment and sexual assault and, therefore, will reduce the amount of specific and general deterrence around such misconduct. Another commenter cited numerous articles, as well as the NPRM, for the

proposition that sexual harassment and sexual assault can be deterred showing that the Department also acknowledges that proposition.

Several commenters stated that, if the Department decides to implement §106.45(b)(6), the predicted harms of re-traumatization must be factored into a new cost-benefit and regulatory impact analysis. Other commenters argued that requiring complainants to submit to cross-examination will reduce the number of students pursing formal complaints of sexual harassment on campuses and will make campuses less safe. One commenter asserted that the Department omitted the cost to schools of students' greater demand for psychological and medical services as a result of recipients investigating fewer complaints of sexual harassment and sexual assault. The commenter asserted that institutions of higher education are already spending significant amounts of money on campus mental health services. The commenter argued that imposing new barriers and creating new stressors would exacerbate the rising costs of mental health services.

Discussion: We disagree that the proposed and final regulations create obstacles to reporting incidents of sexual harassment and sexual assault. Rather, both the proposed and final regulations clarify recipients' burdens under Title IX. To address potential confusion regarding what constitutes a formal complaint, we have revised the definition of "formal complaint" in §106.30. As noted elsewhere, we have no reason to conclude that these final regulations would increase the number of incidents of sexual harassment and assault. As discussed above, fundamental respect for due process will not result in trauma for complainants or an increased need for mental health services. Such claims are speculative, at best, to be appropriately included in Departmental estimates. Further, we note that complainants are not required under the final regulations to participate in cross-examination, and decision-makers are prohibited from basing a determination regarding responsibility on the absence of a party. Accordingly, to the extent

complainants believed participation would likely cause harm, they could opt not to participate in the cross-examination, while still receiving supportive measures designed to restore or preserve the complainant's equal educational access.

Changes: We have revised the definition of the term "formal complaint" in §106.30. The definition of "formal complaint" in § 106.30 is revised to mean a document filed by a complainant, or signed by the Title IX Coordinator, requesting that the recipient investigate sexual harassment allegations; a formal complaint may be filed in person, by mail, or e-mail; and the formal complaint may be a document or electronic submission with the complainant's physical or digital signature or otherwise indicating that the complainant is the person filing the formal complaint.

Comments: One commenter stated that the Department failed to use the term "transgender" in the proposed regulations. The commenter cautioned that this overt exclusion may make transgender students less likely to report on campus sexual harassment or sexual assault to the designated Title IX Coordinator. The commenter also cited a recent survey of transgender people, showing that 17 percent of K-12 students and 16 percent of college or vocational school students who were "out" or perceived as transgender reported leaving school because of mistreatment.[1930]

Discussion: We appreciate commenters' concerns for the diverse range of students covered under Title IX. We agree that the term "transgender" did not appear in the NPRM. Such an omission does not, in any way, indicate that a student's gender identity would cause them not to be

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[1930] *See* National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey* (Dec. 2016), http://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF.

protected from sex discrimination under Title IX. As more fully explained in the "Gender-based harassment" subsection of the "Sexual Harassment" subsection of the "Section 106.30 Definitions" section of this preamble, these final regulations focus on prohibited conduct, and anyone may experience sexual harassment as defined in § 106.30.

Changes: None.

Comments: One commenter asserted that one of the commenter's non-profit's clients has investigated over 650 cases since data tracking systems were developed in 2014 in response to a resolution agreement with OCR. Since that time, this K-12 district, which enrolls about 35,000 students in over 50 schools, has investigated and remediated an average of 33 complaints and 89 reports each year for the past four years. In the 2015-2016 school year, the district investigated and remediated 73 complaints and 126 reports of sexual and/or gender-based harassment. The same commenter asserted that recipients generally have poor or underdeveloped data management systems that result in the significant underreporting of the number of cases to Civil Rights Data Collection (CRDC) and other stakeholders. The commenter recommended that the Department increase the baseline estimate, as the commenter's data shows recipients investigate, on average, 3.5 cases per week.

This commenter asserted that the Centers for Disease Control and Prevention's (CDC's) Youth Risk Behavior Survey (YRBS) provides important context across a few key indicators.[1931] Based on the most recently available national data from 2017, the commenter asserted that the CDC estimates that over 11 percent of female students and 3.5 percent of male students reported

[1931] Commenter cited: Centers for Disease Control & Prevention, Division of Adolescent & School Health, *Youth Risk Behavior Survey Data Summary and Trends Report: 2007-2017* (2018).

being physically forced to have sexual intercourse.[1932] Across the recipients and States that participate in the YRBS, the indicators ranged from 7.5 percent to 15.3 percent for female students and from 2.5 percent to 16.1 percent for male students.[1933] While not a direct indicator of the number of incidents of forced sexual intercourse that result in a Title IX complaint or report, the commenter reported this data to show that the number of potential Title IX sexual assault cases are likely significantly higher than the current baseline estimate of 3.5 cases annually.[1934]

This commenter also cited the California Department of Health Services and California Department of Education's California Healthy Kids Survey (CHKS), which also provides contextual indicators. Statewide, about eight percent of students reported being bullied or harassed at school due to their gender at least once, and over four percent reported two or more instances of gender-based bullying or harassment.[1935] Applying the four percent rate to the entire population of public school K-12 students in California, which was 6,220,413 in the 2017-18 school year, the commenter argued that there are likely over 240,800 students who have been repeatedly bullied or harassed due to their gender in California. The commenter stated that the prevalence of gender-based harassment also ranges significantly by the race/ethnicity of survey respondents, from 6.1 percent among Asian students to 12.8 percent among Native Hawaiian/Pacific Islander students.

[1932] *Id*.
[1933] *Id*.
[1934] *Id*.
[1935] Commenter cited: Austin, G., Polik, *et al*., *School climate, substance use, and student well-being in California, 2015-17* (WestEd 2018).

Discussion: We recognize that, as with any diverse group of entities, there will be some level of variation. There will undoubtedly be LEAs that conduct more Title IX related investigations than average. In developing our assumptions, we did not intend to imply that the specific number we employed would apply to every recipient in every instance. Rather, we attempted to determine a reasonable average, based on the data available to us, of the effect across 15,505 LEAs nationwide. Further, while anecdotal evidence or data from the YRBS may be informative, it does not necessarily improve upon the systematic data reported by LEAs through the CRDC. Based on the commenter's statement, the LEA being described is one of the largest LEAs in the country, which would necessarily place them as an outlier and not particularly helpful to inform our analysis.

YRBS data do not represent all LEAs, and we have reason to believe that patterns in participation in YRBS may indicate problems with its external validity – that is, LEAs which participate in YRBS do not necessarily look the same as LEAs that do not participate and, therefore, the YRBS data may skew in important ways. Additionally, the prevalence of incidents of sexual harassment does not necessarily indicate the number of investigations that recipients perform. The YRBS data represents student self-reports on a confidential questionnaire, and it is very likely that a high number of the incidents that students may confidentially report as part of the study would never have been reported to a responsible employee of the recipient under the Department's 2001 Revised Guidance on Sexual Harassment and 2017 Q&A, which represents the baseline against which the Department promulgates these final regulations. If a responsible employee did not know or reasonably should not have known about the alleged sexual harassment, then the recipient would not have investigated the alleged sexual harassment under the 2001 Revised Guidance and 2017 Q&A. Therefore, the data from YRBS does not clearly or

predictably correlate with the number of investigations conducted by LEAs. Rather, a data collection reported by LEAs such as the CRDC is much more likely to capture the alleged incidents that recipients are required to investigate. Accordingly, the CRDC remains a better source to inform the baseline assumptions for these final regulations.

Changes: None.

Comments: One commenter asserted that the RIA's cost savings estimates ignore the obligations the Clery Act imposes on schools to respond appropriately to complaints involving stalking, dating violence, domestic violence, and sexual assault. The commenter stated that, at the same time, recipients also remain obligated by Title IX to respond appropriately to general sex discrimination claims. The commenter stated that the NPRM's purported cost savings are premised on the proposed rules' more narrow definition of sexual harassment and sexual assault, as well as the mandate that institutions dismiss cases without any investigation if the complaint fails to state an actionable claim.

One commenter asserted that the proposed regulations introduce potential for confusion as employees and administrative staff try to sort through which process to use in different circumstances. For example, if a student accused the student's spouse of both sexual assault and domestic violence not amounting to sexual harassment, the commenter requested clarification as to whether the institution would be compelled to bifurcate the investigation into one that complies with the Department's proposed formal complaint process and one that does not.

Discussion: We appreciate that the definition of sexual harassment in the proposed rules may have generated some confusion, particularly with regard to its omission of particular incidents otherwise covered under the Clery Act. Therefore, we have revised the definition of "sexual harassment" to include sexual assault, dating violence, domestic violence, and stalking as

defined in the Clery Act and VAWA, respectively, and have updated our estimates of the number of investigations to encompass the broader array of incidents that constitute sexual harassment under the final regulations. To do so, we used Clery Act data to identify a multiplier that could be used on our initial estimate to account for the new definition. Using 2017 Clery Act data, the Department found that there were approximately 1.416 reported incidents of dating violence, domestic violence, or stalking reported for every incident of sexual assault. We multiplied our estimated number of investigations per year in the NPRM by 2.416 to arrive at a new baseline of 5.70 investigations per institution of higher education per year.

Changes: We have revised the definition of "sexual harassment" under §106.30 and revised our estimate of the number of investigations occurring annually.

Comments: Many commenters asserted that the Clery Act and Title IX's general prohibition against sex discrimination will require schools to continue to investigate complaints involving stalking, dating violence, domestic violence, and sexual assault.

Discussion: We recognize that the distinction between incidents covered under the Clery Act and these final regulations may have generated some confusion. We have therefore amended the definition of "sexual harassment" to include sexual assault, dating violence, domestic violence, and stalking, as defined by the Clery Act and VAWA, respectively. A recipient's obligations, however, remain different under the Clery Act and Title IX. Under these final regulations, implementing Title IX, a recipient must conduct an investigation, which is part of the grievance process in § 106.45, after a formal complaint is filed by a complainant or signed by the Title IX Coordinator. A recipient's obligations under the Clery Act may be different, and the Department is not issuing regulations to implement the Clery Act through this notice-and-comment rulemaking.

Changes: We have amended the definition of "sexual harassment" in §106.30 to include sexual assault, dating violence, domestic violence, and stalking, as defined by the Clery Act and VAWA, respectively.

Comments: One commenter asserted that the Department significantly inflated the current number of Title IX investigations in order to inflate the "cost savings" of reducing these investigations. Another commenter stated that, to estimate the number of Title IX investigations at institutions of higher education, the Department relied on a 2014 Senate report that allowed institutions of higher education to report whether they had conducted "0," "1," "2-5," "6-10," or ">10" investigations of sexual violence in the previous five years.[1936] The commenter argued that the Department, without justification, rounded up for each of these categories. If a school reported that it had conducted "2-5" or ">10" investigations, the Department inputted "5" and "50," respectively, into its model, far higher than the medians of 3.5 and 30 investigations for those two categories. Elsewhere, the Department inexplicably assumed that there are twice as many "sexual harassment investigations" as there are "sexual misconduct investigations," without defining what these terms mean. Subsequently, the commenter argued that the "estimate" that each institution of higher education conducts 2.36 investigations per year is highly inflated.

Discussion: Regarding the Department's treatment and coding of the survey data available from the Senate subcommittee report, our analysis in the NPRM went into great detail regarding our

[1936] Claire McCaskill, S. Subcomm. on Financial Contracting Oversight – *Majority Staff, Sexual Violence on Campus, 113th Cong*. (2014).

rationales.[1937] In addition, we provided the public with information regarding the sensitivity of our analyses to these decisions.[1938]

While we understand that some commenters may have thought that our estimated number of Title IX investigations was inflated, we note that many others thought we underestimated the current number. In either case, our assumptions were made using the best data available and were not made in the hopes of reaching a particular conclusion with regards to the likely effects of the proposed rules. Further, our categorization and description of terms were intended to align with the definitions used in the proposed regulations. We note that "sexual assault" is a subpart of the definition of "sexual harassment," and we were attempting to distinguish between the two.

As a result of revisions to the proposed regulations, the Department has revised its analysis and concluded that these final regulations impose net costs.

Changes: None.

Comments: Several commenters at small universities stated that the proposed regulations incorrectly assume that the proposed regulations will produce a decrease in costs due to a decrease in the number of formal investigations schools must perform. Although the proposed regulations and final regulations would not require schools to investigate allegations of sexual harassment that occurred outside of a recipient's education program or activity or outside the United States, the commenters' student conduct codes would compel them to continue to investigate such incidents, even if outside the purview of Title IX, so the proposed regulations and these final regulations would result in a net increase of duties and tasks for those schools that

[1937] *See* 83 FR 61485.
[1938] *See* 83 FR 61485 fn. 18, 61489.

wish to investigate allegations of sexual harassment that occurred outside the recipient's education program or activity or outside the United States.

Discussion: We appreciate that, for a variety of reasons, some subset of postsecondary institutions and elementary and secondary schools may not experience any reduction in the number of investigations conducted annually. These recipients were included in analytical group 3 as discussed in the NPRM.[1939] Given that such effects were already accounted for in our initial analysis, we do not believe a change is necessary.

The Department has made revisions to its analysis based on the revisions to the proposed regulations. For example, the Department takes into account incidents that may occur in any building owned or controlled by a student organization that is officially recognized by a postsecondary institution as a result of changes to § 106.44(a), describing a recipient's education program or activity. The Department used Clery Act data that captures reports from geographic areas such as noncampus property to err on the side of caution because noncampus property as defined in 34 CFR 668.46(a) includes more than just buildings owned or controlled by a student organization that is officially recognized by a postsecondary institution.

In the NPRM, the Department assumed that a proportion of current investigations, equivalent to the proportion of total incidents reported under the Clery Act in the noncampus or public property geographies, would no longer require investigation under the proposed rules because of the scope of education program or activity under the proposed rules. The change in the final regulations would require some, but not all, incidents reported on noncampus property, as defined in 34 CFR 668.46(a), to be investigated by the recipient. While ideally the Department

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[1939] *See* 83 FR 61486.

would be able to subdivide the incidents reported under the noncampus geography to isolate those occurring in buildings owned or controlled by student organizations that are officially recognized by the institution, we do not have data with that granularity of detail. Rather than arbitrarily identify a percentage of incidents occurring in such locations, the Department is now assuming that the reduction in investigations due to their occurring outside of the education program or activity of a recipient is equivalent to the proportion of total incidents reported under the Clery Act that occurred on public property. This approach effectively assumes that recipients will continue to investigate formal complaints of all incidents occurring on noncampus property, as defined in 34 CFR 668.46(a), which includes but is not limited to off-campus buildings owned or controlled by a student organization that is officially recognized by a postsecondary institution.

Changes: The Department revised its analysis to include incidents that may occur in buildings owned or controlled by a student organization that is officially recognized by a postsecondary institution The Department has revised its estimate of the reduction in the number of investigations occurring under the final regulations. The Department now assumes that the number of investigations occurring each year will decrease from 5.70 to 3.82.

Comments: Several commenters noted that the NPRM referenced "administrative assistants" several times as additional personnel to whom Title IX Coordinators can delegate tasks, but the commenters asserted that most Title IX Coordinators, especially those at small institutions, do not have administrative assistants and a majority handle all of their administrative work on their own.

Discussion: We appreciate that many Title IX Coordinators may not have dedicated administrative assistants to accomplish tasks. However, our intention was to identify work that

was likely to be passed off to another employee of the organization, such as an administrative assistant or office administrator, whose typical work activities are more likely to include administrative tasks, such as reserving rooms, coordinating meeting times, recordkeeping, and sending and tracking correspondence. To the extent that such staff are not utilized, recipients may realize costs that are either higher or lower than those described herein. If Title IX Coordinators accomplish the work more efficiently than would be possible with the aid of an administrative assistant, recipients may experience lower costs. To the extent that it will take Title IX Coordinators the same amount of time to accomplish tasks as it would take an administrative assistant to do the same task, recipients are likely to see higher costs as a result of the higher wage rates assumed for Title IX Coordinators. We continue to believe that many of the tasks associated with coordinating the grievance process – including scheduling facilities, staff, and resources and ensuring all appropriate notices are provided to all parties in a timely manner – would most appropriately fall to an employee in a position such as an administrative assistant, and we continue to include these positions in our analysis.

Changes: None.

Comments: Multiple commenters asserted that the RIA's estimate for hourly costs of an attorney is too low. One commenter asserted that in the commenter's State, the average hourly rate for civil attorneys is between $250 and $325. Based on the Department's own estimate that a case would require 40 hours of attorney time for each party, and assuming that the parties qualified for the commenter's State bar's modest means program (which charges no more than $60, $80, or $100 per hour), parties would still be spending between $2,400 and $4,000. Another commenter stated that the Department provides no basis for this assumed rate for an attorney,

which is significantly lower than the average hourly rate of attorneys in the commenter's area.[1940]

Some commenters from small and rural colleges asserted that they lack in-house legal counsel and must hire outside counsel to assist when legal questions arise. Numerous commenters from several small universities stated that, while a larger institution might be able to employ a full-time attorney for the $90.71 hourly rate the proposed rules assumed, small institutions that retain attorneys on an *ad hoc* basis for a limited number of cases will likely pay a much higher rate. For example, one commenter's institution typically pays attorneys between $250 and $400 per hour, meaning that this institution's costs are likely to significantly exceed the Department's estimates. Another commenter at a small college asserted that the college typically retains attorneys for an amount averaging somewhere between $360 per hour and $530 per hour. Additional commenters from small institutions reported attorneys costing somewhere between $200 and $600 an hour. One commenter stated that, to calculate the cost of the proposed regulations, the average school attorney's rate in the commenter's State is about $300, which is much higher than the Department's estimate.

Discussion: We appreciate commenters' concerns and recognize that many attorneys may charge hourly rates for services in excess of those used in our estimates. However, as discussed on page 61486 of the NPRM, we are relying on data from the Bureau of Labor Statistics (BLS) and

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[1940] *See, e.g.*, Jay Reeves, *Top 10 Hourly Rates by City*, LAWYERS MUTUAL BYTE OF PREVENTION BLOG (Apr. 6, 2018), https://www.lawyersmutualnc.com/blog/top-10-lawyer-hourly-rates-by-city (listing lawyer rates by practice area ranging from $86/hour to $340/hour); Hugh A. Simons, *Read This Before You Set Your 2018 Billing Rates*, LAW JOURNAL NEWSLETTERS (Nov. 2017), http://www.lawjournalnewsletters.com/2017/11/01/read-this-before-you-set-your-2018-billing-rates/ (indicating first year associates cost their employers approximately $111/hour).

utilized the median hourly wage rate for attorneys in the education sector. It is our general practice to use wage rates available from BLS for these types of estimates.

Changes: None.

Comments: One commenter, speaking for a community college that serves as the largest institution of higher education in the commenter's State, asserted that the Department's citation of Angela F. Amar *et al.*, *Administrators' perceptions of college campus protocols, response, and student prevention efforts for sexual assault*, 29 VIOLENCE & VICTIMS 579 (2014), is problematic because it assumes that hearing boards are commonplace at institutions of higher education. The commenter's review of the above article showed that 51 percent of respondents to the research study were from four-year private colleges and 38 percent were from four-year public colleges. The commenter asserted that the underlying assumptions cited by the Department on how colleges respond to conduct cases is skewed toward four-year, primarily residential institutions and did not take into account the context in which many community colleges operate. The commenter asserted that the proposed regulations will require schools to create a hearing system for a small subset of cases, which will impose administrative and financial burdens as boards must be created from scratch, trained on the legal nuances of sexual harassment and discrimination, and would respond to a small portion of conduct cases.

Discussion: We appreciate the commenter's input and did not intend, by citation to a particular source, to indicate that the proposed regulations or our analysis were only pertinent to, or only considered, four-year institutions. The purpose of that particular citation was to help inform our understanding of the status quo. Our analysis assumed that 60 percent of IHEs use the Title IX Coordinator as the decision-maker in their current enforcement structure.

We believe that assumption readily comports with the commenter's concern about community colleges that may not have formal hearing boards or independent decision-makers currently in place. We recognize that at least some subset of institutions will have to create new processes to comply with the final regulations, and our initial estimates took this into account. Specifically, we note that our estimates include development or revision of grievance procedures and include training for Title IX Coordinators, investigators, decision-makers, or any person designated by a recipient to facilitate an informal resolution process. We believe that these estimates capture the concerns raised by the commenter.

Changes: None.

Comments: Several commenters also disputed the RIA's estimate that an IHE will perform 2.36 investigations each year. At the University of Iowa, according to the Office of Sexual Misconduct Response Coordinator 2017 annual report, 444 reports were taken and 58 investigations were completed in one year.[1941] One commenter asked how the RIA sets the estimated average at 2.36 investigations of sexual harassment for each IHE per year, when statistics show sexual harassment and assault occurs much more often. One commenter reported that, according to the National Sexual Violence Resource Center, one in five women and one in 16 men are sexually assaulted while in college and more than 90 percent of sexual assault victims on college campuses do not report the assault.[1942] Another commenter disagreed with the

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[1941] *See* University of Iowa Office of the Sexual Misconduct Response Coordinator, "Report Resolution and Outcomes," https://osmrc.uiowa.edu/about-us/2017-annual-report/osmrc-case-and-outcome-data/report-resolution-and-outcomes.

[1942] National Sexual Violence Resource Center, *Info and Stats for Journalists: Statistics About Sexual Violence* 2 (2015), https://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_statistics-about-sexual-violence_0.pdf.

Department's calculation of 2.36 investigations of sexual harassment per year, as most four-year institutions have well over 2.36 investigations each year.

Discussion: As noted elsewhere, we are very aware that a subset of the nation's largest IHEs will annually conduct more investigations than the average IHE. Such an outcome is assumed in any distribution. We clearly described in the NPRM our process for arriving at the estimated number of investigations occurring per year.[1943] However, we have, for other reasons described elsewhere in these final regulations, revised our estimated number of investigations occurring per year.

Changes: None.

Comments: One commenter asserted that, while the Department assumes an approximate reduction of 0.18 of the number of IHE investigations by disregarding off-campus sexual harassment, the Department fails to allocate time for the investigation that would need to occur for the jurisdictional analysis to establish where the incident occurs.

Discussion: As explained earlier in the RIA, these final regulations do not categorically exclude allegations of sexual harassment that occur off campus. Recipients must respond to any allegations of sexual harassment in their education program or activity, whether the alleged sexual harassment occurs on campus or off campus.[1944] We agree that, in some instances, recipients may need to expend resources to determine whether a particular incident occurred outside of the recipient's education program or activity. We have added time for Title IX

[1943] 83 FR 61485-88.

[1944] *See, e.g.*, the discussion in "Section 106.44(a) 'education program or activity'" subsection in "Section 106.44 Recipient's Response to Sexual Harassment Generally" section.

Coordinators and investigators to engage in such an analysis in approximately 50 percent of incidents.

Changes: We have added a new cost category designed to capture the efforts of recipients to determine whether a particular incident occurred in a recipient's education program or activity.

Data Sources

Comments: Several commenters argued that Clery Act data inaccurately reflects the number of investigations because it only tracks on-campus conduct, and, as a result, should not be used to estimate the general rate of investigations per reported sexual offense at four-year IHEs. Commenters pointed out that many cases that lead to investigations involve off-campus behavior. Numerous commenters also noted that Clery data fails to include instances of sexual harassment and discrimination.

One commenter asserted that, while Clery Act data is an important resource, any user must seriously consider the limitations of that data source. The commenter stated that the American Association of University Women (AAUW) has investigated underreporting related to the Clery Act and concluded that reported campus safety and crime statistics reflect the fact that "some schools have built the necessary systems to . . . disclose accurate statistics – and others have not."[1945] The commenter cited other studies of Clery Act data and educational institutions

[1945] *See, e.g.*, American Association of University Women, *89 Percent of Colleges Reported Zero Incidents of Rape in 2015* (May 10, 2017), https://www.aauw.org/article/clery-act-data-analysis-2017/; American Association of University Women, *91 Percent of Colleges Reported Zero Incidents of Rape in 2014* (Nov. 23, 2015), https://www.aauw.org/article/clery-act-data-analysis/.

that have identified similar concerns about underreporting, overreporting, and misreporting of data around sexual assault.[1946]

On the LEA level, commenters reported that the Department is even less clear about its calculations, simply stating that it "assumes that only 50 percent of the incidents reported in the CRDC would result in a formal complaint, for a reduction in the number of investigations of 1.62 per year." The commenter asserted that the basis of the Department's assumption regarding formal complaints is not provided. The commenter argued that, while the CRDC provides another important source of data for the public, it is also limited by the quality of data it imports.[1947] Other commenters stated that inaccurate data is particularly a problem with the sexual harassment reports, on which the proposed regulations so heavily rely. Commenters reported that the AAUW has analyzed the CRDC sexual harassment data and determined that many school districts were simply reporting no incidents rather than collecting and reporting the true numbers of cases of sexual harassment that were reported or resulted in discipline. These commenters argued that to rely on such datasets to enact sweeping changes to Title IX law means that the projected costs are not being conducted in a rigorous or high-quality manner and are likely to be inaccurate.[1948]

[1946] *See, e.g.*, California State Auditor, *Clery Act Requirements and Crime Reporting: Compliance Continues to Challenge California's Colleges and Universities*, Report 2017-032 (May 2018); National Academies of Sciences, Engineering, and Medicine, *Innovations in Federal Statistics: Combining Data Sources While Protecting Privacy* 44 (2017) ("the data on sexual violence reported by many institutions in response to the [Clery] act's requirements is of questionable quality").

[1947] *See, e.g.*, Evie Blad, *How Bad Data from One District Skewed National Rankings on Chronic Absenteeism*, EDUCATION WEEK (Jan. 9, 2019), http://blogs.edweek.org/edweek/rulesforengagement/2019/01/chronic_absenteeism.html.

[1948] *See, e.g.*, American Association of University Women, *Three-Fourths of Schools Report Zero Incidents of Sexual Harassment in Grades 7-12* (Oct. 24, 2017), https://www.aauw.org/article/schools-report-zero-incidents-of-

One commenter asserted that the Department must seek to adopt the same attitude and standard as the Equal Employment Opportunity Commission Task Force on the study of harassment in the workplace, which issued a report in 2016 that explicitly acknowledged the dearth of data as it related to workplace harassment and did not accept data at face value, instead acknowledging that not all claims will be represented in available datasets given rampant underreporting and systemic data collection challenges. The commenter requested that the Department halts its rulemaking while it revisits its cost calculations, reviews the accuracy of the Clery Act and CRDC data on which its calculations rely, and makes its underlying calculations available to the public.

One commenter contended that the Department relies on unreliable estimates of the number of reported sexual assaults to gauge the number of sexual assault investigations per year. The commenter admits that the Department is limited by a dearth of reliable evidence but asserts that the Department's projections likely underestimate the average number of investigations universities perform each year. The same commenter asserted that, since many of the other costs are computed based on this average number of investigations, a gross underestimate of the number of investigations would have a large effect on the overall cost-savings analysis, suggesting lower costs of implementation than is true.

Discussion: As an initial matter, it is important to note that the Department clearly identified data limitations in the NPRM and requested that members of the public identify any comprehensive

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sexual-harassment/; Lisa Maatz, American Association of University Women, *Why Are So Many Schools Not Reporting Sexual Harassment and Bullying Allegations?*, THE HUFFINGTON POST (October 24, 2016), https://www.huffingtonpost.com/lisa-maatz/why-are-so-many-schoolsn_b_12626620.html; American Association of University Women, *Two-Thirds of Public Schools Reported Zero Incidents of Sexual Harassment in 2013-14* (July 12, 2016), https://www.aauw.org/article/schools-report-zero-sexual-harassment/.

data sources which might improve our estimates. We also should note that Clery Act data was not used as the primary basis for our assessment of the number of investigations currently being conducted per year. Rather, the data was used to help provide context to the calculations derived from the Senate subcommittee report.[1949] Regarding the CRDC data, we equally recognized and acknowledged data quality issues, but in the absence of higher quality comprehensive data, we opted to rely upon the information we had. We also explained our rationale for how we coded the survey data at great length in the NPRM and provided alternative estimates in the Sensitivity Analysis section of the NPRM to more clearly highlight for the public the impact of these assumptions on the results of our analysis. While we recognize that outliers exist in the universe of recipients, our assumptions were intended to capture the overall average. We have made other changes to our assumptions as described elsewhere to attempt to address some of the commenters' concerns regarding potential underestimation of implementation costs. Indeed, as a result of revisions to the proposed regulations, the Department has determined that these final regulations are economically significant and impose net costs.

Changes: None.

Comments: Another commenter asked why the Department failed to consult the large and robust body of research produced through the academic, peer-review research process that is the hallmark of the research enterprise.

[1949] *See* 83 FR 61485.

Discussion: The Department consulted relevant research studies in developing cost estimates as evidenced by the citations included in the NPRM.[1950]

Changes: None.

Other

Comments: One commenter contended that the proposed regulations would reduce the number of sexual harassment and sexual assault investigations and, thus, would enable more sexual assaulters to pass background checks and become employed in Federal agencies. The commenter asserted that, pursuant to Executive Order 12866, to make a reliable estimate of the potential costs to Federal agencies, the Department would need to conduct a review of the U.S. Office of Personnel Management background investigations to determine how many allegations of incidences of sexual harassment and assault were discovered through contact with record providers at IHEs and LEAs, and, of those, determine how many would not have been required to be investigated under the proposed regulations. The commenter argued that hiring individuals with a history of sexual assault would be dangerous for Federal workers as well as the public, and criminology literature shows that college-student rapists commonly repeat their offenses against more victims over time.

Discussion: We decline to conduct the analysis suggested by the commenter. We are uncertain that such an analysis could be effectively and efficiently conducted. Even if it could, we are

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[1950] *E.g.,* Jacquelyn D. Wiersma-Mosley & James DiLoreto, *The Role of Title IX Coordinators on College and University Campuses*, 8 BEHAV. SCI. 4, 5-6 (2018), https://www mdpi.com/2076-328X/8/4/38/htm (click on "Full-Text PDF") (page references herein are to this PDF version); Tara N. Richards, *An updated review of institutions of higher education's responses to sexual assault: Results from a nationally representative sample*, 34 JOURNAL OF INTERPERSONAL VIOLENCE 1, 11-12 (2016); Heather M. Karjane *et al.*, *Campus Sexual Assault: How America's Institutions of Higher Education Respond* 62-94, Final Report, NIJ Grant # 1999-WA-VX-0008 (Education Development Center, Inc. 2002); Angela F. Amar *et al.*, *Administrators' perceptions of college campus protocols, response, and student prevention efforts for sexual assault*, 29 VIOLENCE & VICTIMS 579 (2014).

uncertain of its value in completing our analysis. It is unclear how the commenter would expect us to incorporate the results of this review into our estimates. Moreover, the definition of "sexual harassment" in § 106.30 of these final regulations includes sexual assault as defined in the Clery Act, and these final regulations require recipients to respond to allegations of sexual assault pursuant to § 106.44(a).

Changes: None.

Comments: One institution suggested that the Department consider creating a lighter set of procedural requirements to lessen the burden on small schools by allowing schools to apply less strict requirements, if the school has a student body with fewer than 3,000 students and formally investigates fewer than ten Title IX complaints in a year.

Discussion: We appreciate the suggestion but decline to set different standards for small entities. We believe that students at all schools are entitled to reliable determinations regarding responsibility under Title IX and that such determinations should be made in a manner that is consistent with constitutional due process and fundamental fairness. We do not believe that requiring a fair, reliable grievance process for students at small entities creates an unnecessary burden for small schools.

Changes: None.

Comments: One commenter asserted that the proposed regulations should not be exempt from Executive Order 13771, as the cost savings are inaccurate and exaggerated. Therefore, the commenter suggested that the Department should identify two deregulatory actions for each additional regulation added herein, keeping in mind that a review of the plain language of the requirements reveals nearly 50 new regulatory obligations.

Discussion: As a result of revisions to the proposed regulations and other changes, the Department has revised its analysis and has determined that these final regulations are economically significant under Executive Order 12866 and impose net costs under Executive Order 13771. In accordance with Executive Order 13771, the Department will identify two deregulatory actions.

Changes: The Department has revised its analysis and has determined that these final regulations are economically significant and impose net costs.

Comments: One commenter asserted that the RIA failed to clarify that each of the LEA recipient organizations covered by Title IX include many individual public schools and that each school should have a Title IX Coordinator to meet the demands of the proposed regulations. The commenter expressed concern that hiring a Title IX Coordinator for each school in an LEA would be cost prohibitive. One commenter stated that LEAs should also have Title IX Coordinators, and they should have responsibility for helping to train and assist school-level Title IX Coordinators. The commenter asserted the fact that the RIA provided no numbers of schools in LEAs is confusing.

Discussion: We agree that hiring a new staff member to serve as a Title IX Coordinator for each school in the country would generate extremely large expenses above and beyond those estimated in the proposed or final regulations. The final regulations, however, do not require such action. The final regulations do not require that a Title IX Coordinator be a newly hired individual, only that a recipient designate and authorize at least one employee to serve as the Title IX Coordinator.[1951] We do not believe it is likely that recipients will opt to comply with this

[1951] Section 106.8(a).

requirement in the final regulations by hiring an additional staff member whose sole role is to serve as the Title IX Coordinator, given that 34 CFR 106.8 already requires the designation of a responsible employee. Additionally, individual elementary and secondary schools are generally not recipients as defined in the final regulations pursuant to §106.30; they are operational units of the recipient entity, which is the local education agency. These final regulations do not require each operating component of each recipient to independently designate and authorize a Title IX Coordinator. Instead, the LEA is the recipient and would therefore be responsible for designating and authorizing an employee to serve as the Title IX Coordinator.

Changes: None.

Comments: Several commenters asserted that the RIA's estimate that the Title IX Coordinator can review and revise their regulations, in an average time of eight hours, is not tenable because changes to policy and procedures at institutions of higher education require broad consultation and participation of stakeholders across the institution, including but not limited to students, faculty, student affairs staff, academic affairs staff, human resources professionals, senior staff members, and even trustees. Multiple commenters stated that policy changes demand significant time and prescribed processes for approval, adoption, and ratification at the institutional and system level, resulting in the need for substantial human and financial resources to make those changes. One commenter estimated that, at the commenter's institution, changing their policies and procedures would take about two to six months, because changing a policy means involving a board of trustees, the president, a direct supervisor, faculty governance, and receiving student feedback.

Discussion: We recognize that the process for drafting and approving new policies and procedures can vary widely across recipients. We recognize that the estimate of two to six

months provided by the commenter encompasses the overall process and does not represent two to six months of full-time, active work. Therefore, we have revised our estimates of the average amount of time needed by recipients to revise their grievance procedures and have added additional time for administrators to review and approve the final policies and procedures. At the LEA level, we now assume this process will take six hours from the Title IX Coordinator and 24 hours from an attorney. We also assume two hours from an administrator to review and approve the policies. At the IHE level, we assume this process will take 12 hours from the Title IX Coordinator and 48 hours from an attorney. We have also added four hours for an administrator to review and approve the policies. For other entities, we assume the process will take four hours for a Title IX Coordinator, 16 hours from an attorney, and two hours from an administrator.

Changes: We have revised our estimates of the amount of time necessary for recipients to revise their policies and grievance procedures and added time for review and approval of the policies and procedures by administrators.

Comments: Several commenters asserted that the proposed regulations represent a dramatic increase in the cost of administering Title IX, since most Title IX Coordinators at small institutions are smaller roles, often comprising of one of several “hats” a single administrator will wear. One commenter asserted that the proposed regulations would require schools to increase the amount of time spent on each investigation, despite a reduction in formal investigations. Several commenters asserted that under the proposed regulations, many small institutions would be required to employ a dedicated Title IX Coordinator, a separate investigator, and a separate decision-maker, all of whom will need mandatory Title IX training. Additionally, commenters stated that the school will need to provide a mediator to facilitate the informal, mediated resolution, and hearing advisors to both parties if they do not provide one for

themselves. According to comments, under this rubric, small institutions would be required to retain up to six individuals to handle a small number of formal investigations. One commenter stated that, according to a 2018 study, "most Title IX Coordinators were in part-time positions with less than three years of experience."[1952]

Discussion: We have considered the overall impact of these final regulations and, as discussed herein, we believe that the average recipient will see a net decrease in burden under these final regulations and that any increase in time spent by recipients on any individual investigation will be more than offset by the fewer number of investigations. Particularly for smaller entities, we do not believe that the workload for a Title IX Coordinator would necessitate the hiring of a dedicated staff member. While recipients may choose to hire a dedicated staff member as the Title IX Coordinator, we do not believe that in most instances, such an approach would be warranted solely as a result of these final regulations. For example, although the investigator may not be the same person as the decision-maker under § 106.45(b)(7)(i), these final regulations do not preclude the Title IX Coordinator from also serving as the recipient's investigator as long as the Title IX Coordinator does not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent under § 106.45(b)(1)(iii). The same holds true for the other positions described by the commenters. These final regulations do not require a recipient to provide an informal resolution process pursuant to § 106.45(b)(9) and do not preclude the Title IX Coordinator from serving as the person designated by a recipient to facilitate an informal resolution process.

[1952] Jacquelyn D. Wiersma-Mosley & James DiLoreto, *The Role of Title IX Coordinators on College and University Campuses*, 8 BEHAV. SCI. 4 (2018), https://www.mdpi.com/2076-328X/8/4/38/htm (click on "Full-Text PDF") (page references herein are to this PDF version).

The Department acknowledges that many recipients will designate a person other than the Title IX Coordinator to facilitate an informal resolution process and that § 106.45(b)(1)(iii) requires that a recipient to train any person designated by the recipient to facilitate an informal resolution process. Accordingly, the Department adjusts its cost estimates to include the training of the person designated by the recipient to facilitate an informal resolution process and other costs associated with an informal resolution process.

Changes: The Department adjusts its cost estimates to include the training of the person designated by the recipient to facilitate an informal resolution process and other costs associated with an informal resolution process.

Section 106.44(a) Supportive Measures

Comments: Multiple commenters asserted that coordinating supportive measures for complainants, while also accommodating the respondent due to the presumption of innocence, will be time-consuming and costly for schools. One commenter asserted that, if the respondent is found responsible and suspended or expelled, the conflict is removed, which removes the need, and cost, for staff to coordinate additional supportive measures for complainants. The commenter expressed concern that the proposed regulations would require schools to divert additional resources towards supportive measures, including no-contact orders, scheduling checks to ensure students will not cross paths, working with the Registrar's Office and the complainant to switch classes, and making other academic accommodations for multiple semesters, for perhaps multiple years. One commenter reported that providing supportive measures to a student takes one to two hours per semester for each student, for an active caseload of 30 to 40 students per year. At most, the staff member spends two full working weeks at the beginning of each semester coordinating supportive measures by making calls to set up accommodations and checking for

potential conflicts. The commenter projects the tangible financial costs of this work on supportive measures to be about six weeks of the commenter's yearly salary.

Numerous commenters noted that the RIA failed to estimate the costs of providing additional supportive measures, despite the NPRM acknowledging that the proposed rules encouraged recipients to direct complainants towards services that qualify as supportive measures. These commenters also asserted that increasing campus escort services and other security services will require additional staff hires and working hours. One commenter argued that the NPRM's assumption that counseling services are already largely offered for free to students is not accurate, as many students are still responsible for co-pays for mental health services and not all students have health insurance. The commenter cited a news article which reported that, as of 2016, 8.7 percent of all students or 1.7 million individuals remained uninsured.

Discussion: We disagree with commenters that we failed to account for supportive measures in the NPRM. We discussed at great length the complexities of accurately capturing the full range of costs associated with the proposed requirement, solicited specific feedback from the general public, and estimated time burdens for several staff.[1953] We appreciate the commenter who asserted that the provision of supportive measures takes approximately one to two hours per semester per student given that our initial estimates assumed three hours per year per student. Further, we appreciate that the commenter provided a potential upper bound for our estimates – two working days per semester for a caseload of 30 students or approximately two hours per student per year at the beginning of the semester. We recognize that Title IX Coordinators,

[1953] *See* 83 FR 61487.

coordinating the provision of supportive measures for larger numbers of students, will have greater time burdens than those serving fewer students and, therefore, our estimates are intended to capture the average burden across all students and recipients. We are unclear on the specific concern raised by the commenter regarding the provision of supportive measures after a respondent is removed from campus, but we note that our assumptions regarding the provision of supportive measures is not related to the outcome of the grievance process. Regarding the costs of the supportive measures themselves, we note that we did not receive estimates from the public for us to consider. We note that a large number of supportive measures likely to be offered by recipients such as changing class assignments or allowing a complainant to have more time to complete an assignment or to take a test would have little to no cost for the recipient. Other supportive measures, which may be offered less frequently (for example, providing campus security escorts), would necessarily have much higher average costs.

Without information from the public on an appropriate cost, we have opted, in these final estimates, to include an average cost of $250 per provision of supportive measures to reflect the cost to recipients to provide the services. We recognize that, in many instances, this will represent an overestimate of the actual costs borne by recipients and that, in a smaller number of instances, it will represent an underestimate. To provide greater clarity to the public regarding the impact of this assumption on our final cost estimates, we calculated three alternative models, in addition to the mainline estimate, to assess the sensitivity of our analysis to this assumption.

TABLE VI. SENSITIVITY ANALYSIS OF COSTS OF SUPPORTIVE MEASURES

Estimated cost of supportive measures	$100	$250	$1000
Estimated total cost of final regulations	($708,607)	$82,953,995	$501,267,005

Changes: The Department has included a cost of $250 for supportive measures.

Section 106.45(b)(1)(iii) Title IX Coordinators, Investigators, and Decision-makers must be Properly Trained

Comments: Many commenters raised the issue that ending the single investigator model would result in burdensome compliance costs on schools. Commenters emphasized that the NPRM would require schools to hire and train multiple individuals to fill different roles, thus increasing compliance costs. Commenters argued that this would be especially burdensome for smaller community colleges and rural schools with fewer resources and available staff. The NPRM would potentially require recipients to hire and train six people, including a Title IX Coordinator, an investigator, a decision-maker, two party advisors, and an appeals decision-maker.

Commenters noted that schools are not courts of law, and yet training costs would be significant under the NPRM, such as legal training for decision-makers on conducting quasi-judicial proceedings, ruling on objections, and managing attorneys. Schools would have to meet these costs even if they rarely have Title IX complaints and investigations. Staff at many schools necessarily wear multiple hats and perform multiple functions, and conducting simultaneous Title IX investigations could be impossible under the proposed regulations. Further, commenters argued that it is already challenging for recipients to find adequate talent and hiring staff with sufficient expertise in these roles. These commenters asserted the increased litigation risk as a

result of the proposed regulations would discourage people from serving in these roles. One commenter suggested the NPRM would likely require recipients to spend about $400,000 on salary to manage Title IX cases, which undermines the Department's contention that the proposed regulations would save recipients money. One commenter asserted that the compliance burden is especially heavy given the uncertain future funding of IHEs and skepticism of higher education at the State level. Commenters argued that the Department should not impose regulations that require additional staffing and resources without providing the necessary funding, and many institutions may have no choice but to pass along these substantial costs to students.

Discussion: We appreciate the commenters' concerns and agree that the practical effects of proposed regulations on regulated entities should be a primary concern when engaging in rulemaking. As explained throughout this preamble, we believe that the costs and burdens on regulated entities serve the important purpose of furthering Title IX's non-discrimination mandate. We note that, while it is possible that recipients could respond to these final regulations by hiring additional staff, we believe commenters overstate both the likelihood and the magnitude of such a response.

Generally, we believe that the actual regulatory requirements for Title IX Coordinators, investigators, advisors, and decision-makers are flexible and the change in the necessary time commitments at the average recipient entity are so negligible that it is highly unlikely that these final regulations would result in a critical need for more staffing at recipient entities. Recipients are already required to designate a responsible employee under 34 CFR 106.8(a), which is essentially the same person as the Title IX Coordinator in these final regulations, so it is unclear that these final regulations will necessitate hiring an additional staff member to fulfill a role

already fulfilled by another employee. Regarding investigators, it is unclear why that role could not be fulfilled by an individual already conducting other investigations on behalf of the recipient, and as previously stated, these final regulations do not preclude the Title IX Coordinator from also serving as the recipient's investigator. Although the commenters specifically noted hiring attorneys, we believe they are referring to the requirements, under §106.45(b)(6)(i), relating to providing certain parties with advisors for the purposes of conducting cross-examination during live hearings. We note that § 106.45(b)(6)(i) does not require those advisors to be attorneys, nor does it require them to have any specialized legal training. Further, given that recipients are only required to provide advisors in the event that a party does not have an advisor of choice present at the live hearing, we think the number of instances in which such recipients would provide such advisors would be so minimal that institutions would be highly unlikely to hire two additional, highly paid staff to fulfill those roles. Instead, we think that most recipients have administrative and other staff who may serve as an assigned advisor to a party in those instances where a postsecondary institution is required to hold a live hearing and one or both parties appear at the live hearing without the party's own advisor of choice. Finally, with regard to decision-makers, the requirements in the final regulations are flexible enough that it is unclear why an individual already serving in a decision-making capacity would be unable to fill such a role.

We note that recipients may opt to provide additional training to Title IX Coordinators, investigators, decision-makers, and any person designated by a recipient to facilitate an informal resolution process about their roles and how to execute them effectively. As such, we have revised our estimates related to the training of staff.

Regarding the alternative estimate relating to the salary burden on recipients to comply with these final regulations, we disagree. It would be inappropriate to assume such a high burden would be undertaken by the average recipient given the relative cost and time commitments. We note that, based on wage rate data from BLS, hiring a full-time Title IX Coordinator, an investigator, and a decision-maker would cost, on average, less than $325,000 per year. Not including the burden reductions associated with fewer Title IX investigations under these final regulations, we estimate the hour burden across these three roles to be less than 400 hours per year on average, or about six percent of the three full-time equivalents (FTEs).

The Department recognizes that all recipients face a degree of uncertainty in their future funding, and we believe that regulatory actions that reduce costs for recipients, such as these final regulations, provide much needed flexibility for recipients in responding to that uncertainty and help to minimize the financial burden passed onto students.

Changes: We have increased the amount of time estimated for training of Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process from 4 hours to 8 hours and have added additional training in each subsequent year.

Comments: Several commenters asserted the Department's estimate that Title IX Coordinators, investigators, and decision-makers would need only 16 hours of training is unrealistic. Numerous commenters also noted that the RIA's assumption that institutions will only be training one person for each role with respect to the Title IX Coordinator, investigator, and decision-maker is unrealistic for large universities. Additionally, several commenters stated that the NPRM failed to account for the costs associated with retraining members of the campus community who are no longer mandatory reporters because they would not be "responsible employees" or employees who are required to respond to allegations of sexual harassment under the proposed regulations.

Several commenters asserted that the RIA significantly underestimated the amount of time and resources small institutions would need to appropriately train Title IX Coordinators, investigators, and adjudicators. One commenter asserted that the Department projected these trainings as "one time" but neglected to consider the significant ongoing cost of training new staff members as a result of employment attrition and ensuring that all participants in the process have substantive ongoing training and preparation to ensure that their competency reflects the most up-to-date practices.

Discussion: We appreciate that our estimates of training may have been too low. As a result, we have increased our estimates of the time associated with training staff to eight hours for Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. We have also added training for 50 percent of personnel each year to account for turnover in staff or training of additional staff. We do not believe it is reasonable to include retraining for all staff of all recipients to ensure that they are aware that they are not considered "responsible employees" or employees to whom notice of sexual harassment or allegations of sexual harassment conveys actual knowledge to the recipient under the final regulations. We believe that such a purpose could be just as easily achieved by a distribution of the recipient's policies. Further, these final regulations charge an LEA with actual knowledge (and thus obligations to respond to sexual harassment) whenever any employee has notice of sexual harassment, so LEAs that already train nearly all their employees to be "responsible employees" likely will not alter that training under these final regulations, and for IHEs, these final regulations leave each institution flexibility to decide whether the institution desires all (or nearly all, or some subset) of its employees to be "mandatory reporters" who must report notice of

sexual harassment to the Title IX Coordinator. Accordingly, not all IHEs will modify their current policies regarding which employees are considered "responsible employees."

Changes: We have increased the duration and frequency of training activities for Title IX Coordinators, investigators, decision-makers, and any person designated by a recipient to facilitate an informal resolution process. We now assume eight hours of training for each staff member with additional training each subsequent year.

Comments: One commenter asserted that even if K-12 school districts could hire an adequate number of individuals to train, the cost of training and the ability to spare the time for that training is burdensome.

Another commenter stated that the RIA failed to acknowledge the costs that K-12 schools will need to spend to train their Title IX Coordinators. The same commenter also stated that the calculations do not appear to consider the amount of time employees will have to spend scheduling sessions to make information available, going back and forth about follow-up questions, additional travel time, etc. The commenter contended that these calculations do not appear to consider the overall burden this activity will place on already over-extended school personnel.

Discussion: As noted elsewhere, we have revised our estimates to include additional time for training Title IX Coordinators, investigators, decision-makers, and any person designated by a recipient to facilitate an informal resolution process. We are unclear why an LEA would be required under these final regulations to hire multiple staff members to conduct training. Further, it appears that the commenter is assuming the training of multiple Title IX Coordinators within LEAs. While recipients may identify individuals at each school to support Title IX compliance efforts, they are not required to do so under the final regulations, which require each recipient to

designate and authorize "at least one" employee to serve as a Title IX Coordinator pursuant to § 106.8(a). Section 106.30 defines an elementary and secondary school as an LEA, a preschool, or a private elementary or secondary school. Furthermore, the final regulations do not require training to be conducted in-person such that travel to and from training sessions is required; the final regulations also do not preclude training of Title IX Coordinators to be conducted online or virtually. To the extent that LEAs opted to provide training for school-level staff, we believe it is most likely that such trainings would be included in or replace existing training offered by the LEA and therefore the effects associated with the final regulations would be *de minimis*.

Changes: We have revised our estimates to include additional time for training Title IX Coordinators, investigators, decision-makers, and any person designated by a recipient to facilitate an informal resolution process.

Section 106.45(b)(5) Investigation of Formal Complaints

Comments: Some commenters expressed concern about the financial and administrative cost the proposed regulations will impose on recipients. Commenters contend that recipients are better equipped to conduct grievance procedures without outside advisors, and that allowing parties to have advisors will subject recipients to more litigation. Other commenters argued that training advisors, implementing evidentiary rules, and conducting campus procedures like a courtroom would be too costly for many recipients, especially K-12 institutions.

Discussion: We appreciate commenters' concerns, but we do not believe that allowing parties to have advisors will necessarily subject recipients to a greater litigation risk. We believe the final regulations clearly establish the expectations for recipients in a manner that is consistent with constitutional due process for misconduct proceedings, and, in so doing, may actually reduce undue litigation risk. We also note that we have, to the maximum extent possible, calculated the

likely costs of complying with these final regulations and believe that while many recipients will experience net costs, and the final regulations overall impose estimated net costs, the benefits of predictably, transparently protecting every student's civil rights under Title IX in a manner consistent with constitutional rights, outweigh the costs of compliance.

Changes: None.

Comments: Multiple commenters also noted that it would be expensive for universities to provide technology for parties to review the investigative report and other evidence that does not allow the parties to print or otherwise share the evidence with others. Several commenters asserted that, under the proposed regulations, small schools will have to bear the significant costs of electronic file-sharing platforms for making evidence available to parties and advisors. According to comments, services that provide these types of systems can add thousands of extra dollars to administrative systems on an annual basis.

Discussion: We agree that the proposed regulations may have proved confusing with respect to the requirement for recipients to provide the evidence to the parties in an electronic format for inspection and review. The proposed regulations allowed but did not require recipients to use a file-sharing platform, and the Department omits the reference to the file-sharing platform in these final regulations to alleviate any confusion. The Department revised § 106.45(b)(5)(vi) to state that recipients may provide the evidence to the parties in an electronic format or a hard copy.

Changes: We have revised § 106.45(b)(5)(vi) to state that recipients may provide the evidence to the parties in an electronic format or a hard copy for inspection and review.

Comments: One commenter asserted the requirement in the proposed regulations that the Title IX Coordinator must give the parties ten days to inspect and review evidence in § 106.45(b)(5)(vi), and another ten days to respond to the investigative report in §

106.45(b)(5)(vii), would result in a significant drain on resources and would draw out the processing time of every investigation. The commenter claimed that these two ten-day requirements would especially increase the administrative burden on small institutions.

Discussion: The Department is not convinced by the commenter's argument that these two ten-day periods would result in any delays in processing a formal complaint. These two ten-day periods allow both parties to inspect and review the evidence that may support or not support the allegations and also to review and respond to the investigative report. Each recipient may choose whether to give the parties ten calendar days or ten business days, and recipients retain discretion in this regard. It is not clear from the comment why providing parties adequate time to inspect and review the evidence and to review and respond to the investigation report would create a unique administrative burden for small entities.

Changes: None.

Section 106.45(b)(6) Hearings

Comments: Several commenters noted that the NPRM's requirement for live hearings with cross-examination would pose a significant cost to respondents who must hire an advisor competent at cross-examination, which will most likely be an attorney.

Discussion: We believe it is important to note that neither complainants nor respondents are required to hire advisors, and the final regulations expressly state that a party's advisor of choice may be, but need not be, an attorney. If a party does not have an advisor to conduct cross-examination on behalf of that party, it is incumbent upon a postsecondary institution to provide an advisor for that party at a live hearing under § 106.45(b)(6)(i) for the limited purpose of conducting cross-examination on behalf of the party who does not bring an advisor of choice to the hearing. Section 106.45(b)(6)(i) expressly states that such an advisor provided by the

recipient does not need to be an attorney. There are no requirements that advisors (whether a party's advisor of choice or a recipient-provided advisor at a live hearing) have any specialized training. People other than attorneys may conduct cross-examination, and not all attorneys regularly conduct cross-examination. For example, attorneys who special in transactional matters are usually not as skilled in conducting cross-examination. Regardless of these factors, our initial estimates included costs associated with an attorney to fulfill these advisor roles to provide an upper-bound of the likely costs of the live hearings. We note that our model makes no distinction between whether advisors are secured by complainants, respondents, or recipients – such a factor would not affect our estimate.

Changes: None.

Comments: Many commenters asserted that they would need to spend money on training staff to adjudicate at grievance proceedings or on hiring attorneys to adjudicate. One commenter stated that even though the NPRM notes the use of hearing boards has become a relatively common practice at the IHE level, this does not mean that all IHEs are using staff to handle Title IX hearings. The commenter stated that due to the legal liability and complexity of these cases, an increasing number of IHEs have hired outside hearing officers to handle their hearings and appeals. For the commenter's university, the expense per case runs from $5,000 to $20,000. The commenter acknowledges, however, that many IHEs already hire outside hearing officers, and predicts the practice will continue at universities and colleges around the country. Additionally, the same commenter predicted that costs for Title IX hearings have and will continue to increase regardless of whether these specific regulations become effective.

Another commenter disputed the Department's estimate that with respect to 60 percent of IHEs, the Title IX Coordinator also serves as the decision-maker. The commenter argued that

only allowing costs for an additional adjudicator in 40 percent of hearings is arbitrary and in direct contradiction to the proposed regulation, at § 106.45(b)(7)(i), which precludes the decision-maker from being the same person as the Title IX Coordinator or the investigator.

Discussion: We believe it is important to first clarify the Department's estimates and discussion in the NPRM. We note that the commenter may have misunderstood the Department's discussion of the individual serving as the decision-maker in the NPRM. In the NPRM, we noted that "we also assume that the Title IX Coordinator serves as the decision-maker in 60 percent of IHEs."[1954] That statement was intended to address our assumption regarding the baseline, and our underlying estimates and calculations assumed that Title IX Coordinators would no longer serve in such capacities. As noted in the NPRM, the assumption that Title IX Coordinators currently serve as decision-makers in 60 percent of IHEs was based on research cited in the notice.[1955] We also note that our estimates, which assume that all live hearings will be conducted with independent decision-makers moving forward was consistent with the proposed regulations. Further, whether or not recipients currently use decision-makers who are employees, or contract out to use independent or professional decision-makers, recipients retain these options under the final regulations. Finally, regarding the specific individual conducting the live hearing, we assumed that such an individual would be an adjudicator employed in the education sector. We believe that this assumption aligns with the commenter's recommendation.

Changes: None.

[1954] 83 FR 61488.
[1955] *Id*.

Comments: Several commenters asserted that many schools would need to spend significant funds on either training existing faculty and staff to perform cross-examinations or on hiring attorneys to perform cross-examinations. Many commenters stated that due to the nature of the proposed hearing and the legal acumen that would be required of advisors to effectively represent their party, that advisor would likely be an attorney. Commenters noted that providing one or more attorneys with the requisite knowledge will come at considerable expense to the recipient. At the same time, multiple commenters warned that the RIA's estimate for hourly costs of an attorney are too low.

Discussion: We appreciate commenters' concerns regarding the requirements in §106.45(b)(6)(i) that if a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party. Such advisors need not be provided with specialized training or be attorneys because the essential function of such an advisor provided by the recipient is not to "represent" a party but rather to relay the party's cross-examination questions that the party wishes to have asked of other parties or witnesses so that parties never personally question or confront each other during a live hearing.

While it would be within the discretion of recipients to hire attorneys to fulfill these roles, we believe it is more likely that recipients will opt to assign another member of its faculty or staff to conduct the cross-examination. In the NPRM, we estimated the costs of the proposed regulations using attorneys to fulfill these roles in order to provide a conservative estimate of the costs of each of these hearings. Regarding the hourly cost of attorneys used in the NPRM, those figures were based on the median hourly wage for attorneys in the education sector as reported by the BLS. BLS wage data is widely considered to be reliable estimates for use in such

analyses, and we do not believe it would be appropriate to single out a specific personnel category and use a different, and less rigorous, source.

Changes: None.

Comments: Several commenters asserted that it would be financially burdensome to provide audio-visual technology for the parties to listen and watch the live hearing in a different room while it is not their turn to be cross-examined. One commenter stated that the proposed regulations fail to account for the costs of this additional technology, including not just the purchase of software, but also the costs of launching and maintaining the technology. One commenter asserted that recipients would incur additional costs to create or renovate building space necessary to hold the live hearings and cross-examinations. Numerous commenters also asserted that the technology required to allow cross-examinations in other rooms would be costly for small institutions, as these smaller schools do not have dedicated space or current set-ups with the technology needed to grant a request for parties to be in separate rooms at live hearings. Additionally, several commenters asserted that the NPRM failed to account for the additional costs of money, time, and training that recipients would pay to implement a new system of documentation in its investigations and adjudications. One commenter asserted that the Department never estimated the costs for transcription and translation services that may be needed at the live hearings.

Discussion: We understand that very few recipients, as part of their regular operations, maintain separate hearing rooms equipped with closed-circuit cameras or other live audio and visual conferencing technology. However, the final regulations do not require recipients to construct such spaces or equip them with expensive technology. The final regulations create no requirements on the space in which the hearing is held and, therefore, we believe most recipients

will be able to identify a suitable space within their existing facilities such as an office, classroom, or conference room. Indeed, we believe that it would be the most efficient use of resources for recipients to use their limited available funding for creating new spaces to conduct these live hearings. Section 106.45(b)(6)(i) of these final regulations requires recipients, at the request of either party, to allow for the live hearing, including cross-examination, to occur with the parties in separate rooms and with technology allowing the decision-maker and parties to simultaneously see and hear the party or the witness answering questions. We note that this could be accomplished with an expensive closed-circuit television or video-conferencing system and, to the extent that recipients already possess such technologies, they could use them to meet the requirements of this part. We also recognize that a large number of recipients do not have such technology or equipment readily available to them. In such instances, recipients would be faced with either purchasing such equipment or using existing equipment paired with various software solutions. We believe that very few recipients are likely to, as a result of the final regulations, invest in costly new equipment for a relatively infrequent occurrence – that is, a recipient is unlikely to spend several thousand dollars on equipment and software it only intends to use one to three times per year. We believe it is much more likely that recipients will opt to use existing equipment, such as webcams, laptops, or cell phones, paired with free or relatively inexpensive software solutions. We note that there are more than a dozen free video web conferencing platforms that recipients could use to ensure that decision-makers and parties could simultaneously see and hear the party or witness who is answering questions. Further, the requirements for creating audio or audiovisual recordings or a transcript of hearings can be met at very low or no cost using commonly available voice memo apps or software or tape recorders. However, to ensure that we account for these costs where they may occur, we have revised our

assumptions to include a cost for the various technology requirements associated with the final regulations. As discussed above, we believe that recipients are unlikely to incur these costs and, as such, this approach represents an overestimate of likely costs incurred by recipients to comply with this requirement.

Changes: We have revised our estimates to include a cost of $100 per hearing to meet the audiovisual requirements in §106.45(b)(6)(i).

Comments: One commenter asserted that it is unreasonable to assume adequate representation could occur with representation by an attorney for only one hour, or two hours for a non-attorney, for a hearing, particularly one involving a complex investigation of a sexual assault.

Discussion: We appreciate the commenters' feedback. We agree that it is likely that an advisor who may be, but is not required to be, an attorney, may need to spend additional time with a complainant or respondent outside of the hearing itself for a variety of purposes. As such, we have increased our estimated time commitment of advisors to eight hours per hearing at the LEA level and 60 hours at the IHE level.

Changes: We have increased our estimates of the time necessary on the part of an advisor with respect to hearings.

Section 106.45(b)(7) Determinations Regarding Responsibility

Comments: One commenter suggested that moving from the preponderance of the evidence standard to the clear and convincing evidence standard would increase costs to recipients because of the resulting protests, uproar, instability on campus, and litigation risk.

Discussion: The Department revised § 106.45(b)(7)(i) of the final regulations such that recipients would have a clear choice between applying the preponderance of the evidence standard or the clear and convincing evidence standard to reach determinations regarding responsibility. Given

this change, the Department cannot reliably predict how many recipients would choose the clear and convincing evidence standard, the number or degree of protests that would stem from such a choice, or the extent to which recipients would be exposed to litigation. We also presume that a recipient will consider all factors in choosing which standard to apply, including the effects mentioned by the commenter. Ultimately, because the final regulations permit a recipient to choose the standard of evidence it wishes to use, none of the costs mentioned by the commenter are directly attributable to the final regulations.

Changes: The Department has revised § 106.45(b)(7)(i) of the final regulations such that recipients would have a clear choice between applying the preponderance of the evidence standard or the clear and convincing evidence standard to reach determinations regarding responsibility. We have removed the limitation contained in the NPRM that would have permitted recipients to use the preponderance of the evidence standard only if they used that standard for non-sexual misconduct that has the same maximum disciplinary sanction.

Comments: Several commenters asserted that small institutions lack the human resources to comply with the prohibition of the single investigator model, and they expressed concern about how to afford the staff necessary to comply with the requirements in the proposed regulations. Commenters from small to mid-sized rural colleges, and mixed urban and rural colleges, stated that the Title IX Coordinator often wears multiple hats by also serving as the Human Resources Director, Dean of Students, or Administrative Vice President, as well as fulfilling other operational duties.

Discussion: We recognize that these final regulations may require a number of recipients to alter their current policies and practices. We note that although the investigator may not be the same person as the decision-maker under § 106.45(b)(7)(i), these final regulations do not preclude the

Title IX Coordinator from also serving as the recipient's investigator as long as the Title IX Coordinator does not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent under § 106.45(b)(1)(iii). As noted in the "Regulatory Flexibility Act" section of this notice, we do not believe that the costs associated with complying with these final regulations will unnecessarily burden small entities.

Changes: None.

Section 106.45(b)(8) Appeals

Comments: Commenters argued that §106.45(b)(8) of the final regulations will be costly for recipients to implement. Commenters also requested that the Department modify the proposed regulations to allow the same person who made the initial determination of responsibility to also make the appeal determination because otherwise the cost may be too great, especially for smaller and rural K-12 school districts and community colleges.

Discussion: We decline the commenters' suggested change. We believe it is important for the decision-maker reviewing appeals to be a different person than the person who made the initial decision, in part, because the decision-maker on appeal is asked to review the determination reached by the original decision-maker (including based on any claim of bias or conflict of interest on the part of the decision-maker). However, we note that our initial estimates only assumed training for a single decision-maker and did not include training for the additional individual who would be necessary for reviewing appeals because the proposed regulations, unlike the final regulations. Section 106.45(b)(8) of these final regulations requires recipients to offer appeals, equally to both parties, on three specified bases, and to ensure that the decision-maker on appeal is not the same person who served as the Title IX Coordinator, investigator, or decision-maker making the original determination. We have therefore updated our estimates to

include a second decision-maker for appeals. Our initial burden estimates related to the appeals process do not need to be updated to account for this change.

Changes: We have revised our estimates to account for the separate decision-maker necessary to review appeals.

Section 106.45(b)(9) Informal Resolution

Comments: Several commenters asserted that the RIA's estimate that ten percent of all formal complaints at the LEA and IHE level would be resolved through informal resolution is too low. One commenter recommended that the Department utilize the 34 percent figure reported by Wiersma-Mosley and DiLoreto.[1956]

Discussion: The Department is persuaded by these comments that more than ten percent of formal complaints may be resolved through informal resolution and adjusts this assumption upward in the final regulations. The 34 percent figure reported by Wiersma-Mosley and DiLoreto applies only to postsecondary institutions and not elementary and secondary schools, and, thus, is not the most reliable figure.[1957] Additionally, these final regulations do not require recipients to provide an informal resolution process and expressly prohibit recipients from providing an informal resolution process to resolve allegations that an employee sexually harassed a student pursuant to § 106.45(b)(9)(iii). We do not think it is appropriate to assume that 34 percent of all formal complaints will be resolved through informal resolution when the

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[1956] Jacquelyn D. Wiersma-Mosley & James DiLoreto, *The Role of Title IX Coordinators on College and University Campuses*, 8 BEHAV. SCI. 4, 6 (2018), https://www.mdpi.com/2076-328X/8/4/38/htm (click on "Full-Text PDF") (page references herein are to this PDF version).

[1957] *See* the discussion in the "Informal Resolution" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section. There are different views about informal resolution, and the Department does not wish to overestimate the number of recipients that may choose to offer an informal resolution process or assume the scope of any informal resolution process.

Department has precluded at least some formal complaints from being resolved through the informal resolution process. Accordingly, we adjust the assumption in the NPRM that ten percent of all formal complaints will be resolved through informal resolution and assume that 25 percent of all formal complaints will be resolved through informal resolution.[1958]

Changes: The Department assumes that 25 percent of all formal complaints will be resolved through informal resolution.

Executive Orders 12866, 13563, and 13771

Regulatory Impact Analysis

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

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

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

[1958] An assumption of 25 percent will provide a more conservative estimate with respect to the net cost savings that recipients may realize as a result of the informal resolution process. The Department does not wish to overestimate the net cost savings as a result of the informal resolution process.

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

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

This final regulatory action is an economically significant regulatory action subject to review by OMB under section 3(f) of Executive Order 12866.

Under Executive Order 13771, for each new regulation that the Department proposes for notice and comment or otherwise promulgates that is a significant regulatory action under Executive Order 12866 and that imposes total costs greater than zero, it must identify two deregulatory actions. For FY 2020, any new incremental costs associated with a new regulation must be fully offset by the elimination of existing costs through deregulatory actions. OMB has determined that the final regulations are a significant regulatory action under Executive 13771.

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

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

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

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

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

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

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

We are issuing these final regulations only on a reasoned determination that their benefits justify their costs. In choosing among alternative regulatory approaches, we selected those approaches that maximize net benefits. The information in this RIA measures the effect of these policy decisions on stakeholders and the Federal government as required by and in accordance with Executive Orders 12866 and 13563.[1959] Based on the analysis that follows, the Department

[1959] Although the Department may designate certain classes of scientific, financial, and statistical information as influential under its Guidelines, the Department does not designate the information in the Regulatory Impact Analysis in these final regulations as influential and provides this information to comply with Executive Orders 12866 and 13563. U.S. Dep't. of Education, Information Quality Guidelines (Oct. 17, 2005), https://www2.ed.gov/policy/gen/guid/iq/iqg html.

believes that these regulations are consistent with the principles in Executive Orders 12866 and 13563.

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

In this RIA we discuss the need for the regulatory action, the potential costs and benefits, assumptions, limitations, and data sources. Although the majority of costs associated with information collection are discussed within this RIA, elsewhere in this notice under the Paperwork Reduction Act of 1965, we also identify and further explain burdens specifically associated with information collection requirements.

Consistent with the statement in Executive Order 13563 that the Nation's regulatory system must "measure, and seek to improve, the actual results of regulatory requirements," we also intend to evaluate the economic impact of these final regulations on a voluntary, post-implementation basis. As additional data becomes available, we plan to analyze it and take appropriate steps, including employing the analysis in any future rulemaking.

Need for Regulatory Action

Based on its extensive review of the critical issues addressed in this rulemaking, the Department has determined that current regulations and guidance did not provide sufficiently clear standards for how recipients must respond to allegations of sexual harassment, including defining what conduct constitutes sexual harassment. To address this concern, we promulgate these final regulations to recognize and address sexual harassment as a form of sex discrimination under Title IX for the purpose of ensuring that recipients understand their legal obligations, including what conduct is actionable as harassment under Title IX, when and how a recipient must respond to allegations of sexual harassment, and particular requirements that such

a response must meet in order to ensure that the recipient is protecting the rights of all persons, including students, to be free from sex discrimination in the recipient's education program or activity.

In addition to addressing sexual harassment, the Department has concluded it is also necessary to amend some of the existing regulations that apply to all sex discrimination and not just sexual harassment under Title IX. We amend existing regulations by stating that Title IX does not require recipients to infringe upon existing constitutional protections, that the Assistant Secretary for Civil Rights may require a recipient to take remedial action to remedy a violation of 34 CFR part 106, consistent with 20 U.S.C. 1682, and that recipients that qualify for a religious exemption under Title IX need not submit a letter to the Department as a prerequisite to claiming the exemption. Additionally, we amend existing regulations regarding the designation of a Title IX Coordinator (referred to as a responsible employee in existing regulation 34 CFR 106.8(a)), dissemination of the recipient's notice that it does not discriminate on the basis of sex, and adoption of grievance procedures to address sex discrimination and a grievance process to address sexual harassment, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond.

Discussion of Costs, Benefits, and Transfers

The Department has analyzed the costs of complying with the final regulations. Due to uncertainty about the current capacity of recipients, lack of high-quality comprehensive data about the status quo, and the specific choices that recipients will make regarding how to comply with these final regulations, the Department cannot estimate these costs with absolute precision. However, as discussed below, we estimate these final regulations to result in a net cost of between $48.6 and $62.2 million over ten years.

The Department has reviewed the comments submitted in response to the NPRM and has revised some assumptions in response to the feedback we received. Our rationale for such revisions is described elsewhere in this notice. For the sake of transparency of this analysis, even in instances where our estimates did not change, we have provided our initial rationale herein.

To accurately estimate the costs of these final regulations, the Department needed to establish an appropriate baseline for current practice. In doing so, it was necessary to know the current number of Title IX investigations occurring in LEAs and IHEs. In 2014, the U.S. Senate Subcommittee on Financial and Contracting Oversight released a report[1960] which included survey data from 440 four-year IHEs regarding the number of investigations of sexual violence that had been conducted during the previous five-year period. Two of the five possible responses to the survey were definite numbers (0, 1), while the other three were ranges (2-5, 6-10, >10). Responses were also disaggregated by the size of the institution (large, medium, or small). Although the report does not clearly identify a definition of "sexual violence" provided to survey respondents, the term would appear to capture only a subset of the types of incidents that may result in a Title IX investigation. Indeed, when the Department examined public reports of Title IX reports and investigations at 55 IHEs nationwide, incidents of sexual misconduct represented, on average, 45 percent of investigations conducted. Further, a number of the types of incidents that were categorized as "sexual misconduct" in those reports may, or may not, have been categorized as "sexual violence," depending on the survey respondent. To address the fact that the subcommittee report may fail to capture all incidents of sexual misconduct at responding

[1960] Claire McCaskill, S. Subcomm. on Financial Contracting Oversight – *Majority Staff, Sexual Violence on Campus, 113th Cong*. (2014).

IHEs, the Department first top-coded the survey data. To the extent that survey respondents treated the terms "sexual misconduct" and "sexual violence" interchangeably, this top-coding approach may result in an overestimate of the number of sexual misconduct investigations conducted at institutions. By top-coding the ranges (e.g., "5" for any respondent indicating "2-5") and assuming 50 investigations for any respondent indicating more than ten investigations, the Department was able to estimate the average number of sexual misconduct investigations conducted by four-year institutions in each size category. We then divided this estimate by five to arrive at an estimated number of investigations per year. To address the fact that incidents of sexual misconduct only represent a subset of all Title IX investigations conducted by IHEs in any given year, we then multiplied this result by two, assuming (consistent with our convenience sample of public Title IX reporting) that sexual misconduct investigations represented approximately 50 percent of all Title IX investigations conducted by institutions.

Because the report only surveyed four-year institutions, the Department needed to impute similar data for two-year and less-than-two-year institutions, which represent approximately 57 percent of all institutions in the report. In order to do so, the Department analyzed sexual offenses reported under the Clery Act and combined this data with total enrollment information from the Integrated Postsecondary Education Data System (IPEDS) for all Title IV-eligible institutions within the United States, as these institutions must comply with the Clery Act. Assuming that the number of reports of sexual offenses under the Clery Act is positively correlated with the number of investigations, the Department arrived at a general rate of investigations per reported sexual offense at four-year IHEs by institutional enrollment. These rates were then applied to two-year and less-than-two-year institutions within the same category using the average number of sexual offenses reported under the Clery Act for such institutions to

arrive at an average number of investigations per year by size and level of institution. These estimates were then weighted by the number of institutions in each category to arrive at an estimated average 2.36 investigations of sexual harassment per IHE per year.

A number of commenters indicated that our initial estimate of the current number of investigations occurring at IHEs was too low. As described in this Regulatory Impact Analysis section of this notice, we have upwardly revised this estimate. Based on public comment, it was clear that our coding of the Senate subcommittee data may have been inadequate to fully account for the full range of investigations currently being undertaken by IHEs. We therefore took those data and used Clery data to determine a multiplier which may help us better transform the more limited scope of the Senate subcommittee data into the broader array of incidents that IHEs currently investigate. As noted in the NPRM and elsewhere in this notice, we recognize that there are weaknesses with the Clery data, such as the fact that Clery data may not capture all incidents of sexual harassment that occur on campus. However, we believe it is the best proxy for us to use in transforming the more direct data we have from the Senate subcommittee report. Clery data can provide useful information about the relationships between various types of incidents because Clery data is likely to be positively correlated with the actual underlying number of incidents – that is, when the underlying number of instances of sexual harassment increase (particularly sexual assaults, dating violence, domestic violence, and stalking), the number of incidents reported under the Clery Act will also increase. Although we requested that the public inform us of any better approach to estimating these baselines, we did not receive any quality alternatives. For all of these reasons, we are proceeding with using our initial estimates of the baseline number of investigations increased by a factor of 1.416, which accounts for the

inclusion of dating violence, domestic violence, and stalking incidents. We now assume a baseline of 5.70 investigations per year per IHE.

As noted in the NPRM, the Department does not have information on the average number of investigations of sexual harassment occurring each year in LEAs. As part of the Civil Rights Data Collection (CRDC), the Department does, however, gather information on the number of incidents of harassment based on sex in LEAs each year. During school year 2015-2016, LEAs reported an average of 3.23 of such incidents. Therefore, the Department assumes that LEAs, on average, currently conduct approximately 3.23 Title IX investigations each year.

The Department issued guidance regarding Title IX compliance in 2011, which resulted in recipients conducting more investigations of incidents of sexual harassment as the 2011 Dear Colleague Letter provided that "[r]egardless of whether a harassed student, his or her parent, or a third party files a complaint under the school's grievance procedures or otherwise requests action on the student's behalf, a school that knows, or reasonably should know, about possible harassment must promptly investigate to determine what occurred . . . ."[1961] In 2017, the Department rescinded that guidance and published alternative, interim guidance while this regulatory action was underway. The Department reaffirmed that the interim guidance is not legally binding on recipients. Wiersma-Mosley and DiLoreto[1962] did not identify substantial rollback of Title IX activities among IHEs compared to Richards,[1963] who found substantial

[1961] 2011 Dear Colleague Letter at 4.
[1962] Jacquelyn D. Wiersma-Mosley & James DiLoreto, *The Role of Title IX Coordinators on College and University Campuses*, 8 BEHAV. SCI. 4 (2018), https://www.mdpi.com/2076-328X/8/4/38/htm (click on "Full-Text PDF") (page references herein are to this PDF version).
[1963] Tara N. Richards, *An updated review of institutions of higher education's responses to sexual assault: Results from a nationally representative sample*, 34 JOURNAL OF INTERPERSONAL VIOLENCE 1 (2016).

changes relative to Karjane, Fisher, and Cullen.[1964] Consistent with those studies, we believe it is highly likely that a subset of recipients have continued Title IX enforcement in accordance with the prior, now rescinded guidance, due to the uncertainty of the regulatory environment, and that it is reasonable to assume that some subset of recipients either never complied with the 2011 Dear Colleague Letter or the 2014 Q&A or amended their compliance activities after the rescission of that guidance. We do not, however, know with absolute certainty how many recipients fall into each category, making it difficult to accurately predict the likely effects of this regulatory action.

In general, the Department assumes that recipients fall into one of three groups: (1) recipients who have complied with the statutory and regulatory requirements and either did not comply with the 2011 Dear Colleague Letter or the 2014 Q&A or who reduced Title IX activities to the level required by statute and regulation after the rescission of the 2011 Dear Colleague Letter or the 2014 Q&A and will continue to do so; (2) recipients who continued Title IX activities at the level required by the 2011 Dear Colleague Letter or the 2014 Q&A but will amend their Title IX activities to the level required under current statute and the proposed regulations issued in this proceeding; and (3) recipients who continued Title IX activities at the level required under the 2011 Dear Colleague Letter or the 2014 Q&A and will continue to do so after final regulations are issued. In this structure, we believe that recipients in the second group are most likely to experience a net cost savings under these final regulations. We therefore

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[1964] Heather M. Karjane *et al.*, *Campus Sexual Assault: How America's Institutions of Higher Education Respond* 62-94, Final Report, NIJ Grant # 1999-WA-VX-0008 (Education Development Center, Inc. 2002), https://www.ncjrs.gov/pdffiles1/nij/grants/196676.pdf.

estimate savings for this group of recipients only. We estimate no cost savings for recipients in the first and third groups.

In estimating the number of recipients in each group, we assume that most LEAs and IHEs are generally risk averse regarding Title IX compliance, and so we assume that very few would have adjusted their enforcement efforts after the rescission of the 2011 Dear Colleague Letter or the 2014 Q&A or would have failed to align their activities with the guidance initially. Therefore, we estimate that only five percent of LEAs and five percent of IHEs fall into Group 1. Given the particularly acute financial constraints on LEAs, we assume that a vast majority (90 percent) will fall into Group 2 – meeting all requirements of the proposed regulations and applicable laws, but not using limited resources to maintain a Title IX compliance structure beyond such requirements. Among IHEs, we assume that, for a large subset of recipients, various pressures will result in retention of the status quo in every manner that is permitted under the final regulations. Our model accounts for their decision to do so, and we only assume that 50 percent of IHEs experience any cost savings from these final regulations (placing them in Group 2). Therefore, we estimate that Group 3 will consist of five percent of LEAs and 45 percent of IHEs. We did not receive public comment directly responsive to these estimates and have therefore maintained them in this final cost analysis.

We have revised our baseline assumptions by adding entities other than LEAs and IHEs into our model. These entities are recipients of Federal education funding but may not operate a traditional education program (e.g., museums, libraries, cultural centers). We are not aware of the extent to which such entities are currently conducting Title IX investigations and therefore assume that they are conducting two such investigations per year with a reduction of 50 percent after these final regulations become effective. We should note that generally, these other entities

are very small and have few employees and no full-time students. We therefore think it unlikely they would have a baseline number of investigations much higher than our assumption. However, to provide full transparency to the general public, we have included the information in Table VII, which shows the impact on our estimates of alternative assumptions about the baseline number of investigations and the reduction in that number resulting from these final regulations:

TABLE VII. SENSITIVITY ANALYSIS OF OTHER ENTITIES BASELINE ASSUMPTION

		Reduction as a result of the rule		
		90%	50%	10%
Baseline number of investigations	15/YEAR	$116,766,845	$195,526,067	$274,285,289
	2/YEAR	$72,452,766	$82,953,995	$93,455,225
	1/YEAR	$69,043,990	$74,294,605	$79,545,220

We further assume that 90 percent of other entities will be in the first analytical group as discussed in the NPRM, with a remaining five percent in each of the other two groups. This assumption is based on a belief that entities, given their small size and limited capacity, would be more likely to adopt a minimal Title IX compliance framework, to the extent that they have one currently in operation. We maintain our assumption about how LEAs and IHEs fall into those analytical groups.

For comparability purposes between the final regulations and the NPRM, we have retained the number of LEAs and IHEs we used in the NPRM.

Unless otherwise specified, our model uses median hourly wages for personnel employed in the education sector as reported by the Bureau of Labor Statistics[1965] and an employer cost for employee compensation rate of 1.46.[1966]

We assume all recipients will need to take time to review and understand these final regulations. At the LEA level, we assume four hours for the Title IX Coordinator (assuming a loaded wage rate of $65.22 per hour for educational administrators), and eight hours for an attorney (at a rate of $90.71 per hour). At the IHE level, we assume eight hours for the Title IX Coordinator and 16 hours for an attorney. We did not receive public comment on these estimates and have therefore not revised them from the NPRM. For other entities, we assume four hours for the Title IX Coordinator and eight hours for an attorney. We note that our estimates in the NPRM incorrectly omitted costs for reviewing the final regulations at the IHE level and some personnel at the LEA level. We have corrected that error for these estimates. We therefore estimate the cost of this activity as approximately $30,324,610.

We assume that all recipients will need to revise their grievance procedures. We assume that at the LEA level this will take six hours for the Title IX Coordinator and 24 hours for an attorney with an additional two hours for an administrator to review and approve them. At the IHE level, we assume this will take 12 hours for the Title IX Coordinator and 28 hours for an attorney with an additional four hours for an administrator to review and approve them. These estimates were revised from the NPRM in response to public comment. For other entities, we

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[1965] U.S. Dep't. of Labor, Bureau of Labor Statistics, *May 2017 National Industry-Specific Occupational Employment and Wage Estimates: Sector 61 – Educational Services* (Mar. 30, 2018), https://www.bls.gov/oes/current/naics2_61 htm.

[1966] U.S. Dep't. of Labor, Bureau of Labor Statistics, *Economic News Release: Table 1. Civilian Workers, by Major Occupational and Industry Group* (Sept. 18, 2018), https://www.bls.gov/news release/ecec.t01 htm.

assume this will take four hours for a Title IX Coordinator and 16 hours for an attorney with an additional two hours for an administrator to review and approve them. We therefore estimate the cost of this activity as approximately $82,441,460.

We assume 40 percent of LEAs, 20 percent of IHEs,[1967] and all other entities will need to post their non-discrimination statement. At the LEA level, we assume this will take one half hour each for a Title IX Coordinator and an attorney and two hours for a web developer (at $44.12 per hour). At the IHE level, we assume this will take one hour each for the Title IX Coordinator and an attorney and two hours for a web developer. We did not receive public comment on these estimates and have therefore not revised them from the NPRM. For other entities, we assume this will take one hour each from the Title IX Coordinator and an attorney and two hours for a web developer. We therefore estimate the cost of this activity as approximately $1,494,020.

We assume that all recipients will need to train their Title IX Coordinators, an investigator, any person designated by a recipient to facilitate an informal resolution process (e.g., a mediator), and two decision-makers (assuming an additional decision-maker for appeals). We assume this training will take approximately eight hours for all staff at the LEA and IHE level. These estimates have been revised since the NPRM due to public comment. For other entities, we assume only four hours of training for the Title IX Coordinator, as we believe that their smaller organizational footprint and more limited staffing may result in a shorter training

[1967] Richards, and Wiersma-Mosley & DiLoreto at 5, found that approximately 80 percent of IHEs (81 percent and 79 percent, respectively) posted their policies and procedures. Jacquelyn D. Wiersma-Mosley & James DiLoreto, *The Role of Title IX Coordinators on College and University Campuses*, 8 BEHAV. SCI. 4 (2018), available at https://www.mdpi.com/2076-328X/8/4/38/htm (click on "Full-Text PDF") (page references herein are to this PDF version); Tara N. Richards, *An updated review of institutions of higher education's responses to sexual assault: Results from a nationally representative sample*, 34 JOURNAL OF INTERPERSONAL VIOLENCE 1 (2016).

time for such staff. We therefore estimate the cost of this activity as approximately $52,135,230 in Year 1 and $26,067,620 in each subsequent year.

The final regulations require recipients to conduct an investigation only if a formal complaint of sexual harassment is filed by the complainant or signed by the Title IX Coordinator. In reviewing a sample of public Title IX documents, the Department noted that larger IHEs were more likely than smaller IHEs to conduct investigations only in the event of formal complaints, as opposed to investigating all reports they received. Consistent with this observation, the Department found that the rate of average investigations relative to the number of reports of sexual offenses under the Clery Act was lower at large (more than 10,000 students) at four-year institutions than it was at smaller four-year institutions. As a result, the Department used the Clery Act data to impute the likely effect of these regulations on various institutions. Specifically, we assumed in the NPRM that, under these regulations, the gap in the rate of investigations between large IHEs and smaller ones would decrease by approximately 50 percent.

However, we believe that, given revisions to the definition of "formal complaint" in § 106.30, it will be easier and more likely for complainants to file a formal complaint if they wish to do so. Thus, we now only assume a smaller reduction in the number of investigations than we did in the NPRM – a 40 percent "gap closing" as opposed to the 50 percent included in the NPRM. This figure was not reduced further because we believe that the inclusion of dating violence, domestic violence, and stalking to the definition of "sexual harassment" may offset the effects from an easier formal complaint process. Specifically, we believe that, due to the nature of dating violence and domestic violence, individuals may be less likely to file a formal complaint than they would in instances of sexual assault.

Therefore, we estimate that the requirement to investigate only in the event of formal complaints would result in a reduction in the average number of investigations per IHE per year of 1.60. This reduction is equivalent to all IHEs in Group 2 experiencing a reduction in investigations of approximately 28 percent. In addition, the proposed regulations only require investigations in the event of sexual harassment within a recipient's education program or activity. Again, assuming that Clery Act reports correlate with all incidents of sexual harassment (as defined in these final regulations), we assume a further reduction in the number of investigations per IHE per year of approximately 0.29, using the number of public property and reported-by-police reports as a proxy for the number of off-campus sexual harassment investigations currently being conducted by IHEs.[1968] As noted in our responses to comments, we believe that this approach will result in a likely underestimate of the cost savings from the final regulations as at least some proportion of noncampus incidents reported under the Clery Act would also not have to be investigated under the final regulations, but the Department does not assume any savings from a reduction in such investigations. As a result, we estimate that each IHE in Group 2 will experience a reduction in the number of Title IX investigations of approximately 1.89 per year.

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

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[1968] The Department notes that this likely represents a severe under-estimate of the actual proportion of incidents of sexual harassment that occur off campus and recognizes some off-campus incidents may be part of a recipient's education program or activity as described in § 106.44(a). According to a study from United Educators, approximately 41 percent of sexual assault claims examined occurred off campus. United Educators, *Facts from United Educator's Report Confronting Campus Sexual Assault* (2015), https://www.ue.org/sexual_assault_claims_study/.

investigations of 1.62 per year. We did not receive public comment on this assumption and are therefore retaining it in these final estimates. Although we estimate that the number of investigations under the proposed regulations will decrease at both the IHE and LEA levels, Title IX Coordinators are still expected to respond to informal complaints or reports of sexual harassment. Such responses will not be dictated by the recipient's grievance procedures, and § 106.44(a) requires the Title IX Coordinator to promptly contact the complainant to discuss the availability of the supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.[1969] Although the final regulations require such supportive measures to be offered without fee or charge, we do not estimate specific costs associated with the provision of particular supportive measures. Although such costs for supportive measures were not included in the NPRM, the Department has added a flat cost of $250 per set of supportive measures provided in response to public comment. We have also revised our initial estimates to include time burdens for students to each set of supportive measures provided. Further, the number of informal complaints or reports of sexual harassment has been adjusted due to changes in assumptions regarding the baseline number of investigations and the proportion of those that will result in formal complaints under the final regulations. At the LEA level, we assume that each response to a report of sexual harassment will take three hours from

[1969] In Angela F. Amar *et al.*, *Administrators' perceptions of college campus protocols, response, and student prevention efforts for sexual assault*, 29 VIOLENCE & VICTIMS 579 (2014), the most common campus services provided at the IHE level were mental health services, health services, law enforcement, and victim assistance/advocacy.

the Title IX Coordinator, eight hours for an administrative assistant, and 12 hours each for two students (at the K-12 level, we assume the Federal minimum wage for students). At the IHE level, we assume each informal complaint will require three hours from the Title IX Coordinator, 16 hours from an administrative assistant, and 24 hours each for two students (at the postsecondary level, we assume median hourly wage for all workers, or $18.58 per hour). For other entities, we assume each response to an informal complaint will require three hours from the Title IX Coordinator, eight hours from an administrative assistant, and 12 hours each for two students (for other entities, we average the wage rates for K-12 and postsecondary students). Across all recipients, we assume a flat cost of $250 per set of supportive measures provided. We therefore estimate the cost of this activity as approximately $31,164,490 per year.

In response to public comment, we have added a new category of costs not included in the NPRM. We recognize that there may be instances in which recipients expend time and resources to determine if a particular incident occurred within the recipient's education program or activity or in a circumstance in which the recipient would be otherwise required to investigate. At the LEA and IHE level, we assume this would take approximately four hours for a Title IX Coordinator and 12 hours from an investigator. We do not assume that these types of investigations will be likely at other entities, given their small scope and limited activities where they would exercise substantial control over respondents outside of clearly defined events and circumstances. We therefore assume that this activity would cost approximately $10,338,310 per year.

For formal complaints, we made several revisions to our initial assumptions based on public comment. First, we increased the amount of time an attorney or advisor would spend on any individual investigation. Second, we included two students as part of each investigation.

Third, we added a nominal $100 cost per hearing to accommodate the recordkeeping and technology requirements (e.g., video conferencing to meet the cross-examination requirements when parties request separate rooms). Finally, we have revised the number of formal investigations that occur based on the assumptions described above. At the LEA level, we therefore assume that a formal investigation will require eight hours from the Title IX Coordinator, 16 hours from an administrative assistant, eight hours each for two advisors (using the wage rate for attorneys), 20 hours for an investigator, eight hours for the decision-maker, and 12 hours each for two students. At the IHE level, we assume a formal investigation will take 24 hours from a Title IX Coordinator, 40 hours from an administrative assistant, 60 hours each for two advisors, 40 hours for an investigator, 16 hours for a decision-maker, and 24 hours each for two students. For other entities, we assume each formal investigation will require eight hours from a Title IX Coordinator, 16 hours for an administrative assistant, eight hours each for two advisors, 20 hours for an investigator, eight hours for a decision-maker, and 12 hours each for two students. We therefore estimate the reduction in burden associated with the reduced number of investigations as approximately $189,134,990 per year.

As in the NPRM, we assume that some subset of recipients may not currently be conducting investigations in a manner that would comply with the requirements of these final regulations. For those recipients, we assume an increased cost to comply. At the LEA level, we believe these requirements will require an additional two hours for a Title IX Coordinator, three hours from an administrative assistant, eight hours each for two advisors, ten hours from an investigator, and eight hours from a decision-maker. At the IHE level, these requirements will result in an increase of six hours for the Title IX Coordinator, ten hours for an administrative assistant, 60 hours each for two advisors, 20 hours for an investigator, and 16 hours from a

decision-maker. For other entities, we believe this will result in an increase of two hours for the Title IX Coordinator, four hours for an administrative assistant, one hour each for two advisors, ten hours for an investigator, and four hours for a decision-maker. We also assume the same additional nominal charge for all entities associated with recordkeeping and technology requirements. For analytical group one, we therefore estimate formal investigations to result in a cost increase of $21,867,410 per year.

As in the NPRM we assume that 50 percent of all decisions result in appeal. We revised our estimates in this section from the NPRM to increase the time commitment on the part of advisors and to add students. At the LEA level, we assume that each appeal will require 4 hours from the Title IX Coordinator, eight hours from an administrative assistant, eight hours each for two advisors, eight hours for a decision-maker, and 12 hours each for two students. At the IHE level, we assume each appeal would require approximately 12 hours from the Title IX Coordinator, 20 hours from an administrative assistant, 16 hours each for two advisors, 8 hours for a decision-maker, and 24 hours each for two students. For other entities, we assume each appeal will require four hours for the Title IX Coordinator, eight hours for an administrative assistant, 8 hours each for two advisors, eight hours for a decision-maker, and 12 hours each for two students. We therefore estimate a total cost of this activity as approximately $62,024,720 per year.

As in the NPRM, we assume that some proportion of formal complaints will be resolved through an informal resolution process. In response to public comment, we now assume that 25 percent of formal complaints will be resolved through an informal resolution process. In such instances, we assume such a process will reduce half the time burden on investigators and advisors, all of the time burden for decision-makers, and all of the costs associated with

recordkeeping and technology requirements for the live hearing.[1970] We further assume that it will increase the time burdens on administrative assistants and the time for a person designated by a recipient to facilitate an informal resolution process. We note that in the NPRM, we included additional time for the Title IX Coordinator who may help facilitate an informal resolution process. In response to public comment and to changes from the proposed regulations to the final regulations, we acknowledge that recipients may and are likely to designate a person other than the Title IX Coordinator to facilitate an informal resolution process. We have therefore reassigned this time burden to a person other than the Title IX Coordinator designated by the recipient to facilitate an informal resolution process and assume that the informal resolution will not create additional time burdens for the Title IX Coordinator relative to a grievance process under § 106.45. At the LEA level and in other entities, we assume an increase of four hours for an administrative assistant and four hours for a person designated by the recipient to facilitate an informal resolution process. At the IHE level, we assume each informal resolution will require an additional eight hours for an administrative assistant and an additional 8 hours for a person designated by the recipient to facilitate an informal resolution process. We therefore assume that informal resolutions will result in a net cost savings of $29,694,690 per year.

[1970] The Department assumes that 25 percent of formal complaints will be resolved through an informal resolution process under § 106.45(b)(9) because such an assumption will provide a more conservative estimate with respect to the net cost savings that recipients may realize as a result of the informal resolution process. The Department does not wish to overestimate the net cost savings as a result of the informal resolution process. In the "Paperwork Reduction Act of 1965" section, the Department assumes 100 percent participation with respect to the informal resolution process because such an assumption provides the most conservative estimate with respect to burden. Accordingly, the Department errs on the side of underestimating any net cost savings and overestimating burden.

As described in the NPRM, the final regulations require recipients to maintain certain documentation regarding their Title IX activities. We assume that the recordkeeping and documentation requirements would have a higher first year cost associated with establishing the system for documentation with a lower out-year cost for maintaining it. At the LEA level, we assume that the Title IX Coordinator would spend four hours in Year 1 establishing the system and an administrative assistant would spend eight hours doing so. At the IHE level, we assume recipients are less likely to use a paper filing system and are likely to use an electronic database for managing such information. Therefore, we assume it will take a Title IX Coordinator 24 hours, an administrative assistant 40 hours, and a database administrator 40 hours (at $50.71/hr) to set up the system. In later years, we assume that the systems will be relatively simple to maintain. At the LEA level, we assume it will take the Title IX Coordinator two hours and an administrative assistant four hours to do so. At the IHE level, we assume four hours from the Title IX Coordinator, 40 hours from an administrative assistant, and eight hours from a database administrator. We did not receive public comment on these time estimates and, therefore, have not revised these assumptions from the NPRM. Given their size and organizational complexity, we assume that other entities will face the same time burdens associated with complying as LEAs. We therefore estimate the recordkeeping requirements to cost approximately $39,114,530 in Year 1 and $15,189,260 in each subsequent year.

In total, we estimate these final regulations to generate a net cost of between $48.6 and $62.2 million over ten years.

Regulatory Alternatives Considered

The Department considered the following alternatives to the proposed regulations: (1) leaving the current regulations and current guidance in place and issuing no proposed regulations

at all; (2) leaving the current regulations in place and reinstating the 2011 Dear Colleague Letter or the 2014 Q&A; and (3) issuing proposed regulations that added to the current regulations broad statements of general principles under which recipients must promulgate grievance procedures. Alternative (2) was rejected by the Department for the reasons expressed in the preamble of the NPRM[1971] and for the reasons described throughout this preamble: the procedural and substantive problems with the 2011 Dear Colleague Letter and 2014 Q&A that prompted the Department to rescind that guidance remained as concerning now as when the guidance was rescinded. Additionally, the Department determined that restoring that guidance would once again leave recipients unclear about how to ensure they implemented prompt and equitable grievance procedures. Alternative (1) was rejected by the Department because current regulations are entirely silent on whether Title IX and those implementing regulations expressly cover sexual harassment. The Department chose not to address a crucial topic like sexual harassment through guidance which would have left this serious issue subject only to non-legally binding guidance rather than regulatory prescriptions. The lack of legally binding standards would leave survivors of sexual harassment with fewer legal protections and both alleged victims and persons accused of sexual harassment with no predictable, consistent expectation of the level of fairness or due process available from recipients' grievance procedures. Alternative (3) was rejected by the Department because the problems with the status quo regarding recipients' Title IX procedures, as identified by numerous stakeholders and experts, made it clear that a regulation that was too vague or broad (e.g., "respond supportively to persons who report sexual harassment" or "provide due process protections before disciplining a student for sexual

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[1971] 83 FR 61489.

harassment") would not provide sufficient predictability or consistency across recipients to achieve the benefits sought by the Department. After careful consideration of various alternatives, the Department believes that the proposed regulations represent the most prudent and cost effective way of achieving the desired benefits of (a) ensuring that recipients know their specific legal obligations with respect to responses to sexual harassment, (b) ensuring that schools and colleges take all reports of sexual harassment seriously (including by offering supportive measures to help complainants preserve equal educational access irrespective of whether allegations are investigated), (c) ensuring that schools and colleges treat all persons accused of sexual harassment fairly and provide both parties strong procedural rights in any grievance process resolving sexual harassment allegations, and (d) ensuring that victims of sexual harassment in recipients' education programs or activities are provided with remedies.

Accounting Statement

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

TABLE VIII. ACCOUNTING STATEMENT

Category	Benefits
Clarity, specificity, and permanence with respect to recipient schools and colleges knowing their legal obligations under Title IX with respect to sexual harassment	Not Quantified
A legal framework for schools' and colleges' response to sexual harassment that ensures all reports of sexual harassment are treated seriously and alleged victims are offered supportive measures, all persons accused are treated fairly, and both parties to any grievance process resolving sexual harassment allegations are given due process protections	Not Quantified
Preserve constitutional rights, recognize religious exemptions in the absence of written request	Not Quantified

	Costs	
	3%	7%
Reading and understanding the rule	$3,451,427	$4,035,086
Revision of grievance procedures	$9,383,159	$10,969,915
Posting of non-discrimination statement	$170,044	$198,799
Training of Title IX Coordinators, investigators, decision-makers, and any person designated by a	$29,034,530	$29,536,255

1997

recipient to facilitate an informal resolution process		
Response to informal reports	$70,343,754	$70,343,754
Reduction in the number of investigations	($178,796,679)	($178,796,679)
Increased investigation requirements	$21,867,415	$21,867,415
Appeal process	$62,024,722	$62,024,722
Informal resolution of complaints	($25,665,969)	($25,665,969)
Creation and maintenance of documentation	$17,912,337	$18,372,828

Regulatory Flexibility Act

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

As described in the NPRM, for purposes of assessing the impacts on small entities, the Department is defining a "small" IHE as a two-year IHE with an enrollment of less than 500

FTE or a four-year IHE with an enrollment of less than 1,000 FTE. Pursuant to conversations with the SBA, the Department has opted to define "small" LEAs as those with annual revenues of less than $7,000,000. The Department estimates there are approximately 631 small IHEs and 7,900 small LEAs.

Based on the model described above, an IHE conducting approximately 5.70 investigations per year with no reduction under the new rules and no investigations resulting in informal resolution would see an increase in costs of approximately $28,065 per year. According to data from IPEDS, in FY 2017, small IHEs had, on average, total revenues of approximately $9,925,999. Therefore, we would anticipate that the final regulations could generate a burden on small IHEs equal to approximately 0.28 percent of annual revenue. We therefore do not believe that these regulations would place a substantial burden on small IHEs.

Based on the model above, an LEA conducting an average of 3.23 investigations per year with no reduction under the new rules and no investigations resulting in informal resolutions would see an increase in costs of approximately $11,978 per year. In 2015-2016, small LEAs had an average total revenue of approximately $4,565,342. Therefore, we estimate that the final regulations could generate a cost burden on small LEAs of approximately 0.26 percent of total revenues. We therefore do not believe that these final regulations would place a substantial burden on small LEAs.

The Department certifies that this rule, if promulgated, will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act of 1995

As part of its continuing effort to reduce paperwork and the burden of responding, the Department provides the general public and Federal agencies with an opportunity to comment on

proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This requirement helps ensure that the public understands the Department's collection instructions; respondents can provide the requested data in the desired format; reporting burden (time and financial resources) is minimized; collection instruments are clearly understood; and the Department can properly assess the impact of collection requirements on respondents.

The Department's typical practice is to calculate burden over a three-year period. For transparency and to provide full information with respect to impact, the Department provides burden calculations for both a three-year period as well as the seven-year record retention period in the information below.

The following sections contain information collection requirements:

Proposed § 106.44(b)(3) Supportive Measures Safe Harbor in Absence of a Formal Complaint [removed in final regulations]

These final regulations do not include § 106.44(b)(3) as proposed in the NPRM, which provided recipients a safe harbor with respect to supportive measures. Accordingly, there is no burden to include.

§ 106.45(b)(2) Written Notice of Allegations

Section 106.45(b)(2) requires all recipients, upon receipt of a formal complaint, to provide written notice to the complainant and the respondent, informing the parties of the recipient's grievance process and providing sufficient details of the sexual harassment allegations being investigated. This written notice will help ensure that the nature and scope of the investigation, and the recipient's procedures, are clearly understood by the parties at the commencement of an investigation.

We estimate that most recipients will need to create a form, or modify one already used, to comply with these requirements. With respect to all recipients, including elementary and secondary schools, postsecondary institutions, and other recipients of Federal financial assistance, we estimate that it will take the Title IX Coordinator one hour to create or modify a form to use for these purposes, and that an attorney will spend 0.5 hours reviewing the form for compliance with § 106.45(b)(2). We estimate there will be no cost in out-years, and that the cost of maintaining such a form is captured under the recordkeeping requirements of § 106.45(b)(10) described below, for a total Year 1 cost of $2,650,654. The total burden for this requirement over three years or over seven years, which is the length of time that a recipient must maintain records under § 106.45(b)(10)(i), is 35,958 hours under OMB Control Number 1870-NEW, because this form only needs to be created once.

§ 106.45(b)(9) Informal Resolution

Section 106.45(b)(9) requires that recipients who wish to provide parties with the option of informal resolution of formal complaints, may offer this option to the parties but may only proceed by: first, providing the parties with written notice disclosing the sexual harassment allegations, the requirements of an informal resolution process, any consequences from participating in the informal resolution process; and second, obtaining the parties' voluntary, written consent to the informal resolution process. This provision permits – but does not require – recipients to allow for voluntary participation in an informal resolution as a method of resolving the allegations in formal complaints without completing the investigation and adjudication. This provision prohibits recipients from offering or facilitating an informal resolution process to resolve allegations that an employee sexually harassed a student.

We estimate that not all elementary and secondary schools, postsecondary institutions, or other recipients will choose to offer informal resolution as a feature of their grievance process; of those recipients that do, we estimate that most recipients will need to create a form, or modify one already used, to comply with the requirements of this section. With respect to all recipients, including elementary and secondary schools, postsecondary institutions, and other recipients of Federal financial assistance, we estimate that it will take Title IX Coordinators one (1) hour to create or modify a form to use for these purposes, and that an attorney will spend 0.5 hours reviewing the form for compliance with § 106.45(b)(9). We estimate there will be no cost in out-years, and that the cost of maintaining such a form is captured under the recordkeeping requirements of § 106.45(b)(9) described above, for a total Year 1 cost of $2,650,654. The total burden for this requirement over three years or over seven years, which is the length of time that a recipient must maintain records under § 106.45(b)(10), is 35,958 hours under OMB Control Number 1870-NEW, because this form only needs to be created once. Even though not all recipients may choose to offer an informal resolution process, we are estimating this burden for 100 percent of recipients to provide the most conservative estimate of any burden.

§ 106.45(b)(10) Recordkeeping

Section 106.45(b)(10) requires recipients to maintain certain documentation regarding their Title IX activities. Recipients will be required to maintain for a period of seven years records of: sexual harassment investigations, including any determination regarding responsibility and any audio or audiovisual recording or transcript required under § 106.45(b)(6)(i), any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity; any appeal and the result therefrom; any informal resolution; and

all materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. Additionally, for each response required under § 106.44(a), a recipient must create, and maintain for a period of seven years, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity. The Department clarifies in these final regulations that if a recipient does not provide a complainant with supportive measures, then such documentation must include the reasons why such a response was not clearly unreasonable in light of the known circumstances. This information will allow a recipient and OCR to assess on a longitudinal basis the prevalence of sexual harassment affecting access to a recipient's programs and activities, whether a recipient is complying with Title IX when responding to reports and formal complaints of sexual harassment, and the necessity for additional or different measures, including any remedial actions under § 106.3(a). We estimate the volume of records to be created and retained may represent a decline from current recordkeeping due to clarification elsewhere in these final regulations 1) that an investigation under § 106.45 needs to be conducted only if a complainant files or a Title IX Coordinator signs a formal complaint and the allegations in the formal complaint are not dismissed under § 106.45(b)(3) and 2) that an informal resolution process may be used to resolve allegations in a formal complaint pursuant to § 106.45(b)(9); both of these provisions will likely result in fewer investigative records being generated.

We estimate that recipients will have a higher first-year cost associated with establishing the system for documentation with a lower out-year cost for maintaining it. With respect to

elementary and secondary schools, we assume that the Title IX Coordinator will spend 4 hours in Year 1 establishing the system and an administrative assistant will spend 8 hours doing so. With respect to postsecondary institutions, we assume recipients are less likely to use a paper filing system and are likely to use an electronic database for managing such information. Therefore, we assume it will take a Title IX Coordinator 24 hours, an administrative assistant 40 hours, and a database administrator 40 hours to set up the system for a total Year 1 estimated cost of approximately $39,114,530 for 16,606 elementary and secondary schools, 6,766 postsecondary institutions, and 600 other entities that are recipients of Federal financial assistance. Given their size and organizational complexity, we assume that other entities that are recipients of Federal financial assistance that are not elementary and secondary schools or postsecondary institutions will face the same time burdens associated with complying as elementary and secondary schools.

In later years, we assume that the systems will be relatively simple to maintain. At the elementary and secondary school level as well as for other recipients of Federal financial assistance that are not elementary and secondary schools or postsecondary institutions, we assume it will take the Title IX Coordinator 2 hours and an administrative assistant 4 hours to do so. At the postsecondary institution level, we assume 4 hours from the Title IX Coordinator, 40 hours from an administrative assistant, and 8 hours from a database administrator. In total, we estimate an ongoing cost of approximately $15,189,260 per year.

We estimate that elementary and secondary schools and other recipients of Federal financial assistance will take 12 hours and postsecondary institutions will take 104 hours to establish and maintain a recordkeeping system for the required sexual harassment documentation during Year 1. In out-years, we estimate that elementary and secondary schools and other recipients of Federal financial assistance will take 6 hours annually and postsecondary

institutions will take 52 hours annually to maintain the recordkeeping requirement for Title IX sexual harassment documentation. The total burden for this recordkeeping over three years is 398,544 hours for elementary and secondary schools, 1,407,328 hours for postsecondary institutions, and 14,400 for other recipients of Federal financial assistance. The Department calculates burden over a seven-year period because § 106.45(b)(10)(i) requires recipients to maintain certain records for a period of seven years. The total burden for this recordkeeping requirement over seven years is 797,088 hours for elementary and secondary schools, 2,814,656 hours for postsecondary institutions, and 28,800 hours for other recipients of Federal financial assistance. Collectively, we estimate the burden over seven years for elementary and secondary schools, postsecondary institutions, and other recipients of Federal financial assistance for recordkeeping of Title IX sexual harassment documents will be 3,640,544 hours under OMB Control Number 1870-NEW.

Collection of Information

Regulatory section	Information collection	OMB Control Number and estimated burden [change in burden]
106.45(b)(2)	This regulatory provision requires recipients to provide parties with written notice when investigating a formal complaint.	OMB 1870-NEW. The burden over the first seven years will be $2,650,654 and 35,958 hours.
106.45(b)(9)	This regulatory provision requires recipients to provide written notice to	OMB 1870-NEW. The burden over the first seven

	parties wishing to participate in informal resolution of a formal complaint.	years will be $2,650,654 and 35,958 hours.
106.45(b)(10)	This regulatory provision requires recipients to maintain certain documentation related to Title IX activities.	OMB 1870-NEW. The burden over the first seven years will be $130,250,090 and 3,640,544 hours.
TOTAL		$135,551,398 3,712,460 hours

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2006

List of Subjects in 34 CFR Part 106

Education, Sex discrimination, Civil rights, Sexual harassment

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Betsy DeVos,
Secretary of Education.

2007

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

PART 106—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION

PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

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

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

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

§106.3 Remedial and affirmative action and self-evaluation.

(a) *Remedial action*. If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity under this part, or otherwise violated this part, such recipient must take such remedial action as the Assistant Secretary deems necessary to remedy the violation, consistent with 20 U.S.C. 1682.

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

§ 106.6 Effect of other requirements and preservation of rights.

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

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

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

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

(e) *Effect of Section 444 of General Education Provisions Act (GEPA)/Family Educational Rights and Privacy Act (FERPA)*. The obligation to comply with this part is not obviated or alleviated by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99.

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

(g) *Exercise of rights by parents or guardians.* Nothing in this part may be read in derogation of any legal right of a parent or guardian to act on behalf of a "complainant," "respondent," "party," or other individual, subject to paragraph (e) of this section, including but not limited to filing a formal complaint.

(h) *Preemptive effect*. To the extent of a conflict between State or local law and title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law.

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4. Section 106.8 is revised to read as follows:

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

(a) *Designation of coordinator.* Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which employee must be referred to as the "Title IX Coordinator." The recipient must notify applicants

for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator pursuant to this paragraph. Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report. Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator.

(b) *Dissemination of policy*—(1) *Notification of policy.* Each recipient must notify persons entitled to a notification under paragraph (a) of this section that the recipient does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by title IX and this part not to discriminate in such a manner. Such notification must state that the requirement not to discriminate in the education program or activity extends to admission (unless subpart C of this part does not apply) and employment, and that inquiries about the application of title IX and this part to such recipient may be referred to the recipient's Title IX Coordinator, to the Assistant Secretary, or both.

(2) *Publications.* (i) Each recipient must prominently display the contact information required to be listed for the Title IX Coordinator under paragraph (a) of this section and the policy described in paragraph (b)(1) of this section on its website, if any, and in each handbook

or catalog that it makes available to persons entitled to a notification under paragraph (a) of this section.

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

(c) *Adoption of grievance procedures.* A recipient must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part and a grievance process that complies with § 106.45 for formal complaints as defined in § 106.30. A recipient must provide to persons entitled to a notification under paragraph (a) of this section notice of the recipient's grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond.

(d) *Application outside the United States.* The requirements of paragraph (c) of this section apply only to sex discrimination occurring against a person in the United States.

5. Section 106.9 is revised to read as follows:

§ 106.9 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

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

§ 106.12 Educational institutions controlled by religious organizations.

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(b) *Assurance of exemption*. An educational institution that seeks assurance of the exemption set forth in paragraph (a) of this section may do so by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part that conflict with a specific tenet of the religious organization. An institution is not required to seek assurance from the Assistant Secretary in order to assert such an exemption. In the event the Department notifies an institution that it is under investigation for noncompliance with this part and the institution wishes to assert an exemption set forth in paragraph (a) of this section, the institution may at that time raise its exemption by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization, whether or not the institution had previously sought assurance of an exemption from the Assistant Secretary.

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7. Add § 106.18 to subpart B to read as follows:

§ 106.18 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

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8. Add § 106.24 to subpart C to read as follows:

§ 106.24 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

9. Add § 106.30 to subpart D to read as follows:

§ 106.30 Definitions.

(a) As used in this part:

Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual knowledge is the respondent. The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient. "Notice" as used in this paragraph includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator as described in § 106.8(a).

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

Consent. The Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault, as referenced in this section.

Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed. A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under § 106.8(a), and by any additional method designated by the recipient. As used in this paragraph, the phrase "document filed by a complainant" means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint. Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party under this part or under § 106.45, and must comply with the requirements of this part, including § 106.45(b)(1)(iii).

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

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

(1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;

(2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or

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

Supportive measures means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment, or deter sexual harassment. Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

(b) As used in §§ 106.44 and 106.45:

Elementary and secondary school means a local educational agency (LEA), as defined in the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act, a preschool, or a private elementary or secondary school.

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Postsecondary institution means an institution of graduate higher education as defined in § 106.2(l), an institution of undergraduate higher education as defined in § 106.2(m), an institution of professional education as defined in § 106.2(n), or an institution of vocational education as defined in § 106.2(o).

10. Add § 106.44 to subpart D to read as follows:

§ 106.44 Recipient's response to sexual harassment.

(a) *General response to sexual harassment.* A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances. For the purposes of this section, §§ 106.30, and 106.45, "education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. A recipient's response must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. The Department may not deem a

recipient to have satisfied the recipient's duty to not be deliberately indifferent under this part based on the recipient's restriction of rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment.

(b) *Response to a formal complaint.* (1) In response to a formal complaint, a recipient must follow a grievance process that complies with § 106.45. With or without a formal complaint, a recipient must comply with § 106.44(a).

(2) The Assistant Secretary will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient, or otherwise evidence of discrimination under title IX by the recipient, solely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence.

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

(d) *Administrative leave.* Nothing in this subpart precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45. This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.

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11. Add § 106.45 to subpart D to read as follows:

§ 106.45 Grievance process for formal complaints of sexual harassment.

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

(b) *Grievance process*. For the purpose of addressing formal complaints of sexual harassment, a recipient's grievance process must comply with the requirements of this section. Any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in § 106.30, must apply equally to both parties.

(1) *Basic requirements for grievance process*. A recipient's grievance process must—

(i) Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. Remedies must be designed to restore or preserve equal access to the recipient's education program or activity. Such remedies may include the same individualized services described in § 106.30 as "supportive measures"; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent;

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

(iii) Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the definition of sexual harassment in § 106.30, the scope of the recipient's education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. A recipient must ensure that decision-makers receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section. A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of this section. Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment;

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

(v) Include reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes, and a process that allows for the

temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities;

(vi) Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility;

(vii) State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment;

(viii) Include the procedures and permissible bases for the complainant and respondent to appeal;

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

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

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

(A) Notice of the recipient's grievance process that complies with this section, including any informal resolution process.

(B) Notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in § 106.30, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment under § 106.30, and the date and location of the alleged incident, if known. The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process. The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section. The written notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

(ii) If, in the course of an investigation, the recipient decides to investigate allegations about the complainant or respondent that are not included in the notice provided pursuant to paragraph (b)(2)(i)(B) of this section, the recipient must provide notice of the additional allegations to the parties whose identities are known.

(3) *Dismissal of a formal complaint*—(i) The recipient must investigate the allegations in a formal complaint. If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient's education program or activity, or did not occur against a person in the United States, then the recipient

must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; such a dismissal does not preclude action under another provision of the recipient's code of conduct.

(ii) The recipient may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by the recipient; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

(iii) Upon a dismissal required or permitted pursuant to paragraph (b)(3)(i) or (b)(3)(ii) of this section, the recipient must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties.

(4) *Consolidation of formal complaints*. A recipient may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances. Where a grievance process involves more than one complainant or more than one respondent, references in this section to the singular "party," "complainant," or "respondent" include the plural, as applicable.

(5) *Investigation of a formal complaint*. When investigating a formal complaint and throughout the grievance process, a recipient must—

(i) Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties provided that the recipient cannot access, consider, disclose, or otherwise use a party's records

that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for a grievance process under this section (if a party is not an "eligible student," as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a "parent," as defined in 34 CFR 99.3);

(ii) Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence;

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

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

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

(vi) Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal

complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination; and

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

(6) *Hearings*. (i) For postsecondary institutions, the recipient's grievance process must provide for a live hearing. At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings. At the request of either party, the recipient must provide for the live hearing to occur with the

parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions. Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant. If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party. Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions. Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipient's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other. Recipients must create an audio

or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

(ii) For recipients that are elementary and secondary schools, and other recipients that are not postsecondary institutions, the recipient's grievance process may, but need not, provide for a hearing. With or without a hearing, after the recipient has sent the investigative report to the parties pursuant to paragraph (b)(5)(vii) of this section and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party. With or without a hearing, questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.

(7) *Determination regarding responsibility.* (i) The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. To reach this determination, the recipient must apply the standard of evidence described in paragraph (b)(1)(vii) of this section.

(ii) The written determination must include—

(A) Identification of the allegations potentially constituting sexual harassment as defined in § 106.30;

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

(C) Findings of fact supporting the determination;

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

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

(F) The recipient's procedures and permissible bases for the complainant and respondent to appeal.

(iii) The recipient must provide the written determination to the parties simultaneously. The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

(iv) The Title IX Coordinator is responsible for effective implementation of any remedies.

(8) *Appeals*. (i) A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases:

(A) Procedural irregularity that affected the outcome of the matter;

(B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and

(C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

(ii) A recipient may offer an appeal equally to both parties on additional bases.

(iii) As to all appeals, the recipient must:

(A) Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;

(B) Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;

(C) Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of this section;

(D) Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;

(E) Issue a written decision describing the result of the appeal and the rationale for the result; and

(F) Provide the written decision simultaneously to both parties.

(9) *Informal resolution*. A recipient may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section. Similarly, a recipient may not require the parties to

participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed. However, at any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient –

(i) Provides to the parties a written notice disclosing: the allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;

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

(iii) Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

(10) *Recordkeeping.* (i) A recipient must maintain for a period of seven years records of –

(A) Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required under paragraph (b)(6)(i) of this section, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity;

(B) Any appeal and the result therefrom;

(C) Any informal resolution and the result therefrom; and

(D) All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.

(ii) For each response required under § 106.44, a recipient must create, and maintain for a period of seven years, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity. If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.

12. Add § 106.46 to subpart D to read as follows:

§ 106.46 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

13. Add § 106.62 to subpart E to read as follows:

§ 106.62 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

14. Subpart F is revised to read as follows:

Subpart F–Retaliation

Sec.

106.71 Retaliation

106.72 Severability

Subpart F–Retaliation

§ 106.71 Retaliation.

(a) *Retaliation prohibited*. No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part. Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation. The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or

filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder. Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).

(b) *Specific circumstances*. (1) The exercise of rights protected under the First Amendment does not constitute retaliation prohibited under paragraph (a) of this section.

(2) Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

§ 106.72 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

15. Add subpart G to read as follows:

Subpart G – Procedures

Sec.

106.81 Procedures

106.82 Severability

Subpart G – Procedures

§ 106.81 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 34 CFR 100.6-100.11 and 34 CFR part 101. The definitions in § 106.30 do not apply to 34 CFR 100.6-100.11 and 34 CFR part 101.

§ 106.82 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

Subject Index to Title IX Preamble and Regulation [Removed]

16. Remove the Subject Index to Title IX Preamble and Regulation.

17. In addition to the amendments set forth above, in 34 CFR part 106, remove the parenthetical authority citation at the ends of §§ 106.1, 106.2, 106.3, 106.4, 106.5, 106.6, 106.7, , 106.11, 106.12, 106.13, 106.14, 106.15, 106.16, 106.17, 106.21, 106.22, 106.23, 106.31, 106.32, 106.33, 106.34, 106.35, 106.36, 106.37, 106.38, 106.39, 106.40, 106.41, 106.42, 106.43, 106.51, 106.52, 106.53, 106.54, 106.55, 106.56, 106.57, 106.58, 106.59, 106.60, and 106.61.

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Title 34 → Subtitle B → Chapter I → Part 106

Title 34: Education

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

Contents

Subpart D—Discrimination on the Basis of Sex in Education Programs or Activities Prohibited

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

SOURCE: 45 FR 30955, May 9, 1980, unless otherwise noted.

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Subpart A—Introduction

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§106.1 Purpose and effective date.

Link to an amendment published at 85 FR 30579, May 19, 2020.

The purpose of this part is to effectuate title IX of the Education Amendments of 1972, as amended by Pub. L. 93-568, 88 Stat. 1855 (except sections 904 and 906 of those Amendments) which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part. This part is also intended to effectuate section 844 of the Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484. The effective date of this part shall be July 21, 1975.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682, as amended by Pub. L. 93-568, 88 Stat. 1855, and sec. 844, Education Amendments of 1974, 88 Stat. 484, Pub. L. 93-380)

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§106.2 Definitions.

Link to an amendment published at 85 FR 30579, May 19, 2020.

As used in this part, the term:

(a) *Title IX* means title IX of the Education Amendments of 1972, Pub. L. 92-318, as amended by section 3 of Pub. L. 93-568, 88 Stat. 1855, except sections 904 and 906 thereof; 20 U.S.C. 1681, 1682, 1683, 1685, 1686.

(b) *Department* means the Department of Education.

(c) *Secretary* means the Secretary of Education.

(d) *Assistant Secretary* means the Assistant Secretary for Civil Rights of the Department.

(e) *Reviewing Authority* means that component of the Department delegated authority by the Secretary to appoint, and to review the decisions of, administrative law judges in cases arising under this part.

(f) *Administrative law judge* means a person appointed by the reviewing authority to preside over a hearing held under this part.

(g) *Federal financial assistance* means any of the following, when authorized or extended under a law administered by the Department:

(1) A grant or loan of Federal financial assistance, including funds made available for:

(i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and

(ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.

(2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

(3) Provision of the services of Federal personnel.

(4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.

(5) Any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

(h) *Program or activity* and *program* means all of the operations of—

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

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

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

(ii) A local educational agency (as defined in 20 U.S.C. 8801), system of vocational education, or other school system;

(3)(i) An entire corporation, partnership, other private organization, or an entire sole proprietorship—

(A) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(B) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

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

(4) Any other entity that is established by two or more of the entities described in paragraph (h)(1), (2), or (3) of this section; any part of which is extended Federal financial assistance.

(Authority: 20 U.S.C. 1687)

(i) *Recipient* means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives such assistance, including any subunit, successor, assignee, or transferee thereof.

(j) *Applicant* means one who submits an application, request, or plan required to be approved by a Department official, or by a recipient, as a condition to becoming a recipient.

(k) *Educational institution* means a local educational agency (LEA) as defined by section 1001(f) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 3381), a preschool, a private elementary or secondary school, or an applicant or recipient of the type defined by paragraph (l), (m), (n), or (o) of this section.

(l) *Institution of graduate higher education* means an institution which:

(1) Offers academic study beyond the bachelor of arts or bachelor of science degree, whether or not leading to a certificate of any higher degree in the liberal arts and sciences; or

(2) Awards any degree in a professional field beyond the first professional degree (regardless of whether the first professional degree in such field is awarded by an institution of undergraduate higher education or professional education); or

(3) Awards no degree and offers no further academic study, but operates ordinarily for the purpose of facilitating research by persons who have received the highest graduate degree in any field of study.

(m) *Institution of undergraduate higher education* means:

(1) An institution offering at least two but less than four years of college level study beyond the high school level, leading to a diploma or an associate degree, or wholly or principally creditable toward a baccalaureate degree; or

(2) An institution offering academic study leading to a baccalaureate degree; or

(3) An agency or body which certifies credentials or offers degrees, but which may or may not offer academic study.

(n) *Institution of professional education* means an institution (except any institution of undergraduate higher education) which offers a program of academic study that leads to a first professional degree in a field for which there is a national specialized accrediting agency recognized by the Secretary.

(o) *Institution of vocational education* means a school or institution (except an institution of professional or graduate or undergraduate higher education) which has as its primary purpose preparation of students to pursue a technical, skilled, or semiskilled occupation or trade, or to pursue study in a technical field, whether or not the school or institution offers certificates, diplomas, or degrees and whether or not it offers fulltime study.

(p) *Administratively separate unit* means a school, department or college of an educational institution (other than a local educational agency) admission to which is independent of admission to any other component of such institution.

(q) *Admission* means selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by a recipient.

(r) *Student* means a person who has gained admission.

(s) *Transition plan* means a plan subject to the approval of the Secretary pursuant to section 901(a)(2) of the Education Amendments of 1972, under which an educational institution operates in making the transition from being an educational institution which admits only students of one sex to being one which admits students of both sexes without discrimination.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980; 45 FR 37426, June 3, 1980, as amended at 65 FR 68056, Nov. 13, 2000]

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§106.3 Remedial and affirmative action and self-evaluation.

Link to an amendment published at 85 FR 30572, May 19, 2020.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *Remedial action.* If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall

take such remedial action as the Assistant Secretary deems necessary to overcome the effects of such discrimination.

(b) *Affirmative action.* In the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex. Nothing herein shall be interpreted to alter any affirmative action obligations which a recipient may have under Executive Order 11246.

(c) *Self-evaluation.* Each recipient education institution shall, within one year of the effective date of this part:

(1) Evaluate, in terms of the requirements of this part, its current policies and practices and the effects thereof concerning admission of students, treatment of students, and employment of both academic and non-academic personnel working in connection with the recipient's education program or activity;

(2) Modify any of these policies and practices which do not or may not meet the requirements of this part; and

(3) Take appropriate remedial steps to eliminate the effects of any discrimination which resulted or may have resulted from adherence to these policies and practices.

(d) *Availability of self-evaluation and related materials.* Recipients shall maintain on file for at least three years following completion of the evaluation required under paragraph (c) of this section, and shall provide to the Assistant Secretary upon request, a description of any modifications made pursuant to paragraph (c)(ii) of this section and of any remedial steps taken pursuant to paragraph (c)(iii) of this section.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§106.4 Assurance required.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *General.* Every application for Federal financial assistance shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Assistant Secretary, that the education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part. An assurance of compliance with this part shall not be satisfactory to the Assistant Secretary if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with §106.3(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior or subsequent to the submission to the Assistant Secretary of such assurance.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended to provide real property or structures thereon, such assurance shall obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used to provide an education program or activity.

(2) In the case of Federal financial assistance extended to provide personal property, such assurance shall obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases such assurance shall obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Form.* The Director will specify the form of the assurances required by paragraph (a) of this section and the extent to which such assurances will be required of the applicant's or recipient's subgrantees, contractors, subcontractors, transferees, or successors in interest.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980, as amended at 45 FR 86298, Dec. 30, 1980; 65 FR 68056, Nov. 13, 2000]

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§106.5 Transfers of property.

Link to an amendment published at 85 FR 30579, May 19, 2020.

If a recipient sells or otherwise transfers property financed in whole or in part with Federal financial assistance to a transferee which operates any education program or activity, and the Federal share of the fair market value of the property is not upon such sale or transfer properly accounted for to the Federal Government both the transferor and the transferee shall be deemed to be recipients, subject to the provisions of subpart B of this part.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§106.6 Effect of other requirements.

Link to an amendment published at 85 FR 30573, May 19, 2020.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *Effect of other Federal provisions.* The obligations imposed by this part are independent of, and do not alter, obligations not to discriminate on the basis of sex imposed by Executive Order 11246, as amended; sections 704 and 855 of the Public Health Service Act (42 U.S.C. 292d and 298b-2); Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et*

seq.); the Equal Pay Act (29 U.S.C. 206 and 206(d)); and any other Act of Congress or Federal regulation.

(Authority: Secs. 901, 902, 905, Education Amendments of 1972, 86 Stat. 373, 374, 375; 20 U.S.C. 1681, 1682, 1685)

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

(c) *Effect of rules or regulations of private organizations.* The obligation to comply with this part is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association which would render any applicant or student ineligible to participate or limit the eligibility or participation of any applicant or student, on the basis of sex, in any education program or activity operated by a recipient and which receives Federal financial assistance.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980, as amended at 65 FR 68056, Nov. 13, 2000]

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§106.7 Effect of employment opportunities.

Link to an amendment published at 85 FR 30579, May 19, 2020.

The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for members of one sex than for members of the other sex.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§106.8 Designation of responsible employee and adoption of grievance procedures.

Link to an amendment published at 85 FR 30573, May 19, 2020.

(a) *Designation of responsible employee.* Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part. The recipient shall notify all its students and employees of the name, office address and telephone number of the employee or employees appointed pursuant to this paragraph.

(b) *Complaint procedure of recipient.* A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§106.9 Dissemination of policy.

Link to an amendment published at 85 FR 30573, May 19, 2020.

(a) *Notification of policy.* (1) Each recipient shall implement specific and continuing steps to notify applicants for admission and employment, students and parents of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, that it does not discriminate on the basis of sex in the educational program or activity which it operates, and that it is required by title IX and this part not to discriminate in such a manner. Such notification shall contain such information, and be made in such manner, as the Assistant Secretary finds necessary to apprise such persons of the protections against discrimination assured them by title IX and this part, but shall state at least that the requirement not to discriminate in the education program or activity extends to employment therein, and to admission thereto unless Subpart C does not apply to the recipient, and that inquiries concerning the application of title IX and this part to such recipient may be referred to the employee designated pursuant to §106.8, or to the Assistant Secretary.

(2) Each recipient shall make the initial notification required by paragraph (a)(1) of this section within 90 days of the effective date of this part or of the date this part first applies to such recipient, whichever comes later, which notification shall include publication in:

(i) Local newspapers;

(ii) Newspapers and magazines operated by such recipient or by student, alumnae, or alumni groups for or in connection with such recipient; and

(iii) Memoranda or other written communications distributed to every student and employee of such recipient.

(b) *Publications.* (1) Each recipient shall prominently include a statement of the policy described in paragraph (a) of this section in each announcement, bulletin, catalog, or application form which it makes available to any person of a type, described in paragraph (a) of this section, or which is otherwise used in connection with the recruitment of students or employees.

(2) A recipient shall not use or distribute a publication of the type described in this paragraph which suggests, by text or illustration, that such recipient treats applicants,

students, or employees differently on the basis of sex except as such treatment is permitted by this part.

(c) *Distribution.* Each recipient shall distribute without discrimination on the basis of sex each publication described in paragraph (b) of this section, and shall apprise each of its admission and employment recruitment representatives of the policy of nondiscrimination described in paragraph (a) of this section, and require such representatives to adhere to such policy.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980, as amended at 65 FR 68056, Nov. 13, 2000]

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Subpart B—Coverage

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§106.11 Application.

Link to an amendment published at 85 FR 30579, May 19, 2020.

Except as provided in this subpart, this part 106 applies to every recipient and to the education program or activity operated by such recipient which receives Federal financial assistance.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 86298, Dec. 30, 1980, as amended at 65 FR 68056, Nov. 13, 2000]

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§106.12 Educational institutions controlled by religious organizations.

Link to an amendment published at 85 FR 30573, May 19, 2020.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *Application.* This part does not apply to an educational institution which is controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such organization.

(b) *Exemption.* An educational institution which wishes to claim the exemption set forth in paragraph (a) of this section, shall do so by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§106.13 Military and merchant marine educational institutions.

Link to an amendment published at 85 FR 30579, May 19, 2020.

This part does not apply to an educational institution whose primary purpose is the training of individuals for a military service of the United States or for the merchant marine.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§106.14 Membership practices of certain organizations.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *Social fraternities and sororities.* This part does not apply to the membership practices of social fraternities and sororities which are exempt from taxation under section 501(a) of the Internal Revenue Code of 1954, the active membership of which consists primarily of students in attendance at institutions of higher education.

(b) *YMCA, YWCA, Girl Scouts, Boy Scouts and Camp Fire Girls.* This part does not apply to the membership practices of the Young Men's Christian Association, the Young Women's Christian Association, the Girl Scouts, the Boy Scouts and Camp Fire Girls.

(c) *Voluntary youth service organizations.* This part does not apply to the membership practices of voluntary youth service organizations which are exempt from taxation under section 501(a) of the Internal Revenue Code of 1954 and the membership of which has been traditionally limited to members of one sex and principally to persons of less than nineteen years of age.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; sec. 3(a) of P.L. 93-568, 88 Stat. 1862 amending Sec. 901)

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§106.15 Admissions.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) Admissions to educational institutions prior to June 24, 1973, are not covered by this part.

(b) *Administratively separate units.* For the purposes only of this section, §§106.16 and 106.17, and subpart C, each administratively separate unit shall be deemed to be an

educational institution.

(c) *Application of subpart C.* Except as provided in paragraphs (d) and (e) of this section, subpart C applies to each recipient. A recipient to which subpart C applies shall not discriminate on the basis of sex in admission or recruitment in violation of that subpart.

(d) *Educational institutions.* Except as provided in paragraph (e) of this section as to recipients which are educational institutions, subpart C applies only to institutions of vocational education, professional education, graduate higher education, and public institutions of undergraduate higher education.

(e) *Public institutions of undergraduate higher education.* Subpart C does not apply to any public institution of undergraduate higher education which traditionally and continually from its establishment has had a policy of admitting only students of one sex.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980, as amended at 45 FR 86298, Dec. 30, 1980]

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§106.16 Educational institutions eligible to submit transition plans.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *Application.* This section applies to each educational institution to which subpart C applies which:

(1) Admitted only students of one sex as regular students as of June 23, 1972; or

(2) Admitted only students of one sex as regular students as of June 23, 1965, but thereafter admitted as regular students, students of the sex not admitted prior to June 23, 1965.

(b) *Provision for transition plans.* An educational institution to which this section applies shall not discriminate on the basis of sex in admission or recruitment in violation of subpart C unless it is carrying out a transition plan approved by the Secretary as described in §106.17, which plan provides for the elimination of such discrimination by the earliest practicable date but in no event later than June 23, 1979.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§106.17 Transition plans.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *Submission of plans.* An institution to which §106.16 applies and which is composed of more than one administratively separate unit may submit either a single transition plan applicable to all such units, or a separate transition plan applicable to each such unit.

(b) *Content of plans.* In order to be approved by the Secretary a transition plan shall:

(1) State the name, address, and Federal Interagency Committee on Education (FICE) Code of the educational institution submitting such plan, the administratively separate units to which the plan is applicable, and the name, address, and telephone number of the person to whom questions concerning the plan may be addressed. The person who submits the plan shall be the chief administrator or president of the institution, or another individual legally authorized to bind the institution to all actions set forth in the plan.

(2) State whether the educational institution or administratively separate unit admits students of both sexes, as regular students and, if so, when it began to do so.

(3) Identify and describe with respect to the educational institution or administratively separate unit any obstacles to admitting students without discrimination on the basis of sex.

(4) Describe in detail the steps necessary to eliminate as soon as practicable each obstacle so identified and indicate the schedule for taking these steps and the individual directly responsible for their implementation.

(5) Include estimates of the number of students, by sex, expected to apply for, be admitted to, and enter each class during the period covered by the plan.

(c) *Nondiscrimination.* No policy or practice of a recipient to which §106.16 applies shall result in treatment of applicants to or students of such recipient in violation of subpart C unless such treatment is necessitated by an obstacle identified in paragraph (b) (3) of this section and a schedule for eliminating that obstacle has been provided as required by paragraph (b) (4) of this section.

(d) *Effects of past exclusion.* To overcome the effects of past exclusion of students on the basis of sex, each educational institution to which §106.16 applies shall include in its transition plan, and shall implement, specific steps designed to encourage individuals of the previously excluded sex to apply for admission to such institution. Such steps shall include instituting recruitment which emphasizes the institution's commitment to enrolling students of the sex previously excluded.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980, as amended at 65 FR 68056, Nov. 13, 2000]

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§106.18 xxx

Link to an amendment published at 85 FR 30573, May 19, 2020.

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Subpart C—Discrimination on the Basis of Sex in Admission and Recruitment Prohibited

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§106.21 Admission.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *General.* No person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission, by any recipient to which this subpart applies, except as provided in §§106.16 and 106.17.

(b) *Specific prohibitions.* (1) In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies shall not:

(i) Give preference to one person over another on the basis of sex, by ranking applicants separately on such basis, or otherwise;

(ii) Apply numerical limitations upon the number or proportion of persons of either sex who may be admitted; or

(iii) Otherwise treat one individual differently from another on the basis of sex.

(2) A recipient shall not administer or operate any test or other criterion for admission which has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be unavailable.

(c) *Prohibitions relating to marital or parental status.* In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies:

(1) Shall not apply any rule concerning the actual or potential parental, family, or marital status of a student or applicant which treats persons differently on the basis of sex;

(2) Shall not discriminate against or exclude any person on the basis of pregnancy, childbirth, termination of pregnancy, or recovery therefrom, or establish or follow any rule or practice which so discriminates or excludes;

(3) Shall treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition; and

(4) Shall not make pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is “Miss” or “Mrs.” A recipient may make pre-admission inquiry as to the sex of an applicant for admision, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§106.22 Preference in admission.

Link to an amendment published at 85 FR 30579, May 19, 2020.

A recipient to which this subpart applies shall not give preference to applicants for admission, on the basis of attendance at any educational institution or other school or entity which admits as students only or predominantly members of one sex, if the giving of such preference has the effect of discriminating on the basis of sex in violation of this subpart.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§106.23 Recruitment.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *Nondiscriminatory recruitment.* A recipient to which this subpart applies shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action pursuant to §106.3(a), and may choose to undertake such efforts as affirmative action pursuant to §106.3(b).

(b) *Recruitment at certain institutions.* A recipient to which this subpart applies shall not recruit primarily or exclusively at educational institutions, schools or entities which admit as students only or predominantly members of one sex, if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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Link to an amendment published at 85 FR 30574, May 19, 2020.

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Subpart D—Discrimination on the Basis of Sex in Education Programs or Activities Prohibited

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Link to an amendment published at 85 FR 30574, May 19, 2020.

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§106.31 Education programs or activities.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *General.* Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance. This subpart does not apply to actions of a recipient in connection with admission of its students to an education program or activity of (1) a recipient to which subpart C does not apply, or (2) an entity, not a recipient, to which subpart C would not apply if the entity were a recipient.

(b) *Specific prohibitions.* Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

(1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;

(2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

(3) Deny any person any such aid, benefit, or service;

(4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;

(5) Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition;

(6) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;

(7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

(c) *Assistance administered by a recipient educational institution to study at a foreign institution.* A recipient educational institution may administer or assist in the administration of scholarships, fellowships, or other awards established by foreign or domestic wills, trusts, or similar legal instruments, or by acts of foreign governments and restricted to members of one sex, which are designed to provide opportunities to study abroad, and which are awarded to students who are already matriculating at or who are graduates of the recipient institution; *Provided,* a recipient educational institution which administers or assists in the administration of such scholarships, fellowships, or other awards which are restricted to members of one sex provides, or otherwise makes available reasonable opportunities for similar studies for members of the other sex. Such opportunities may be derived from either domestic or foreign sources.

(d) *Aid, benefits or services not provided by recipient.* (1) This paragraph applies to any recipient which requires participation by any applicant, student, or employee in any education program or activity not operated wholly by such recipient, or which facilitates, permits, or considers such participation as part of or equivalent to an education program or activity operated by such recipient, including participation in educational consortia and cooperative employment and student-teaching assignments.

(2) Such recipient:

(i) Shall develop and implement a procedure designed to assure itself that the operator or sponsor of such other education program or activity takes no action affecting any applicant, student, or employee of such recipient which this part would prohibit such recipient from taking; and

(ii) Shall not facilitate, require, permit, or consider such participation if such action occurs.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980, as amended at 47 FR 32527, July 28, 1982; 65 FR 68056, Nov. 13, 2000]

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§106.32 Housing.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *Generally.* A recipient shall not, on the basis of sex, apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing, except as provided in this section (including housing provided only to married students).

(b) *Housing provided by recipient.* (1) A recipient may provide separate housing on the basis of sex.

(2) Housing provided by a recipient to students of one sex, when compared to that provided to students of the other sex, shall be as a whole:

(i) Proportionate in quantity to the number of students of that sex applying for such housing; and

(ii) Comparable in quality and cost to the student.

(c) *Other housing.* (1) A recipient shall not, on the basis of sex, administer different policies or practices concerning occupancy by its students of housing other than provided by such recipient.

(2) A recipient which, through solicitation, listing, approval of housing, or otherwise, assists any agency, organization, or person in making housing available to any of its students, shall take such reasonable action as may be necessary to assure itself that such housing as is provided to students of one sex, when compared to that provided to students of the other sex, is as a whole:

(i) Proportionate in quantity and

(ii) Comparable in quality and cost to the student.

A recipient may render such assistance to any agency, organization, or person which provides all or part of such housing to students only of one sex.

(Authority: Secs. 901, 902, 907, Education Amendments of 1972, 86 Stat. 373, 374, 375; 20 U.S.C. 1681, 1682, 1686)

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§106.33 Comparable facilities.

Link to an amendment published at 85 FR 30579, May 19, 2020.

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374)

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§106.34 Access to classes and schools.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *General standard.* Except as provided for in this section or otherwise in this part, a recipient shall not provide or otherwise carry out any of its education programs or activities separately on the basis of sex, or require or refuse participation therein by any of its students on the basis of sex.

on the basis of sex.

(1) *Contact sports in physical education classes.* This section does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.

(2) *Ability grouping in physical education classes.* This section does not prohibit grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex.

(3) *Human sexuality classes.* Classes or portions of classes in elementary and secondary schools that deal primarily with human sexuality may be conducted in separate sessions for boys and girls.

(4) *Choruses.* Recipients may make requirements based on vocal range or quality that may result in a chorus or choruses of one or predominantly one sex.

(b) *Classes and extracurricular activities*—(1) *General standard.* Subject to the requirements in this paragraph, a recipient that operates a nonvocational coeducational elementary or secondary school may provide nonvocational single-sex classes or extracurricular activities, if—

(i) Each single-sex class or extracurricular activity is based on the recipient's important objective—

(A) To improve educational achievement of its students, through a recipient's overall established policy to provide diverse educational opportunities, provided that the single-sex nature of the class or extracurricular activity is substantially related to achieving that objective; or

(B) To meet the particular, identified educational needs of its students, provided that the single-sex nature of the class or extracurricular activity is substantially related to achieving that objective;

(ii) The recipient implements its objective in an evenhanded manner;

(iii) Student enrollment in a single-sex class or extracurricular activity is completely voluntary; and

(iv) The recipient provides to all other students, including students of the excluded sex, a substantially equal coeducational class or extracurricular activity in the same subject or activity.

(2) *Single-sex class or extracurricular activity for the excluded sex.* A recipient that provides a single-sex class or extracurricular activity, in order to comply with paragraph (b)(1)(ii) of this section, may be required to provide a substantially equal single-sex class or extracurricular activity for students of the excluded sex.

(3) *Substantially equal factors.* Factors the Department will consider, either individually or in the aggregate as appropriate, in determining whether classes or extracurricular activities are substantially equal include, but are not limited to, the following: the policies and criteria of admission, the educational benefits provided, including the quality, range, and content of curriculum and other services and the quality and availability of books, instructional materials, and technology, the qualifications of faculty and staff, geographic accessibility, the quality, accessibility, and availability of facilities and resources provided to the class, and intangible features, such as reputation of faculty.

(4) *Periodic evaluations.* (i) The recipient must conduct periodic evaluations to ensure that single-sex classes or extracurricular activities are based upon genuine justifications and do not rely on overly broad generalizations about the different talents, capacities, or preferences of either sex and that any single-sex classes or extracurricular activities are substantially related to the achievement of the important objective for the classes or extracurricular activities.

(ii) Evaluations for the purposes of paragraph (b)(4)(i) of this section must be conducted at least every two years.

(5) *Scope of coverage.* The provisions of paragraph (b)(1) through (4) of this section apply to classes and extracurricular activities provided by a recipient directly or through another entity, but the provisions of paragraph (b)(1) through (4) of this section do not apply to interscholastic, club, or intramural athletics, which are subject to the provisions of §§106.41 and 106.37(c) of this part.

(c) *Schools*—(1) *General Standard.* Except as provided in paragraph (c)(2) of this section, a recipient that operates a public nonvocational elementary or secondary school that excludes from admission any students, on the basis of sex, must provide students of the excluded sex a substantially equal single-sex school or coeducational school.

(2) *Exception.* A nonvocational public charter school that is a single-school local educational agency under State law may be operated as a single-sex charter school without regard to the requirements in paragraph (c)(1) of this section.

(3) *Substantially equal factors.* Factors the Department will consider, either individually or in the aggregate as appropriate, in determining whether schools are substantially equal include, but are not limited to, the following: The policies and criteria of admission, the educational benefits provided, including the quality, range, and content of curriculum and other services and the quality and availability of books, instructional materials, and technology, the quality and range of extracurricular offerings, the qualifications of faculty and staff, geographic accessibility, the quality, accessibility, and availability of facilities and resources, and intangible features, such as reputation of faculty.

(4) *Definition.* For the purposes of paragraph (c)(1) through (3) of this section, the term “school” includes a “school within a school,” which means an administratively separate school located within another school.

(Authority: 20 U.S.C. 1681, 1682)

(Authority: 20 U.S.C. 1681, 1682)

[71 FR 62542, Oct. 25, 2006]

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§106.35 Access to institutions of vocational education.

Link to an amendment published at 85 FR 30579, May 19, 2020.

A recipient shall not, on the basis of sex, exclude any person from admission to any institution of vocational education operated by that recipient.

(Authority: 20 U.S.C. 1681, 1682)

[71 FR 62543, Oct. 25, 2006]

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§106.36 Counseling and use of appraisal and counseling materials.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *Counseling.* A recipient shall not discriminate against any person on the basis of sex in the counseling or guidance of students or applicants for admission.

(b) *Use of appraisal and counseling materials.* A recipient which uses testing or other materials for appraising or counseling students shall not use different materials for students on the basis of their sex or use materials which permit or require different treatment of students on such basis unless such different materials cover the same occupations and interest areas and the use of such different materials is shown to be essential to eliminate sex bias. Recipients shall develop and use internal procedures for ensuring that such materials do not discriminate on the basis of sex. Where the use of a counseling test or other instrument results in a substantially disproportionate number of members of one sex in any particular course of study or classification, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination in the instrument or its application.

(c) *Disproportion in classes.* Where a recipient finds that a particular class contains a substantially disproportionate number of individuals of one sex, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination on the basis of sex in counseling or appraisal materials or by counselors.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§106.37 Financial assistance.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *General.* Except as provided in paragraphs (b) and (c) of this section, in providing financial assistance to any of its students, a recipient shall not:

(1) On the basis of sex, provide different amount or types of such assistance, limit eligibility for such assistance which is of any particular type or source, apply different criteria, or otherwise discriminate;

(2) Through solicitation, listing, approval, provision of facilities or other services, assist any foundation, trust, agency, organization, or person which provides assistance to any of such recipient's students in a manner which discriminates on the basis of sex; or

(3) Apply any rule or assist in application of any rule concerning eligibility for such assistance which treats persons of one sex differently from persons of the other sex with regard to marital or parental status.

(b) *Financial aid established by certain legal instruments.* (1) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by acts of a foreign government which requires that awards be made to members of a particular sex specified therein; *Provided,* That the overall effect of the award of such sex-restricted scholarships, fellowships, and other forms of financial assistance does not discriminate on the basis of sex.

(2) To ensure nondiscriminatory awards of assistance as required in paragraph (b)(1) of this section, recipients shall develop and use procedures under which:

(i) Students are selected for award of financial assistance on the basis of nondiscriminatory criteria and not on the basis of availability of funds restricted to members of a particular sex;

(ii) An appropriate sex-restricted scholarship, fellowship, or other form of financial assistance is allocated to each student selected under paragraph (b)(2)(i) of this section; and

(iii) No student is denied the award for which he or she was selected under paragraph (b)(2)(i) of this section because of the absence of a scholarship, fellowship, or other form of financial assistance designated for a member of that student's sex.

(c) *Athletic scholarships.* (1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

(2) Separate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with this paragraph and §106.41.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; and Sec. 844, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484)

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§106.38 Employment assistance to students.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *Assistance by recipient in making available outside employment.* A recipient which assists any agency, organization or person in making employment available to any of its students:

(1) Shall assure itself that such employment is made available without discrimination on the basis of sex; and

(2) Shall not render such services to any agency, organization, or person which discriminates on the basis of sex in its employment practices.

(b) *Employment of students by recipients.* A recipient which employs any of its students shall not do so in a manner which violates subpart E of this part.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§106.39 Health and insurance benefits and services.

Link to an amendment published at 85 FR 30579, May 19, 2020.

In providing a medical, hospital, accident, or life insurance benefit, service, policy, or plan to any of its students, a recipient shall not discriminate on the basis of sex, or provide such benefit, service, policy, or plan in a manner which would violate Subpart E of this part if it were provided to employees of the recipient. This section shall not prohibit a recipient from providing any benefit or service which may be used by a different proportion of students of one sex than of the other, including family planning services. However, any recipient which provides full coverage health service shall provide gynecological care.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§106.40 Marital or parental status.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *Status generally.* A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.

(b) *Pregnancy and related conditions.* (1) A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.

(2) A recipient may require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.

(3) A recipient which operates a portion of its education program or activity separately for pregnant students, admittance to which is completely voluntary on the part of the student as provided in paragraph (b)(1) of this section shall ensure that the separate portion is comparable to that offered to non-pregnant students.

(4) A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.

(5) In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980, as amended at 65 FR 68056, Nov. 13, 2000]

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§106.41 Athletics.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport.

for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(c) *Equal opportunity.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(2) The provision of equipment and supplies;

(3) Scheduling of games and practice time;

(4) Travel and per diem allowance;

(5) Opportunity to receive coaching and academic tutoring;

(6) Assignment and compensation of coaches and tutors;

(7) Provision of locker rooms, practice and competitive facilities;

(8) Provision of medical and training facilities and services;

(9) Provision of housing and dining facilities and services;

(10) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) *Adjustment period.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; and Sec. 844, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484)

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§106.42 Textbooks and curricular material.

Link to an amendment published at 85 FR 30579, May 19, 2020.

Nothing in this regulation shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§106.43 Standards for measuring skill or progress in physical education classes.

Link to an amendment published at 85 FR 30579, May 19, 2020.

If use of a single standard of measuring skill or progress in physical education classes has an adverse effect on members of one sex, the recipient shall use appropriate standards that do not have that effect.

(Authority: 20 U.S.C. 1681, 1682)

[71 FR 62543, Oct. 25, 2006]

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Subpart E—Discrimination on the Basis of Sex in Employment in Education Programs or Activities Prohibited

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§106.51 Employment.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *General.* (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives Federal financial assistance.

(2) A recipient shall make all employment decisions in any education program or activity operated by such recipient in a nondiscriminatory manner and shall not limit, segregate, or classify applicants or employees in any way which could adversely affect any applicant's or employee's employment opportunities or status because of sex.

(3) A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by this subpart, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient.

(4) A recipient shall not grant preferences to applicants for employment on the basis of attendance at any educational institution or entity which admits as students only or predominantly members of one sex, if the giving of such preferences has the effect of discriminating on the basis of sex in violation of this part.

(b) *Application.* The provisions of this subpart apply to:

(1) Recruitment, advertising, and the process of application for employment;

(2) Hiring, upgrading, promotion, consideration for and award of tenure, demotion, transfer, layoff, termination, application of nepotism policies, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation, and changes in compensation;

(4) Job assignments, classifications and structure, including position descriptions, lines of progression, and seniority lists;

(5) The terms of any collective bargaining agreement;

(6) Granting and return from leaves of absence, leave for pregnancy, childbirth, false pregnancy, termination of pregnancy, leave for persons of either sex to care for children or dependents, or any other leave;

(7) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(8) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, selection for tuition assistance, selection for sabbaticals and leaves of absence to pursue training;

(9) Employer-sponsored activities, including those that are social or recreational; and

(10) Any other term, condition, or privilege of employment.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980, as amended at 65 FR 68056, Nov. 13, 2000]

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§106.52 Employment criteria.

Link to an amendment published at 85 FR 30579, May 19, 2020.

A recipient shall not administer or operate any test or other criterion for any employment opportunity which has a disproportionately adverse effect on persons on the basis of sex unless:

(a) Use of such test or other criterion is shown to predict validly successful performance in the position in question; and

(b) Alternative tests or criteria for such purpose, which do not have such disproportionately adverse effect, are shown to be unavailable.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§106.53 Recruitment.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *Nondiscriminatory recruitment and hiring.* A recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees. Where a recipient has been found to be presently discriminating on the basis of sex in the recruitment or hiring of employees, or has been found to have in the past so discriminated, the recipient shall recruit members of the sex so discriminated against so as to overcome the effects of such past or present discrimination.

(b) *Recruitment patterns.* A recipient shall not recruit primarily or exclusively at entities which furnish as applicants only or predominantly members of one sex if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§106.54 Compensation.

Link to an amendment published at 85 FR 30579, May 19, 2020.

A recipient shall not make or enforce any policy or practice which, on the basis of sex:

(a) Makes distinctions in rates of pay or other compensation;

(b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§106.55 Job classification and structure.

Link to an amendment published at 85 FR 30579, May 19, 2020.

A recipient shall not:

(a) Classify a job as being for males or for females;

(b) Maintain or establish separate lines of progression, seniority lists, career ladders, or tenure systems based on sex; or

(c) Maintain or establish separate lines of progression, seniority systems, career ladders, or tenure systems for similar jobs, position descriptions, or job requirements which classify persons on the basis of sex, unless sex is a bona-fide occupational qualification for the positions in question as set forth in §106.61.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§106.56 Fringe benefits.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *Fringe benefits defined.* For purposes of this part, *fringe benefits* means: Any medical, hospital, accident, life insurance or retirement benefit, service, policy or plan, any

profit-sharing or bonus plan, leave, and any other benefit or service of employment not subject to the provision of §106.54.

(b) *Prohibitions.* A recipient shall not:

(1) Discriminate on the basis of sex with regard to making fringe benefits available to employees or make fringe benefits available to spouses, families, or dependents of employees differently upon the basis of the employee's sex;

(2) Administer, operate, offer, or participate in a fringe benefit plan which does not provide either for equal periodic benefits for members of each sex, or for equal contributions to the plan by such recipient for members of each sex; or

(3) Administer, operate, offer, or participate in a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex or which otherwise discriminates in benefits on the basis of sex.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§106.57 Marital or parental status.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *General.* A recipient shall not apply any policy or take any employment action:

(1) Concerning the potential marital, parental, or family status of an employee or applicant for employment which treats persons differently on the basis of sex; or

(2) Which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

(b) *Pregnancy.* A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

(c) *Pregnancy as a temporary disability.* A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom and any temporary disability resulting therefrom as any other temporary disability for all job related purposes, including commencement, duration and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

(d) *Pregnancy leave.* In the case of a recipient which does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of

absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status which she held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§106.58 Effect of State or local law or other requirements.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *Prohibitory requirements.* The obligation to comply with this subpart is not obviated or alleviated by the existence of any State or local law or other requirement which imposes prohibitions or limits upon employment of members of one sex which are not imposed upon members of the other sex.

(b) *Benefits.* A recipient which provides any compensation, service, or benefit to members of one sex pursuant to a State or local law or other requirement shall provide the same compensation, service, or benefit to members of the other sex.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§106.59 Advertising.

Link to an amendment published at 85 FR 30579, May 19, 2020.

A recipient shall not in any advertising related to employment indicate preference, limitation, specification, or discrimination based on sex unless sex is a *bona-fide* occupational qualification for the particular job in question.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§106.60 Pre-employment inquiries.

Link to an amendment published at 85 FR 30579, May 19, 2020.

(a) *Marital status.* A recipient shall not make pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is “Miss or Mrs.”

(b) *Sex.* A recipient may make pre-employment inquiry as to the sex of an applicant for employment, but only if such inquiry is made equally of such applicants of both sexes and if

the results of such inquiry are not used in connection with discrimination prohibited by this part.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§106.61 Sex as a bona-fide occupational qualification.

Link to an amendment published at 85 FR 30579, May 19, 2020.

A recipient may take action otherwise prohibited by this subpart provided it is shown that sex is a bona-fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section which is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students, or other persons, but nothing contained in this section shall prevent a recipient from considering an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682

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Link to an amendment published at 85 FR 30578, May 19, 2020.

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Subpart F—Procedures [Interim]

Link to an amendment published at 85 FR 30578, May 19, 2020.

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§106.71 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 34 CFR 100.6-100.11 and 34 CFR, part 101.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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Subpart G—XXX

Link to an amendment published at 85 FR 30579, May 19, 2020.

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Subject Index to Title IX Preamble and Regulation[1]

Link to an amendment published at 85 FR 30579, May 19, 2020.

[1]Preamble paragraph numbers are in brackets [ ].

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Appendix A to Part 106—Guidelines for Eliminating Discrimination and Denial of Services on the Basis of Race, Color, National Origin, Sex, and Handicap in Vocational Education Programs

EDITORIAL NOTE: For the text of these guidelines, see 34 CFR part 100, appendix B.

[44 FR 17168, Mar. 21, 1979]

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ARTICLE I. GENERAL PROVISIONS

Rule 101. Scope

These rules govern proceedings in the courts of the United States and before the United States bankruptcy judges and United States magistrate judges, to the extent and with the exceptions stated in rule 1101.

Rule 102. Purpose and Construction

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Rule 103. Rulings on Evidence

(a) Effect of Erroneous Ruling. – Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. – In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of Proof. – In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial,

a party need not renew an objection or offer of proof to preserve a claim of error for appeal.
(b) Record of Offer and Ruling. – The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.
(c) Hearing of Jury. – In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.
(d) Plain Error. – Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

Rule 104. Preliminary Questions

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.
(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.
(c) Hearing of jury. Hearings on the admissibility of

confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.
(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.
(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility

Rule 105. Limited Admissibility

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Rule 106. Remainder of or Related Writings or Recorded Statements

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

ARTICLE II. JUDICIAL NOTICE

Rule 201. Judicial Notice of Adjudicative Facts

(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.
(b) Kinds of facts. A judicially noticed fact must be one

not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
(c) When discretionary. A court may take judicial notice, whether requested or not.
(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.
(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.
(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.
(g) Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

ARTICLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

Rule 301. Presumptions in General in Civil Actions and Proceedings

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet

the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

Rule 302. Applicability of State Law in Civil Actions and Proceedings

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.

ARTICLE IV. RELEVANCY AND ITS LIMITS

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading

the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally. – Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. – In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of alleged victim. – In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) Character of witness. – Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts. – Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for

other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Rule 405. Methods of Proving Character

(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

Rule 406. Habit; Routine Practice

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Rule 407. Subsequent Remedial Measures

When, after an injury or harm allegedly caused by an

event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Rule 408. Compromise and Offers to Compromise

(a) Prohibited uses. – Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish – or accepting or offering or promising to accept – a valuable consideration in compromising or attempting to compromise a claim; and

(2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

(b) Permitted uses. – This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention

of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

Rule 409. Payment of Medical and Similar Expenses

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
(1) a plea of guilty which was later withdrawn;
(2) a plea of nolo contendere;
(3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or
(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by

the defendant under oath, on the record and in the presence of counsel.

Rule 411. Liability Insurance

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

Rule 412. Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition

(a) Evidence generally inadmissible. – The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) Exceptions. –

(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;

(B) evidence of specific instances of sexual behavior by the

alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and
(C) evidence the exclusion of which would violate the constitutional rights of the defendant.
(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.
(c) Procedure to determine admissibility. –
(1) A party intending to offer evidence under subdivision (b) must –
(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause, requires a different time for filing or permits filing during trial; and
(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.
(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

Rule 413. Evidence of Similar Crimes in Sexual Assault Cases

(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved –

(1) any conduct proscribed by chapter 109A of title 18, United States Code;

(2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;

(3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;

(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

(5) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4).

Rule 414. Evidence of Similar Crimes in Child Molestation Cases

(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved –

(1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;

(2) any conduct proscribed by chapter 110 of title 18, United States Code;

(3) contact between any part of the defendant's body or an

object and the genitals or anus of a child;
(4) contact between the genitals or anus of the defendant and any part of the body of a child;
(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or
(6) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(5).

Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation

(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.
(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.
(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

ARTICLE V. PRIVILEGES

Rule 501. General Rule

Except as otherwise required by the Constitution of the

United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

ARTICLE VI. WITNESSES

Rule 601. General Rule of Competency

Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

Rule 602. Lack of Personal Knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

Rule 603. Oath or Affirmation

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

Rule 604. Interpreters

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.

Rule 605. Competency of Judge as Witness

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

Rule 606. Competency of Juror as Witness

(a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may

testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

Rule 607. Who May Impeach

The credibility of a witness may be attacked by any party, including the party calling the witness.

Rule 608. Evidence of Character and Conduct of Witness

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for

truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) General rule. For the purpose of attacking the character for truthfulness of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has

elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

Rule 610. Religious Beliefs or Opinions

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

Rule 611. Mode and Order of Interrogation and Presentation

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

Rule 612. Writing Used to Refresh Memory

Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either –

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

Rule 613. Prior Statements of Witnesses

(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need

not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.
(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

Rule 614. Calling and Interrogation of Witnesses by Court

(a) Calling by court. The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.
(b) Interrogation by court. The court may interrogate witnesses, whether called by itself or by a party.
(c) Objections. Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

Rule 615. Exclusion of Witnesses

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a

party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present.

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

Rule 701. Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those

perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Rule 704. Opinion on Ultimate Issue

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Rule 706. Court Appointed Experts

(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury

of the fact that the court appointed the expert witness.
(d) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

ARTICLE VIII. HEARSAY

Rule 801. Definitions

The following definitions apply under this article:
(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
(b) Declarant. A "declarant" is a person who makes a statement.
(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
(d) Statements which are not hearsay. A statement is not hearsay if –
(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.
(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.
(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.
(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.
(6) Records of Regularly Conducted Activity. – A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a

person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the

Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination,

statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) Reputation as to character. Reputation of a person's character among associates or in the community.

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment,

judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.
(23) Judgment as to personal, family, or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.
(24) [Transferred to Rule 807]

Rule 804. Hearsay Exceptions; Declarant Unavailable
(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant –
(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
(3) testifies to a lack of memory of the subject matter of the declarant's statement; or
(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption,

refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly

indicate the trustworthiness of the statement.
(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.
(5) [Transferred to Rule 807]
(6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

Rule 805. Hearsay Within Hearsay

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would

be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

Rule 807. Residual Exception

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

Rule 901. Requirement of Authentication or Identification

(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person

or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute or rule. Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.

Rule 902. Self-authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.
(2) Domestic public documents not under seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.
(3) Foreign public documents. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable

opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

(5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.

(6) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals.

(7) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) Acknowledged documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) Presumptions under Acts of Congress. Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic.
(11) Certified Domestic Records of Regularly Conducted Activity. – The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record –
(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
(B) was kept in the course of the regularly conducted activity; and
(C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.
(12) Certified Foreign Records of Regularly Conducted Activity. – In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record –

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
(B) was kept in the course of the regularly conducted activity; and
(C) was made by the regularly conducted activity as a regular practice.
The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

Rule 903. Subscribing Witness' Testimony Unnecessary
The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1001. Definitions
For purposes of this article the following definitions are applicable:
(1) Writings and recordings. "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse,

mechanical or electronic recording, or other form of data compilation.
(2) Photographs. "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.
(3) Original. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original".
(4) Duplicate. A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

Rule 1002. Requirement of Original

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

Rule 1003. Admissibility of Duplicates

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Rule 1004. Admissibility of Other Evidence of Contents

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if –

(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or

(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.

Rule 1005. Public Records

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

Rule 1006. Summaries

The contents of voluminous writings, recordings, or

photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

Rule 1007. Testimony or Written Admission of Party

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.

Rule 1008. Functions of Court and Jury

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

ARTICLE XI. MISCELLANEOUS RULES

Rule 1101. Applicability of Rules

(a) Courts and judges. These rules apply to the United States district courts, the District Court of Guam, the

District Court of the Virgin Islands, the District Court for the Northern Mariana Islands, the United States courts of appeals, the United States Claims Court, and to United States bankruptcy judges and United States magistrate judges, in the actions, cases, and proceedings and to the extent hereinafter set forth. The terms "judge" and "court" in these rules include United States bankruptcy judges and United States magistrate judges.

(b) Proceedings generally. These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under title 11, United States Code.

(c) Rule of privilege. The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.

(d) Rules inapplicable. The rules (other than with respect to privileges) do not apply in the following situations:

(1) Preliminary questions of fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104.

(2) Grand jury. Proceedings before grand juries.

(3) Miscellaneous proceedings. Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

(e) Rules applicable in part. In the following proceedings

these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority: the trial of misdemeanors and other petty offenses before United States magistrate judges; review of agency actions when the facts are subject to trial de novo under section 706(2)(F) of title 5, United States Code; review of orders of the Secretary of Agriculture under section 2 of the Act entitled "An Act to authorize association of producers of agricultural products" approved February 18, 1922 (7 U.S.C. 292), and under sections 6 and 7(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499f, 499g(c)); naturalization and revocation of naturalization under sections 310-318 of the Immigration and Nationality Act (8 U.S.C. 1421-1429); prize proceedings in admiralty under sections 7651-7681 of title 10, United States Code; review of orders of the Secretary of the Interior under section 2 of the Act entitled "An Act authorizing associations of producers of aquatic products" approved June 25, 1934 (15 U.S.C. 522); review of orders of petroleum control boards under section 5 of the Act entitled "An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes", approved February 22, 1935 (15 U.S.C. 715d); actions for fines, penalties, or forfeitures under part V of title IV of the Tariff Act of 1930 (19 U.S.C. 1581-1624), or under the Anti-Smuggling Act (19 U.S.C. 1701-1711);

criminal libel for condemnation, exclusion of imports, or other proceedings under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301-392); disputes between seamen under sections 4079, 4080, and 4081 of the Revised Statutes (22 U.S.C. 256-258); habeas corpus under sections 2241-2254 of title 28, United States Code; motions to vacate, set aside or correct sentence under section 2255 of title 28, United States Code; actions for penalties for refusal to transport destitute seamen under section 4578 of the Revised Statutes (46 U.S.C. 679); actions against the United States under the Act entitled "An Act authorizing suits against the United States in admiralty for damage caused by and salvage service rendered to public vessels belonging to the United States, and for other purposes", approved March 3, 1925 (46 U.S.C. 781-790), as implemented by section 7730 of title 10, United States Code.

Rule 1102. Amendments

Amendments to the Federal Rules of Evidence may be made as provided in section 2072 of title 28 of the United States Code.

Rule 1103. Title

These rules may be known and cited as the Federal Rules of Evidence.

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U.S. Department of Education Title IX Final Rule Overview

GUIDING PRINCIPLES

- **Historic Recognition of Sexual Harassment as Sex Discrimination**

  For the first time, the Department's Title IX regulations recognize that sexual harassment, including sexual assault, is unlawful sex discrimination. The Department previously addressed sexual harassment only through guidance documents, which are not legally binding and do not have the force and effect of law. Now, the Department's regulations impose important legal obligations on school districts, colleges, and universities (collectively "schools"), requiring a prompt response to reports of sexual harassment. The Final Rule improves the clarity and transparency of the requirements for how schools must respond to sexual harassment under Title IX so that every complainant receives appropriate support, respondents are treated as responsible only after receiving due process and fundamental fairness, and school officials serve impartially without bias for or against any party.

- **Supporting Complainants & Respecting Complainants' Autonomy**

  Under the Final Rule, schools must offer free supportive measures to every alleged victim of sexual harassment (called "complainants" in the Final Rule). Supportive measures are individualized services to restore or preserve equal access to education, protect student and employee safety, or deter sexual harassment. Supportive measures must be offered even if a complainant does not wish to initiate or participate in a grievance process. Every situation is unique, and individuals react to sexual harassment differently. Therefore, the Final Rule gives complainants control over the school-level response best meeting their needs. It respects complainants' wishes and autonomy by giving them the clear choice to file a formal complaint, separate from the right to supportive measures. The Final Rule also provides a fair and impartial grievance process for complainants, and protects complainants from being coerced or threatened into participating in a grievance process.

- **Non-Discrimination, Free Speech, and Due Process**

  The Final Rule reflects core American values of equal treatment on the basis of sex, free speech and academic freedom, due process of law, and fundamental fairness. Schools must operate free from sex discrimination, including sexual harassment. Complainants and respondents must have strong, clear procedural rights in a predictable, transparent grievance process designed to reach reliable outcomes. The Final Rule ensures that schools do not violate First Amendment rights when complying with Title IX.

A SCHOOL'S RESPONSE TO SEXUAL HARASSMENT

- Under the Final Rule, any of the following conduct on the basis of sex constitutes sexual harassment:
  - A school employee conditioning an educational benefit or service upon a person's participation in unwelcome sexual conduct (often called "*quid pro quo*" harassment);
  - Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school's education program or activity; or
  - Sexual assault, dating violence, domestic violence, or stalking (as those offenses are defined in the Clery Act, 20 U.S.C. § 1092(f), and the Violence Against Women Act, 34 U.S.C. § 12291(a)).

- Consistent with Supreme Court precedent and the text of Title IX, a school must respond when: (1) the school has actual knowledge of sexual harassment; (2) that occurred within the school's education program or activity; (3) against a person in the United States. The Final Rule expands "actual knowledge" to include notice to any elementary or secondary school employee, and states that any person (*e.g.,* the alleged victim or any third party) may report to a Title IX Coordinator in person or by e-mail, phone, or mail. The Final Rule also specifies that a school's "education program or activity" includes situations over which the school exercised substantial control, and also buildings owned or controlled by student organizations officially recognized by a postsecondary institution, such as many fraternity and sorority houses.

- Consistent with Supreme Court precedent, a school violates Title IX when its response to sexual harassment is clearly unreasonable in light of the known circumstances, and the Final Rule adds mandatory response obligations such as offering supportive measures to every complainant, with or without a formal complaint.

- Schools must investigate every formal complaint (which may be filed by a complainant or by a school's Title IX Coordinator). If the alleged conduct does not fall under Title IX, then a school may address the allegations under the school's own code of conduct and provide supportive measures.

A FAIR GRIEVANCE PROCESS

The Final Rule requires schools to investigate and adjudicate formal complaints of sexual harassment using a grievance process that incorporates due process principles, treats all parties fairly, and reaches reliable responsibility determinations. A school's grievance process must:

- Give both parties written notice of the allegations, an equal opportunity to select an advisor of the party's choice (who may be, but does not need to be, an attorney), and an equal opportunity to submit and review evidence throughout the investigation;
- Use trained Title IX personnel to objectively evaluate all relevant evidence without prejudgment of the facts at issue and free from conflicts of interest or bias for or against either party;
- Protect parties' privacy by requiring a party's written consent before using the party's medical, psychological, or similar treatment records during a grievance process;
- Obtain the parties' voluntary, written consent before using any kind of "informal resolution" process, such as mediation or restorative justice, and not use an informal process where an employee allegedly sexually harassed a student;
- Apply a presumption that the respondent is not responsible during the grievance process (often called a "presumption of innocence"), so that the school bears the burden of proof and the standard of evidence is applied correctly;
- Use either the preponderance of the evidence standard or the clear and convincing evidence standard (and use the same standard for formal complaints against students as for formal complaints against employees);
- Ensure the decision-maker is not the same person as the investigator or the Title IX Coordinator (i.e., no "single investigator models");
- For postsecondary institutions, hold a live hearing and allow cross-examination by party advisors (never by the parties personally); K-12 schools do not need to hold a hearing, but parties may submit written questions for the other parties and witnesses to answer;
- Protect all complainants from inappropriately being asked about prior sexual history ("rape shield" protections);

- Send both parties a written determination regarding responsibility explaining how and why the decision-maker reached conclusions;
- Effectively implement remedies for a complainant if a respondent is found responsible for sexual harassment;
- Offer both parties an equal opportunity to appeal;
- Protect any individual, including complainants, respondents, and witnesses, from retaliation for reporting sexual harassment or participating (or refusing to participate) in any Title IX grievance process;
- Make all materials used to train Title IX personnel publicly available on the school's website or, if the school does not maintain a website, make these materials available upon request for inspection by members of the public; and
- Document and keep records of all sexual harassment reports and investigations.

SEX DISCRIMINATION REGULATIONS

Relating to sex discrimination generally, and not only to sexual harassment, the final regulations also:

- Affirm that the Department may require schools to take remedial action for discriminating on the basis of sex or otherwise violating the Department's Title IX regulations;
- Expressly state that in response to any claim of sex discrimination under Title IX, schools are never required to deprive an individual of rights guaranteed under the U.S. Constitution;
- Account for the interplay of Title IX, Title VII, and FERPA, as well as the legal rights of parents or guardians to act on behalf of individuals with respect to exercising Title IX rights;
- Update the requirement for schools to designate and identify a Title IX Coordinator, disseminate their non-discrimination policy and the Title IX Coordinator's contact information to ensure accessible channels for reporting sex discrimination (including sexual harassment), and notify students, employees, parents, and others of how the school will respond to reports and complaints of sex discrimination (including sexual harassment); and
- Clarify that an institution controlled by a religious organization is not required to submit a written statement to the Department to qualify for the Title IX religious exemption.

Summary of Major Provisions of the Department of Education's Title IX Final Rule

Issue	The Title IX Final Rule: Addressing Sexual Harassment in Schools
1. Notice to the School, College, University ("Schools"): Actual Knowledge	The Final Rule requires a K-12 school to respond whenever *any* employee has notice of sexual harassment, including allegations of sexual harassment. Many State laws also require all K-12 employees to be mandatory reporters of child abuse. For postsecondary institutions, the Final Rule allows the institution to choose whether to have mandatory reporting for all employees, or to designate some employees to be confidential resources for college students to discuss sexual harassment without automatically triggering a report to the Title IX office. For all schools, notice to a Title IX Coordinator, or to an official with authority to institute corrective measures on the recipient's behalf, charges a school with actual knowledge and triggers the school's response obligations.
2. Definition of Sexual Harassment for Title IX Purposes	The Final Rule defines sexual harassment broadly to include any of three types of misconduct on the basis of sex, all of which jeopardize the equal access to education that Title IX is designed to protect: Any instance of *quid pro quo* harassment by a school's employee; any unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it denies a person equal educational access; any instance of sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA). - The Final Rule prohibits sex-based misconduct in a manner consistent with the First Amendment. *Quid pro quo* harassment and Clery Act/VAWA offenses are <u>not</u> evaluated for severity, pervasiveness, offensiveness, or denial of equal educational access, because such misconduct is sufficiently serious to deprive a person of equal access. - The Final Rule uses the Supreme Court's *Davis* definition (severe *and* pervasive *and* objectively offensive conduct, effectively denying a person equal educational access) as one of the three categories of sexual harassment, so that where unwelcome sex-based conduct consists of speech or expressive conduct, schools balance Title IX enforcement with respect for free speech and academic freedom. - The Final Rule uses the Supreme Court's Title IX-specific definition rather than the Supreme Court's Title VII workplace standard (severe *or* pervasive conduct creating a hostile work environment). First Amendment concerns differ in educational environments and workplace environments, and the Title IX definition provides First Amendment protections appropriate for educational institutions where students are learning, and employees are teaching. Students, teachers, faculty, and others should enjoy free speech and academic freedom protections, even when speech or expression is offensive.

3. Sexual Harassment Occurring in a School's "Education Program or Activity" and "in the United States"	The Title IX statute applies to persons in the United States with respect to education programs or activities that receive Federal financial assistance. Under the Final Rule, schools must respond when sexual harassment occurs in the school's education program or activity, against a person in the United States. - The Title IX statute and existing regulations contain broad definitions of a school's "program or activity" and the Department will continue to look to these definitions for the scope of a school's education program or activity. Education program or activity includes locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurred, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution (such as a fraternity or sorority house). - Title IX applies to all of a school's education programs or activities, whether such programs or activities occur on-campus or off-campus. A school may address sexual harassment affecting its students or employees that falls outside Title IX's jurisdiction in any manner the school chooses, including providing supportive measures or pursuing discipline.
4. Accessible Reporting to Title IX Coordinator	The Final Rule expands a school's obligations to ensure its educational community knows how to report to the Title IX Coordinator. - The employee designated by a recipient to coordinate its efforts to comply with Title IX responsibilities must be referred to as the "Title IX Coordinator." - Instead of notifying only students and employees of the Title IX Coordinator's contact information, the school must also notify applicants for admission and employment, parents or legal guardians of elementary and secondary school students, and all unions, of the name or title, office address, e-mail address, and telephone number of the Title IX Coordinator. - Schools must prominently display on their websites the required contact information for the Title IX Coordinator. - Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by e-mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report. - Such a report may be made at any time, including during non-business hours, by using the telephone number or e-mail address, or by mail to the office address, listed for the Title IX Coordinator.
5. School's Mandatory Response Obligations: The Deliberate Indifference Standard	Schools must respond promptly to Title IX sexual harassment in a manner that is not deliberately indifferent, which means a response that is not clearly unreasonable in light of the known circumstances. Schools have the following mandatory response obligations: - Schools must offer supportive measures to the person alleged to be the victim (referred to as the "complainant").

	- The Title IX Coordinator must promptly contact the complainant confidentially to discuss the availability of supportive measures, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. - Schools must follow a grievance process that complies with the Final Rule before the imposition of any disciplinary sanctions or other actions that are not supportive measures, against a respondent. - Schools must not restrict rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment, when complying with Title IX. - The Final Rule requires a school to investigate sexual harassment allegations in any formal complaint, which can be filed by a complainant, or signed by a Title IX Coordinator. - The Final Rule affirms that a complainant's wishes with respect to whether the school investigates should be respected unless the Title IX Coordinator determines that signing a formal complaint to initiate an investigation over the wishes of the complainant is not clearly unreasonable in light of the known circumstances. - If the allegations in a formal complaint do not meet the definition of sexual harassment in the Final Rule, or did not occur in the school's education program or activity against a person in the United States, the Final Rule clarifies that the school must dismiss such allegations *for purposes of Title IX* but may still address the allegations in any manner the school deems appropriate under the school's own code of conduct.
6. School's Mandatory Response Obligations: Defining "Complainant," "Respondent," "Formal Complaint," "Supportive Measures"	When responding to sexual harassment (e.g., by offering supportive measures to a complainant and refraining from disciplining a respondent without following a Title IX grievance process, which includes investigating formal complaints of sexual harassment), the Final Rule provides clear definitions of complainant, respondent, formal complaint, and supportive measures so that recipients, students, and employees clearly understand how a school must respond to sexual harassment incidents in a way that supports the alleged victim and treats both parties fairly. The Final Rule defines "complainant" as an individual *who is alleged to be the victim* of conduct that could constitute sexual harassment. - This clarifies that any third party as well as the complainant may report sexual harassment. - While parents and guardians do not become complainants (or respondents), the Final Rule expressly recognizes the legal rights of parents and guardians to act on behalf of parties (including by filing formal complaints) in Title IX matters. The Final Rule defines "respondent" as an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

	The Final Rule defines "formal complaint" as a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment and states: - At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the school with which the formal complaint is filed. - A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under the Final Rule, and by any additional method designated by the school. - The phrase "document filed by a complainant" means a document or electronic submission (such as by e-mail or through an online portal provided for this purpose by the school) that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint. - Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or a party during a grievance process, and must comply with requirements for Title IX personnel to be free from conflicts and bias. The Final Rule defines "supportive measures" as individualized services reasonably available that are non-punitive, non-disciplinary, and not unreasonably burdensome to the other party while designed to ensure equal educational access, protect safety, or deter sexual harassment. - The Final Rule evaluates a school's selection of supportive measures and remedies based on what is not clearly unreasonable in light of the known circumstances, and does not second guess a school's disciplinary decisions, but requires the school to offer supportive measures, and provide remedies to a complainant whenever a respondent is found responsible.
7. Grievance Process, General Requirements	The Final Rule prescribes a consistent, transparent grievance process for resolving formal complaints of sexual harassment. Aside from hearings (see Issue #9 below), the grievance process prescribed by the Final Rule applies to all schools equally including K-12 schools and postsecondary institutions. The Final Rule states that a school's grievance process must: - Treat complainants equitably by providing remedies any time a respondent is found responsible, and treat respondents equitably by not imposing disciplinary sanctions without following the grievance process prescribed in the Final Rule. - Remedies, which are required to be provided to a complainant when a respondent is found responsible, must be designed to maintain the complainant's equal access to education and may include the same individualized services described in the Final Rule as supportive measures; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent. - Require objective evaluation of all relevant evidence, inculpatory and exculpatory, and avoid credibility determinations based on a person's status as a complainant, respondent, or witness.

	- Require Title IX personnel (Title IX Coordinators, investigators, decision-makers, people who facilitate any informal resolution process) to be free from conflicts of interest or bias for or against complainants or respondents. - Training of Title IX personnel must include training on the definition of sexual harassment in the Final Rule, the scope of the school's education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. - A school must ensure that decision-makers receive training on any technology to be used at a live hearing. - A school's decision-makers and investigators must receive training on issues of relevance, including how to apply the rape shield protections provided only for complainants. - Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process. - Recipients must post materials used to train Title IX personnel on their websites, if any, or make materials available for members of the public to inspect. - Include reasonably prompt time frames for conclusion of the grievance process, including appeals and informal resolutions, with allowance for short-term, good cause delays or extensions of the time frames. - Describe the range, or list, the possible remedies a school may provide a complainant and disciplinary sanctions a school might impose on a respondent, following determinations of responsibility. - State whether the school has chosen to use the preponderance of the evidence standard, or the clear and convincing evidence standard, for all formal complaints of sexual harassment (including where employees and faculty are respondents). - Describe the school's appeal procedures, and the range of supportive measures available to complainants and respondents. - A school's grievance process must not use, rely on, or seek disclosure of information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege. - Any provisions, rules, or practices other than those required by the Final Rule that a school adopts as part of its grievance process for handling formal complaints of sexual harassment, must apply equally to both parties.

8. Investigations	The Final Rule states that the school must investigate the allegations in any formal complaint and send written notice to both parties (complainants and respondents) of the allegations upon receipt of a formal complaint. During the grievance process and when investigating: - The burden of gathering evidence and burden of proof must remain on schools, not on the parties. - Schools must provide equal opportunity for the parties to present fact and expert witnesses and other inculpatory and exculpatory evidence. - Schools must not restrict the ability of the parties to discuss the allegations or gather evidence (e.g., no "gag orders"). - Parties must have the same opportunity to select an advisor of the party's choice who may be, but need not be, an attorney. - Schools must send written notice of any investigative interviews, meetings, or hearings. - Schools must send the parties, and their advisors, evidence directly related to the allegations, in electronic format or hard copy, with at least 10 days for the parties to inspect, review, and respond to the evidence. - Schools must send the parties, and their advisors, an investigative report that fairly summarizes relevant evidence, in electronic format or hard copy, with at least 10 days for the parties to respond. - Schools must dismiss allegations of conduct that do not meet the Final Rule's definition of sexual harassment or did not occur in a school's education program or activity against a person in the U.S. Such dismissal is only for Title IX purposes and does not preclude the school from addressing the conduct in any manner the school deems appropriate. - Schools may, in their discretion, dismiss a formal complaint or allegations therein if the complainant informs the Title IX Coordinator in writing that the complainant desires to withdraw the formal complaint or allegations therein, if the respondent is no longer enrolled or employed by the school, or if specific circumstances prevent the school from gathering sufficient evidence to reach a determination. - Schools must give the parties written notice of a dismissal (mandatory or discretionary) and the reasons for the dismissal. - Schools may, in their discretion, consolidate formal complaints where the allegations arise out of the same facts. - The Final Rule protects the privacy of a party's medical, psychological, and similar treatment records by stating that schools cannot access or use such records unless the school obtains the party's voluntary, written consent to do so.
9. Hearings:	The Final Rule adds provisions to the "live hearing with cross-examination" requirement for postsecondary institutions and clarifies that hearings are optional for K-12 schools (and any other recipient that is not a postsecondary institution).

Summary of Major Provisions of the Department of Education's Title IX Final Rule

(a) Live Hearings & Cross-Examination (for Postsecondary Institutions)	(a) For postsecondary institutions, the school's grievance process must provide for a live hearing: - At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. - Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally. - At the request of either party, the recipient must provide for the entire live hearing (including cross-examination) to occur with the parties located in separate rooms with technology enabling the parties to see and hear each other. - Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker must first determine whether the question is relevant and explain to the party's advisor asking cross-examination questions any decision to exclude a question as not relevant. - If a party does not have an advisor present at the live hearing, the school must provide, without fee or charge to that party, an advisor of the school's choice who may be, but is not required to be, an attorney to conduct cross-examination on behalf of that party. - If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions. - Live hearings may be conducted with all parties physically present in the same geographic location or, at the school's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually. - Schools must create an audio or audiovisual recording, or transcript, of any live hearing.
(b) Hearings are Optional, Written Questions Required (for K-12 Schools)	(b) For recipients that are K-12 schools, and other recipients that are not postsecondary institutions, the recipient's grievance process may, *but need not*, provide for a hearing: - With or without a hearing, after the school has sent the investigative report to the parties and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.
(c) *Rape Shield Protections for Complainants*	(c) The Final Rule provides rape shield protections for complainants (as to all recipients whether postsecondary institutions, K-12 schools, or others), deeming irrelevant questions and evidence about a complainant's prior sexual behavior unless offered to prove that someone other than the respondent committed the alleged misconduct or offered to prove consent.

10. Standard of Evidence & Written Determination	The Final Rule requires the school's grievance process to state whether the standard of evidence to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard. The Final Rule makes each school's grievance process consistent by requiring each school to apply the same standard of evidence for all formal complaints of sexual harassment whether the respondent is a student or an employee (including faculty member). - The decision-maker (who cannot be the same person as the Title IX Coordinator or the investigator) must issue a written determination regarding responsibility with findings of fact, conclusions about whether the alleged conduct occurred, rationale for the result as to each allegation, any disciplinary sanctions imposed on the respondent, and whether remedies will be provided to the complainant. - The written determination must be sent simultaneously to the parties along with information about how to file an appeal.
11. Appeals	The Final Rule states that a school must offer both parties an appeal from a determination regarding responsibility, and from a school's dismissal of a formal complaint or any allegations therein, on the following bases: procedural irregularity that affected the outcome of the matter, newly discovered evidence that could affect the outcome of the matter, and/or Title IX personnel had a conflict of interest or bias, that affected the outcome of the matter. - A school may offer an appeal equally to both parties on additional bases.
12. Informal Resolution	The Final Rule allows a school, in its discretion, to choose to offer and facilitate informal resolution options, such as mediation or restorative justice, so long as both parties give voluntary, informed, written consent to attempt informal resolution. Any person who facilitates an informal resolution must be well trained. The Final Rule adds: - A school may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to a formal investigation and adjudication of formal complaints of sexual harassment. Similarly, a school may not require the parties to participate in an informal resolution process and may not offer an informal resolution process unless a formal complaint is filed. - At any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint. - Schools must not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

13. Retaliation Prohibited	The Final Rule expressly prohibits retaliation. - Charging an individual with code of conduct violations that do not involve sexual harassment, but arise out of the same facts or circumstances as a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX constitutes retaliation. - The school must keep confidential the identity of complainants, respondents, and witnesses, except as may be permitted by FERPA, as required by law, or as necessary to carry out a Title IX proceeding. - Complaints alleging retaliation may be filed according to a school's prompt and equitable grievance procedures. - The exercise of rights protected under the First Amendment does not constitute retaliation. - Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a Title IX grievance proceeding does not constitute retaliation; however, a determination regarding responsibility, alone, is not sufficient to conclude that any party made a bad faith materially false statement.

TITLE IX SEXUAL HARASSMENT PROCEDURES AND GRIEVANCE PROCESS FOR FORMAL COMPLAINTS

The Title IX sexual harassment procedures and grievance process for formal complaints prescribed in this attachment apply only when a report includes allegations of sexual harassment subject to Title IX regulations. (34 CFR 106.44, 106.45)

All other reports or complaints of discrimination or retaliation shall follow the complaint procedures established in Policy 103 Attachment 2 regarding discrimination.

[Note: a live hearing process is not required for the grievance process for formal complaints in the K-12 setting. Language on a live hearing process is <u>not</u> included in these procedures, but the district may add language in consultation with the school solicitor.]

<u>Definitions</u>

Actual knowledge means notice of sexual harassment or allegations of sexual harassment to the district's Title IX Coordinator or any district official who has the authority to institute corrective measures on behalf of the district, or to any employee of an elementary and secondary school, other than the respondent.

Exculpatory evidence means evidence tending to exonerate the accused or helps to establish their innocence.

Inculpatory evidence means evidence tending to incriminate the accused or indicate their guilt.

Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging Title IX sexual harassment and requesting that the district investigate the allegation. The authority for the Title IX Coordinator to sign a formal complaint does not make the Title IX Coordinator the complainant or other party during the grievance process. The phrase "**document filed by a complainant**" refers to a document or electronic submission that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.

Retaliation shall mean actions including, but not limited to, intimidation, threats, coercion, or discrimination against a victim or other person because they report conduct that may constitute discrimination or harassment, including Title IX sexual harassment, in accordance with Board policy and procedures, participate in an investigation or other process addressing discrimination or Title IX sexual harassment, or act in opposition to discriminatory practices.

The following actions shall <u>not</u> constitute retaliation:

1. An individual exercising free speech under the rights protected by the First Amendment.

2. The assignment of consequences consistent with Board policy and the Code of Student Conduct when an individual knowingly makes a materially false statement in bad faith in an investigation. The fact that the charges of discrimination were unfounded or unsubstantiated shall not be the sole reason to conclude that any party made a materially false statement in bad faith.

Supportive measures mean nondisciplinary, nonpunitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.

Supportive measures shall be designed to restore or preserve equal access to the education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the educational environment, or to deter sexual harassment. Supportive measures may include, but are not limited to:

1. Counseling.
2. Extensions of deadlines or other course-related adjustments.
3. Modifications of work or class schedules.
4. Campus escort services.
5. Mutual restrictions on contact between the parties.
6. Changes in work or housing locations.
7. Leaves of absence.
8. Increased security.
9. Monitoring of certain areas of the campus.
10. Assistance from domestic violence or rape crisis programs.
11. Assistance from community health resources including counseling resources.

Supportive measures may also include assessments or evaluations to determine eligibility for special education or related services, or the need to review an Individualized Education Program (IEP) or Section 504 Service Agreement based on a student's behavior. This could include, but is not limited to, a manifestation determination or functional behavioral assessment (FBA), in accordance with applicable law, regulations or Board policy. (Pol. 103.1, 113, 113.1, 113.2, 113.3)

Title IX sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

1. A district employee conditioning the provision of an aid, benefit, or district service on an individual's participation in unwelcome sexual conduct, commonly referred to as *quid pro quo sexual harassment*.

2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive and objectively offensive that it effectively denies a person equal access to a district education program or activity.

3. Sexual assault, dating violence, domestic violence or stalking.

    a. **Dating Violence** means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim and where the existence of such a relationship is determined by the following factors:

        1) Length of relationship.

        2) Type of relationship.

        3) Frequency of interaction between the persons involved in the relationship.

    b. **Domestic violence** includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving federal funding, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.

    c. **Sexual assault** means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.

    d. **Stalking,** under Title IX means stalking on the basis of sex, for example when the stalker desires to date a victim. Stalking means engaging in a course of conduct directed at a specific person that would cause a reasonable person to either:

        1) Fear for their safety or the safety of others.

        2) Suffer substantial emotional distress.

Such conduct must have taken place during a district education program or activity and against a person in the United States to qualify as sexual harassment subject to Title IX regulations. An **education program or activity** includes the locations, events or circumstances over which the district exercises substantial control over both the respondent and the context in which the harassment occurs.

TITLE IX SEXUAL HARASSMENT PROCEDURES

General Response – (with or without a formal complaint)

Any person, whether the alleged victim or not, may report Title IX sexual harassment using the Discrimination/Sexual Harassment/Bullying/Hazing/Dating Violence/Retaliation Report Form or by making a general report verbally or in writing to the building principal, or by using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report. Upon receipt of a report, school staff shall immediately notify the building principal.

A report may be made at any time, including during nonbusiness hours. Verbal reports shall be documented by the Title IX Coordinator or employee receiving the report using the Discrimination/Sexual Harassment/Bullying/Hazing/Dating Violence/Retaliation Report Form, and these procedures shall be implemented appropriately.

District staff who become aware of bullying, hazing, harassment or other discrimination affecting a student or staff member shall promptly report it to the building principal.

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

When the district has actual knowledge of Title IX sexual harassment, the district is required to respond promptly and in a manner that is not deliberately indifferent, meaning not clearly unreasonable in light of the known circumstances.

All sexual harassment reports and complaints received by the building principal shall be promptly directed to the Title IX Coordinator, in accordance with Board policy. The Title IX Coordinator shall use the Discrimination/Sexual Harassment/Bullying/Hazing/Dating Violence/Retaliation Report Form to gather additional information from the reporter and/or other parties identified in the report, to determine if the allegations meet the definition and parameters for Title IX sexual harassment.

The Title IX Coordinator shall promptly contact the complainant regarding the report to gather additional information as necessary, and to discuss the availability of supportive measures. The Title IX Coordinator shall consider the complainant’s wishes with respect to supportive measures.

The Title IX Coordinator shall initially assess whether the reported conduct:

1. Meets the definition of Title IX sexual harassment.

2. Occurred in a district program or activity under the control of the district and against a person in the United States.

3. Involves other Board policies or the Code of Student Conduct.

4. Indicates, based on an individualized safety and risk analysis, that there is an immediate threat to the physical health or safety of an individual.

5. Involves a student identified as a student with a disability under the Individuals with Disabilities Education Act or Section 504 of the Rehabilitation Act. (Pol. 103.1, 113)

If the result of this initial assessment determines that none of the allegations fall within the scope of Title IX sexual harassment, but the matter merits review and possible action under the Code of Student Conduct and other Board policies or Attachment 2 addressing Discrimination Complaints, then the Title IX Coordinator shall redirect the report to the appropriate administrator to address the allegations. (Pol. 103, 103.1, 113.1, 218, 247, 249, 252, 317, 317.1)

If the result of the initial assessment determines that the allegations may constitute Title IX sexual harassment, the Title IX Coordinator shall promptly explain to the complainant the process for filing a formal complaint and inform the complainant of the continued availability of supportive measures with or without the filing of a formal complaint.

The Title IX Coordinator shall contact the parents/guardians and provide them with information regarding the report and Title IX sexual harassment procedures and grievance process for formal complaints.

If the complainant, school staff or others with professional knowledge relating to the complainant's health and well-being indicate that notifying the parents/guardians could cause serious harm to the health or well-being of the complainant or other person(s), the Title IX Coordinator will determine, in consultation with such individuals and upon advice of legal counsel, whether to withhold or delay notification of the report from the complainant's parents/guardians.

The Title IX Coordinator shall also determine what supportive measures may be offered to the respondent.

If either party is an identified student with a disability, or thought to be disabled, the Title IX Coordinator shall contact the Director of Special Education to coordinate the required actions in accordance with Board policy. (Pol. 113, 113.1, 113.2, 113.3)

Confidentiality regarding the supportive measures offered and the identity of the following individuals shall be maintained, except as may be permitted by law or regulations relating to the conduct of any investigation: (20 U.S.C. Sec. 1232g; 34 CFR Parts 99, 106; Pol. 113.4, 216)

1. Individuals making a report or formal complaint.

2. Complainant(s).

3. Respondent(s).

4. Witnesses.

The district shall treat complainants and respondents equitably by:

1. Offering supportive measures to the complainant and may offer such measures to the respondent.

2. Following the grievance process for formal complaints before imposing disciplinary sanctions or other actions that are not supportive measures on the respondent.

Disciplinary Procedures When Reports Allege Title IX Sexual Harassment -

When reports allege Title IX sexual harassment, disciplinary sanctions may not be imposed until the completion of the grievance process for formal complaints. The district shall presume that the respondent is not responsible for the alleged conduct until a determination has been made at the completion of the grievance process for formal complaints.

When an emergency removal, as described below, is warranted to address an immediate threat to the physical health or safety of an individual, and it is not feasible to continue educational services remotely or in an alternative setting, the normal procedures for suspension and expulsion shall be conducted to accomplish the removal, including specific provisions to address a student with a disability where applicable. (Pol. 113.1, 113.2, 113.3, 233)

When an emergency removal is not required, disciplinary sanctions will be considered in the course of the Title IX grievance process for formal complaints. Following the issuance of the written determination and any applicable appeal, any disciplinary action specified in the written determination or appeal decision shall be implemented in accordance with the normal procedures for suspensions, expulsions or other disciplinary actions, including specific provisions to address a student with a disability where applicable. (Pol. 113.1, 113.2, 218, 233)

Supportive Measures -

All supportive measures provided by the district shall remain confidential, to the extent that maintaining such confidentiality would not impair the ability of the district to provide the supportive measures. (34 CFR 106.44)

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

Reasonable Accommodations –

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

Emergency Removal –

If the district has determined, based on an individualized safety and risk analysis, that there is an immediate threat to the physical health or safety of any student or other individual due to the allegations of Title IX sexual harassment, the respondent may be removed from the district's education program or activity or moved to an alternative setting, consistent with all rights under federal and state laws and regulations, and Board policy, including but not limited to the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act and the Americans with Disabilities Act. If the respondent is an identified student with a disability, or thought to be disabled, the Title IX Coordinator shall contact the Director of Special Education to coordinate the required actions in accordance with Board policy. The respondent shall be provided with notice and provided an opportunity for due process, in accordance with law, regulations and Board policy. When expulsion is necessary because continuation of educational services is not feasible, the Board's written adjudication of expulsion shall address the pending Title IX process and the impact of the outcome of the Title IX process on a student's emergency removal status. (20 U.S.C. Sec. 1400 et seq. ; 29 U.S.C. Sec. 794 ; 42 U.S.C. Sec. 12101 et seq. ; 34 CFR 106.44 ; Pol. 103.1, 113.1, 233)

Administrative Leave -

When an employee, based on an individualized safety and risk analysis, poses an immediate threat to the health or safety of any student or other individual, the employee may be removed on an emergency basis.

An accused nonstudent district employee may be placed on administrative leave during the pendency of the grievance process for formal complaints, consistent with all rights under Section 504 of the Rehabilitation Act and the Americans with Disabilities Act, and in accordance with

state law and regulations, Board policy and an applicable collective bargaining agreement or individual contract. (29 U.S.C. Sec. 794, 42 U.S.C. Sec. 12101 et seq., 34 CFR 106.44, Pol. 317)

Required Reporting Under Other Policies -

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

Timeframes

Reasonably prompt timeframes shall be established for the conclusion of the grievance process for formal complaints, including timeframes for the informal resolution process and timeframes for filing and resolving appeals.

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

1. The absence of a party, a party's advisor or a witness.

2. Concurrent law enforcement activity.

3. Need for language assistance or accommodation of disabilities.

Redirection or Dismissal of Title IX Formal Complaints

Formal complaints may be dismissed, if at any time during the investigation or written determination steps described below:

1. A complainant provides written notification of withdrawal of any allegations or of the formal complaint.

2. The respondent is no longer enrolled or employed by the district in a district program or activity.

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

Only alleged conduct that occurred in the district's education program or activity, and against a person in the United States, may qualify as Title IX sexual harassment within the district's jurisdiction. If it is determined during the investigation or written determination steps below that

none of the allegations, if true, would meet the definition and parameters of Title IX sexual harassment within the district's jurisdiction, the Title IX Coordinator shall dismiss the formal complaint under Title IX. If the matter merits review and possible action under the Code of Student Conduct and other Board policies or Attachment 2 addressing Discrimination Complaints, then the Title IX Coordinator shall redirect the report to the appropriate administrator to address the allegations.

Written notification shall be promptly issued to the parties simultaneously of any allegations found not to qualify or that are dismissed in compliance with Title IX. Written notification shall state whether the allegations will continue to be addressed pursuant to the Code of Student Conduct and other Board policies or Attachment 2 addressing Discrimination Complaints.

A dismissal may be appealed via the appeal procedures set forth in this Attachment.

Consolidation of Title IX Formal Complaints

The district may consolidate formal complaints against more than one (1) respondent, or by more than one (1) complainant against one or more respondents, or by one (1) individual against another individual, where the allegations of sexual harassment arise out of the same facts or circumstances.

GRIEVANCE PROCESS FOR FORMAL COMPLAINTS

Step 1 – Formal Complaint

The district is required to initiate the grievance process for formal complaints when a complainant or the complainant's parent/guardian files a formal complaint. The Title IX Coordinator is also authorized to initiate this process despite a complainant's wishes when actions limited to supportive measures are not a sufficient response to alleged behavior, or when a formal complaint process is necessary to investigate and address the situation adequately. For example, if disciplinary action would be warranted if allegations are true, if the respondent is an employee, or if further investigation is needed to assess the extent of the behavior and impact on others, it may be clearly unreasonable not to initiate the formal complaint process. Only the Title IX Coordinator is authorized to initiate the formal complaint process despite a complainant's wishes, but the Title IX Coordinator may consult with the school solicitor and other district officials in making this decision.

The complainant or the Title IX Coordinator shall use the designated section of the Discrimination/Sexual Harassment/Bullying/Hazing/Dating Violence/Retaliation Report Form to file or sign a formal complaint.

The Title IX Coordinator shall assess whether the investigation should be conducted by the building principal, another district employee, the Title IX Coordinator or an attorney and shall promptly assign the investigation to that individual.

The Title IX Coordinator, investigator, decision-maker, or any individual designated to facilitate the informal resolution process, each must have completed the required training for such roles as designated in Board policy and shall not have a conflict of interest or bias for or against an individual complainant or respondent, or for or against complainants or respondents in general.

The respondent shall be presumed not responsible for the alleged conduct until a written determination regarding responsibility has been made at the conclusion of the grievance process for formal complaints.

Notice Requirements -

Upon receipt of a formal complaint, or when the Title IX Coordinator signs a formal complaint to initiate the grievance process for formal complaints, the Title IX Coordinator shall provide written notice to all known parties, and the parents/guardians of known parties, where applicable, providing the following information:

1. Notice of the district's grievance process for formal complaints and any informal resolution process that may be available.

2. Notice of the allegations potentially constituting Title IX sexual harassment, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include:

    a. The identity of the parties involved, if known.

    b. The conduct allegedly constituting sexual harassment.

    c. The date and location of the alleged incident(s), if known.

3. A statement that a written determination regarding responsibility shall be made at the conclusion of the grievance process for formal complaints and, until that time, the respondent is presumed not responsible for the alleged conduct.

4. Notice that parties may have an advisor of their choice, who may be, but is not required to be, an attorney. The advisor may inspect and review evidence.

5. Notice that Board policy and the district's Code of Student Conduct prohibits knowingly making false statements or knowingly submitting false information to school officials in connection with reports of misconduct or discrimination complaints.

6. Notice to all known parties of any additional allegations that the district decides to investigate during the course of the investigation.

Step 2 – Informal Resolution Process

[Note: The informal resolution process cannot be offered or used to facilitate a resolution for any formal complaint where the allegations state that an employee sexually harassed a student.]

At any time after a formal complaint has been filed, but prior to reaching a determination of responsibility, if the Title IX Coordinator believes the circumstances are appropriate, the Title IX Coordinator may offer the parties the opportunity to participate in an informal resolution process, which does not involve a full investigation and adjudication of the Title IX sexual harassment complaint.

The district may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal Title IX sexual harassment complaints. Similarly, a district may not require the parties to participate in an informal resolution process.

Informal resolutions can take many forms, depending on the particular case. Examples include, but are not limited to, mediation, facilitated discussions between the parties, restorative practices, acknowledgment of responsibility by a respondent, apologies, a requirement to engage in specific services, or supportive measures.

When offering an informal resolution process, the Title IX Coordinator shall:

1. Provide the parties a written notice disclosing the following:

    a. The allegations.

    b. The requirements of the informal resolution process, including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations; provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process for formal complaints.

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

2. Obtain the parties' voluntary, written consent to the informal resolution process. As part of the consent process, all parties shall be informed of the rights being waived by agreeing to the informal resolution process, and shall acknowledge such agreement in writing.

3. The informal resolution process shall be conducted within

    { } five (5) school days

    { } ten (10) school days

{ } twenty (20) school days

{ } _____ school days

of the parties' signed agreement for the informal resolution process.

If the matter is resolved to the satisfaction of the parties, the district employee facilitating the informal resolution process shall document the nature of the complaint and the proposed resolution of the matter, have both parties sign the documentation and receive a copy, and forward it to the Title IX Coordinator. Within

{ } ten (10) school days

{ } twenty (20) school days

{ } _____ school days

after the complaint is resolved in this manner, the Title IX Coordinator shall contact the complainant to determine if the resolution was effective and to monitor the agreed upon remedies. The Title IX Coordinator shall document the informal resolution process, responses from all parties, and an explanation of why the district's response was not deliberately indifferent to the reported complaint of sexual harassment.

***If Step 2 Informal Resolution Process results in the final resolution of the complaint, the following steps are not applicable.**

Step 3 – Investigation

The designated investigator, if other than the Title IX Coordinator, shall work with the Title IX Coordinator to assess the scope of the investigation, who needs to be interviewed and what records or evidence may be relevant to the investigation. The investigation stage shall be concluded within

{ } twenty (20) school days.

{ } thirty (30) school days.

{ } _____ school days.

When investigating a formal complaint, the investigator shall:

1. Bear the burden of proof and gather evidence and conduct interviews sufficient to reach a written determination. During the process of gathering evidence, unless the district obtains the voluntary, written consent of the party, or the party's parent/guardian when legally required, the district cannot access, consider, disclose or otherwise use a party's records which are protected by legal privilege, such as those records made or maintained by a

physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with providing treatment to the party. (Pol. 113.4, 207, 209, 216, Safe2Say Something Procedures)

2. Objectively evaluate all available evidence, including inculpatory and exculpatory evidence.

3. Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.

4. Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.

   { } However the district may request a nondisclosure agreement be signed by the parties and their advisor(s), if any, stating that they will not disseminate or disclose evidence and documents exchanged in the investigation.

5. Provide the parties with the same opportunities to have others present during any interview or other meeting, including an advisor of the party's choice. The district may establish restrictions, applicable to both parties, regarding the extent to which the advisor may participate.

6. Provide written notice to any party whose participation is invited or expected during the investigation process with the following information, in sufficient time for the party to prepare to participate:

   a. Date.

   b. Time.

   c. Location.

   d. Participants.

   e. Purpose of all investigative interviews or other meetings.

7. Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations, including evidence the district does not intend to rely on to reach a determination regarding responsibility and any inculpatory and exculpatory evidence, whether obtained from a party or other source.

If at any point the investigation expands to include additional allegations that were <u>not</u> included in the initial notice provided upon initiation of the grievance process for formal complaints, the investigator shall alert the Title IX Coordinator. The Title IX Coordinator shall provide written notice of the new allegations to the known parties.

Prior to the completion of the investigative report, the investigator shall:

1. Send to each party and the party's advisor, if any, the evidence subject to inspection and review in electronic or hard copy format.

2. Provide the parties at least ten (10) school days following receipt of the evidence to submit a written response.

3. Consider the written response prior to drafting the investigative report.

The investigator shall draft an investigative report that fairly summarizes relevant evidence and shall provide the investigative report to all parties and to the designated decision-maker.

If the investigation reveals that the conduct being investigated may involve a violation of criminal law, the investigator shall promptly notify the Title IX Coordinator, who shall promptly inform law enforcement authorities about the allegations and make any additional required reports, in accordance with law, regulations and Board policy. (Pol. 218, 317.1, 806)

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

In the course of an investigation, it is possible that conduct other than, or in addition to, Title IX sexual harassment may be identified as part of the same incident or set of circumstances, The fact that there may be Title IX sexual harassment involved does not preclude the district from addressing other identified violations of the Code of Student Conduct or Board policy. If such other conduct is being investigated and addressed together with Title IX sexual harassment as part of the Title IX grievance process for formal complaints, disciplinary action normally should not be imposed until the completion of the Title IX grievance process for formal complaints. A decision whether and when to take such action should be made in consultation with the school solicitor.

Step 4 – Written Determination and District Action

Designation of Decision-Maker -

To avoid any conflict of interest or bias, the decision-maker cannot be the same person as the Title IX Coordinator or the investigator. The responsibility as the decision-maker for complaints of Title IX sexual harassment shall generally be designated to the

{ } building principal.

{ } Superintendent.

{ } Director of Student Services.

{ } _____Other.

If the _____ has a conflict of interest or is a party in the formal complaint process, they shall disclose the conflict and the Title IX Coordinator shall designate another individual to serve as the decision-maker.

Written Determination Submissions -

A written determination of responsibility (written determination) must not be finalized less than ten (10) days after the investigator completes the investigative report and provides it to all parties. Before the decision-maker reaches a determination regarding responsibility, the decision-maker shall afford each party the opportunity to submit written, relevant questions that a party wants to be asked of any party or witness, shall provide each party with the answers, and shall allow for additional, limited follow-up questions from each party.

Relevant questions for a party or witness must be submitted by each party within

{ } three (3) school days

{ } five (5) school days

{ } _____ school days

following receipt of the investigative report. Follow-up questions must be submitted by each party within

{ } three (3) school days

{ } five (5) school days

{ } _____ school days

of being provided the answers to the initial questions.

Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant as part of the follow-up questions and responses, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

The decision-maker shall explain to the party proposing the questions about any decision to exclude a question as not relevant.

Written Determination -

The decision-maker must issue a written determination for the conduct alleged in formal complaints. To reach this determination, the decision-maker shall apply the preponderance of the evidence standard, meaning that the party bearing the burden of proof must present evidence which is more credible and convincing than that presented by the other party or which shows that the fact to be proven is more probable than not.

{ } *[Note: Districts may consult with their school solicitor and decide to use the "clear and convincing evidence" standard, as permitted by the federal regulations, in place of the "preponderance of the evidence" standard. However, the legal disadvantages of this should be carefully considered with the school solicitor.]* the clear and convincing evidence standard, meaning that the party bearing the burden of proof must show that the truth of the allegations is highly probable.

In considering evidence, the decision-maker shall ensure credibility determinations are not based on an individual's status as a complainant, respondent or witness.

After considering all relevant evidence, the decision-maker shall issue a written determination that includes:

1. Identification of the allegations potentially constituting Title IX sexual harassment.

2. A description of the procedural steps taken from the receipt or signing of the formal complaint through the written determination, including any notifications to the parties, interviews with parties and witnesses, site visits, and methods used to gather other evidence.

3. Findings of fact supporting the determination.

4. Conclusions regarding the application of the district's Code of Student Conduct or Board policies to the facts.

5. A statement of, and rationale for, the result as to each allegation, including:

    a. Determination regarding responsibility.

    b. Disciplinary sanctions.

    c. Remedies designed to restore or preserve equal access to the district's education program or activity that will be provided by the district to the complainant. Such remedies may be punitive or disciplinary and need not avoid burdening the respondent.

6. The procedures, deadline and permissible bases for the complainant and respondent to appeal.

The written determination shall be provided to the parties simultaneously. The determination becomes final either:

1. On the date that the district provides the parties with the written decision of the result of the appeal, if an appeal is filed;

2. Or, if an appeal is not filed, on the date on which an appeal would no longer be considered timely, in accordance with the timeframe established for appeals in this Attachment.

The Title IX Coordinator shall be responsible to ensure that any remedies are implemented by the appropriate district officials and for following up as needed to assess the effectiveness of such remedies. Disciplinary actions shall be consistent with the Code of Student Conduct, Board policies and administrative regulations, district procedures, applicable collective bargaining agreements, and state and federal laws and regulations, including specific requirements and provisions for students with disabilities. (Pol. 113.1, 218, 233, 317, 317.1)

Appeal Process

Districts must offer both parties the right to appeal a determination of responsibility and the right to appeal the district's dismissal of a Title IX formal complaint or any allegation in the Title IX formal complaint. The scope of appeals related to Title IX sexual harassment are limited to the following reasons for appeal as stated in the Title IX regulations:

1. A procedural irregularity that affected the outcome of the matter.

2. New evidence that that could affect the outcome was not reasonably available at the time the decision to dismiss or determination of responsibility was made.

3. The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against the individual complainant or respondent or for or against complainants or respondents generally that affected the outcome of the matter.

Written notice of a party's appeal shall be submitted to the Title IX Coordinator within

{ } five (5) school days

{ } ten (10) school days

{ } _____ school days

after the date of the written determination. Notice of appeal shall include a brief statement describing the basis for the appeal.

The Title IX Coordinator shall ensure that the designated appeal authority is not the same person as the decision-maker that reached the determination, the investigator, or the Title IX Coordinator. The designated appeal authority shall be the:

{ } District solicitor or outside counsel.

{ } Outside hearing officer.

{ } _____ (Other).

For all appeals, the designated appeal authority shall:

1. Provide written notice to the other party when notice of an appeal is filed and implement appeal procedures equally for both parties.

2. Provide both parties a reasonable, equal opportunity to submit a written statement in support of or challenging the stated basis for the appeal. Supporting statements shall describe in detail as applicable the procedural irregularities asserted to have affected the outcome of the determination, the nature of any new evidence asserted to have affected the outcome, and the nature of any bias asserted to have affected the outcome, with an explanation of how the outcome was affected by such factors. If evidence exists supporting the basis for appeal, it shall accompany the supporting statement, or it shall identify where such evidence may be found.

   Supporting statements must be submitted to the appeal authority and provided to the other party within

   { } five (5) school days

   { } ten (10) school days

   { } _____ school days

   of the written notice of appeal.

   Statements in opposition to the appeal shall be submitted within five (5) school days of the submission of supporting statements. If a statement in opposition to an appeal refers to any evidence beyond what is described in a supporting statement, it shall accompany the statement in opposition, or it shall identify where such evidence may be found.

   The appeal authority may accept and consider evidence in support of or in opposition to an appeal in making any conclusions necessary to deciding the appeal. Alternatively, when the appeal authority determines that factors exist making it necessary for the decision-maker to further develop the evidentiary record relevant to the basis for appeal, the appeal authority may return the matter to the decision-maker for that limited purpose.

3. Determine whether the appeal meets the grounds for permitted reasons for appeal and justifies modifying the written determination.

4. Issue a written decision setting forth the respects, if any, in which the written determination is modified and the rationale for the result within

   { } five (5) school days.

   { } ten (10) school days.

   { } twenty (20) school days.

   { } _____ school days.

5. Provide the written decision simultaneously to both parties. A copy of the written decision shall also be provided to the Title IX Coordinator.

Recordkeeping

The district shall maintain the following records for a of a minimum of seven (7) years after conclusion of procedures and implementation of disciplinary sanctions and/or remedies, or in the case of a complainant or respondent who is a minor, until the expiration of the longest statute of limitations for filing a civil suit applicable to any allegation:

1. Each Title IX sexual harassment investigation, including any written determination and any audio or audiovisual recording or transcript, and disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the district's education program or activity.

2. Any appeal and the result.

3. Any informal resolution and the result.

4. All materials used to train the Title IX Coordinator, investigators, decision-makers, and any person who facilitates an informal resolution process.

5. Records of any district actions, including any supportive measures, taken in response to a report or formal complaint of Title IX sexual harassment. In each instance, the district shall document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the district's education program or activity. If a district does not provide a complainant with supportive measures, then the district must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit the district in the future from providing additional explanations or detailing additional measures taken.

Title 18

CHAPTER 57
WIRETAPPING AND ELECTRONIC SURVEILLANCE

Subchapter

Enactment. Present Chapter 57 was added October 4, 1978, P.L.831, No.164, effective in 60 days.

Prior Provisions. Former Chapter 57, which related to invasion of privacy, was added December 6, 1972, P.L.1482, No.334, and repealed October 4, 1978, P.L.831, No.164, effective in 60 days.

Cross References. Chapter 57 is referred to in section 1522 of Title 4 (Amusements); section 3575 of Title 42 (Judiciary and Judicial Procedure).

SUBCHAPTER A
GENERAL PROVISIONS

Sec.

Subchapter Heading. The heading of Subchapter A was added October 21, 1988, P.L.1000, No.115, effective immediately.

§ 5701. Short title of chapter.

This chapter shall be known and may be cited as the "Wiretapping and Electronic Surveillance Control Act."

§ 5702. Definitions.

As used in this chapter, the following words and phrases shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Aggrieved person." A person who was a party to any intercepted wire, electronic or oral communication or a person against whom the interception was directed.

"Aural transfer." A transfer containing the human voice at any point between and including the point of origin and the point of reception.

"Communication common carrier." Any person engaged as a common carrier for hire, in intrastate, interstate or foreign communication by wire or radio or in intrastate, interstate or foreign radio transmission of energy; however, a person engaged in radio broadcasting shall not, while so engaged, be deemed a common carrier.

"Communication service." Any service which provides to users

the ability to send or receive wire or electronic communications.

"Communication system." Any wire, radio, electromagnetic, photo-optical or photoelectronic facilities for the transmission of communications and any computer facilities or related electronic equipment for the electronic storage of such communications.

"Contents." As used with respect to any wire, electronic or oral communication, is any information concerning the substance, purport, or meaning of that communication.

"Court." The Superior Court. For the purposes of Subchapter C only, the term shall mean the court of common pleas.

"Crime of violence." Any of the following:

(1) Any of the following crimes:

(i) Murder in any degree as defined in section 2502(a), (b) or (c) (relating to murder).

(ii) Voluntary manslaughter as defined in section 2503 (relating to voluntary manslaughter), drug delivery resulting in death as defined in section 2506(a) relating to drug delivery resulting in death), aggravated assault as defined in section 2702(a)(1) or (2) (relating to aggravated assault), 2718 (relating to strangulation), kidnapping as defined in section 2901(a) or (a.1) (relating to kidnapping), rape as defined in section 3121(a), (c) or (d) (relating to rape), involuntary deviate sexual intercourse as defined in section 3123(a), (b) or (c) (relating to involuntary deviate sexual intercourse), sexual assault as defined in section 3124.1 (relating to sexual assault), aggravated indecent assault as defined in section 3125(a) or (b) (relating to aggravated indecent assault), incest as defined in section 4302(a) or (b) (relating to incest), arson as defined in section 3301(a) (relating to arson and related offenses), burglary as defined in section 3502(a)(1) (relating to burglary), robbery as defined in section 3701(a)(1)(i), (ii) or (iii) (relating to robbery) or robbery of a motor vehicle as defined in section 3702(a) (relating to robbery of motor vehicle).

(iii) Intimidation of witness or victim as defined in section 4952(a) and (b) (relating to intimidation of witnesses or victims).

(iv) Retaliation against witness, victim or party as defined in section 4953(a) and (b) (relating to retaliation against witness, victim or party).

(v) Criminal attempt as defined in section 901(a) (relating to criminal attempt), criminal solicitation as defined in section 902(a) (relating to criminal solicitation) or criminal conspiracy as defined in section 903(a) (relating to criminal conspiracy) to commit any of the offenses specified in this definition.

(2) Any offense equivalent to an offense under paragraph (1) under the laws of this Commonwealth in effect at the time of the commission of that offense or under the laws of another jurisdiction.

"Electronic communication." Any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photo-optical system, except:

(1) (Deleted by amendment).

(2) Any wire or oral communication.

(3) Any communication made through a tone-only paging device.

(4) Any communication from a tracking device (as defined in this section).

"Electronic communication service." (Deleted by amendment).

"Electronic communication system." (Deleted by amendment).

"Electronic, mechanical or other device." Any device or ~ but not limited to, an induction coi~

apparatus, including, but not limited to, an induction coil or a telecommunication identification interception device, that can be used to intercept a wire, electronic or oral communication other than:

(1) Any telephone or telegraph instrument, equipment or facility, or any component thereof, furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business, or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business, or being used by a communication common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties.

(2) A hearing aid or similar device being used to correct subnormal hearing to not better than normal.

(3) Equipment or devices used to conduct interceptions under section 5704(15) (relating to exceptions to prohibition of interception and disclosure of communications).

"Electronic storage."

(1) Any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof.

(2) Any storage of such a communication by an electronic communication service for purpose of backup protection of the communication.

"Home." The residence of a nonconsenting party to an interception, provided that access to the residence is not generally permitted to members of the public and the party has a reasonable expectation of privacy in the residence under the circumstances.

"In-progress trace." The determination of the origin of a telephonic communication to a known telephone during an interception.

"Intercept." Aural or other acquisition of the contents of any wire, electronic or oral communication through the use of any electronic, mechanical or other device. The term shall include the point at which the contents of the communication are monitored by investigative or law enforcement officers. The term shall not include the acquisition of the contents of a communication made through any electronic, mechanical or other device or telephone instrument to an investigative or law enforcement officer, or between a person and an investigative or law enforcement officer, where the investigative or law enforcement officer poses as an actual person who is the intended recipient of the communication, provided that the Attorney General, a deputy attorney general designated in writing by the Attorney General, a district attorney or an assistant district attorney designated in writing by a district attorney of the county wherein the investigative or law enforcement officer is to receive or make the communication has reviewed the facts and is satisfied that the communication involves suspected criminal activities and has given prior approval for the communication.

"Investigative or law enforcement officer." Any officer of the United States, of another state or political subdivision thereof or of the Commonwealth or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter or an equivalent crime in another jurisdiction, and any attorney authorized by law to prosecute or participate in the prosecution of such offense.

"Judge." When referring to a judge authorized to receive applications for, and to enter, orders authorizing interceptions of wire, electronic or oral communications pursuant to Subchapter B (relating to wire, electronic or oral communication), any judge of the Superior Court.

"Mobile communications tracking information." Information generated by a communication common carrier or a communication service which indicates the location of an electronic device

supported by the communication common carrier or communication service.

"One call system." A communication system established by users to provide a single telephone number for contractors or designers or any other person to call notifying users of the caller's intent to engage in demolition or excavation work.

"Oral communication." Any oral communication uttered by a person possessing an expectation that such communication is not subject to interception under circumstances justifying such expectation. The term does not include the following:

(1) An electronic communication.

(2) A communication made in the presence of a law enforcement officer on official duty who is in uniform or otherwise clearly identifiable as a law enforcement officer and who is using an electronic, mechanical or other device which has been approved under section 5706(b)(4) (relating to exceptions to prohibitions in possession, sale, distribution, manufacture or advertisement of electronic, mechanical or other devices) to intercept the communication in the course of law enforcement duties. As used in this paragraph only, "law enforcement officer" means a member of the Pennsylvania State Police, an individual employed as a police officer who holds a current certificate under 53 Pa.C.S. Ch. 21 Subch. D (relating to municipal police education and training), a sheriff or a deputy sheriff.

"Organized crime."

(1) The unlawful activity of an association trafficking in illegal goods or services, including but not limited to, gambling, prostitution, loan sharking, controlled substances, labor racketeering, or other unlawful activities; or

(2) any continuing criminal conspiracy or other unlawful practice which has as its objective:

(i) large economic gain through fraudulent or coercive practices; or

(ii) improper governmental influence.

"Pen register." A device which is used to capture, record or decode electronic or other impulses which identify the numbers dialed or otherwise transmitted, with respect to wire or electronic communications, on the targeted telephone. The term includes a device which is used to record or decode electronic or other impulses which identify the existence of incoming and outgoing wire or electronic communications on the targeted telephone. The term does not include a device used by a provider or customer of a wire or electronic communication service for billing, or recording as an incident to billing, for communication service provided by the provider, or any device used by a provider, or customer of a wire communication service for cost accounting or other like purposes in the ordinary course of business.

"Person." Any employee, or agent of the United States or any state or political subdivision thereof, and any individual, partnership, association, joint stock company, trust or corporation.

"Readily accessible to the general public." As used with respect to a radio communication, that such communication is not:

(1) scrambled or encrypted;

(2) transmitted using modulation techniques of which the essential parameters have been withheld from the public with the intention of preserving the privacy of the communication;

(3) carried on a subscriber or other signal subsidiary to a radio transmission;

(4) transmitted over a communication system provided by a common carrier, unless the communication is a tone-only paging system communication; or

(5) transmitted on frequencies allocated under 47 CFR Parts 25, 74D, E, F or 94, unless, in the case of a

communication transmitted on a frequency allocated under Part 74 which is not exclusively allocated to broadcast auxiliary services, the communication is a two-way voice communication by radio.

"Remote computing service." The provision to the public of computer storage or processing services by means of an electronic communications system.

"Signed, written record." A memorialization of the contents of any wire, electronic or oral communication intercepted in accordance with this subchapter, including the name of the investigative or law enforcement officer who transcribed the record, kept in electronic, paper or any form. The signature of the transcribing officer shall not be required to be written, but may be electronic.

"State." Any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico and any territory or possession of the United States.

"Suspected criminal activity." A particular offense that has been, is or is about to occur as set forth under section 5709(3)(ii) (relating to application for order), any communications to be intercepted as set forth under section 5709(3)(iii) or any of the criminal activity set forth under section 5709(3)(iv) establishing probable cause for the issuance of an order.

"Telecommunication identification interception device." Any equipment or device capable of intercepting any electronic communication which contains any electronic serial number, mobile identification number, personal identification number or other identification number assigned by a telecommunication service provider for activation or operation of a telecommunication device.

"Tracking device." An electronic or mechanical device which permits only the tracking of the movement of a person or object.

"Trap and trace device." A device which captures the incoming electronic or other impulses which identify the originating number of an instrument or device from which a wire or communication was transmitted. The term includes caller ID, deluxe caller ID or any other features available to ascertain the telephone number, location or subscriber information of a facility contacting the facility whose communications are to be intercepted.

"User." Any person or entity who:

(1) uses an electronic communication service; and

(2) is duly authorized by the provider of the service to engage in the use.

"Wire communication." Any aural transfer made in whole or in part through the use of facilities for the transmission of communication by wire, cable or other like connection between the point of origin and the point of reception, including the use of such a connection in a switching station, furnished or operated by a telephone, telegraph or radio company for hire as a communication common carrier.

(Dec. 23, 1981, P.L.593, No.175, eff. 60 days; Oct. 21, 1988, P.L.1000, No.115, eff. imd.; Feb. 18, 1998, P.L.102, No.19, eff. imd.; Dec. 9, 2002, P.L.1350, No.162, eff. 60 days; Oct. 25, 2012, P.L.1634, No.202, eff. 60 days; July 7, 2017, P.L.304, No.22, eff. 60 days; June 5, 2020, P.L. , No.32, eff. 60 days)

2020 Amendment. Act 32 amended the def. of "crime of violence."

2017 Amendment. Act 22 amended the def. of "oral communication."

2012 Amendment. Act 202 amended the defs. of "intercept," "trap and trace device" and "wire communication," added the defs. of "communication service," "communication system," "crime of violence," "mobile communications tracking information" and "signed, written record" and deleted the defs. of "electronic communication service" and "electronic communication system."

2002 Amendment. Act 162 added the def. of "suspected criminal

activity."

1998 Amendment. Act 19 amended the defs. of "electronic communication," "electronic, mechanical or other device," "intercept," "investigative or law enforcement officer," "judge," "pen register" and "wire communication" and added the defs. of "home," "state" and "telecommunication identification interception device."

Cross References. Section 5702 is referred to in sections 911, 5706, 5903, 6321 of this title; section 901 of Title 34 (Game); section 67A07 of Title 42 (Judiciary and Judicial Procedure); sections 57A12, 57B02 of Title 53 (Municipalities Generally); section 2604.1 of Title 66 (Public Utilities).

SUBCHAPTER B
WIRE, ELECTRONIC OR ORAL COMMUNICATION

Sec.

Subchapter Heading. The heading of Subchapter B was added

October 21, 1988, P.L.1000, No.115, effective immediately.

Cross References. Subchapter B is referred to in section 5702 of this title.

§ 5703. Interception, disclosure or use of wire, electronic or oral communications.

Except as otherwise provided in this chapter, a person is guilty of a felony of the third degree if he:

(1) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire, electronic or oral communication;

(2) intentionally discloses or endeavors to disclose to any other person the contents of any wire, electronic or oral communication, or evidence derived therefrom, knowing or having reason to know that the information was obtained through the interception of a wire, electronic or oral communication; or

(3) intentionally uses or endeavors to use the contents of any wire, electronic or oral communication, or evidence derived therefrom, knowing or having reason to know, that the information was obtained through the interception of a wire, electronic or oral communication.

(Oct. 21, 1988, P.L.1000, No.115, eff. imd.)

§ 5704. Exceptions to prohibition of interception and disclosure of communications.

It shall not be unlawful and no prior court approval shall be required under this chapter for:

(1) An operator of a switchboard, or an officer, agent or employee of a provider of wire or electronic communication service, whose facilities are used in the transmission of a wire communication, to intercept, disclose or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the provider of wire or electronic communication service. However, no provider of wire or electronic communication service shall utilize service observing or random monitoring except for mechanical or service quality control checks.

(2) Any investigative or law enforcement officer or any person acting at the direction or request of an investigative or law enforcement officer to intercept a wire, electronic or oral communication involving suspected criminal activities, including, but not limited to, the crimes enumerated in section 5708 (relating to order authorizing interception of wire, electronic or oral communications), where:

(i) (Deleted by amendment).

(ii) one of the parties to the communication has given prior consent to such interception. However, no interception under this paragraph shall be made unless the Attorney General or a deputy attorney general designated in writing by the Attorney General, or the district attorney, or an assistant district attorney designated in writing by the district attorney, of the county wherein the interception is to be initiated, has reviewed the facts and is satisfied that the consent is voluntary and has given prior approval for the interception; however, such interception shall be subject to the recording and record keeping requirements of section 5714(a) (relating to recording of intercepted communications) and that the Attorney General, deputy attorney general, district attorney or assistant district attorney authorizing the interception shall be the custodian of recorded evidence obtained therefrom;

(iii) the investigative or law enforcement officer meets in person with a suspected felon and wears a concealed electronic or mechanical device capable of intercepting or recording oral communications. However, no [illegible] under this subparagraph may be used in

interception under this subparagraph may be used in any criminal prosecution except for a prosecution involving harm done to the investigative or law enforcement officer. This subparagraph shall not be construed to limit the interception and disclosure authority provided for in this subchapter; or

(iv) the requirements of this subparagraph are met. If an oral interception otherwise authorized under this paragraph will take place in the home of a nonconsenting party, then, in addition to the requirements of subparagraph (ii), the interception shall not be conducted until an order is first obtained from the president judge, or his designee who shall also be a judge, of a court of common pleas, authorizing such in-home interception, based upon an affidavit by an investigative or law enforcement officer that establishes probable cause for the issuance of such an order. No such order or affidavit shall be required where probable cause and exigent circumstances exist. For the purposes of this paragraph, an oral interception shall be deemed to take place in the home of a nonconsenting party only if both the consenting and nonconsenting parties are physically present in the home at the time of the interception.

(3) Police and emergency communications systems to record telephone communications coming into and going out of the communications system of the Pennsylvania Emergency Management Agency or a police department, fire department or county emergency center, if:

(i) the telephones thereof are limited to the exclusive use of the communication system for administrative purposes and provided the communication system employs a periodic warning which indicates to the parties to the conversation that the call is being recorded;

(ii) all recordings made pursuant to this clause, all notes made therefrom, and all transcriptions thereof may be destroyed at any time, unless required with regard to a pending matter; and

(iii) at least one nonrecorded telephone line is made available for public use at the Pennsylvania Emergency Management Agency and at each police department, fire department or county emergency center.

(4) A person, to intercept a wire, electronic or oral communication, where all parties to the communication have given prior consent to such interception.

(5) Any investigative or law enforcement officer, or communication common carrier acting at the direction of an investigative or law enforcement officer or in the normal course of its business, to use a pen register, trap and trace device or telecommunication identification interception device as provided in Subchapter E (relating to pen registers, trap and trace devices and telecommunication identification interception devices).

(6) Personnel of any public utility to record telephone conversations with utility customers or the general public relating to receiving and dispatching of emergency and service calls provided there is, during such recording, a periodic warning which indicates to the parties to the conversation that the call is being recorded.

(7) A user, or any officer, employee or agent of such user, to record telephone communications between himself and a contractor or designer, or any officer, employee or agent of such contractor or designer, pertaining to excavation or demolition work or other related matters, if the user or its agent indicates to the parties to the conversation that the call will be or is being recorded. As used in this paragraph, the terms "user," "contractor," "demolition work," "designer"

and "excavation work" shall have the meanings given to them in the act of December 10, 1974 (P.L.852, No.287), referred to as the Underground Utility Line Protection Law; and a one call system shall be considered for this purpose to be an agent of any user which is a member thereof.

(8) A provider of electronic communication service to record the fact that a wire or electronic communication was initiated or completed in order to protect the provider, another provider furnishing service toward the completion of the wire or electronic communication, or a user of that service, from fraudulent, unlawful or abusive use of the service.

(9) A person or entity providing electronic communication service to the public to divulge the contents of any such communication:

(i) as otherwise authorized in this section or section 5717 (relating to investigative disclosure or use of contents of wire, electronic or oral communications or derivative evidence);

(ii) with the lawful consent of the originator or any addressee or intended recipient of the communication;

(iii) to a person employed or authorized, or whose facilities are used, to forward the communication to its destination; or

(iv) which were inadvertently obtained by the service provider and which appear to pertain to the commission of a crime, if such divulgence is made to a law enforcement agency.

A person or entity providing electronic communication service to the public shall not intentionally divulge the contents of any communication (other than one directed to the person or entity, or an agent thereof) while in transmission of that service to any person or entity other than an addressee or intended recipient of the communication or an agent of the addressee or intended recipient.

(10) Any person:

(i) to intercept or access an electronic communication made through an electronic communication system configured so that the electronic communication is readily accessible to the general public;

(ii) to intercept any radio communication which is transmitted:

(A) by a station for the use of the general public, or which relates to ships, aircraft, vehicles or persons in distress;

(B) by any governmental, law enforcement, civil defense, private land mobile or public safety communication system, including police and fire systems, readily accessible to the general public;

(C) by a station operating on an authorized frequency within the bands allocated to the amateur, citizens band or general mobile radio services; or

(D) by any marine or aeronautical communication system;

(iii) to engage in any conduct which:

(A) is prohibited by section 633 of the Communications Act of 1934 (48 Stat. 1105, 47 U.S.C. § 553); or

(B) is excepted from the application of section 705(a) of the Communications Act of 1934 (47 U.S.C. § 605(a)) by section 705(b) of that act (47 U.S.C. § 605(b)); or

(iv) to intercept any wire or electronic communication the transmission of which is causing harmful interference to any lawfully operating station, to the extent necessary to identify the source of the interference.

(v) other users of the same frequency to intercept any

(11) Other users of the same frequency to intercept any radio communication made through a system which utilizes frequencies monitored by individuals engaged in the provisions or use of the system, if the communication is not scrambled or encrypted.

(12) Any investigative or law enforcement officer or any person acting at the direction or request of an investigative or law enforcement officer to intercept a wire or oral communication involving suspected criminal activities where the officer or the person is a party to the communication and there is reasonable cause to believe that:

(i) the other party to the communication is either:

(A) holding a hostage; or

(B) has barricaded himself and taken a position of confinement to avoid apprehension; and

(ii) that party:

(A) may resist with the use of weapons; or

(B) is threatening suicide or harm to himself or others.

(13) An investigative officer, a law enforcement officer or employees of the Department of Corrections for State correctional facilities to intercept, record, monitor or divulge any oral communication, electronic communication or wire communication from or to an inmate in a facility under the following conditions:

(i) The Department of Corrections shall adhere to the following procedures and restrictions when intercepting, recording, monitoring or divulging any oral communication, electronic communication or wire communication from or to an inmate in a State correctional facility as provided for by this paragraph:

(A) Before the implementation of this paragraph, all inmates of the facility shall be notified in writing that, as of the effective date of this paragraph, their oral communication, electronic communication or wire communication may be intercepted, recorded, monitored or divulged.

(B) Unless otherwise provided for in this paragraph, after intercepting or recording an oral communication, electronic communication or wire communication, only the superintendent, warden or a designee of the superintendent or warden or other chief administrative official or his or her designee, or law enforcement officers shall have access to that recording.

(C) The contents of an intercepted and recorded oral communication, electronic communication or wire communication shall be divulged only as is necessary to safeguard the orderly operation of the facility, in response to a court order or in the prosecution or investigation of any crime.

(ii) So as to safeguard the attorney-client privilege, the Department of Corrections shall not intercept, record, monitor or divulge an oral communication, electronic communication or wire communication between an inmate and an attorney.

(iii) Persons who are engaging in an oral communication, electronic communication or wire communication with an inmate shall be notified that the communication may be recorded or monitored. Notice may be provided by any means reasonably designed to inform the noninmate party of the recording or monitoring.

(iv) The Department of Corrections shall promulgate guidelines to implement the provisions of this paragraph for State correctional facilities.

(14) An investigative officer, a law enforcement officer or employees of a county correctional facility to intercept,

record, monitor or divulge an oral communication, electronic communication or wire communication from or to an inmate in a facility under the following conditions:

(i) The county correctional facility shall adhere to the following procedures and restrictions when intercepting, recording, monitoring or divulging an oral communication, electronic communication or wire communication from or to an inmate in a county correctional facility as provided for by this paragraph:

(A) Before the implementation of this paragraph, all inmates of the facility shall be notified in writing that, as of the effective date of this paragraph, their oral communications, electronic communications or wire communications may be intercepted, recorded, monitored or divulged.

(B) Unless otherwise provided for in this paragraph, after intercepting or recording an oral communication, electronic communication or wire communication, only the superintendent, warden or a designee of the superintendent or warden or other chief administrative official or his or her designee, or law enforcement officers shall have access to that recording.

(C) The contents of an intercepted and recorded oral communication, electronic communication or wire communication shall be divulged only as is necessary to safeguard the orderly operation of the facility, in response to a court order or in the prosecution or investigation of any crime.

(ii) So as to safeguard the attorney-client privilege, the county correctional facility shall not intercept, record, monitor or divulge an oral communication, electronic communication or wire communication between an inmate and an attorney.

(iii) Persons who are engaging in an oral communication, electronic communication or wire communication with an inmate shall be notified that the communication may be recorded or monitored. Notice may be provided by any means reasonably designed to inform the noninmate party of the recording or monitoring.

(iv) The superintendent, warden or a designee of the superintendent or warden or other chief administrative official of the county correctional system shall promulgate guidelines to implement the provisions of this paragraph for county correctional facilities.

(15) The personnel of a business engaged in telephone marketing or telephone customer service by means of wire, oral or electronic communication to intercept such marketing or customer service communications where such interception is made for the sole purpose of training, quality control or monitoring by the business, provided that one party involved in the communications has consented to such intercept. Any communications recorded pursuant to this paragraph may only be used by the business for the purpose of training or quality control. Unless otherwise required by Federal or State law, communications recorded pursuant to this paragraph shall be destroyed within one year from the date of recording.

(16) (Deleted by amendment).

(17) Any victim, witness or private detective licensed under the act of August 21, 1953 (P.L.1273, No.361), known as The Private Detective Act of 1953, to intercept the contents of any wire, electronic or oral communication, if that person is under a reasonable suspicion that the intercepted party is committing, about to commit or has committed a crime of violence and there is reason to believe that evidence of the crime of violence may be obtained from the interception.

(18) A person to intercept oral communications for

disciplinary or security purposes on a school bus or school vehicle, as those terms are defined in 75 Pa.C.S. § 102 (relating to definitions), if all of the following conditions are met:

(i) The school board has adopted a policy that authorizes audio interception on school buses or school vehicles for disciplinary or security purposes.

(ii) Each school year, the school board includes the policy in a student handbook and in any other publication of the school entity that sets forth the comprehensive rules, procedures and standards of conduct for the school entity.

(iii) The school board posts a notice that students may be audiotaped, which notice is clearly visible on each school bus or school vehicle that is furnished with audio-recording equipment.

(iv) The school entity posts a notice of the policy on the school entity's publicly accessible Internet website.

This paragraph shall not apply when a school bus or school vehicle is used for a purpose that is not school related.

(July 10, 1981, P.L.227, No.72, eff. 60 days; Dec. 23, 1981, P.L.593, No.175, eff. 60 days; Oct. 21, 1988, P.L.1000, No.115, eff. imd.; Sept. 26, 1995, 1st Sp.Sess., P.L.1056, No.20, eff. 60 days; Dec. 19, 1996, P.L.1458, No.186, eff. 60 days; Feb. 18, 1998, P.L.102, No.19, eff. imd.; June 11, 2002, P.L.367, No.52, eff. imd.; Oct. 25, 2012, P.L.1634, No.202, eff. 60 days; Feb. 4, 2014, P.L.21, No.9; June 23, 2016, P.L.392, No.56, eff. 60 days; July 7, 2017, P.L.304, No.22, eff. 60 days)

2017 Amendment. Act 22 amended pars. (13) and (14) and deleted par. (16).

2016 Amendment. Act 56 amended par. (18).

2014 Amendment. Act 9 amended par. (16) and added par. (18), effective in 60 days as to par. (16) and immediately as to the remainder of the section.

2012 Amendment. Act 202 amended pars. (2)(ii), (12)(ii), (13)(i)(B) and (14)(i)(B) and added par. (17).

1998 Amendment. Act 19 amended the intro. par. and pars. (2), (5) and (9) and added par. (15).

1996 Amendment. Act 186 amended par. (2) and added par. (14).

1995 Amendment. Act 20, 1st Sp.Sess., added par. (13).

Cross References. Section 5704 is referred to in sections 5702, 5706, 5717, 5720, 5721.1, 5742, 5747, 5749, 5782 of this title; section 901 of Title 30 (Fish); section 901 of Title 34 (Game).

§ 5705. Possession, sale, distribution, manufacture or advertisement of electronic, mechanical or other devices and telecommunication identification interception devices.

Except as otherwise specifically provided in section 5706 (relating to exceptions to prohibitions in possession, sale, distribution, manufacture or advertisement of electronic, mechanical or other devices), a person is guilty of a felony of the third degree if he does any of the following:

(1) Intentionally possesses an electronic, mechanical or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of a wire, electronic or oral communication.

(2) Intentionally sells, transfers or distributes an electronic, mechanical or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of a wire, electronic or oral communication.

(3) Intentionally manufactures or assembles an electronic, mechanical or other device, knowing or having reason to know

that the design of such device renders it primarily useful for the purpose of the surreptitious interception of a wire, electronic or oral communication.

(4) Intentionally places in any newspaper, magazine, handbill, or other publication any advertisement of an electronic, mechanical or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of a wire, electronic or oral communication or of an electronic, mechanical or other device where such advertisement promotes the use of such device for the purpose of the surreptitious interception of a wire, electronic or oral communication.

(5) Intentionally possesses a telecommunication identification interception device.

(Oct. 21, 1988, P.L.1000, No.115, eff. imd.; Oct. 25, 2012, P.L.1634, No.202, eff. 60 days)

2012 Amendment. Act 202 amended the section heading and added par. (5).

§ 5706. Exceptions to prohibitions in possession, sale, distribution, manufacture or advertisement of electronic, mechanical or other devices.

(a) Unlawful activities.--It shall not be unlawful under this chapter for:

(1) a provider of wire or electronic communication service or an officer, agent or employee of, or a person under contract with, such a provider, in the normal course of the business of providing the wire or electronic communication service; or

(2) a person under contract with the United States, the Commonwealth or a political subdivision thereof, a state or a political subdivision thereof, or an officer, agent or employee of the United States, the Commonwealth or a political subdivision thereof, or a state or a political subdivision thereof,

to possess, sell, distribute, manufacture, assemble or advertise an electronic, mechanical or other device, while acting in furtherance of the appropriate activities of the United States, the Commonwealth or a political subdivision thereof, a state or a political subdivision thereof or a provider of wire or electronic communication service.

(b) Responsibility.--

(1) Except as provided under paragraph (2), the Attorney General and the district attorney or their designees so designated in writing shall have the sole responsibility to buy, possess and loan any electronic, mechanical or other device which is to be used by investigative or law enforcement officers for purposes of interception as authorized under section 5704(2), (5) and (12) (relating to exceptions to prohibition of interception and disclosure of communications), 5712 (relating to issuance of order and effect), 5713 (relating to emergency situations) or 5713.1 (relating to emergency hostage and barricade situations).

(2) The division or bureau or section of the Pennsylvania State Police responsible for conducting the training in the technical aspects of wiretapping and electronic surveillance as required by section 5724 (relating to training) may buy and possess any electronic, mechanical or other device which is to be used by investigative or law enforcement officers for purposes of interception as authorized under section 5704(2), (5) and (12), 5712, 5713 or 5713.1 for the purpose of training. However, any electronic, mechanical or other device bought or possessed under this provision may be loaned to or used by investigative or law enforcement officers for purposes of interception as authorized under section 5704(2), (5) and (12), 5712, 5713 or 5713.1 only upon written approval by the Attorney General or a deputy attorney general designated in writing

general or a deputy attorney general designated in writing by the Attorney General or the district attorney or an assistant district attorney designated in writing by the district attorney of the county wherein the suspected criminal activity has been, is or is about to occur.

(3) With the permission of the Attorney General or a district attorney who has designated any supervising law enforcement officer for purposes of interceptions as authorized under section 5713.1, the law enforcement agency which employs the supervising law enforcement officer may buy, possess, loan or borrow any electronic, mechanical or other device which is to be used by investigative or law enforcement officers at the direction of the supervising law enforcement officer solely for the purpose of interception as authorized under sections 5704(12) and 5713.1.

(4) The Pennsylvania State Police shall annually establish equipment standards for any electronic, mechanical or other device which is to be used by law enforcement officers for purposes of recording a communication under circumstances within paragraph (2) of the definition of "oral communication" in section 5702 (relating to definitions). The equipment standards shall be published annually in the Pennsylvania Bulletin.

(5) The Pennsylvania State Police shall annually establish and publish standards in the Pennsylvania Bulletin for the secure onsite and off-site storage of an audio recording made in accordance with paragraph (4) or any accompanying video recording. The standards shall comply with the Federal Bureau of Investigation's Criminal Justice Information Services (CJIS) Security Policy.

(6) A vendor to law enforcement agencies which stores data related to audio recordings and video recordings shall, at a minimum, comply with the standards set forth by the Pennsylvania State Police under paragraphs (4) and (5). Law enforcement agencies under contract with a vendor for the storage of data before the effective date of this paragraph shall comply with paragraphs (4) and (5) and this paragraph upon expiration or renewal of the contract.

(Oct. 21, 1988, P.L.1000, No.115, eff. imd.; Feb. 18, 1998, P.L.102, No.19, eff. imd.; June 11, 2002, P.L.367, No.52, eff. imd.; Dec. 9, 2002, P.L.1350, No.162, eff. 60 days; July 7, 2017, P.L.304, No.22, eff. 60 days)

2017 Amendment. Act 22 amended subsec. (b).

Cross References. Section 5706 is referred to in sections 5702, 5705 of this title; section 901 of Title 34 (Game); section 67A07 of Title 42 (Judiciary and Judicial Procedure).

§ 5707. Seizure and forfeiture of electronic, mechanical or other devices.

Any electronic, mechanical or other device possessed, used, sent, distributed, manufactured, or assembled in violation of this chapter is hereby declared to be contraband and may be seized and forfeited to the Commonwealth in accordance with 42 Pa.C.S. §§ 5803 (relating to asset forfeiture), 5805 (relating to forfeiture procedure), 5806 (relating to motion for return of property), 5807 (relating to restrictions on use), 5807.1 (relating to prohibition on adoptive seizures) and 5808 (relating to exceptions).

(Oct. 21, 1988, P.L.1000, No.115, eff. imd.; June 29, 2017, P.L.247, No.13, eff. July 1, 2017)

Cross References. Section 5707 is referred to in section 5803 of Title 42 (Judiciary and Judicial Procedure).

§ 5708. Order authorizing interception of wire, electronic or oral communications.

The Attorney General, or, during the absence or incapacity of the Attorney General, a deputy attorney general designated in writing by the Attorney General, or the district attorney or

during the absence or incapacity of the district attorney, an assistant district attorney designated in writing by the district attorney of the county wherein the suspected criminal activity has been, is or is about to occur, may make written application to any Superior Court judge for an order authorizing the interception of a wire, electronic or oral communication by the investigative or law enforcement officers or agency having responsibility for an investigation involving suspected criminal activities when such interception may provide evidence of the commission of any of the following offenses, or may provide evidence aiding in the apprehension of the perpetrator or perpetrators of any of the following offenses:

(1) Under this title:

Section 911 (relating to corrupt organizations)
Section 2501 (relating to criminal homicide)
Section 2502 (relating to murder)
Section 2503 (relating to voluntary manslaughter)
Section 2702 (relating to aggravated assault)
Section 2706 (relating to terroristic threats)
Section 2709.1 (relating to stalking)
Section 2716 (relating to weapons of mass destruction)
Section 2901 (relating to kidnapping)
Section 3011 (relating to trafficking in individuals)
Section 3012 (relating to involuntary servitude)
Section 3121 (relating to rape)
Section 3123 (relating to involuntary deviate sexual intercourse)
Section 3124.1 (relating to sexual assault)
Section 3125 (relating to aggravated indecent assault)
Section 3301 (relating to arson and related offenses)
Section 3302 (relating to causing or risking catastrophe)
Section 3502 (relating to burglary)
Section 3701 (relating to robbery)
Section 3921 (relating to theft by unlawful taking or disposition)
Section 3922 (relating to theft by deception)
Section 3923 (relating to theft by extortion)
Section 4701 (relating to bribery in official and political matters)
Section 4702 (relating to threats and other improper influence in official and political matters)
Section 5512 (relating to lotteries, etc.)
Section 5513 (relating to gambling devices, gambling, etc.)
Section 5514 (relating to pool selling and bookmaking)
Section 5516 (relating to facsimile weapons of mass destruction)
Section 6318 (relating to unlawful contact with minor)

(2) Under this title, where such offense is dangerous to life, limb or property and punishable by imprisonment for more than one year:

Section 910 (relating to manufacture, distribution or possession of devices for theft of telecommunications services)
Section 2709(a)(4), (5), (6) or (7) (relating to harassment)
Section 3925 (relating to receiving stolen property)
Section 3926 (relating to theft of services)
Section 3927 (relating to theft by failure to make required disposition of funds received)
Section 3933 (relating to unlawful use of computer)
Section 4108 (relating to commercial bribery and breach of duty to act disinterestedly)
Section 4109 (relating to rigging publicly exhibited contest)
Section 4117 (relating to insurance fraud)

Section 4117 (relating to insurance fraud)
Section 4305 (relating to dealing in infant children)
Section 4902 (relating to perjury)
Section 4909 (relating to witness or informant taking bribe)
Section 4911 (relating to tampering with public records or information)
Section 4952 (relating to intimidation of witnesses or victims)
Section 4953 (relating to retaliation against witness or victim)
Section 5101 (relating to obstructing administration of law or other governmental function)
Section 5111 (relating to dealing in proceeds of unlawful activities)
Section 5121 (relating to escape)
Section 5902 (relating to prostitution and related offenses)
Section 5903 (relating to obscene and other sexual materials and performances)
Section 7313 (relating to buying or exchanging Federal Supplemental Nutrition Assistance Program (SNAP) benefit coupons, stamps, authorization cards or access devices)

(3) Under the act of March 4, 1971 (P.L.6, No.2), known as the Tax Reform Code of 1971, where such offense is dangerous to life, limb or property and punishable by imprisonment for more than one year:
Section 1272 (relating to sales of unstamped cigarettes)
Section 1273 (relating to possession of unstamped cigarettes)
Section 1274 (relating to counterfeiting)

(4) Any offense set forth under section 13(a) of the act of April 14, 1972 (P.L.233, No.64), known as The Controlled Substance, Drug, Device and Cosmetic Act, not including the offense described in clause (31) of section 13(a).

(5) Any offense set forth under the act of November 15, 1972 (P.L.1227, No.272).

(6) Any conspiracy to commit any of the offenses set forth in this section.

(7) Under the act of November 24, 1998 (P.L.874, No.110), known as the Motor Vehicle Chop Shop and Illegally Obtained and Altered Property Act.

(Dec. 2, 1983, P.L.248, No.67, eff. imd.; Oct. 21, 1988, P.L.1000, No.115, eff. imd.; Feb. 2, 1990, P.L.4, No.3, eff. imd.; Feb. 18, 1998, P.L.102, No.19, eff. imd.; Dec. 21, 1998, P.L.1086, No.145, eff. 60 days; June 28, 2002, P.L.481, No.82, eff. 60 days; Nov. 20, 2002, P.L.1104, No.134, eff. 60 days; Dec. 9, 2002, P.L.1350, No.162, eff. 60 days; Dec. 9, 2002, P.L.1759, No.218, eff. 60 days; Nov. 9, 2006, P.L.1340, No.139, eff. 60 days; July 2, 2014, P.L.945, No.105, eff. 60 days; Oct. 24, 2018, P.L.1159, No.160, eff. 60 days)

2018 Amendment. Act 160 amended par. (2).

2014 Amendment. Act 105 amended par. (1).

2002 Amendments. Act 82 amended par. (1), Act 134 amended par. (1), Act 162 amended the entire section and Act 218 amended pars. (1) and (2). Act 162 overlooked the amendment by Act 134 and Act 218 overlooked the amendments by Acts 134 and 162, but the amendments do not conflict in substance and have been given effect in setting forth the text of section 5708.

Effective Date. After January 20, 2003, and before February 7, 2003, section 5708 will reflect only the amendment by Act 134, as follows:

§ 5708. Order authorizing interception of wire, electronic or oral communications.

The Attorney General, or, during the absence or incapacity

of the Attorney General, a deputy attorney general designated in writing by the Attorney General, or the district attorney or, during the absence or incapacity of the district attorney, an assistant district attorney designated in writing by the district attorney of the county wherein the interception is to be made, may make written application to any Superior Court judge for an order authorizing the interception of a wire, electronic or oral communication by the investigative or law enforcement officers or agency having responsibility for an investigation involving suspected criminal activities when such interception may provide evidence of the commission of any of the following offenses, or may provide evidence aiding in the apprehension of the perpetrator or perpetrators of any of the following offenses:

(1) Under this title:
Section 911 (relating to corrupt organizations)
Section 2501 (relating to criminal homicide)
Section 2502 (relating to murder)
Section 2503 (relating to voluntary manslaughter)
Section 2702 (relating to aggravated assault)
Section 2706 (relating to terroristic threats)
Section 2709(b) (relating to harassment and stalking)
Section 2716 (relating to weapons of mass destruction)
Section 2901 (relating to kidnapping)
Section 3121 (relating to rape)
Section 3123 (relating to involuntary deviate sexual intercourse)
Section 3124.1 (relating to sexual assault)
Section 3125 (relating to aggravated indecent assault)
Section 3301 (relating to arson and related offenses)
Section 3302 (relating to causing or risking catastrophe)
Section 3502 (relating to burglary)
Section 3701 (relating to robbery)
Section 3921 (relating to theft by unlawful taking or disposition)
Section 3922 (relating to theft by deception)
Section 3923 (relating to theft by extortion)
Section 4701 (relating to bribery in official and political matters)
Section 4702 (relating to threats and other improper influence in official and political matters)
Section 5512 (relating to lotteries, etc.)
Section 5513 (relating to gambling devices, gambling, etc.)
Section 5514 (relating to pool selling and bookmaking)
Section 5516 (relating to facsimile weapons of mass destruction)
Section 6318 (relating to unlawful contact with minor)

(2) Under this title, where such offense is dangerous to life, limb or property and punishable by imprisonment for more than one year:
Section 910 (relating to manufacture, distribution or possession of devices for theft of telecommunications services)
Section 3925 (relating to receiving stolen property)
Section 3926 (relating to theft of services)
Section 3927 (relating to theft by failure to make required disposition of funds received)
Section 3933 (relating to unlawful use of [illegible]

Section 3933 (relating to unlawful use of computer)
Section 4108 (relating to commercial bribery and breach of duty to act disinterestedly)
Section 4109 (relating to rigging publicly exhibited contest)
Section 4117 (relating to insurance fraud)
Section 4305 (relating to dealing in infant children)
Section 4902 (relating to perjury)
Section 4909 (relating to witness or informant taking bribe)
Section 4911 (relating to tampering with public records or information)
Section 4952 (relating to intimidation of witnesses or victims)
Section 4953 (relating to retaliation against witness or victim)
Section 5101 (relating to obstructing administration of law or other governmental function)
Section 5111 (relating to dealing in proceeds of unlawful activities)
Section 5121 (relating to escape)
Section 5504 (relating to harassment by communication or address)
Section 5902 (relating to prostitution and related offenses)
Section 5903 (relating to obscene and other sexual materials and performances)
Section 7313 (relating to buying or exchanging Federal food order coupons, stamps, authorization cards or access devices)

(3) Under the act of March 4, 1971 (P.L.6, No.2), known as the Tax Reform Code of 1971, where such offense is dangerous to life, limb or property and punishable by imprisonment for more than one year:
Section 1272 (relating to sales of unstamped cigarettes)
Section 1273 (relating to possession of unstamped cigarettes)
Section 1274 (relating to counterfeiting)

(4) Any offense set forth under section 13(a) of the act of April 14, 1972 (P.L.233, No.64), known as The Controlled Substance, Drug, Device and Cosmetic Act, not including the offense described in clause (31) of section 13(a).

(5) Any offense set forth under the act of November 15, 1972 (P.L.1227, No.272).

(6) Any conspiracy to commit any of the offenses set forth in this section.

(7) Under the act of November 24, 1998 (P.L.874, No.110), known as the Motor Vehicle Chop Shop and Illegally Obtained and Altered Property Act.

References in Text. The act of November 15, 1972 (P.L.1227, No.272), referred to in this section, amended the act of December 8, 1970 (P.L.874, No.276), known as The Pennsylvania Corrupt Organizations Act of 1970, which was repealed by the act of December 6, 1972 (P.L.1482, No.334). The subject matter is now contained in section 911 of Title 18.

Section 3933, referred to in this section, is repealed.

Section 5504, referred to in this section, is repealed.

The act of November 24, 1998 (P.L.874, No.110), known as the Vehicle Chop Shop and Illegally Obtained and Altered Property Act, referred to in paragraph (7), was repealed by the act of October 25, 2012 (P.L.1645, No.203). The subject matter is now contained in Chapter 77 of this title.

Cross References. Section 5708 is referred to in sections 5704, 5710, 5713, 5742 of this title.

§ 5709. Application for order.

Each application for an order of authorization to intercept a wire, electronic or oral communication shall be made in writing upon the personal oath or affirmation of the Attorney General or a district attorney of the county wherein the suspected criminal activity has been, is or is about to occur and shall contain all of the following:

(1) A statement of the authority of the applicant to make such application.

(2) A statement of the identity and qualifications of the investigative or law enforcement officers or agency for whom the authority to intercept a wire, electronic or oral communication is sought.

(3) A sworn statement by the investigative or law enforcement officer who has knowledge of relevant information justifying the application, which shall include:

(i) The identity of the particular person, if known, committing the offense and whose communications are to be intercepted.

(ii) The details as to the particular offense that has been, is being, or is about to be committed.

(iii) The particular type of communication to be intercepted.

(iv) A showing that there is probable cause to believe that such communication will be communicated on the wire communication facility involved or at the particular place where the oral communication is to be intercepted.

(v) The character and location of the particular wire communication facility involved or the particular place where the oral communication is to be intercepted.

(vi) A statement of the period of time for which the interception is required to be maintained, and, if the character of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular statement of facts establishing probable cause to believe that additional communications of the same type will occur thereafter.

(vii) A particular statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed, or reasonably appear to be unlikely to succeed if tried or are too dangerous to employ.

(4) Where the application is for the renewal or extension of an order, a particular statement of facts showing the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(5) A complete statement of the facts concerning all previous applications, known to the applicant made to any court for authorization to intercept a wire, electronic or oral communication involving any of the same facilities or places specified in the application or involving any person whose communication is to be intercepted, and the action taken by the court on each such application.

(6) A proposed order of authorization for consideration by the judge.

(7) Such additional testimony or documentary evidence in support of the application as the judge may require.

(Oct. 21, 1988, P.L.1000, No.115, eff. imd.; Dec. 9, 2002, P.L.1350, No.162, eff. 60 days)

Cross References. Section 5709 is referred to in sections 5702, 5712.1, 5713.1 of this title.

§ 5710. Grounds for entry of order.

(a) Application.--Upon consideration of an application, the judge may enter an ex parte order, as requested or as modified,

authorizing the interception of wire, electronic or oral communications anywhere within the Commonwealth, if the judge determines on the basis of the facts submitted by the applicant that there is probable cause for belief that all the following conditions exist:

(1) the person whose communications are to be intercepted is committing, has or had committed or is about to commit an offense as provided in section 5708 (relating to order authorizing interception of wire, electronic or oral communications);

(2) particular communications concerning such offense may be obtained through such interception;

(3) normal investigative procedures with respect to such offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ;

(4) the facility from which, or the place where, the wire, electronic or oral communications are to be intercepted, is, has been, or is about to be used, in connection with the commission of such offense, or is leased to, listed in the name of, or commonly used by, such person;

(5) the investigative or law enforcement officers or agency to be authorized to intercept the wire, electronic or oral communications are qualified by training and experience to execute the interception sought, and are certified under section 5724 (relating to training); and

(6) in the case of an application, other than a renewal or extension, for an order to intercept a communication of a person or on a facility which was the subject of a previous order authorizing interception, the application is based upon new evidence or information different from and in addition to the evidence or information offered to support the prior order, regardless of whether such evidence was derived from prior interceptions or from other sources.

(b) Corroborative evidence.--As part of the consideration of an application in which there is no corroborative evidence offered, the judge may inquire in camera as to the identity of any informants or any other additional information concerning the basis upon which the investigative or law enforcement officer or agency has applied for the order of authorization which the judge finds relevant in order to determine if there is probable cause pursuant to this section.

(Oct. 21, 1988, P.L.1000, No.115, eff. imd.)

Cross References. Section 5710 is referred to in sections 5712, 5721.1 of this title.

§ 5711. Privileged communications.

No otherwise privileged communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

§ 5712. Issuance of order and effect.

(a) Authorizing orders.--An order authorizing the interception of any wire, electronic or oral communication shall state the following:

(1) The identity of the investigative or law enforcement officers or agency to whom the authority to intercept wire, electronic or oral communications is given and the name and official identity of the person who made the application.

(2) The identity of, or a particular description of, the person, if known, whose communications are to be intercepted.

(3) The character and location of the particular communication facilities as to which, or the particular place of the communication as to which, authority to intercept is granted.

(4) A particular description of the type of the communication to be intercepted and a statement of the particular offense to which it relates.

(5) The period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

(b) Time limits.--No order entered under this section shall authorize the interception of any wire, electronic or oral communication for a period of time in excess of that necessary under the circumstances. Every order entered under this section shall require that such interception begin and terminate as soon as practicable and be conducted in such a manner as to minimize or eliminate the interception of such communications not otherwise subject to interception under this chapter by making reasonable efforts, whenever possible, to reduce the hours of interception authorized by said order. In the event the intercepted communication is in a code or foreign language and an expert in that code or foreign language is not reasonably available during the interception period, minimization may be accomplished as soon as practicable after such interception. No order entered under this section shall authorize the interception of wire, electronic or oral communications for any period exceeding 30 days. The 30-day period begins on the day on which the investigative or law enforcement officers or agency first begins to conduct an interception under the order, or ten days after the order is entered, whichever is earlier. Extensions or renewals of such an order may be granted for additional periods of not more than 30 days each. No extension or renewal shall be granted unless an application for it is made in accordance with this section, and the judge makes the findings required by section 5710 (relating to grounds for entry of order).

(c) Responsibility.--The order shall require the Attorney General or the district attorney, or their designees, to be responsible for the supervision of the interception.

(d) Progress reports.--Whenever an order authorizing an interception is entered, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. The reports shall be made at such intervals as the judge may require.

(e) Final report.--Whenever an interception is authorized pursuant to this section, a complete written list of names of participants and evidence of offenses discovered, including those not stated in the application for order, shall be filed with the court as soon as practicable after the authorized interception is terminated.

(f) Assistance.--An order authorizing the interception of a wire, electronic or oral communication shall, upon request of the applicant, direct that a provider of communication service shall furnish the applicant forthwith all information, facilities and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such service provider is affording the person whose communications are to be intercepted. The obligation of a provider of communication service under such an order may include, but is not limited to, installation of a pen register or of a trap and trace device, providing caller ID, deluxe caller ID or any other features available to ascertain the telephone number, location or subscriber information of a facility contacting the facility whose communications are to be intercepted, disclosure of a record or other information otherwise available under section 5743 (relating to requirements for governmental access), including conducting an in-progress trace during an interception, provided that such obligation of a provider of communications service is technologically feasible. The order shall apply regardless of whether the electronic service provider is headquartered within this Commonwealth, if the interception is otherwise conducted within this Commonwealth as provided under this chapter. The order

regarding disclosure of a record or other information otherwise available under section 5743 shall apply to all electronic service providers who service facilities which contact or are contacted by the facility whose communications are to be intercepted, regardless of whether the order specifically names any provider of communication service. The order may specify the period of time an electronic service provider has to furnish to the applicant who requests disclosure of a record or other information otherwise available under section 5743. Any provider of communication service furnishing such facilities or technical assistance shall be compensated therefor by the applicant for reasonable expenses incurred in providing the facilities or assistance. The service provider shall be immune from civil and criminal liability for any assistance rendered to the applicant pursuant to this section.

(g) Entry by law enforcement officers.--An order authorizing the interception of a wire, electronic or oral communication shall, if requested, authorize the entry of premises or facilities specified in subsection (a)(3), or premises necessary to obtain access to the premises or facilities specified in subsection (a)(3), by the law enforcement officers specified in subsection (a)(1), as often as necessary solely for the purposes of installing, maintaining or removing an electronic, mechanical or other device or devices provided that such entry is reasonably necessary to accomplish the purposes of this subchapter and provided that the judge who issues the order shall be notified of the time and method of each such entry prior to entry if practical and, in any case, within 48 hours of entry.

(Oct. 21, 1988, P.L.1000, No.115, eff. imd.; Feb. 18, 1998, P.L.102, No.19, eff. imd.; Oct. 25, 2012, P.L.1634, No.202, eff. 60 days)

2012 Amendment. Act 202 amended subsecs. (a) intro. par. and (f).

1998 Amendment. Act 19 amended subsecs. (e), (f) and (g).

Cross References. Section 5712 is referred to in sections 5706, 5712.1, 5713.1, 5721.1 of this title.

§ 5712.1. Target-specific orders.

(a) Target-specific wiretaps.--The requirements of sections 5712(a)(3) (relating to issuance of order and effect) and 5709(3)(iv) and (v) (relating to application for order) shall not apply if:

(1) In the case of an application with respect to the interception of an oral communication, all of the following apply:

(i) The application contains a full and complete statement as to why specification is not practical and identifies the person committing the offense and whose communications are to be intercepted.

(ii) The judge finds the specification is not practical.

(2) In the case of an application with respect to a wire or electronic communication, all of the following apply:

(i) The application identifies the person believed to be committing the offense and whose communications are to be intercepted and the applicant makes a showing that there is probable cause to believe that the person's actions could have the effect of thwarting interception by changing facilities or devices.

(ii) The judge finds that the purpose has been adequately shown.

(b) Supplementary orders.--Following the issuance of a target-specific wiretap order, the judge shall sign supplementary orders upon request and in a timely manner, authorizing the investigative or law enforcement officers or agency to intercept additional communications devices or facilities upon a showing of reasonable suspicion that all of the following apply:

(1) The target of the original order has in fact changed

communications devices or facilities or is presently using additional communications devices, communications facilities or places.

(2) The target of the original order is likely to use the specified communications device or facility for criminal purposes similar to or related to those specified in the original order.

(c) Application for supplementary orders.--An application for a supplementary order shall contain all of the following:

(1) The identity of the investigative or law enforcement officers or agency to whom the authority to intercept wire, electronic or oral communications is given and the name and official identity of the person who made the application.

(2) The identity of or a particular description of the person, if known, whose communications are to be intercepted.

(3) The period of time during which the interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

(4) A showing of reasonable suspicion that the target of the original order has in fact changed communications devices or facilities.

(5) A showing of reasonable suspicion that the target of the original order is likely to use the additional facility or device or place for criminal purposes similar to or related to those specified in the original order.

(d) Time limits.--A supplementary order shall not act as an extension of the time limit identified in section 5712(b).

(e) Responsibility.--The order shall require the Attorney General or the district attorney, or their designees, to be responsible for the supervision of the interception.

(f) Progress reports.--If an order authorizing an interception is entered, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. The reports shall be made at intervals as the judge may require.

(g) Final report.--If an interception is authorized under this section, a complete written list of names of participants and evidence of offenses discovered, including those not stated in the application for order, shall be filed with the court as soon as practical after the authorized interception is terminated.

(h) Assistance.--

(1) An order authorizing the interception of a wire, electronic or oral communication shall, upon request of the applicant, direct that a provider of communication service furnish the applicant with all information, facilities and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that the service provider is affording the person whose communications are to be intercepted.

(2) The obligation of a provider of communication service under an order may include installation of a pen register or trap and trace device and disclosure of a record or other information otherwise available under section 5743 (relating to requirements for governmental access), including conducting an in-progress trace during an interception, if the obligation of a provider of communications service is technologically feasible.

(3) A provider of communication service furnishing facilities or technical assistance shall be compensated by the applicant for reasonable expenses incurred in providing the facilities or assistance.

(4) A service provider shall be immune from civil and criminal liability for any assistance rendered to an applicant under this section.

(i) Law enforcement officers.--An order authorizing

(1) Entry by law enforcement officers.--An order authorizing the interception of a wire, electronic or oral communication shall, if requested, authorize the entry of premises or facilities specified under subsection (c)(3) or premises necessary to obtain access to the premises or facilities specified under subsection (c)(3) by law enforcement officers specified under subsection (c)(1) as often as necessary solely for the purposes of installing, maintaining or removing an electronic, mechanical or other device, if all of the following apply:

(1) The entry is reasonably necessary to accomplish the purposes of this subchapter.

(2) The judge who issues the order is notified of the time and method of each entry prior to entry within 48 hours of entry.

(Oct. 25, 2012, P.L.1634, No.202, eff. 60 days)

2012 Amendment. Act 202 added section 5712.1.

§ 5713. Emergency situations.

(a) Application.--Whenever, upon informal application by the Attorney General or a designated deputy attorney general authorized in writing by the Attorney General or a district attorney or an assistant district attorney authorized in writing by the district attorney of a county wherein the suspected criminal activity has been, is or is about to occur, a judge determines there are grounds upon which an order could be issued pursuant to this chapter, and that an emergency situation exists with respect to the investigation of an offense designated in section 5708 (relating to order authorizing interception of wire, electronic or oral communications), and involving conspiratorial activities characteristic of organized crime or a substantial danger to life or limb, dictating authorization for immediate interception of wire, electronic or oral communications before an application for an order could with due diligence be submitted to him and acted upon, the judge may grant oral approval for such interception without an order, conditioned upon the filing with him, within 48 hours thereafter, of an application for an order which, if granted, shall recite the oral approval and be retroactive to the time of such oral approval. Such interception shall immediately terminate when the communication sought is obtained or when the application for an order is denied, whichever is earlier. In the event no application for an order is made, the content of any wire, electronic or oral communication intercepted shall be treated as having been obtained in violation of this subchapter.

(b) Further proceedings.--In the event no application is made or an application made pursuant to this section is denied, the court shall cause an inventory to be served as provided in section 5716 (relating to service of inventory and inspection of intercepted communications) and shall require the tape or other recording of the intercepted communication to be delivered to, and sealed by, the court. Such evidence shall be retained by the court in accordance with section 5714 (relating to recording of intercepted communications) and the same shall not be used or disclosed in any legal proceeding except in a civil action brought by an aggrieved person pursuant to section 5725 (relating to civil action for unlawful interception, disclosure or use of wire, electronic or oral communication) or as otherwise authorized by court order. In addition to other remedies and penalties provided by this chapter, failure to effect delivery of any such tape or other recording shall be punishable as contempt by the court directing such delivery. Evidence of oral authorization to intercept wire, electronic or oral communications shall be a defense to any charge against the investigating or law enforcement officer for engaging in unlawful interception.

(Oct. 21, 1988, P.L.1000, No.115, eff. imd.; Feb. 18, 1998, P.L.102, No.19, eff. imd.; Dec. 9, 2002, P.L.1350, No.162, eff. 60 days)

2002 Amendment. Act 162 amended subsec. (a).

Cross References. Section 5713 is referred to in sections 5706, 5713.1, 5716, 5721.1, 5747 of this title.

§ 5713.1. Emergency hostage and barricade situations.

(a) Designation.--The Attorney General or a district attorney may designate supervising law enforcement officers for the purpose of authorizing the interception of wire or oral communications as provided in this section.

(b) Procedure.--A supervising law enforcement officer who reasonably determines that an emergency situation exists that requires a wire or oral communication to be intercepted before an order authorizing such interception can, with due diligence, be obtained, and who determines that there are grounds upon which an order could be entered under this chapter to authorize such interception, may intercept such wire or oral communication. An application for an order approving the interception must be made by the supervising law enforcement officer in accordance with section 5709 (relating to application for order) within 48 hours after the interception has occurred or begins to occur. Interceptions pursuant to this section shall be conducted in accordance with the procedures of this subchapter. Upon request of the supervising law enforcement officer who determines to authorize interceptions of wire communications under this section, a provider of electronic communication service shall provide assistance and be compensated therefor as provided in section 5712(f) (relating to issuance of order and effect). In the absence of an order, such interception shall immediately terminate when the situation giving rise to the hostage or barricade situation ends or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this subchapter, and an inventory shall be served as provided in section 5716 (relating to service of inventory and inspection of intercepted communications). Thereafter, the supervising law enforcement officer shall follow the procedures set forth in section 5713(b) (relating to emergency situations).

(c) Defense.--A good faith reliance on the provisions of this section shall be a complete defense to any civil or criminal action brought under this subchapter or any other statute against any law enforcement officer or agency conducting any interceptions pursuant to this section as well as a provider of electronic communication service who is required to provide assistance in conducting such interceptions upon request of a supervising law enforcement officer.

(d) Definitions.--As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Emergency situation." Any situation where:

(1) a person is holding a hostage and is threatening serious physical injury and may resist with the use of weapons; or

(2) a person has barricaded himself and taken a position of confinement to avoid apprehension and:

(i) has the ability to resist with the use of weapons; or

(ii) is threatening suicide or harm to himself or others.

"Supervising law enforcement officer."

(1) For designations by a district attorney, any law enforcement officer trained pursuant to section 5724 (relating to training) to carry out interceptions under this section who has attained the rank of lieutenant or higher in a law enforcement agency within the county or who is in charge of a

county law enforcement agency.

(2) For designations by the Attorney General, any member of the Pennsylvania State Police trained pursuant to section 5724 to carry out interceptions under this section and designated by the Commissioner of the Pennsylvania State Police who:

(i) has attained the rank of lieutenant or higher; or

(ii) is in charge of a Pennsylvania State Police barracks.

(Oct. 21, 1988, P.L.1000, No.115, eff. imd.; Feb. 18, 1998, P.L.102, No.19, eff. imd.; Oct. 25, 2012, P.L.1634, No.202, eff. 60 days)

2012 Amendment. Act 202 amended subsec. (d).

1998 Amendment. Act 19 amended subsecs. (b) and (c).

1988 Amendment. Act 115 added section 5713.1.

Cross References. Section 5713.1 is referred to in sections 5706, 5716, 5721.1 of this title.

§ 5714. Recording of intercepted communications.

(a) Recording and monitoring.--Any wire, electronic or oral communication intercepted in accordance with this subchapter shall, if practicable, be recorded by tape or other comparable method. The recording shall be done in such a way as will protect it from editing or other alteration. Whenever an interception is being monitored, the monitor shall be an investigative or law enforcement officer certified under section 5724 (relating to training), and where practicable, keep a signed, written record which shall include the following:

(1) The date and hours of surveillance.

(2) The time and duration of each intercepted communication.

(3) The participant, if known, in each intercepted conversation.

(4) A summary of the content of each intercepted communication.

(b) Sealing of recordings.--Immediately upon the expiration of the order or extensions or renewals thereof, all monitor's records, tapes and other recordings shall be transferred to the judge issuing the order and sealed under his direction. Custody of the tapes, or other recordings shall be maintained wherever the court directs. They shall not be destroyed except upon an order of the court and in any event shall be kept for ten years. Duplicate tapes, or other recordings may be made for disclosure or use pursuant to section 5717 (relating to investigative disclosure or use of contents of wire, electronic or oral communications or derivative evidence). The presence of the seal provided by this section, or a satisfactory explanation for its absence, shall be a prerequisite for the disclosure of the contents of any wire, electronic or oral communication, or evidence derived therefrom, under section 5717(b).

(Oct. 21, 1988, P.L.1000, No.115, eff. imd.; Feb. 18, 1998, P.L.102, No.19, eff. imd.)

Cross References. Section 5714 is referred to in sections 5704, 5713, 5749, 5773 of this title.

§ 5715. Sealing of applications, orders and supporting papers.

Applications made, final reports, and orders granted pursuant to this subchapter and supporting papers and monitor's records shall be sealed by the court and shall be held in custody as the court shall direct and shall not be destroyed except on order of the court and in any event shall be kept for ten years. They may be disclosed only upon a showing of good cause before a court of competent jurisdiction except that any investigative or law enforcement officer may disclose such applications, orders and supporting papers and monitor's records to investigative or law enforcement officers of this or another state, any of its

political subdivisions, or of the United States to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure. In addition to any remedies and penalties provided by this subchapter, any violation of the provisions of this section may be punished as contempt of the court.
(Oct. 21, 1988, P.L.1000, No.115, eff. imd.; Feb. 18, 1998, P.L.102, No.19, eff. imd.)

§ 5716. Service of inventory and inspection of intercepted communications.

(a) Service of inventory.--Within a reasonable time but not later than 90 days after the termination of the period of the order or of extensions or renewals thereof, or the date of the denial of an order applied for under section 5713 (relating to emergency situations) or 5713.1 (relating to emergency hostage and barricade situations), the issuing or denying judge shall cause to be served on the persons named in the order, application, or final report an inventory which shall include the following:

(1) Notice of the entry of the order or the application for an order denied under section 5713 or 5713.1.

(2) The date of the entry of the order or the denial of an order applied for under section 5713 or 5713.1.

(3) The period of authorized or disapproved interception.

(4) The fact that during the period wire or oral communications were or were not intercepted.

(b) Postponement.--On an ex parte showing of good cause to the issuing or denying judge the service of the inventory required by this section may be postponed for a period of 30 days. Additional postponements may be granted for periods of not more than 30 days on an ex parte showing of good cause to the issuing or denying judge.

(c) Inspections.--The court, upon the filing of a motion, shall make available to such persons or their attorneys for inspection, the intercepted communications and monitor's records to which the movant was a participant and the applications and orders.
(Oct. 21, 1988, P.L.1000, No.115, eff. imd.)

Cross References. Section 5716 is referred to in sections 5713, 5713.1 of this title.

§ 5717. Investigative disclosure or use of contents of wire, electronic or oral communications or derivative evidence.

(a) Law enforcement personnel.--Any investigative or law enforcement officer who, under subsection (a.1), (b), (b.1) or (c), has obtained knowledge of the contents of any wire, electronic or oral communication, or evidence derived therefrom, may disclose such contents or evidence to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(a.1) Use of information.--Any investigative or law enforcement officer who, by any means authorized by this subchapter, has obtained knowledge of the contents of any wire, electronic or oral communication or evidence derived therefrom may use such contents or evidence to the extent such use is appropriate to the proper performance of his official duties.

(b) Evidence.--Any person who by any means authorized by this chapter, has obtained knowledge of the contents of any wire, electronic or oral communication, or evidence derived therefrom, may disclose such contents or evidence to an investigative or law enforcement officer and may disclose such contents or evidence while giving testimony under oath or affirmation in any criminal proceeding in any court of this Commonwealth or of another state or of the United States or before any state or Federal grand jury or investigating grand jury.

(b.1) Criminal cases.--Any person who by means authorized by

section 5704(17) (relating to exceptions to prohibition of interception and disclosure of communications) has obtained knowledge of the contents of any wire, electronic or oral communication, or evidence derived therefrom, may in addition to disclosures made under subsection (b) disclose such contents or evidence, on the condition that such disclosure is made for the purpose of providing exculpatory evidence in an open or closed criminal case.

(c) Otherwise authorized personnel.--

(1) Except as provided under paragraph (2), any person who, by any means authorized by the laws of another state or the Federal Government, has obtained knowledge of the contents of any wire, electronic or oral communication, or evidence derived from any wire, electronic or oral communication, may disclose the contents or evidence to an investigative or law enforcement officer and may disclose the contents or evidence where otherwise admissible while giving testimony under oath or affirmation in any proceeding in any court of this Commonwealth.

(2) The contents of a nonconsensual interception authorized by the laws of the Federal Government or another state shall not be admissible unless the interception was authorized by a court upon a finding of probable cause that the target of the surveillance is engaged or will engage in a violation of the criminal laws of the Federal Government or any state.

(Oct. 21, 1988, P.L.1000, No.115, eff. imd.; Feb. 18, 1998, P.L.102, No.19, eff. imd.; Oct. 25, 2012, P.L.1634, No.202, eff. 60 days)

2012 Amendment. Act 202 amended subsec. (a) and added subsecs. (b.1) and (c).

Cross References. Section 5717 is referred to in sections 5704, 5714, 5718, 5721.1, 5749 of this title.

§ 5718. Interception of communications relating to other offenses.

When an investigative or law enforcement officer, while engaged in court authorized interceptions of wire, electronic or oral communications in the manner authorized herein, intercepts wire, electronic or oral communications relating to offenses other than those specified in the order of authorization, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in section 5717(a) (relating to investigative disclosure or use of contents of wire, electronic or oral communications or derivative evidence). Such contents and evidence may be disclosed in testimony under oath or affirmation in any criminal proceeding in any court of this Commonwealth or of another state or of the United States or before any state or Federal grand jury when authorized by a judge who finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this subchapter. Such application shall be made as soon as practicable.

(Oct. 21, 1988, P.L.1000, No.115, eff. imd.; Feb. 18, 1998, P.L.102, No.19, eff. imd.)

§ 5719. Unlawful use or disclosure of existence of order concerning intercepted communication.

Except as specifically authorized pursuant to this subchapter any person who willfully uses or discloses the existence of an order authorizing interception of a wire, electronic or oral communication is guilty of a misdemeanor of the second degree.

(Oct. 21, 1988, P.L.1000, No.115, eff. imd.; Feb. 18, 1998, P.L.102, No.19, eff. imd.)

§ 5720. Service of copy of order and application before disclosure of intercepted communication in trial, hearing or proceeding.

The contents of any wire, electronic or oral communication

intercepted in accordance with the provisions of this subchapter, or evidence derived therefrom, shall not be disclosed in any trial, hearing, or other adversary proceeding before any court of the Commonwealth unless, not less than ten days before the trial, hearing or proceeding the parties to the action have been served with a copy of the order, the accompanying application and the final report under which the interception was authorized or, in the case of an interception under section 5704 (relating to exceptions to prohibition of interception and disclosure of communications), notice of the fact and nature of the interception. The service of inventory, order, application, and final report required by this section may be waived by the court only where it finds that the service is not feasible and that the parties will not be prejudiced by the failure to make the service. (Oct. 21, 1988, P.L.1000, No.115, eff. imd.; Feb. 18, 1998, P.L.102, No.19, eff. imd.)

Suspension by Court Rule. Section 5720 was suspended by Pennsylvania Rule of Juvenile Court Procedure No. 800(14), amended February 12, 2010, insofar as it is inconsistent with Rule 340(B)(6) relating to pre-adjudicatory discovery and inspection.

Section 5720 was suspended by Pennsylvania Rule of Criminal Procedure No. 1101(5), adopted March 1, 2000, insofar as it is inconsistent with Rule No. 573 only insofar as section 5720 may delay disclosure to a defendant seeking discovery under Rule No. 573(B)(1)(g).

§ 5721. Suppression of contents of intercepted communication or derivative evidence (Repealed).

1998 Repeal. Section 5721 was repealed February 18, 1998 (P.L.102, No.19), effective immediately.

§ 5721.1. Evidentiary disclosure of contents of intercepted communication or derivative evidence.

(a) Disclosure in evidence generally.--

(1) Except as provided in paragraph (2), no person shall disclose the contents of any wire, electronic or oral communication, or evidence derived therefrom, in any proceeding in any court, board or agency of this Commonwealth.

(2) Any person who has obtained knowledge of the contents of any wire, electronic or oral communication, or evidence derived therefrom, which is properly subject to disclosure under section 5717 (relating to investigative disclosure or use of contents of wire, electronic or oral communications or derivative evidence) may also disclose such contents or evidence in any matter relating to any criminal, quasi-criminal, forfeiture, administrative enforcement or professional disciplinary proceedings in any court, board or agency of this Commonwealth or of another state or of the United States or before any state or Federal grand jury or investigating grand jury. Once such disclosure has been made, then any person may disclose the contents or evidence in any such proceeding.

(3) Notwithstanding the provisions of paragraph (2), no disclosure in any such proceeding shall be made so long as any order excluding such contents or evidence pursuant to the provisions of subsection (b) is in effect.

(b) Motion to exclude.--Any aggrieved person who is a party to any proceeding in any court, board or agency of this Commonwealth may move to exclude the contents of any wire, electronic or oral communication, or evidence derived therefrom, on any of the following grounds:

(1) Unless intercepted pursuant to an exception set forth in section 5704 (relating to exceptions to prohibition of interception and disclosure of communications), the interception was made without prior procurement of an order of authorization under section 5712 (relating to issuance of order

and effect) of an order of approval under section 5713(a) (relating to emergency situations) or 5713.1(b) (relating to emergency hostage and barricade situations).

(2) The order of authorization issued under section 5712 or the order of approval issued under section 5713(a) or 5713.1(b) was not supported by probable cause with respect to the matters set forth in section 5710(a)(1) and (2) (relating to grounds for entry of order).

(3) The order of authorization issued under section 5712 is materially insufficient on its face.

(4) The interception materially deviated from the requirements of the order of authorization.

(5) With respect to interceptions pursuant to section 5704(2), the consent to the interception was coerced by the Commonwealth.

(6) Where required pursuant to section 5704(2)(iv), the interception was made without prior procurement of a court order or without probable cause.

(c) Procedure.--

(1) The motion shall be made in accordance with the applicable rules of procedure governing such proceedings. The court, board or agency, upon the filing of such motion, shall make available to the movant or his counsel the intercepted communication and evidence derived therefrom.

(2) In considering a motion to exclude under subsection (b)(2), both the written application under section 5710(a) and all matters that were presented to the judge under section 5710(b) shall be admissible.

(3) The movant shall bear the burden of proving by a preponderance of the evidence the grounds for exclusion asserted under subsection (b)(3) and (4).

(4) With respect to exclusion claims under subsection (b)(1), (2) and (5), the respondent shall bear the burden of proof by a preponderance of the evidence.

(5) With respect to exclusion claims under subsection (b)(6), the movant shall have the initial burden of demonstrating by a preponderance of the evidence that the interception took place in his home. Once he meets this burden, the burden shall shift to the respondent to demonstrate by a preponderance of the evidence that the interception was in accordance with section 5704(2)(iv).

(6) Evidence shall not be deemed to have been derived from communications excludable under subsection (b) if the respondent can demonstrate by a preponderance of the evidence that the Commonwealth or the respondent had a basis independent of the excluded communication for discovering such evidence or that such evidence would have been inevitably discovered by the Commonwealth or the respondent absent the excluded communication.

(d) Appeal.--In addition to any other right of appeal, the Commonwealth shall have the right to appeal from an order granting a motion to exclude if the official to whom the order authorizing the intercept was granted shall certify to the court that the appeal is not taken for purposes of delay. The appeal shall be taken in accordance with the provisions of Title 42 (relating to judiciary and judicial procedure).

(e) Exclusiveness of remedies and sanctions.--The remedies and sanctions described in this subchapter with respect to the interception of wire, electronic or oral communications are the only judicial remedies and sanctions for nonconstitutional violations of this subchapter involving such communications.
(Feb. 18, 1998, P.L.102, No.19, eff. imd.)

1998 Amendment. Act 19 added section 5721.1.

Cross References. Section 5721.1 is referred to in section 5749 of this title.

§ 5722. Report by issuing or denying judge.

Within 30 days after the expiration of an order or an extension or renewal thereof entered under this subchapter or the denial of an order confirming verbal approval of interception, the issuing or denying judge shall make a report to the Administrative Office of Pennsylvania Courts stating the following:

(1) That an order, extension or renewal was applied for.

(2) The kind of order applied for.

(3) That the order was granted as applied for, was modified, or was denied.

(4) The period of the interceptions authorized by the order, and the number and duration of any extensions or renewals of the order.

(5) The offense specified in the order, or extension or renewal of an order.

(6) The name and official identity of the person making the application and of the investigative or law enforcement officer and agency for whom it was made.

(7) The character of the facilities from which or the place where the communications were to be intercepted.

(Oct. 21, 1988, P.L.1000, No.115, eff. imd.; Feb. 18, 1998, P.L.102, No.19, eff. imd.)

§ 5723. Annual reports and records of Attorney General and district attorneys.

(a) Judges.--In addition to reports required to be made by applicants pursuant to Title 18 U.S.C. § 2519, all judges who have issued orders pursuant to this title shall make annual reports on the operation of this chapter to the Administrative Office of Pennsylvania Courts. The reports by the judges shall contain the following information:

(1) The number of applications made.

(2) The number of orders issued.

(3) The effective periods of such orders.

(4) The number and duration of any renewals thereof.

(5) The crimes in connection with which the orders were sought.

(6) The names and official identity of the applicants.

(7) Such other and further particulars as the Administrative Office of Pennsylvania Courts may require.

(b) Attorney General.--In addition to reports required to be made by applicants pursuant to Title 18 U.S.C. § 2519, the Attorney General shall make annual reports on the operation of this chapter to the Administrative Office of Pennsylvania Courts and to the Judiciary Committees of the Senate and House of Representatives. The reports by the Attorney General shall contain the same information which must be reported pursuant to 18 U.S.C. § 2519(2).

(c) District attorneys.--Each district attorney shall annually provide to the Attorney General all of the foregoing information with respect to all applications authorized by that district attorney on forms prescribed by the Attorney General.

(d) Other reports.--The Chief Justice of the Supreme Court and the Attorney General shall annually report to the Governor and the General Assembly on such aspects of the operation of this chapter as they deem appropriate and make any recommendations they feel desirable as to legislative changes or improvements to effectuate the purposes of this chapter and to assure and protect individual rights.

(Oct. 21, 1988, P.L.1000, No.115, eff. imd.)

§ 5724. Training.

The Attorney General and the Commissioner of the Pennsylvania State Police shall establish a course of training in the legal and technical aspects of wiretapping and electronic surveillance as allowed or permitted by this subchapter, shall establish such regulations as they find necessary and proper for such training program and shall establish minimum standards for certification and periodic recertification of Commonwealth investigative or law

enforcement officers as eligible to conduct wiretapping or electronic surveillance under this chapter. The Pennsylvania State Police shall charge each investigative or law enforcement officer who enrolls in this training program a reasonable enrollment fee to offset the costs of such training.
(Oct. 21, 1988, P.L.1000, No.115, eff. imd.; Feb. 18, 1998, P.L.102, No.19, eff. imd.)

Cross References. Section 5724 is referred to in sections 5706, 5710, 5713.1, 5714, 5749 of this title.

§ 5725. Civil action for unlawful interception, disclosure or use of wire, electronic or oral communication.

(a) Cause of action.--Any person whose wire, electronic or oral communication is intercepted, disclosed or used in violation of this chapter shall have a civil cause of action against any person who intercepts, discloses or uses or procures any other person to intercept, disclose or use, such communication; and shall be entitled to recover from any such person:

(1) Actual damages, but not less than liquidated damages computed at the rate of $100 a day for each day of violation, or $1,000, whichever is higher.

(2) Punitive damages.

(3) A reasonable attorney's fee and other litigation costs reasonably incurred.

(b) Waiver of sovereign immunity.--To the extent that the Commonwealth and any of its officers, officials or employees would be shielded from liability under this section by the doctrine of sovereign immunity, such immunity is hereby waived for the purposes of this section.

(c) Defense.--It is a defense to an action brought pursuant to subsection (a) that the actor acted in good faith reliance on a court order or the provisions of this chapter.
(July 10, 1981, P.L.228, No.73, eff. 60 days; Oct. 21, 1988, P.L.1000, No.115, eff. imd.)

Cross References. Section 5725 is referred to in section 5713 of this title.

§ 5726. Action for removal from office or employment.

(a) Cause of action.--Any aggrieved person shall have the right to bring an action in Commonwealth Court against any investigative or law enforcement officer, public official or public employee seeking the officer's, official's or employee's removal from office or employment on the grounds that the officer, official or employee has intentionally violated the provisions of this chapter. If the court shall conclude that such officer, official or employee has in fact intentionally violated the provisions of this chapter, the court shall order the dismissal or removal from office of said officer, official or employee.

(b) Defense.--It is a defense to an action brought pursuant to subsection (a) that the actor acted in good faith reliance on a court order or the provisions of this chapter.
(July 10, 1981, P.L.228, No.73, eff. 60 days)

§ 5727. Expiration (Repealed).

1988 Repeal. Section 5727 was repealed October 21, 1988 (P.L.1000, No.115), effective immediately.

§ 5728. Injunction against illegal interception.

Whenever it shall appear that any person is engaged or is about to engage in any act which constitutes or will constitute a felony violation of this subchapter, the Attorney General may initiate a civil action in the Commonwealth Court to enjoin the violation. The court shall proceed as soon as practicable to the hearing and determination of the action and may, at any time before final determination, enter a restraining order or prohibition, or take such other action, as is warranted to prevent a continuing and substantial injury to the Commonwealth or to any person or class

of persons for whose protection the action is brought. A proceeding under this section is governed by the Pennsylvania Rules of Civil Procedure, except that, if a criminal complaint has been filed against the respondent, discovery is governed by the Pennsylvania Rules of Criminal Procedure.
(Oct. 21, 1988, P.L.1000, No.115, eff. imd.)

1988 Amendment. Act 115 added section 5728.

SUBCHAPTER C
STORED WIRE AND ELECTRONIC COMMUNICATIONS AND TRANSACTIONAL RECORDS ACCESS

Sec.

Enactment. Subchapter C was added October 21, 1988, P.L.1000, No.115, effective immediately.

§ 5741. Unlawful access to stored communications.

(a) Offense.--Except as provided in subsection (c), it is an offense to obtain, alter or prevent authorized access to a wire or electronic communication while it is in electronic storage by intentionally:

(1) accessing without authorization a facility through which an electronic communication service is provided; or

(2) exceeding the scope of one's authorization to access the facility.

(b) Penalty.--

(1) If the offense is committed for the purpose of commercial advantage, malicious destruction or damage, or private commercial gain, the offender shall be subject to:

(i) a fine of not more than $250,000 or imprisonment for not more than one year, or both, in the case of a first offense; or

(ii) a fine of not more than $250,000 or imprisonment for not more than two years, or both, for any subsequent offense.

(2) In any other case, the offender shall be subject to a fine of not more than $5,000 or imprisonment for not more than six months, or both.

(c) Exceptions.--Subsection (a) of this section does not apply with respect to conduct authorized:

(1) by the person or entity providing a wire or electronic communication service;

(2) by a user of that service with respect to a communication of or intended for that user; or

(3) in section 5743 (relating to requirements for governmental access) or 5744 (relating to backup preservation).

§ 5742. Disclosure of contents and records.

(a) Prohibitions.--Except as provided in subsection (b) and (c):

(1) A person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service:

(i) On behalf of, and received by means of electronic

transmission from, or created by means of computer processing of communications received by means of electronic transmission from, a subscriber or customer of the service.

(ii) Solely for the purpose of providing storage or computer processing services to the subscriber or customer, if the provider is not authorized to access the contents of any such communication for the purpose of providing any services other than storage or computer processing.

(2) A person or entity providing remote computing service to the public shall not knowingly divulge to any person or entity the contents of any communication which is carried or maintained on that service:

(i) On behalf of, and received by means of electronic transmission from, or created by means of computer processing of communications received by means of electronic transmission from, a subscriber or customer of the service.

(ii) Solely for the purpose of providing storage or computer processing services to the subscriber or customer, if the provider is not authorized to access the contents of any such communication for the purpose of providing any services other than storage or computer processing.

(3) A person or entity providing an electronic communication service or remote computing service to the public shall not knowingly divulge a record or other information pertaining to a subscriber to, or customer of, the service.

(b) Exceptions.--A person or entity may divulge the contents of a communication:

(1) to an addressee or intended recipient of the communication or an agent of the addressee or intended recipient;

(2) as otherwise authorized in section 5704(1) (relating to prohibition of interception and disclosure of communications), 5708 (relating to order authorizing interception of wire, electronic or oral communications) or 5743 (relating to governmental access);

(3) with the lawful consent of the originator or an addressee or intended recipient of the communication, or the subscriber in the case of remote computing service;

(4) to a person employed or authorized or whose facilities are used to forward the communication to its destination;

(5) as may be necessarily incident to the rendition of the service or to the protection of the rights or property of the provider of the service; or

(6) to a law enforcement agency, if the contents:

(i) Were inadvertently obtained by the service provider.

(ii) Appear to pertain to the commission of a crime.

(c) Exceptions for disclosure of records or other information.--A person or entity may divulge a record or other information pertaining to a subscriber to, or customer of, the service if any of the following paragraphs apply:

(1) A record or other information may be divulged incident to any service or other business operation or to the protection of the rights or property of the provider.

(2) A record or other information may be divulged to any of the following:

(i) An investigative or law enforcement official as authorized in section 5743.

(ii) The subscriber or customer upon request.

(iii) A third party, upon receipt from the requester of adequate proof of lawful consent from the subscriber to, or customer of, the service to release the information to the third party.

(iv) A party to a legal proceeding, upon receipt from the requester of a court order entered under subsection (c.1)

the party of a court order entered under subsection (c.1). This subparagraph does not apply to an investigative or law enforcement official authorized under section 5743.

(3) Notwithstanding paragraph (2), a record or other information may be divulged as authorized by a Commonwealth statute or as authorized by a Commonwealth regulatory agency with oversight over the person or entity.

(4) Subject to paragraph (2), a record or other information may be divulged as authorized by Federal law or as authorized by a Federal regulatory agency having oversight over the person or entity.

(c.1) Order for release of records.--

(1) An order to divulge a record or other information pertaining to a subscriber or customer under subsection (c)(2)(iv) must be approved by a court presiding over the proceeding in which a party seeks the record or other information.

(2) The order may be issued only after the subscriber or customer received notice from the party seeking the record or other information and was given an opportunity to be heard.

(3) The court may issue a preliminary order directing the provider to furnish the court with the identity of or contact information for the subscriber or customer if the party does not possess this information.

(4) An order for disclosure of a record or other information shall be issued only if the party seeking disclosure demonstrates specific and articulable facts to show that there are reasonable grounds to believe that the record or other information sought is relevant and material to the proceeding. In making its determination, the court shall consider the totality of the circumstances, including input of the subscriber or customer, if any, and the likely impact of the provider.

(Oct. 9, 2008, P.L.1403, No.111, eff. imd.)

2008 Amendment. Act 111 amended the section heading and subsec. (a) intro. par. and added subsecs. (a)(3), (c) and (c.1).

Cross References. Section 5742 is referred to in section 5746 of this title.

§ 5743. Requirements for governmental access.

(a) Contents of communications in electronic storage.-- Investigative or law enforcement officers may require the disclosure by a provider of communication service of the contents of a communication which is in electronic storage in a communication system for:

(1) One hundred eighty days or less only pursuant to a warrant issued under the Pennsylvania Rules of Criminal Procedure.

(2) More than 180 days by the means available under subsection (b).

(b) Contents of communications in a remote computing service.--

(1) Investigative or law enforcement officers may require a provider of remote computing service to disclose the contents of any communication to which this paragraph is made applicable by paragraph (2):

(i) without required notice to the subscriber or customer if the investigative or law enforcement officer obtains a warrant issued under the Pennsylvania Rules of Criminal Procedure; or

(ii) with prior notice from the investigative or law enforcement officer to the subscriber or customer if the investigative or law enforcement officer:

(A) uses an administrative subpoena authorized by a statute or a grand jury subpoena; or

(B) obtains a court order for the disclosure under subsection (d);

except that delayed notice may be given pursuant to section

5745 (relating to delayed notice).

(2) Paragraph (1) is applicable with respect to a communication which is held or maintained on that service:

(i) On behalf of and received by means of electronic transmission from, or created by means of computer processing of communications received by means of electronic transmission from, a subscriber or customer of the remote computing service.

(ii) Solely for the purpose of providing storage or computer processing services to the subscriber or customer, if the provider is not authorized to access the contents of any such communication for the purpose of providing any services other than storage or computer processing.

(c) Records concerning electronic communication service or remote computing service.--

(1) (Deleted by amendment).

(2) A provider of electronic communication service or remote computing service shall disclose a record or other information pertaining to a subscriber to or customer of the service, not including the contents of communications covered by subsection (a) or (b), to an investigative or law enforcement officer only when the investigative or law enforcement officer:

(i) uses an administrative subpoena authorized by a statute or a grand jury subpoena;

(ii) obtains a warrant issued under the Pennsylvania Rules of Criminal Procedure;

(iii) obtains a court order for the disclosure under subsection (d); or

(iv) has the consent of the subscriber or customer to the disclosure.

(3) An investigative or law enforcement officer receiving records or information under paragraph (2) is not required to provide notice to the customer or subscriber.

(d) Requirements for court order.--A court order for disclosure under subsection (b) or (c) shall be issued only if the investigative or law enforcement officer shows that there are specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation. A court issuing an order pursuant to this section, on a motion made promptly by the service provider, may quash or modify the order if the information or records requested are unusually voluminous in nature or compliance with the order would otherwise cause an undue burden on the provider.

(e) No cause of action against a provider disclosing information under this subchapter.--No cause of action shall lie against any provider of wire or electronic communication service, its officers, employees, agents or other specified persons for providing information, facilities or assistance in accordance with the terms of a court order, warrant, subpoena or certification under this subchapter.

(Feb. 18, 1998, P.L.102, No.19, eff. imd.; Oct. 9, 2008, P.L.1403, No.111, eff. imd.; Oct. 25, 2012, P.L.1634, No.202, eff. 60 days)

2012 Amendment. Act 202 amended subsecs. (a) and (b).

2008 Amendment. Act 111 deleted subsec. (c)(1).

1998 Amendment. Act 19 amended subsecs. (d) and (e).

Cross References. Section 5743 is referred to in sections 5712, 5712.1, 5741, 5742, 5743.1, 5744, 5745, 5746, 5747 of this title.

§ 5743.1. Administrative subpoena.

(a) Authorization.--

(1) In an ongoing investigation that monitors or utilizes online services or other means of electronic communication to

identify individuals engaged in an offense involving the sexual exploitation or abuse of children, the following shall apply:

(i) The following may issue in writing and cause to be served a subpoena requiring the production and testimony under subparagraph (ii):

(A) The Attorney General.

(B) A deputy attorney general designated in writing by the Attorney General.

(C) A district attorney.

(D) An assistant district attorney designated in writing by a district attorney.

(ii) A subpoena issued under subparagraph (i) may be issued to a provider of electronic communication service or remote computing service:

(A) requiring disclosure under section 5743(c)(2) (relating to requirements for governmental access) of a subscriber or customer's name, address, telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address, which may be relevant to an authorized law enforcement inquiry; or

(B) requiring a custodian of the records of the provider to give testimony or affidavit concerning the production and authentication of the records or information.

(2) A subpoena under this section shall describe the information required to be produced and prescribe a return date within a reasonable period of time within which the information can be assembled and made available.

(3) If summoned to appear under paragraph (1)(ii)(B), a custodian of records subpoenaed under this section shall be paid the same fees and mileage that are paid to witnesses in the courts of this Commonwealth.

(4) Prior to the return date specified in the subpoena, the person or entity subpoenaed may, in the court of common pleas of the county in which the person or entity conducts business or resides, petition for an order modifying or setting aside the subpoena or for a prohibition of disclosure ordered by a court under paragraph (7).

(5) The following shall apply:

(i) Except as provided under subparagraph (ii), if no case or proceeding arises from the production of materials under this section within a reasonable time after the materials are produced, the agency to which the materials were delivered shall, upon written demand made by the person producing the materials, return the materials to the person.

(ii) This paragraph shall not apply if the production required was of copies rather than originals.

(6) A subpoena issued under paragraph (1) may require production as soon as possible.

(7) Without court approval, no person or entity may disclose to any other person or entity, other than to an attorney in order to obtain legal advice, the existence of the subpoena for a period of up to 90 days.

(8) A subpoena issued under this section may not require the production of anything that would be protected from production under the standards applicable to a subpoena for the production of documents issued by a court.

(b) Service.--The following shall apply:

(1) A subpoena issued under this section may be served by any person who is at least 18 years of age and is designated in the subpoena to serve it.

(2) Service upon a natural person may be made by personal delivery of the subpoena to the person.

(3) Service may be made upon a domestic or foreign corporation or upon a partnership or other unincorporated

association which is subject to suit under a common name by delivering the subpoena to any of the following:

(i) An officer of the entity.

(ii) A managing or general agent of the entity.

(iii) An agent authorized by appointment or by law to receive service of process in this Commonwealth.

(4) The affidavit of the person serving the subpoena entered on a true copy of the subpoena by the person serving it shall be proof of service.

(c) Enforcement.--The following shall apply:

(1) The Attorney General or a district attorney, or a designee may invoke the aid of a court of common pleas within the following jurisdictions to compel compliance with the subpoena:

(i) The jurisdiction in which the investigation is being conducted.

(ii) The jurisdiction in which the subpoenaed person resides, conducts business or may be found.

(2) The court may issue an order requiring the subpoenaed person to appear before the Attorney General or a district attorney, or a designee to produce records or to give testimony concerning the production and authentication of the records. A failure to obey the order of the court may be punished by the court as contempt of court. All process may be served in a judicial district of the Commonwealth in which the person may be found.

(d) Immunity from civil liability.--Notwithstanding any State or local law, any person receiving a subpoena under this section who complies in good faith with the subpoena and produces the records sought shall not be liable in a court of this Commonwealth to a subscriber, customer or other person for the production or for the nondisclosure of that production to the subscriber, customer or person.

(e) Annual reports and records of Attorney General and district attorneys.--The following shall apply:

(1) On or before April 1 following the effective date of this section and annually thereafter, including the year following the expiration of this section, the Attorney General shall make a report on the operation of this section to the Judiciary Committee of the Senate and the Judiciary Committee of the House of Representatives. The reports by the Attorney General shall contain the following information for the previous calendar year:

(i) The number of administrative subpoenas issued.

(ii) The number of investigations for which an administrative subpoena was issued.

(iii) The number of court orders issued under subsections (a)(4) and (7) and (c)(2).

(iv) The number of arrests made and the type of charge filed in cases in which an administrative subpoena was issued.

(v) The number of cases in which an administrative subpoena was issued and in which no arrests or prosecutions resulted.

(2) On or before March 1 following the effective date of this section and annually thereafter, including the year following the expiration of this section, each district attorney shall provide to the Attorney General all of the information under paragraph (1) with respect to all administrative subpoenas issued by that district attorney on forms prescribed by the Attorney General.

(f) Expiration.--(Deleted by amendment).

(g) Definitions.--As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Offense involving the sexual exploitation or abuse of

Children. An offense, including an attempt, conspiracy or solicitation involving any of the following, in which a victim is an individual who is under the age of 18 years:

(1) Chapter 29 (relating to kidnapping).

(2) Chapter 30 (relating to human trafficking).

(3) Chapter 31 (relating to sexual offenses).

(4) Section 6312 (relating to sexual abuse of children).

(5) Section 6318 (relating to unlawful contact with minor).

(6) Section 6320 (relating to sexual exploitation of children).

(Oct. 22, 2014, P.L.2522, No.151, eff. 60 days; Dec. 22, 2017, P.L.1218, No.67, eff. imd.)

2017 Amendment. Act 67 deleted subsec. (f).

2014 Amendment. Act 151 added section 5743.1.

§ 5744. Backup preservation.

(a) Backup preservation.--

(1) An investigative or law enforcement officer acting under section 5743(b)(2) (relating to requirements for governmental access) may include in its subpoena or court order a requirement that the service provider to whom the request is directed create a backup copy of the contents of the electronic communications sought in order to preserve those communications. Without notifying the subscriber or customer of the subpoena or court order, the service provider shall create the backup copy as soon as practicable, consistent with its regular business practices, and shall confirm to the investigative or law enforcement officer that the backup copy has been made. The backup copy shall be created within two business days after receipt by the service provider of the subpoena or court order.

(2) Notice to the subscriber or customer shall be made by the investigative or law enforcement officer within three days after receipt of confirmation that the backup copy has been made, unless the notice is delayed pursuant to section 5745(a) (relating to delayed notice).

(3) The service provider shall not destroy or permit the destruction of the backup copy until the later of:

(i) the delivery of the information; or

(ii) the resolution of all proceedings, including appeals of any proceeding, concerning the government's subpoena or court order.

(4) The service provider shall release the backup copy to the requesting investigative or law enforcement officer no sooner than 14 days after the officer's notice to the subscriber or customer if the service provider has not:

(i) received notice from the subscriber or customer that the subscriber or customer has challenged the officer's request; and

(ii) initiated proceedings to challenge the request of the officer.

(5) An investigative or law enforcement officer may seek to require the creation of a backup copy under paragraph (1) if in his sole discretion the officer determines that there is reason to believe that notification under section 5743 of the existence of the subpoena or court order may result in destruction of or tampering with evidence. This determination is not subject to challenge by the subscriber, customer or service provider.

(b) Customer challenges.--

(1) Within 14 days after notice by the investigative or law enforcement officer to the subscriber or customer under subsection (a)(2), the subscriber or customer may file a motion to quash the subpoena or vacate the court order, copies to be served upon the officer and written notice of the challenge to be given to the service provider. A motion to vacate a court

order shall be filed in the court which issued the order. A motion to quash a subpoena shall be filed in the court which has authority to enforce the subpoena. The motion or application shall contain an affidavit or sworn statement:

(i) stating that the applicant is a customer of or subscriber to the service from which the contents of electronic communications maintained for the applicant have been sought; and

(ii) containing the applicant's reasons for believing that the records sought are not relevant to a legitimate investigative or law enforcement inquiry or that there has not been substantial compliance with the provisions of this subchapter in some other respect.

(2) Service shall be made under this section upon the investigative or law enforcement officer by delivering or mailing by registered or certified mail a copy of the papers to the person, office or department specified in the notice which the customer has received pursuant to this subchapter. For the purposes of this section, the term "delivery" has the meaning given that term in the Pennsylvania Rules of Civil Procedure.

(3) If the court finds that the customer has complied with paragraphs (1) and (2), the court shall order the investigative or law enforcement officer to file a sworn response, which may be filed in camera if the investigative or law enforcement officer includes in its response the reasons which make in camera review appropriate. If the court is unable to determine the motion or application on the basis of the parties' initial allegations and responses, the court may conduct such additional proceedings as it deems appropriate. All such proceedings shall be completed and the motion or application decided as soon as practicable after the filing of the officer's response.

(4) If the court finds that the applicant is not the subscriber or customer for whom the communications sought by the investigative or law enforcement officer are maintained, or that there is reason to believe that the investigative or law enforcement inquiry is legitimate and that the communications sought are relevant to that inquiry, it shall deny the motion or application and order the process enforced. If the court finds that the applicant is the subscriber or customer for whom the communications sought by the governmental entity are maintained, and that there is not reason to believe that the communications sought are relevant to a legitimate investigative or law enforcement inquiry, or that there has not been substantial compliance with the provisions of this subchapter, it shall order the process quashed.

(5) A court order denying a motion or application under this section shall not be deemed a final order, and no interlocutory appeal may be taken therefrom. The Commonwealth or investigative or law enforcement officer shall have the right to appeal from an order granting a motion or application under this section.

(Feb. 18, 1998, P.L.102, No.19, eff. imd.)

1998 Amendment. Act 19 amended subsec. (b).

Cross References. Section 5744 is referred to in sections 5741, 5746 of this title.

§ 5745. Delayed notice.

(a) Delay of notification.--

(1) An investigative or law enforcement officer acting under section 5743(b) (relating to requirements for governmental access) may:

(i) where a court order is sought, include in the application a request for an order delaying the notification required under section 5743(b) for a period not to exceed 90 days, which request the court shall grant

if it determines that there is reason to believe that notification of the existence of the court order may have an adverse result described in paragraph (2); or

(ii) where an administrative subpoena authorized by a statute or a grand jury subpoena is obtained, delay the notification required under section 5743(b) for a period not to exceed 90 days upon the execution of a written certification of a supervisory official that there is reason to believe that notification of the existence of the subpoena may have an adverse result described in paragraph (2).

(2) An adverse result for the purposes of paragraph (1) is:

(i) endangering the life or physical safety of an individual;

(ii) flight from prosecution;

(iii) destruction of or tampering with evidence;

(iv) intimidation of potential witnesses; or

(v) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

(3) The investigative or law enforcement officer shall maintain a true copy of a certification under paragraph (1)(ii).

(4) Extensions of the delay of notification provided for in section 5743 of up to 90 days each may be granted by the court upon application or by certification by a supervisory official in the case of an administrative or grand jury subpoena.

(5) Upon expiration of the period of delay of notification under paragraph (1) or (4), the investigative or law enforcement officer shall serve upon, or deliver by registered or first class mail to, the customer or subscriber a copy of the process or request together with notice which:

(i) states with reasonable specificity the nature of the investigative or law enforcement inquiry; and

(ii) informs the customer or subscriber:

(A) that information maintained for the customer or subscriber by the service provider named in the process or request was supplied to or requested by the investigative or law enforcement officer and the date on which the supplying or request took place;

(B) that notification of the customer or subscriber was delayed;

(C) the identity of the investigative or law enforcement officer or the court which made the certification or determination pursuant to which that delay was made; and

(D) which provision of this subchapter authorizes the delay.

(6) As used in this subsection, the term "supervisory official" means the investigative agent or assistant investigative agent in charge, or an equivalent, of an investigative or law enforcement agency's headquarters or regional office, or the chief prosecuting attorney or the first assistant prosecuting attorney, or an equivalent, of a prosecuting attorney's headquarters or regional office.

(b) Preclusion of notice to subject of governmental access.-- An investigative or law enforcement officer acting under section 5743, when he is not required to notify the subscriber or customer under section 5743(b)(1), or to the extent that it may delay such notice pursuant to subsection (a), may apply to a court for an order commanding a provider of electronic communication service or remote computing service to whom a warrant, subpoena or court order is directed, not to notify any other person of the existence of the warrant, subpoena or court order for such period as the court deems appropriate. The court shall enter such an order if it determines that there is reason to believe that notification of

the existence of the warrant, subpoena or court order will result in:

(1) endangering the life or physical safety of an individual;

(2) flight from prosecution;

(3) destruction of or tampering with evidence;

(4) intimidation of a potential witness; or

(5) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

Cross References. Section 5745 is referred to in sections 5743, 5744 of this title.

§ 5746. Cost reimbursement.

(a) Payment.--Except as otherwise provided in subsection (c), an investigative or law enforcement officer obtaining the contents of communications, records or other information under section 5742 (relating to disclosure of contents and records), 5743 (relating to requirements for governmental access) or 5744 (relating to backup preservation) shall reimburse the person or entity assembling or providing the information for such costs as are reasonably necessary and which have been directly incurred in searching for, assembling, reproducing and otherwise providing the information. Reimbursable costs shall include any costs due to necessary disruption of normal operations of any electronic communication service or remote computing service in which the information may be stored.

(b) Amount.--The amount of the reimbursement provided for in subsection (a) shall be as mutually agreed upon by the investigative or law enforcement officer and the person or entity providing the information or, in the absence of agreement, shall be as determined by the court which issued the order for production of the information or the court before which a criminal prosecution relating to the information would be brought, if no court order was issued for production of the information.

(c) Applicability.--The requirement of subsection (a) does not apply with respect to records or other information maintained by a communication common carrier which relates to telephone toll records and telephone listings obtained under section 5743. The court may, however, order reimbursement as described in subsection (a) if the court determines the information required is unusually voluminous or otherwise caused an undue burden on the provider.

(d) Regulations.--The Attorney General shall promulgate regulations to implement this section.

(Oct. 9, 2008, P.L.1403, No.111, eff. imd.; Oct. 25, 2012, P.L.1634, No.202, eff. 60 days)

2012 Amendment. Act 202 added subsec. (d).

2008 Amendment. Act 111 amended subsec. (a).

§ 5747. Civil action.

(a) Cause of action.--Except as provided in subsection 5743(e) (relating to requirements for governmental access), any provider of electronic communication service, subscriber or customer aggrieved by any violation of this subchapter in which the conduct constituting the violation is engaged in with a knowing or intentional state of mind may, in a civil action, recover from the person or entity which engaged in the violation such relief as may be appropriate.

(b) Relief.--In a civil action under this section, appropriate relief shall include:

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c); and

(3) reasonable attorney fees and other litigation costs reasonably incurred.

(c) Damages.--The court may assess as damages in a civil action under this section the sum of the actual damages suffered

by the plaintiff and any profits made by the violator as a result of the violation, but in no case shall a person entitled to recover receive less than the sum of $1,000.

(d) Defense.--A good faith reliance on:

(1) a court warrant or order, a grand jury subpoena, a legislative authorization or a statutory authorization;

(2) a request of an investigative or law enforcement officer under section 5713 (relating to emergency situations); or

(3) a good faith determination that section 5704(10) (relating to exceptions to prohibitions of interception and disclosure of communications) permitted the conduct complained of;

is a complete defense to any civil or criminal action brought under this subchapter or any other law.

(e) Limitation.--A civil action under this section may not be commenced later than two years after the date upon which the claimant first discovered or had a reasonable opportunity to discover the violation.

(Feb. 18, 1998, P.L.102, No.19, eff. imd.; Oct. 22, 2014, P.L.2522, No.151, eff. 60 days)

2014 Amendment. Act 151 amended subsec. (b).

1998 Amendment. Act 19 amended subsec. (d).

§ 5748. Exclusivity of remedies.

The remedies and sanctions described in this subchapter are the only judicial remedies and sanctions for nonconstitutional violations of this subchapter.

§ 5749. Retention of certain records.

(a) Retention.--The commander shall maintain all recordings of oral communications intercepted under section 5704(16) (relating to exceptions to prohibition of interception and disclosure of communications) for a minimum of 31 days after the date of the interception. All recordings made under section 5704(16) shall be recorded over or otherwise destroyed no later than 90 days after the date of the recording unless any of the following apply:

(1) The contents of the recording result in the issuance of a citation. Except as otherwise authorized under this subsection, any recording maintained under this paragraph shall be recorded over or destroyed no later than 90 days after the conclusion of the proceedings related to the citation. All recordings under this paragraph shall be maintained in accordance with section 5714(a) (relating to recording of intercepted communications), except that monitors need not be certified under section 5724 (relating to training).

(2) The commander or a law enforcement officer on the recording believes that the contents of the recording or evidence derived from the recording may be necessary in a proceeding for which disclosure is authorized under section 5717 (relating to investigative disclosure or use of contents of wire, electronic or oral communications or derivative evidence) or 5721.1 (relating to evidentiary disclosure of contents of intercepted communication or derivative evidence) or in a civil proceeding. All recordings under this paragraph shall be maintained in accordance with section 5714(a), except that monitors need not be certified under section 5724.

(3) A criminal defendant who is a participant on the recording reasonably believes that the recording may be useful for its evidentiary value at some later time in a specific criminal proceeding and, no later than 30 days following the filing of criminal charges, provides written notice to the commander indicating a desire that the recording be maintained. The written notice must specify the date, time and location of the recording; the names of the parties involved; and, if known, the case docket number.

(4) An individual who is a participant on the recording

intends to pursue a civil action or has already initiated a civil action and, no later than 30 days after the date of the recording, gives written notice to the commander indicating a desire that the recording be maintained. The written notice must specify the date, time and location of the recording; the names of the parties involved; and, if a civil action has been initiated, the case caption and docket number.

(5) The commander intends to use the recording for training purposes.

(b) Disclosure.--In addition to any disclosure authorized under sections 5717 and 5721.1, any recording maintained:

(1) Under subsection (a)(4) shall be disclosed pursuant to an order of court or as required by the Pennsylvania Rules of Civil Procedure or the Pennsylvania Rules of Evidence; and

(2) Under subsection (a)(5) shall be disclosed consistent with written consent obtained from the law enforcement officer and all participants.

(c) Definitions.--As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Commander." The:

(1) commissioner or a designee, if the recording at issue was made by a member of the Pennsylvania State Police; or

(2) chief or a designee of the law enforcement agency which made the recording at issue.

"Law enforcement officer." A member of the Pennsylvania State Police or an individual employed as a police officer who is required to be trained under 53 Pa.C.S. Ch. 21 Subch. D (relating to municipal police education and training).

(June 11, 2002, P.L.370, No.53, eff. imd.)

2002 Amendment. Act 53 added section 5749. Section 3 of Act 53 provided that section 5749 shall apply upon the enactment of a statute providing for the intercepting and recording of oral communications under 18 Pa.C.S. § 5704. Act 52 of 2002, effective June 11, 2002, added provisions relating to the intercepting and recording of oral communications under 18 Pa.C.S. § 5704.

References in Text. The reference to "commissioner" in par. (1) of the def. of "commander" in subsec. (c) probably should have been a reference to Commissioner of the Pennsylvania State Police.

Cross References. Section 5749 is referred to in section 5782 of this title.

SUBCHAPTER D
MOBILE TRACKING DEVICES

Sec.

Enactment. Subchapter D was added October 21, 1988, P.L.1000, No.115, effective immediately.

§ 5761. Mobile tracking devices.

(a) Authority to issue.--Orders for the installation and use of mobile tracking devices may be issued by a court of common pleas.

(b) Jurisdiction.--Orders permitted by this section may authorize the use of mobile tracking devices if the device is installed and monitored within this Commonwealth. The court issuing the order must have jurisdiction over the offense under investigation.

(c) Standard for issuance of order.--An order authorizing the use of one or more mobile tracking devices may be issued to an investigative or law enforcement officer by the court of common pleas upon written application. Each application shall be by written affidavit, signed and sworn to or affirmed before the

court of common pleas. The affidavit shall:

(1) state the name and department, agency or address of the affiant;

(2) identify the vehicles, containers or items to which, in which or on which the mobile tracking device shall be attached or be placed, and the names of the owners or possessors of the vehicles, containers or items;

(3) state the jurisdictional area in which the vehicles, containers or items are expected to be found; and

(4) provide a statement setting forth all facts and circumstances which provide the applicant with probable cause that criminal activity has been, is or will be in progress and that the use of a mobile tracking device will yield information relevant to the investigation of the criminal activity.

(d) Notice.--The court of common pleas shall be notified in writing within 72 hours of the time the mobile tracking device has been activated in place on or within the vehicles, containers or items.

(e) Term of authorization.--Authorization by the court of common pleas for the use of the mobile tracking device may continue for a period of 90 days from the placement of the device. An extension for an additional 90 days may be granted upon good cause shown.

(f) Removal of device.--Wherever practicable, the mobile tracking device shall be removed after the authorization period expires. If removal is not practicable, monitoring of the mobile tracking device shall cease at the expiration of the authorization order.

(g) Movement of device.--Movement of the tracking device within an area protected by a reasonable expectation of privacy shall not be monitored absent exigent circumstances or an order supported by probable cause that criminal activity has been, is or will be in progress in the protected area and that the use of a mobile tracking device in the protected area will yield information relevant to the investigation of the criminal activity.

(Oct. 9, 2008, P.L.1403, No.111, eff. imd.; Oct. 25, 2012, P.L.1634, No.202, eff. 60 days)

2012 Amendment. Act 202 amended subsecs. (b) and (c)(4).

SUBCHAPTER E
PEN REGISTERS, TRAP AND TRACE DEVICES AND TELECOMMUNICATION IDENTIFICATION INTERCEPTION DEVICES

Sec.

Enactment. Subchapter E was added October 21, 1988, P.L.1000, No.115, effective immediately.

Subchapter Heading. The heading of Subchapter E was amended February 18, 1998, P.L.102, No.19, effective immediately.

Cross References. Subchapter E is referred to in section 5704 of this title.

§ 5771. General prohibition on use of certain devices and exception.

(a) General rule.--Except as provided in this section, no person may install or use a pen register or a trap and trace device or a telecommunication identification interception device

without first obtaining a court order under section 5773 (relating to issuance of an order for use of certain devices).

(b) Exception.--The prohibition of subsection (a) does not apply with respect to the use of a pen register, a trap and trace device or a telecommunication identification interception device by a provider of electronic or wire communication service:

(1) relating to the operation, maintenance and testing of a wire or electronic communication service or to the protection of the rights or property of the provider, or to the protection of users of the service from abuse of service or unlawful use of service;

(2) to record the fact that a wire or electronic communication was initiated or completed in order to protect the provider, another provider furnishing service toward the completion of the wire communication or a user of the service from fraudulent, unlawful or abusive use of service; or

(3) with the consent of the user of the service.

(b.1) Limitation.--A government agency authorized to install and use a pen register under this chapter shall use technology reasonably available to it that restricts the recording or decoding of electronic or other impulses to the dialing and signaling information utilized in call processing.

(c) Penalty.--Whoever intentionally and knowingly violates subsection (a) is guilty of a misdemeanor of the third degree. (Feb. 18, 1998, P.L.102, No.19, eff. imd.)

Cross References. Section 5771 is referred to in section 5773 of this title.

§ 5772. Application for an order for use of certain devices.

(a) Application.--The Attorney General or a deputy attorney general designated in writing by the Attorney General or a district attorney or an assistant district attorney designated in writing by the district attorney may make application for an order or an extension of an order under section 5773 (relating to issuance of an order for use of certain devices) authorizing or approving disclosure of mobile communications tracking information or, if necessary, the production and disclosure of mobile communications tracking information, the installation and use of a pen register, a trap and trace device or a telecommunication identification interception device under this subchapter, in writing, under oath or equivalent affirmation, to a court of common pleas having jurisdiction over the offense under investigation or to any Superior Court judge when an application for an order authorizing interception of communications is or has been made for the targeted telephone or another application for interception under this subchapter has been made involving the same investigation.

(b) Contents of application.--An application under subsection (a) shall include:

(1) The identity and authority of the attorney making the application and the identity of the investigative or law enforcement agency conducting the investigation.

(2) A certification by the applicant that the information likely to be obtained is relevant to an ongoing criminal investigation being conducted by that agency.

(3) An affidavit by an investigative or law enforcement officer which establishes probable cause for the issuance of an order or extension of an order under section 5773. (Feb. 18, 1998, P.L.102, No.19, eff. imd.; Oct. 25, 2012, P.L.1634, No.202, eff. 60 days)

2012 Amendment. Act 202 amended subsec. (a).

1998 Amendment. Act 19 amended the section heading and subsec. (a).

Cross References. Section 5772 is referred to in section 5773 of this title.

§ 5773. Issuance of an order for use of certain devices.

(a) In general.--Upon an application made under section 5772 (relating to application for an order for use of certain devices), the court shall enter an ex parte order authorizing the disclosure of mobile communications tracking information, the installation and use of a pen register, a trap and trace device or a telecommunication identification interception device within this Commonwealth if the court finds that there is probable cause to believe that information relevant to an ongoing criminal investigation will be obtained by such installation and use on the targeted telephone. If exigent circumstances exist, the court may verbally authorize the disclosure of mobile communications tracking information, the installation and use of a pen register, a trap and trace device or a telecommunication identification interception device. The written order authorizing the disclosure must be entered within 72 hours of the court's verbal authorization.

(b) Contents of order.--An order issued under this section shall:

(1) Specify:

(i) That there is probable cause to believe that information relevant to an ongoing criminal investigation will be obtained from the targeted telephone.

(ii) The identity, if known, of the person to whom is leased or in whose name is listed the targeted telephone, or, in the case of the use of a telecommunication identification interception device, the identity, if known, of the person or persons using the targeted telephone.

(iii) The identity, if known, of the person who is the subject of the criminal investigation.

(iv) In the use of pen registers and trap and trace devices only, the physical location of the targeted telephone.

(v) A statement of the offense to which the information likely to be obtained by the pen register, trap and trace device or the telecommunication identification interception device relates.

(2) Direct, upon the request of the applicant, the furnishing of information, facilities and technical assistance necessary to accomplish the installation of the pen register under section 5771 (relating to general prohibition on use of certain devices and exception).

(3) In the case of a telecommunication identification interception device, direct that all interceptions be recorded and monitored in accordance with section 5714(a)(1) and (2) and (b) (relating to recording of intercepted communications).

(c) Time period and extensions.--

(1) An order issued under this section shall authorize the installation and use of a pen register, trap and trace device or a telecommunication identification interception device for a period not to exceed 60 days.

(2) Extensions of such an order may be granted but only upon an application for an order under section 5772 and upon the judicial finding required by subsection (a). The period of each extension shall be for a period not to exceed 30 days.

(d) Nondisclosure of existence of pen register, trap and trace device or a telecommunication identification interception device.--An order authorizing or approving the installation and use of a pen register, a trap and trace device or a telecommunication identification interception device shall direct that:

(1) The order be sealed until otherwise ordered by the court.

(2) The person owning or leasing the targeted telephone, or who has been ordered by the court to provide assistance to the applicant, not disclose the existence of the pen register, trap and trace device or telecommunication identification interception device or the existence of the investigation to

interception device or the existence of the investigation to the listed subscriber, or to any other person, unless or until otherwise ordered by the court.

(Feb. 18, 1998, P.L.102, No.19, eff. imd.; Oct. 25, 2012, P.L.1634, No.202, eff. 60 days)

2012 Amendment. Act 202 amended subsecs. (a) and (c).

Cross References. Section 5773 is referred to in sections 5771, 5772, 5774 of this title.

§ 5774. Assistance in installation and use of certain devices.

(a) Pen register.--Upon the request of an applicant under this subchapter, a provider of wire or electronic communication service, landlord, custodian or other person shall forthwith provide all information, facilities and technical assistance necessary to accomplish the installation of the pen register unobtrusively and with a minimum of interference with the services that the person so ordered by the court accords the party with respect to whom the installation and use is to take place, if assistance is directed by a court order as provided in section 5773(b)(2) (relating to issuance of an order for use of certain devices).

(b) Trap and trace device.--Upon the request of an applicant under this subchapter, a provider of a wire or electronic communication service, landlord, custodian or other person shall install the device forthwith on the appropriate line and shall furnish all additional information, facilities and technical assistance, including installation and operation of the device unobtrusively and with a minimum of interference with the services that the person so ordered by the court accords the party with respect to whom the installation and use is to take place, if installation and assistance are directed by a court order as provided in section 5773. Unless otherwise ordered by the court, the results of the trap and trace device shall be furnished to the applicant designated in the court order at reasonable intervals during regular business hours for the duration of the order.

(c) Compensation.--A provider of wire or electronic communication service, landlord, custodian or other person who furnishes facilities or technical assistance pursuant to this section shall be reasonably compensated for reasonable expenses incurred in providing the facilities and assistance.

(d) No cause of action against a provider disclosing information under this subchapter.--No cause of action shall lie in any court against any provider of a wire or electronic communication service, its officers, employees, agents or other specified persons for providing information, facilities or assistance in accordance with the terms of a court order under this subchapter.

(e) Defense.--A good faith reliance on a court order or a statutory authorization is a complete defense against any civil or criminal action brought under this subchapter or any other law.

(Feb. 18, 1998, P.L.102, No.19, eff. imd.)

§ 5775. Reports concerning certain devices.

(a) Attorney General.--The Attorney General shall annually report to the Administrative Office of Pennsylvania Courts on the number of orders for pen registers, trap and trace devices and telecommunication identification interception devices applied for by investigative or law enforcement agencies of the Commonwealth or its political subdivisions.

(b) District attorney.--Each district attorney shall annually provide to the Attorney General information on the number of orders for pen registers, trap and trace devices and telecommunication identification interception devices applied for on forms prescribed by the Attorney General.

(Feb. 18, 1998, P.L.102, No.19, eff. imd.)

SUBCHAPTER F
MISCELLANEOUS

Sec.

Enactment. Subchapter F was added October 21, 1988, P.L.1000, No.115, effective immediately.

§ 5781. Expiration of chapter.

This chapter expires December 31, 2023, unless extended by statute.
(Dec. 12, 1994, P.L.1248, No.148, eff. imd.; Feb. 18, 1998, P.L.102, No.19, eff. imd.; Nov. 29, 2004, P.L.1349, No.173, eff. imd.; Oct. 9, 2008, P.L.1403, No.111, eff. imd.; Nov. 27, 2013, P.L.1147, No.102, eff. imd.; July 7, 2017, P.L.304, No.22, eff. 60 days)

§ 5782. Regulations.

The commissioner of the Pennsylvania State Police, in consultation with the Attorney General, shall promulgate regulations consistent with sections 5704(16) (relating to exceptions to prohibition of interception and disclosure of communications) and 5749 (relating to retention of certain records) setting forth procedures to be followed by law enforcement officers regarding the interception, maintenance and destruction of recordings made under section 5704(16).
(June 11, 2002, P.L.370, No.53, eff. imd.)

2002 Amendment. Act 53 added section 5782. Section 3 of Act 53 provided that section 5782 shall apply upon the enactment of a statute providing for the intercepting and recording of oral communications under 18 Pa.C.S. § 5704. Act 52 of 2002, effective June 11, 2002, added provisions relating to the intercepting and recording of oral communications under 18 Pa.C.S. § 5704.